The General Codification Commission and the Modernisation of the Spanish Law of Obligations

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I. Approach

As stated by Reinhard Zimmermann: "From about the mid-1980s, the European Communities began to enact Directives which profoundly affect core areas of the national systems of private law. Milestones of this development were the Directives concerning liability for defective products, contracts negotiated away from business premises, consumer credit, package travel, unfair terms in consumer contracts, and consumer sales. As a result, the requirement of interpreting provisions of national law in conformity with the Directives on which they are based has attained considerable practical importance".1

A clear example of this is Directive 1999/44/EC, of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. Without doubt, this Directive has been a boost

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1 Reinhard Zimmermann, The new German Law of Obligations. Historical and Comparative Perspectives, Oxford, 2005, 35–36. As the author reminds us: "In addition, the European Court of Justice, though not a Supreme Court for private law disputes in the European Union, has started to fashion concepts, rules, and principles which are relevant not only for the law of the Union but also for the private laws of its Member States" (36).
for the modernisation of the law of obligations not only in Spain [first through its implementation by Act 23/2003 of 10 July on Guarantees for the Sale of Consumer Goods (currently not in force) and secondly by the approval of the Revised General Consumer and User Protection Act, 16 November 2007], but also in other European countries, such as Germany (through the German Act to modernise the Law of Obligations of 26 November 2001, by which the BGB was amended, implemented on 1 January 2002).3

In this regard, it is noteworthy that Spanish legislators have chosen - up to now - to incorporate the European Union Directives concerning the so-called consumer law into Spanish legislation by the approval of numerous special laws without amending the Civil Code. In 2007 a further step was taken and a unifying text was adopted which merged several laws implementing European Union Directives into Spanish law: This text is the previously mentioned Revised General Consumer and User Protection Act.4

The Spanish solution, however, unlike Germany's, still requires updating the Civil Code. With this in mind, the Spanish General Codification Commission submitted a proposal to amend the Civil Code to the Justice Ministry: The draft bill Proposal for the Modernisation of the Civil Code on Obligations and Contracts of 2009. A feature of the proposed reform of the Spanish Civil Code is the attempt to make the Civil Code more European and better adapted to modern times, which were also objectives of the aforementioned BGB reform. In this paper, as stated in the explanatory memorandum of the proposal, the following legal texts, inter alia, have been used as reference: (1) The United Nations Convention on Contracts for the International Sale of Goods (CISG 1980); (2) The Principles of International Commercial Contracts (UNIDROIT Principles 2004); (3) The Principles of European Contract Law (PECL); and (4) Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.

The Spanish General Codification Commission was created in the middle of the 19th century as a general administrative body. Since then it has performed and continues to perform important work promoting the pre-legislative tasks of the government. The General Codification Commission has helped to update and improve the legal system through the development of numerous proposals for draft laws, with a high technical quality being their common denominator. However,

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3 Revised General Consumer and User Protection Act (Real Decreto Legislativo 1/2007, 16 November).
5 See the explanatory memorandum to the Act, I and III.
it can now be said that this body stands as a great unknown, not only regarding the work being carried out, but also in terms of its structure and operation. The numerous high-profile legislative initiatives recently introduced by the government use to have their origin not on the work of the Commission but rather on the work of ad hoc ministerial or inter-ministerial committees.

Nevertheless, this fact does not ignore the undeniable leading role that the General Codification Commission has played in modernising many sectors of the Spanish legal system. In recent years it has been involved in preparing many highly relevant laws passed by Parliament (e.g., the Bankruptcy Act, Arbitration Act, European Public Limited-Liability Company Act and Professional Societies Act). Similarly, the Spanish General Codification Commission has promoted various draft bills in the past few years that, upon approval by the Council of Ministers, have become government bills and have begun the parliamentary process; however, due to different parliamentary reasons none of these bills have yet been enacted.

On the other hand, the General Codification Commission is currently making intensive efforts to modernise the law of obligations and contracts, as seen in various draft law proposals and which shall be discussed in this paper. It should be noted that this difficult and commendable task is being carried out with complete academic independence and freedom of opinion, without the Commission members being under any hierarchical instructions whatsoever.

The previous statement justifies the main goals of this paper: First, to explain the regulatory legislation of the General Codification Commission in order to understand its origin, evolution and functions, as well as its internal organisation and operation; and secondly, to analyse the content and principles that have inspired the different reform proposals this body has made for the modernisation of contract law, especially the recent draft bill Proposal for the Modernisation of the Civil Code on Obligations and Contracts of 2009.

