

# A Plea for Rigorous Conceptual Analysis as a Central Method in Transnational Law Design

## Offer and Acceptance as Juridical Acts in the Draft Common Frame of Reference as a Case in Point

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### 1 The problem

From an economic point of view, the development of a European framework for private law makes good sense. Removing externalities caused by multiple legal systems when engaging in cross-border trade in the European Union seems a constructive way to perfect the internal market ideal. Since the European reality prevents a simple top-down replacement of existing national systems, the European Union opted for a two-fold bottom-up approach in drafting a Common Frame of Reference (DCFR) for European private law (Bar, Cive & Schulte Nölke 2009). In terms of *substance*, a bottom-up approach grounded in comparative legal research was used to identify the common European legacy on which to build the European private law framework. In terms of *form*, the optional nature of the framework allows for a voluntary implementation based on merit rather than European decree.

Although the bottom-up approach has come a long way in overcoming the difficulties associated with the structure of the European Union, the comparative approach followed in the substantial part of the DCFR design has not been able to solve all the problems associated with the existing national legal traditions. One particularly pressing problem remains disambiguating the framework. The variety of legal traditions in the European Union allows for various possible interpretations of rules as posed in any explicitly designed European legal framework such as the DCFR. In a transnational context especially, many subtle and not so subtle conceptual differences may surface. In translation, concepts may appear the same, while in actuality they differ significantly. For example: for most English lawyers the idea of a contract without ‘consideration’ is unthinkable, while for their Dutch counterparts ‘consideration’ is irrelevant. In order to create a framework that can be successful across borders and across legal traditions these ambiguities need to be eliminated. This is why the drafters of the DCFR have always focused on conceptual clarity. The use of ambiguous concepts is likely to yield more discussion between parties. This, in turn, will create rather than overcome externalities in terms of legal fees, longer procedures, etc. Consequently, the sig-

nificance of the clear and precise use of legal rules and concepts, particularly in newly developed transnational legal frameworks, can hardly be overstated.<sup>1</sup>

Conceptual clarity can be obtained in a variety of ways. In addition to using historical and comparative methods in constructing new legal frameworks, we claim that rigorous conceptual analysis should play a more prominent role in developing such frameworks, particularly those in a transnational setting. In purposefully designed transnational legal frameworks, such as the DCFR, we need to step beyond the legal rules and concepts of national systems, because ambiguities in rules and concepts are likely to permeate the whole framework. In order to gain conceptual clarity, a conceptual analysis is required that focuses on theoretical issues, 'what the law is', and 'how the law works'.<sup>2</sup> In order to do so, we need to break down central legal concepts into basic legal components so that we can create a better understanding of these concepts and their role in law in general.<sup>3</sup> A classic exposition of such an approach can be found in Hohfeld's (1913) exposition of the basic concepts 'right' and 'duty' as a basis for analysing more complex concepts such as contract and property. In this context, it is useful to distinguish between *static* concepts denoting a legal status, such as contract and property, from what we can call *dynamic* or *performative* concepts denoting an action or event, which can *change* a legal status, such as juridical act and tort. Where the conceptual analysis of the former category, static concepts, tends to centre around the classic philosophical question 'what is law', the latter category, dynamic concepts, tends to focus more on the actual operations of law (*how law functions*). For both types of question it is useful to view law as part of social reality, and take the role that language plays in law seriously.<sup>4</sup>

Conceptual analysis along the lines sketched above can help both in reviewing transnational legal instruments and in evaluating them. In the following examination of the formation of contracts in the DCFR, our conceptual analyses show that despite explicit attention being paid to conceptual clarity, its central concept,

- 1 This view is explicitly shared by the drafters of the DCFR who, in various places, call for a consistent and coherent use of words. For examples and a particular challenge to the readers/users of the DCFR see Bar, Cive, & Schulte Nölke 2009, p. 29f: 'The terminology should be precise and should be used consistently (...). The concepts should be capable of fitting together coherently in model rules, whatever the contents of those model rules (...). The text should be well organised, accessible and readable. Being designed for the Europe of the 21st century, it should be expressed in gender-neutral terms. It should be as simple as is consistent with the need to convey accurately the intended meaning. It should not contain irrational, redundant, or conflicting provisions. Whether the DCFR achieves these aims is for others to judge. Certainly, considerable efforts were made to try to achieve them.'
- 2 See, e.g., Smits 2012.
- 3 See for example Brouwer & Hage (2007) for a more elaborate exposition of this approach.
- 4 Much along the lines of Hart (1961, p. v) who quotes J.L. Austin in his preface emphasizing 'a sharpened awareness of words to sharpen our perception of the phenomena' implying an important role for insights developed in the philosophy of law in the analysis of concepts. Where Hart (1961) was clearly looking for a general concept of law, we seek to use these insights in developing general concepts of legal notions that help us to understand a variety of compound legal concepts (such as contract) better.