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12 Such is the case with the draft bill Proposal for Concordance and Preference of Credits in Singular Executions, among others.
II. The Spanish General Codification Commission: an advisory body for the government on legislative issues

1. Origin, evolution and functions of the General Codification Commission

The Spanish General Codification Commission was created by royal decree on 19 August 1843 as a tool for the codification process that had begun in continental Europe at the end of the 18th century and which continued during all of the 19th century. Witnessing periods of greater and lesser success, the governmental body nonetheless managed to achieve its objective, namely: The passing of various laws and codes, among which the Civil Code is the greatest expression of the codification movement.

Now, 166 years after the creation of the General Codification Commission, the Spanish legal system has evolved and has little in common with the legal and political landscape of the nineteenth century. As the Preamble of Royal Decree 160/1997 of 7 February, by which the statutes of the General Codification Commission are approved, clearly states, "our society is now very distant from that period in which the codification ideal was triumphant. We find ourselves in the midst of the post-codification or better yet, decodification era. The democratic state with its complex bureaucracy that came to life with the 1978 Constitution, along with the growing relevance of societies and organisations that are carefully interwoven by a system of genuine participation, have logically promoted changes in the system of sources of law and in the field of technical legislation. Additionally, our ever-changing society promotes a proliferation of norms and regulations which are quickly modified or superseded, thus rendering any attempt to codify laws with a view to permanency - such as consolidating a judicial sector - completely useless. Consequently, codes are said to have lost their central and privileged place in judicial systems. Instead, special laws deemed necessary in a constantly mutating society, and the constitutional text as the foundation of the values of a political system, have altered the sense of technical legislation. We are therefore living in an era of decodification and special laws that has led to a much criticised proliferation of regulations, a phenomenon which in turn has been described as a challenge the rule of law must face.

19 See, Juan Faustino Latorre Gómez, Crónica de la codificación española, tomo IV, Ministerio de Justicia, Madrid, 1970.
20 BOE 27 February 1997.
22 See, Pau Pedrosa, La segunda codificación, Seguridad jurídica y codificación, Colegio de Registradores de la Propiedad, Mercantiles y Bienes Muebles de España, Madrid, 1999, 75.
23 Translation by authors.
Currently, the General Codification Commission is ruled by the statutes approved by Royal Decree 160/1997 of 7 February, in which the Commission is defined as “the main chartered consultative body for preparing the pre-legislative tasks of the Ministry of Justice” (art. 1), to which it is attached through the Technical Secretariat (art. 2), and is chaired by the Justice Minister (art. 7).

The 1997 reform of the General Codification Commission that incorporated new statutes under Royal Decree 160/1997 was aimed at adapting this body to modern times: The historical model of the Commission as a co-legislator of Parliament has been abandoned and a model consistent with the greater complexity of the current legislative process has been adopted in its place. The new configuration reflects the Commission’s contemporary conception as an “advisory body in one of the most representative functions of the Government such as the preparation and promotion of legislative initiatives” in order to guarantee the “growing demand for technical quality and efficiency in the enactment of laws”.

Pursuant to Article 3 of its statutes, the following are the specific tasks the Commission is currently entrusted to carry out:
1. The preparation of codified or general legislation by express assignment of the Minister of Justice.
2. To review existing law and to report the outcome to the Minister of Justice.
3. To develop projects related to activities pertinent to its role and to submit them to the Minister of Justice.
4. To prepare the report or opinion on matters of law which the Minister of Justice or the government may submit for its consideration.
5. Correction of technical and stylistic issues regarding the draft laws and draft provisions which are forwarded by the Minister of Justice.
6. The proposal for publication of projects, studies and reports produced by the Commission.

2. Operation of the General Codification Commission

The General Codification Commission is a collegiate body (art. 2 of the 1997 statutes), headed by the president, vice-president, section presidents, spokespeople and general secretary.

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21 Translation by authors.
24 Translation by authors.
25 Therefore, its legal regime must be consistent with the provisions of Articles 22 to 27 of Act 30/1992, of 26 November on the Legal Regime of Public Administrations and on the Common Administrative Procedure and Articles 38 to 40 of Act 14/1997 of 14 April on the Organisation and Functioning of the General Administration of the State, without prejudice “to the organisational characteristics of the public administrations to which they belong”, as set forth in Article 22 of Act 30/1992.
26 The organisational structure of the General Codification Commission is governed by Articles 6
Regarding the running of the General Codification Commission, Article 14 of its statutes provides that “it shall function in plenary session, or in standing committee, or in sections” and that “it may also operate under mixed sections in which members of more than one section may take part; The decision to form a mixed section is taken by the president of the Commission who shall then designate its chairperson”\(^{27}\).

Having described the General Codification Commission’s organisation and functioning, further analysis of how its various sections operate is appropriate, as this is where most of the activities related to the development of proposed draft legislation and to the revision of legal codes and existing laws within the legal system take place.

As mentioned above, several sections of the General Codification Commission are formed by the chairpersons and members assigned to them (art. 19.1 of the 1997 statutes). Specifically, there are five Sections (art. 19.2 of the 1997 Statutes): a) civil law, b) commercial law, c) public law, d) criminal law, and e) procedural law. Each of these sections decides on the content of the reports or jobs assigned to them by the president of the General Codification Commission, who shall receive the results directly from them (art. 21.1 of the 1997 statutes).

Relevant studies on specific issues may be proposed by the corresponding chair of each permanent section, as provided for in article 20.1 of the 1997 statutes. In this event, the president of the General Codification Commission appoints the section members as well as the assigned members who are to be part of the effort and they “shall submit the outcome to the president of the section within the established timeline”. Once the draft of the report or law has been submitted, a copy must be sent to the members of the section presided by the chairperson so they may “present in a written and reasoned way any amendments deemed appropriate”, which are to be disclosed to all section members in their meetings for their information and debate (art. 21.3 of the 1997 statutes).

Furthermore, under Article 20.2 of the 1997 statutes, the president of the General Codification Commission is given the power to establish any working groups deemed appropriate, for reasons of urgency or opportunity. These working groups shall be formed by the members of the various sections and by members assigned by the president of the Commission, depending on the assignment. They are to conduct their activities independently and submit results directly to the president within the established timeline.

Finally, Article 22 of the 1997 statutes of the General Codification Commission of 1997 provides for the possibility of setting up special sections “for the review of statutory bodies or preparation of special laws”\(^{28}\). They shall consist of the members and when appropriate, of one or more speakers appointed by the Minister of Justice through 13 of its statutes, approved by the aforementioned Royal Decree 160/1997. The president may assign a secretary nominated by the general secretary to each section.

\(^{27}\) Translation by authors.

\(^{28}\) Translation by authors.
in his role as president of the Commission. At the time of the creation of these special sections, a deadline for completion of the work is to be set, "after which or after an extension of the deadline, if any, they shall be automatically dissolved".

III. Work carried out by the Spanish General Codification Commission in modernising Contract Law

As stated at the beginning of this paper, the Spanish General Codification Commission has, among other efforts, been working on modernising the law of obligations and contracts in recent years. Next, this present paper shall offer details on some of the latest proposals put forward in this area, such as draft bills developed by the civil and commercial law sections. Through them it becomes apparent that one of the most outstanding features of the current review process of legal texts is the harmonising influence exerted by uniform law and European instruments, including so-called soft law. Above all, the consideration of these texts by the Commission typifies their desire to establish a more efficient and coherent law of contract. In the following discussion, some reflections on this commendable goal will be set forth.

The successful results of the General Codification Commission’s efforts to update and modernise the Spanish law of obligations and contracts can be seen in several draft bill proposals published in the early years of this century. These proposals, which the Commission has submitted to the Ministry of Justice in its advisory capacity, share a common academic, independent and non-binding character, and they also provide a reference point for future legal analysis. In reviewing these proposals, close attention shall be given to the sources that were used as reference points in their development.