*juridical act*, allows for two mutually conflicting models of what contracts comprise. The result is more likely to create confusion than provide a common European model for contract law.

The central thesis advanced in the following sections is that rigorous conceptual analysis of fundamental legal notions is indispensable in transnational law design so as to rule out ambiguities in the end product. Section 2 introduces the notion of a juridical act as central notion in the DCFR, philosophically grounds the notion in speech act theory and identifies intentionality as its basic feature. Section 3 uses the conceptual building blocks developed in section two to expose two notions of contract formation based on the DCFR model rules that are mutually inconsistent. Section 4 concludes that this type of analysis is indispensable in the formative stages of transnational law design.

## 2 Juridical acts in the DCFR: conceptual building blocks

One important goal of the DCFR was to develop a uniform European legal terminology which would create more coherence and consistency in European private law (COM 2003/68). The DCFR contains principles, definitions, and model rules of European private law including provisions on contracts, rights and obligations, and property law. The first chapter of the book, dealing with contract law, contains some general provisions which state that contracts are a special kind of juridical act that are bi- or multilateral in nature.<sup>5</sup> Since this exposition suggests a possible analysis in terms of unilateral juridical acts,<sup>6</sup> it is necessary to look at its generic definition first.

DCFR Art. II. – 1:101(2) reads:

‘A juridical act is any statement, whether express or implied from conduct, which is intended to have legal effect as such.’

To jurists working within legal systems that employ this concept, this definition seems straightforward enough. A juridical act is an act performed by someone with an intention to institute some specific juridical consequence for the sake of establishing this particular juridical consequence. Put differently, a juridical act is an act employed to make intentional changes to the set of legal facts within a given legal system. For example, by making a testament, I can establish that person A (rather than B or C) is to inherit my estate upon my death and, consequently, I intentionally change the set of legal facts. The law attaches legal

5 Art. II. – 1:101 DCFR: ‘Meaning of “Contract” and “Juridical Act”’: (1) A contract is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect. It is a bilateral or multilateral juridical act. (2) A juridical act is any statement or agreement whether express or implied from conduct, which is intended to have legal effect as such. It may be unilateral, bilateral or multilateral.’

6 The assumption that two unilateral acts may amount to an agreement is confirmed in the annotated version of the DCFR (Bar, Cive, & Schulte Nölke 2009, p. 339).

consequences to the act precisely because my intention was directed towards the juridical act. The consequence is that A inherits my estate upon my death.<sup>7</sup>

From a logical point of view, the concept of the juridical act can be seen as an intermediary conclusion between the conditions for the existence of the term and the consequences it has within a given legal system. Such intermediate legal concepts are defined by the rules of the specific legal system.<sup>8</sup> As a result, the system-dependent definition of a juridical act may differ in France and the Netherlands. Following Hage (2011, p. 27), concepts that are exhaustively defined by the rules of a specific legal system can be called internal-juridical. These concepts sharply contrast with doctrinal-juridical concepts, which require an act of abstraction to think beyond the confinements of system-specific rules. Doctrinal concepts can be useful in conceptual analysis when the rules in the system do not define the concepts exhaustively, or when one wants to overcome the peculiarities of the specific legal system. Using a doctrinal concept of juridical act in our analysis of the model contract rules, we identify the source of the DCFR's problem in that it is trying to be all things to all men. On the one hand, the DCFR is an attempt to establish a common conceptual framework for European private law. On the other hand, it simultaneously maintains the peculiarities of two different legal traditions by artificially blending them into one legal framework (hence creating an ambiguous internal concept). Both aims are incompatible. In order to see this we need to examine more closely the logical structure of a juridical act.

### 2.1 Logical structure

Juridical acts concern actions.<sup>9</sup> In order for some particular act (in the physical world) to affect the juridical realm, the rules of the system need to attach some juridical meaning to the act in question. Expressed otherwise; in order for an event in the real world to be considered a juridically relevant act, the law must 'count' this particular act as a 'legally relevant act' according to some rule in the system. Subsequently, the law attaches consequences (legal implications) to this newly established act. The term 'legal effect' implies this type of rule.<sup>10</sup> Within the class of acts with legal implications we can recognize the category of juridical acts.<sup>11</sup> The distinguishing characteristic of a juridical act is that it is an act with a particular intention directed at a change in the set of legal facts. Its logical form essentially consists of the following ingredients: (1) An act (statement/agreement) in the physical world performed with the intent of having particular legal consequences, (2) a legal rule ensuring that the act in the physical world counts as

7 A thorough German exposition on the topic can be found in Flume 1979, p. 104f.

8 This view can be traced back to Ross 1957, p. 149.

9 Given the freedom of form implied by the full article DCFR Art. II. – 1:101(2), and expressed in DCFR Art. II. – 1:106(1), it is useful to speak more generically about actions than about statements in this context.