1. Proposals by the Civil Law Section (2005 and 2009)

Among the proposals submitted by the civil law section, special mention must be made of the reforms proposed in respect of the sale of goods (2005) and obligations and contracts (2009). Along with the proposal for the reform on the sale of goods, two other proposals were submitted by the civil law section in 2005.

a) Proposals submitted by the Civil Law Section in 2005

aa) The draft bill Proposal to Amend Articles 10 and 11 of the Civil Code of 2005

The purpose of this proposal was to adjust the wording of these articles to the Convention on the Law Applicable to Contractual Obligations, signed in Rome on 19 June 1980. The fact that Council Regulation (EC) No. 593/2008 of the

European Parliament and of the Council of 17 June 2008 on the law applicable on contractual obligations (Rome I) – which is binding for Member States – is currently in force further reinforces the need to reform the Civil Code in this field.

bb) The draft bill Proposal to Amend the Civil Code regarding Sale of Goods Contracts of 2005

This proposal’s aim is to modernise the Civil Code by incorporating new trends of uniform and European law. In this case, reference has been taken to the United Nations Convention on Contracts for the International Sale of Goods (1980) and Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. The Principles of European Contract Law (PECL) have also been taken into account.

As stated previously, the implementation of Directive 1999/44/EC in the Spanish Civil Code was first carried out through Act 23/2003 of 10 July on Guarantees for the Sale of Consumer Goods (currently not in force) and later by the Revised General Consumer and User Protection Act (16 November 2007).

The Directive has not been transposed into the Spanish legal system by means of a reform of the Civil Code as in other countries (e.g. Germany). However, as stated in the explanatory memorandum of the draft bill Proposal amending the Civil Code regarding Sale of Goods Contracts, reform of the Spanish Civil Code in this area is in fact necessary given that the Directive – in pursuit of harmonisation – adopts the system of contractual responsibility as set forth in the 1980 United Nations Convention on Contracts for the International Sale of Goods (ratified by Spain) and Principles of European Contract Law. The draft bill Proposal notes, nonetheless, that the Spanish legal code is already moving in this direction, “Basically, the new system is characterised by its use of a unitary concept of non-performance and by an orderly structuring of the traditional remedies available to creditors in these cases. The reform that is now required is due to the unavoidable demand for a modernisation of the Civil Code in an area in which its underlying principles continue to become further removed from both the jurisprudential evolution of our own Civil Code as well as new trends in uniform and European law.” The proposed reform welcomes the new system

\[\text{\textsuperscript{20}} \text{Official Journal of the European Union 4.7.2008, L 177/6.} \\
\text{\textsuperscript{22}} \text{The incorporation of Directive 1999/44/EC into our legal system was first achieved through the Act 23/2003 of 10 July which guarantees the sale of consumer goods and later with the Revised General Consumer and User Protection Act (Real Decreto Legislativo 1/2007, 16 November) which supersedes the 2003 Act.} \\
\text{\textsuperscript{24}} \text{Translation by authors.} \]
and relinquishes, for example, the liability for latent defects remedies as originally inherited from Roman law\textsuperscript{35}.

c) The draft bill Proposal to Amend Chapters II and III of Volume XVII of Book IV of the Civil Code (2005)\textsuperscript{36}

This proposed draft responds to the Insolvency Act\textsuperscript{37}, by which the Government is required to submit to Parliament a draft law regulating competition and priority of debts\textsuperscript{38}.

b) Proposals submitted by the Civil Law Section in 2009: The draft bill Proposals for the Modernisation of the Civil Code on Obligations and Contracts\textsuperscript{39}

Through these proposals the General Codification Commission seeks to reform the law of obligations and contracts (Articles 1088 to 1314 CC), with the aim of not only adapting these regulations to modern times, but also – as we shall be demonstrated – to bring Spanish law closer to European legal systems. The last text (2009) combines the draft bill Proposal to Amend the Civil Code regarding the Sale of Goods Contracts of 2005 and a previous draft bill Proposal to Modernise the Law of Obligations and Contracts of January 2009\textsuperscript{40}. As with the proposed reform of the Civil Code in respect of the sale of goods (2005), these proposals (January 2009 and the merged text of 2009\textsuperscript{41}) are also inspired by the United Nations Convention on Contracts for the International Sale of Goods (1980) and the Principles of European Contract Law (PECL)\textsuperscript{42}. Additionally, these proposals take reference to the Principles of International Commercial Contracts (UNIDROIT Principles 2004). A report on these proposals is discussed later in this paper (section IV).

2. Proposals by the Commercial Law Section (2006)

It is important to highlight that the common denominator shared between the Commercial Law Section proposals submitted by the Spanish General Codif-

\textsuperscript{35} Antonio Manuel Morales Moreno, Adaptación del Código civil al Derecho Europeo: La compraventa, Anuario de Derecho civil 2003, 1609-1651


\textsuperscript{37} 33\textsuperscript{rd} final disposition.

\textsuperscript{38} The 21 July 2006 Act that was submitted to Parliament did not include the proposal's guidelines, although there were suggestions that they were not entirely ignored. The project was never approved due to the dissolution of Parliament.


\textsuperscript{41} This text has not introduced changes to the first one of January 2009.

tion Commission to the Ministry of Justice in 2006 is the use of uniform law as a reference, as has similarly been done in the just mentioned proposals to reform the Civil Code regarding the sale of goods (2005) and the law of obligations and contracts (2009). They are:

- The draft bill Proposal to Amend the General Part of the Commercial Code on Commercial Contracts and on Prescription and Lapse (2006). This proposal arises from the awareness that the regulations on this matter in the Commercial Code of 1885 are outdated. The proposed draft aims to modernise legislation in respect of typical commercial contracts and to regulate the institutions of prescription and lapse, which are essential for achieving trade security. The proposal is inspired by the United Nations Convention on Contracts for the International Sale of Goods (1980) as well as by the 2004 UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law (in the version prepared by the commission chaired by Professor Ole Lando).

- The draft bill Proposal on Distribution Agreements (2006). This proposal aims to bridge the gap in the Spanish legal system regarding regulations on contracts involving commercial distribution in order to enhance legal security and avoid situations of abuse when there is a disparity in bargaining power between the parties. Among other sources, this proposal draws upon the 2004 UNIDROIT Principles on International Commercial Contracts and the UNIDROIT preliminary work on a “Model Franchise Disclosure Law”.

As noted, both the United Nations Convention on Contracts for the International Sale of Goods (1980) as well as the Principles of European Contract Law have been the common denominators in and sources of inspiration for the three major reforms that have been proposed for the Civil Code and Commercial Code. Other uniform and European law texts have also been taken into consideration, although not always referred to in any instance: in particular, the aforementioned Directive 1999/44/EC was necessarily taken into account in the proposed reform on the sale of goods (2005) while the 2004 UNIDROIT Principles of International Commercial Contracts have served as an explicitly quoted reference, both in preparing the text reforming the Commercial Code relating to commercial contracts (2006) as well as in the Civil Code concerning obligations and contracts (2009).

To the extent that these uniform and European texts have served as landmarks in the modernisation of other foreign legal codes, it appears that their inspirational influence would be a good way of not only bringing coherence to the Spanish legal system (an internal coherence), but also of harmonising it with other foreign legal...
systems, especially European regimes (legal convergence). The following analysis of the draft bill Proposal for the Modernisation of the Civil Code on Obligations and Contracts (2009) will assess the accuracy of each of these claims.

**IV. Analysis of the Draft Bill proposal for the modernisation of the civil code on Obligations and Contracts (2009)**

Without being exhaustive, the proposed Civil Code reform on obligations and contracts could be considered from two points of view: a) from a legal harmonisation perspective, it could be compared to reforms that have been or are being proposed in the legal codes of Spain’s neighbours, and b) from the perspective of the internal coherence of the system, some of the latest reforms proposed by the General Codification Commission in Spain could be compared, particularly with reference to the 2005 sale of goods and the 2006 commercial contract reforms.

1. The harmonising goal of the proposal

As is well known, the term "legal harmonization" currently refers to the objective of achieving concurrence between the various national laws, especially concerning obligations and contracts in Europe, in order to open up markets and to facilitate cross-border transactions.

As indicated, when drafting the draft bill Proposal for the Modernisation of the Civil Code on Obligations and Contracts (January 2009), the members of the General Codification Commission responsible for its implementation had a dual aim. First of all, to "set the rules that will best respond to current urgent needs". Secondly, the explanatory memorandum describes "seeking the closest possible approximation of Spanish law to European legal systems as they are conceived today", as an "obvious" purpose. And, it adds: "Without a doubt the fact that the differences amongst legal systems within the European Union are not very substantial can ease cross-border operations. All this is in expectancy of the unification of European contract law norms which may occur at some point in time". In fact, steps are already being taken in this sense: (1) Proposal for a