10 From legal practise we know that writing a note in which you intend to terminate a rental contract, will under particular conditions count as the juridical act of 'giving notice' which in turn results in the termination of a rental contract (which is its juridical consequence).

11 Another example of such a category can be *tort* (or *delict*).

a juridical act, and (3) a second legal rule attaching the intended juridical consequences to the successful instantiation of the concept juridical act.<sup>12</sup>

Part of the action when performing a juridical act is what jurists commonly denote by 'the declaration' or in the case of the DCFR, 'the statement'. The declaration is the outward appearance of the (inner) intention to perform a juridical act. Moreover, it constitutes the necessary communication between parties needed to perform a juridical act. However, the declaration of the intention is not merely a description of the inner intention to act, it is the act itself. Instead of describing something we act *by* saying or doing something, we perform juridical acts *by* declaring our intention. To use a concrete example: in saying 'I do' when standing together in front of a magistrate, one is not so much describing that one wants to marry, one is actually marrying. We act with words when performing a juridical act; the juridical act is a speech act.

### 2.1.1 *Speech act theory*

In his work on speech acts, Searle (1969, p. 29-33) distinguishes in them two main aspects. All speech acts have a *propositional content* and an *illocutionary force*. The propositional content is the substance of the speech act and focuses on the descriptive meaning of the words. If I say 'there is a dog', the propositional content is that I refer to a dog over there. The illocutionary force is not concerned with what I am *saying* but with what I am *doing* in addition to uttering the words. For example: I can describe something, I can ask a question, I can give a warning, or any other possibility. This illocutionary force is conventional, but the way we use language, our (unspoken) rules and etiquette, all contribute to the illocutionary force of the speech act. In a different situation and with different manners, an utterance can have a different illocutionary force. In the 'there is a dog' example, the illocutionary force can differ: I can describe a situation, 'there is a dog' as in 'aw, look at that cute dog over there'. I can ask a question, for example, 'there is a dog?' as in 'is that a dog over there, or is it a different animal?'. I can give a warning, such as 'there is a dog!' as in 'watch out, there is a gigantic dog snarling at us!' In all these examples, each with a different illocutionary force, the propositional content is the same, namely, there is a dog.

According to Searle, every illocutionary force is characterized by a *direction of fit*. The illocutionary force can be aimed at getting the words to match the world, *word-to-world direction of fit*, or getting the world to match the words, *world-to-word direction of fit*. When someone utters a sentence, the intention is either that the words match the world, e.g., a description of facts or that the world will match the word, e.g., to act with words. A good example to explain the difference between these directions further comes from Anscombe (1957, p. 56-57): When a man goes to the market carrying a grocery list, he will add the items on the list to his basket. If, for example, the list contains the items beans, butter, bacon, and

12 In addition to the intended legal consequences, there can also be non-intended legal consequences. For the purposes of this exposition, however, we do not take the non-intended consequences into account.

bread, he will change the world according to his list if he buys these items, the world follows the words: it has a world-to-word direction of fit. If a detective is following this man, and he writes down every item the man buys, the list from the detective will, in the end, contain the same items as the grocery list of the man: beans, butter, bacon, and bread. However, the detectives' list is made to represent the world, the words follow the world: it has a word-to-world direction of fit (Searle 1976, p. 3-4).

The difference in direction of fit is of great importance to juridical speech acts, since the goal of a juridical act is to change a legal status in accordance with the words. Juridical acts, therefore, have a world-to-word direction of fit. This type of speech act, which changes the set of facts, can be defined as *constitutive*. The consequence of the constitutive speech act is a change in the set of facts in accordance with the propositional content. When we perform a juridical act we speak of its legal consequences. In legal discourse the act is often described by its consequences; the act is not referred to as: 'to say "I do"', but as: 'to marry', since marriage is the consequence of the speech act 'I do'.<sup>13</sup> The propositional content of a constitutive speech act is the content of the change; its consequences are an integral part of the act. For that reason the act is often renamed after its consequences.<sup>14</sup>