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63 Luis Díez-Picazo Ponse de León (President), José Luis Álvarez Álvarez, Manuel Amorós Guadixola (deceased), Ricardo De Angel Vázquez, Alberto Ballarín Marcial, Roberto Blázquez Uberrós, Alegría Burrás Rodríguez, Jorge Cañadas Laporta, Alfonso Calvo Carvajal, Eduardo Cervera Sánchez Herrera (deceased), José María Clío Ortiz (deceased), Jesús Díez del Corral y Rivas, José Antonio Escarín Ipiem, Diego Espín Cánovas (deceased), José Ferrandí Villena, Manuel Garmilla González (deceased), Francisco Javier Gómez Guillén, Julio Diego González Cano (deceased), Carmen De Grado Sánchez, Carlos Llanzar Álvarez, Ramón López Vila, Mariano Martín-Graziano Fernández (deceased), Luis Martínez-Calcerrada y Gómez, Francisco Mata Pallares, José María Miguel González, José Muniñez Fuentes, Vicente Montes Penáles, Antonio Manuel Morales Moreno, José Luis De los Mozos y De los Mozos, Francisco Núñez Lagos, Fermín Pantaleón Prieto, Antonio Puig de Ferrer, Manuel Peña y Bernáldez de Quiroga, José Poveda Díez, Emeterio Roca i Frias, Antonio Rodríguez Adrados, Manuel Ángel Rueda Pérez, Luis Sambo González, Juan Samartino Ramos, Marta Concepción Sierra Ordóñez, Manuel Talavera Roca (deceased), Marta Telé Núñez and Miguel Virgós Soriano.

64 Explanatory memorandum, IV. (Translation by authors).

In short, reforms of the Spanish Law of obligations and contracts aim to reach the same level the international legal reference texts have85:

"The twentieth century in its entire changing and varied route, has at times seen contradictory phenomena that have impacted squarely on the legal regulation of contracts – set forth in the explanatory memorandum of the draft Proposal – [1]. The last years of the previous century and the early years of this one have affected the phenomenon known as globalisation, the proliferation of markets and cross-border relations. Coupled with the existence of supranational political structures, this has generated the birth of bodies of law to deal with this issue using new views and new approaches"86.

These new approaches and perspectives of modern uniform and European law have become generally accepted reference points for reforming internal systems. The drive for modernisation is not unique to our legal system, as it has also occurred or is now occurring in other neighbouring countries. In this sense the German reform87 is especially noteworthy because through it important parts of the EU directives and of the guiding principles of the United Nations Convention on Contracts for the International Sale of Goods (1980) have been incorporated into the BGB. The Principles of European Contract Law as prepared by the Lando Commission were also taken into account. One author has commented that "at the moment the BGB is the most European of all the European legal codes"88. However, the reform being planned in France seems to give priority to "national tradition, primarily benefitting the French doctrinal and jurisprudential constructs developed over the past two centuries" and this perception of the planned reform has been the basis of criticism89.

As has been said: "The landscape of European Consumer Law is changing. In October 2008, the European Commission presented a proposal for a Directive on Consumer Rights, which aims at revising the Doorstep Selling Directive 85/577/EEC, the Distance Selling Directive 97/7/EC, the Consumer Sales Directive 99/94/EC and the Unfair Contract Terms Directive 93/13/EC. The planned Directive merges these four Directives into one single horizontal instrument regulating common aspects (such as the definition of “consumer” and “trader”, information duties and rights of withdrawal) in a systematic fashion. In contrast to the existing Directives, the proposal moves away from the minimum harmonisation approach, introducing instead the principle of full harmonisation (i.e. Member States cannot maintain or adopt provisions diverging from those laid down in the Directive)" (Martín Onés, De la armonización mínima a la armonización plena. La propuesta de Directiva sobre derechos de los consumidores, translated by Esther Arroyo i Amaya, InDiet 2/2010, 2).


Translation by authors.

74 Gesetz zur Modernisierung des Schuldrechts (26.11.2001).
75 Allix Delemanne, Amargo de Derecho civil 2002, 1144; See, Zimmermann, El nuevo Derecho alemán de obligaciones. Un análisis desde la Historia y el Derecho comparado, (translated by Esther Arroyo i Amaya, Barcelona, 2008 (in Zimmermann [fn. 1]).
76 Antonio Codinella Sánchez, El Anteproyecto francés de reforma del Derecho de obligaciones y del Derecho de la prescripción (Estudio preliminar y traducción), Amargo de Derecho civil 2007, 624. Accord-
Obviously, if more countries refer to the uniform and European law when modernizing their legal texts concerning obligations and contracts issues, harmonization will be of a greater magnitude.