### 2.1.2 *Intentionality*

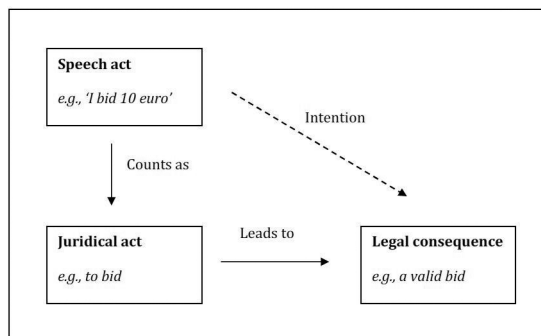
A second aspect of the juridical act, and of the constitutive speech act, is that they require intentionality. A sneeze that sounds as 'I do' is not enough to marry.<sup>15</sup> The action in itself needs to be intended. In Searle's terms, we need to have 'intention in action', for example if I raise my arm, the intention in action is that while I raise my arm I intentionally do so. The intentional action has two components, the experience of acting (the intentional component = intention in action) and the event of the act, say, one's arm going up (Searle 1983, p. 79-111). The act performed in the case of juridical acts is aimed at creating legal consequences. These consequences coincide with the act. Consequently, when we intentionally perform the act it is not only the movement of our arm that needs to be intended, but also the consequence our raising of that arm has. Only this latter intention to the consequence is legally relevant. For example, if I am at an auction and I want to make a bid I not only raise my arm<sup>16</sup> or yell '10 euros' intentionally, I also want to make that bid, so I intentionally perform the juridical act and intend its consequences. In Figure 1 we show a schematic overview of the speech act that can be performed in order to create legal consequences.

13 Of course the institution of 'marriage' is more complicated than just saying 'I do'. It is also contextually bound by the presence of for example state officials and witnesses.

14 For more, see Davidson 1976, p. 84-85.

15 For the purposes of this paper we will not need to discuss the possibility that the failure to establish a juridical act can be 'repaired' by the doctrine of good faith.

16 For now we will equate a physical act with symbolic meaning (raising an arm = placing a bid) with a language act, since both have symbolic meaning.

**Figure 1** *The logical form of juridical acts*

In Figure 1, we see that a particular speech act ('I bid 10 euros') can serve as a juridical ('to bid') act if within the rules of the legal system the speech act 'counts as' a juridical act, which in turn has legal consequences (i.e., the legal duties and rights that the law attaches to a bid). The dotted arrow in the picture depicts the distinguishing conditional requirement for successfully performing a juridical act, namely that it is (intentionally) aimed at achieving the legal consequences the rules of the system attach to a successful application of the juridical act in question.<sup>17</sup> This schematic overview of the juridical act can help in clarifying the conceptual inconsistencies in the DCFR, and can help point out where change is needed. In the following part, we demonstrate this further when we examine the models of contract used in the DCFR.

### 3 Two contractual models

The basic ingredients of a contract are (1) the offer followed by (2) acceptance of that offer.<sup>18</sup> The contract in the DCFR is seen as a (bilateral or multilateral) juridical act, while the *offer* and the *acceptance* are considered unilateral juridical acts. This allows for two mutually excluding contractual models. The unitary model

17 Often there are more conditions required before the juridical act is performed, such as the competence to act. For the purposes of our current analysis, however, these conditions are irrelevant.

18 The relevant clauses in the DCFR are the following:

DCFR Art. II. – 1:101: 'Meaning of "contract" and "juridical act"

(1) A contract is an agreement which is intended to give rise to a binding legal relationship or to have some other legal effect. It is a bilateral or multilateral juridical act.

(2) A juridical act is any statement or agreement, whether express or implied from conduct, which is intended to have legal effect as such. It may be unilateral, bilateral or multilateral.'

DCFR Art. II. – 4:201: 'Offer

(1) A proposal amounts to an offer if: (a) it is intended to result in a contract if the other party accepts it; and (b) it contains sufficiently definite terms to form a contract.'

DCFR Art. II. – 4:204: 'Acceptance

(1) Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer.

(2) Silence or inactivity does not in itself amount to acceptance.'

emphasizes the consensual element in the formation of a contract; the binary model emphasizes the two elements of offer and acceptance in establishing the contract.