2. Proposal content: Some matches and mismatches

The common reference to the sources of various legal and European law should in turn promote a better match between the various bodies that deal with internal law. Slowly, this objective could be achieved with the various proposals made by the General Codification Commission to modernize the Civil and Commercial Codes regarding obligations and contracts issues.

To measure the extent of the above statement, the content of the draft bill Proposal for the Modernisation of the Civil Code on Obligations and Contracts (January 2009)\(^{33}\) shall be analysed by comparing it first to the 2005 Proposal on the sale of goods and later, to the 2006 Proposal on commercial contracts.

In briefly setting out the main issues of the Proposal of January 2009, one should emphasise that the introduction of a broader perspective of obligation into the Civil Code is especially important in the sense that, although until now the law has dealt with the obligation to deliver something specific (a trait which was inherited from Roman law), the reality is that we live in a social and economic context in which contracts often generate the obligation to deliver something generic\(^{34}\). This calls for the regulation of both classes of obligations and its consideration throughout the proposed reform, which is in itself a remarkable change.
From this perspective, the essence of any obligation is generally defined as the duty to "satisfy a creditor's legitimate interest". The obligation is no longer considered solely from the debtor's unique point of view, which has to give, do or not do something specific, but also from the perspective of the creditor, whose legitimate interests must be satisfied. Regarding the phenomenon of mass contracts, which is typical of modern societies, the Proposal not only expressly regulates general obligations, but the general terms of the contract as well. The Proposal will, on the other hand, cover contracts signed away from business establishments and protect consumers in distance contracts and electronic trading. The explanatory memorandum states that it has chosen not to ignore consumer law; instead, the codified text gathers "at least the substantial core of most of the special rules stemming from EU directives and which have subsequently been incorporated into Spanish law", thus partly following the German reform model.

Secondly, the principle promoting the existence of the contract avoids cases which have been treated until now as invalid contracts and were implicitly transferred to the area of breach of contract (particularly cases of initial impossibility). The importance of this same principle of conservation of the contract is also evident in contract formation. The wording of the explanatory memorandum is significant: "The existence of the contract or the fact that it is considered concluded from a legal point of view is made easier through a new contract formation regulation, especially by matching offers and acceptances which is certainly inspired by the United Nations Convention on Contracts for the International Sale of Goods (1980) and the Principles of European Contract Law". Furthermore, the explanatory memorandum adds: "Moreover, by accepting the rule - which now definitely seems to have found its way into modern law - that the initial impossibility of the performance does not in itself void the contract regardless of whether there may be other grounds for annullment, determinations in favour of the contract have been further facilitated"

The Proposal specifically revises the issue of non-performance of obligations, providing a special regulation. A broad concept of non-performance is introduced matching the evolution of the Spanish Civil Code, in turn leading to demands for a higher level of diligence on the part of the debtor: "There is non-performance if the debtor does not exactly carry out the main service or any other duties resulting from the mandatory relationship". At the same time, remedies for non-performance which give the creditor the right to enforce, reduce the price of terminate the contract (with the corresponding damage compensation) when
the creditor’s legitimate interests have not been satisfied are neatly structured. The assignment of risk would be modified under the current criteria, moving it into the realm of non-performance.

The Proposal introduces many other innovations in the Civil Code such as the express regulation of promises; presumptions of passive solidarity – as a general rule – and active joint obligation (mancomunidad activa); the management of penal clauses; various forms of subjectively modifying the obligation (credit assignment, debt assumption, delegation and assignment); representation regulation; contracts favouring a third party and contracts favouring a person to be appointed; as well as regulations on “nullity and avoidance of contract”, which would address issues of consent and expressly provide that a contract may be avoided by giving notice to the other party.

As a result of this approach, it can be said that consistency has been relatively achieved between the Proposal of January 2009 on obligations and contracts and the Proposal of 2005 on the sale of goods texts. This is demonstrated, for example, by (1) The broad conception of obligation that includes both generic and specific delivery; (2) Regulating the transfer of risk in the same way; (3) The treatment of initial impossibility, excessively burdensome fulfillment and changed circumstances; or (4) The structuring of a single system of remedies for non-performance and, among them, the termination of the contract by notice to the other party. However, there are also a few mismatches, particularly in relation to deadlines for price reduction actions in cases of non-performance or the hierarchy of the remedies for non-performance, which the 2005 Proposal regarding the sale of goods incorporated by adopting the 1999/44/EC Directive as a reference, yet which are not included in the January 2009 Proposal. As previously mentioned, both proposals have now been merged.

43 There are exceptions, particularly an excessively burdensome fulfillment or a change of circumstances, which would not result in an enforcement action.

44 Regarding the transfer of risk, the 2009 Proposal merely transcribes the text of the 2005 Proposal made by the General Codification Commission to reform the civil code on the sale of goods.

45 “The Tentative draft bill for the Modernization of the Contract Law prepared by the Codification General Commission […] modifies the penalty clause regime, since it introduces the judicial review of the penalty on the grounds of equity and the loss of the promisee’s right to claim liquidated damages once specific performance has been required. The draft also provides general rules to statutorily govern advance payments in non-commercial contracts.” Igcover, María García, La cláusula penal en la Propuesta de Modernización del Código Civil en materia de Obligaciones y Contratos, InDret 2/2009, 2.

46 From a comparative law point of view, one can find two different ways to avoid contracts: the first one requires going through the judicial process (France, Italy). In the second one, a notification would be enough (USA, UK, Germany). The UNIDROIT, Principles and the PECL (as the DCFR) follow the second model. See, Carmen Iriberri Delgado, La anulación del contrato, Madrid 2011, 38-56.

47 “The Spanish Civil Code of 1889 did not include any section regarding the possibility of revising or cancelling a contract on the base of changed circumstances, that is, the nubes et solum doctrine. Although the Spanish Supreme Court retrieved this doctrine on mid 20th century, its application was rigorously exceptional. However, the recent Proposal for the Modernization of the Civil Code on Contracts includes section 1213, which enables the parties to revise, or even cancel, a contract under hardship when unforeseen circumstances arise and the fulfilment of the contract is excessively burdensome.” Pablo Sánchez Colmán, Alteración de circunstancias en el artículo 1213 de la Propuesta de Modernización del Código Civil en materia de Obligaciones y Contratos, InDret 4/2009, 2.

48 In: Comisión General de Codificación, Propuesta para la modernización del Derecho de obligaciones...
In connection with the proposed reform of the Commercial Code regarding commercial contracts (2006), internal consistency is achieved in part by its explicit reference to the provisions of civil law, as well as by being inspired by the same sources as the January 2009 Proposal (United Nations Convention on Contracts for the International Sale of Goods [1980], 2004 UNIDROIT Principles of International Commercial Contracts and PECL). However, there are several inconsistencies which, as in the case of the proposal on the sale of goods (2005), can be interpreted as granting priority to the special rule over the general one.

In conclusion, the efforts to revamp the law of obligations and contracts as have been undertaken by the Spanish General Codification Commission since the beginning of this century can be assessed as positive in light of their promoting scholarly thought. It would be interesting if these proposals were taken into account in the legislative field, from the perspective of both the system’s internal coherence as well as its synchronisation with other judicial codes and with the uniform and European law. However, reality suggests that these objectives will not be fully attained without the co-operation of the other affected countries (in terms of legal harmonisation) and without an effective co-ordination between the various sections of the General Codification Commission. The goal of harmonisation is undeniably encountering internal and external challenges at the national level, suggesting that the adoption of a horizontal directive or a European Civil Code would probably be the most satisfactory solution.

In all events, however, it is appropriate to acknowledge the work that the Spanish General Codification Commission is carrying out to promote the modernisation of the Spanish law of obligations and contracts.

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y contratos, Gobierno de España, Ministerio de Justicia, Madrid, 2009.

For example, regarding the types of obligation, the 2006 Commercial Code reform distinguishes between obligations of means and results, while the reform of the Civil Code (2009) recommends another classification of obligations (obligations to deliver a specific thing, obligations to provide a generic thing, financial obligations, alternative obligations, conditional obligations, obligations under term); there are also notable differences between the two texts on the subject of non-performance (the concept is broader and more objective in the proposed reform of the Civil Code of 2009 and it also differs in the system of remedies).

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*aufgespießt*

„Our society respects law professors pretty much, lawyers not so much. On the one hand, this is surely ironic. One might think of a law professor as a creature even more monstrous than a lawyer, because the professor’s job is to produce more lawyers.”