### 3.1 *Contract as unitary concept: consensus ad idem*

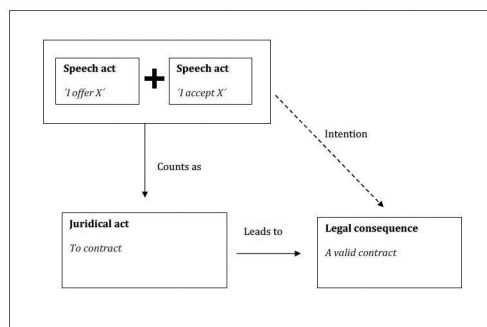
A contract is typically an agreement between two parties who want to bring about certain legal effects. In order for the legal effects to occur, one of the parties must declare to the other his intention to enter with another party into a binding arrangement provided certain conditions are met. The other must then assent to this proposal. According to the unitary model of contract, a contract essentially involves two reciprocal, corresponding declarations of intention. The classic formulation of this ‘will theory of contract’ is attributed to Savigny (1840) who held *consensus ad idem* or *meeting of minds* to be the prime basis for the formation of a valid, hence binding, contract. In essence, the reason for recognizing and enforcing contractual obligations is that they are ‘willed’ by the obligor (Flume 1965, p. 143f). Although the ‘will theory’ has now been supplanted by the ‘declaration theory’ – you are not as such bound by what you meant but by what your addressee reasonably supposed you intended<sup>19</sup> –, the idea remains the same: consent is the basis for the formation of a contract.

The question that remains to be answered, however, is what this consent needs to be about. Suppose A offers B to buy A’s car for € 1000. A proposal made in the non-juridical world, set in sufficiently definite terms (conditions) and intended to form a contract amounts to an instantiation of the juridical institute ‘offer’ under DCFR Art. II. – 4:201. Combined with an indication of assent to the offer from B, this results in the intended juridical effect of entering into a contract. What is important here is that the intention is directed at the conclusion of the contract, a specific requirement for making a successful offer (DCFR Art. II. – 4:201(A)). In terms of juridical acts, it concludes an agreement, which is intended to have legal effect as such, that is, as an agreement. Thus, the intention mentioned in both the offer and the acceptance (*consensus ad idem*) is directed at establishing at (1) a binding legal agreement, the contract, with (2) a specific propositional content that is specified in the terms of the offer. Figure 2 depicts this type of contract schematically.

Retaining the structure of juridical acts depicted in Figure 1, Figure 2 depicts how the rules in the consensual model combine two distinct speech acts performed by two distinct actors (‘I offer’ and ‘I accept’) to form one juridical act (to contract). The crucial element in this picture is that both speech acts need to be directed at a common legal objective, that is, establishing the duties and rights the law attaches to establishing a valid legal contract (of the type in question). The dotted arrow in the figure depicts this latter intention. A typical example of a contract concluded in this manner is that made when two friends decide to form a legal partnership. In this case they intend together to create the partnership and the

19 See also DCFR Art. II. – 4:302 CFR ‘How intention is determined’.



**Figure 2** *Contract as unitary concept*

conditions under which it will happen. There is no clear distinction between offeror and offeree; the parties in question create a contract together.

### 3.2 *Contract as binary concept: invitatio ad offerendum*

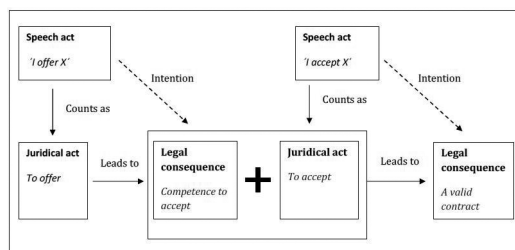
The picture above, however, only tells half the story. The formation of a contract based on offer and acceptance also allows for an alternative reading consistent with the explicitly defined notion of juridical act in the DCFR.<sup>20</sup> The reason for this is that the juridical consequence of entering into a contract can be interpreted as being analytically preceded by another legal effect, namely the creation of a legal competence. In such a reading, A's proposal to sell his car for € 1000, is viewed as an invitation to treat or bargain (*invitatio ad offerendum*). This effectively amounts to A's creation of a juridical competence for B to either accept A's offer or to make a counterbid. By making B competent to do so, A has successfully performed a (valid) unilateral juridical act according to the rules of the DCFR. This, however, has consequences for the intention that is supposed to be aimed at the legal effect in question. DCFR Art. II. – 2:101(2) states that the intention of the acting party needs to be directed at the legal effect as such. If 'as such' means 'in the exact sense of the word', as is indicated by the Oxford Dictionary of English, the intention would need to be aimed at establishing the offer and, hence, at creating the competence in question since this is the legal effect as such. Figure 3 depicts this type of contract schematically.

The picture immediately shows that the intentions of the two actors are directed towards different ends. The intention of the offeror is directed towards creating a competence<sup>21</sup>, while the intention of the offeree is directed towards the legal consequences of establishing a valid contract and its associated obligations.<sup>22</sup> Most 'take-it-or-leave-it contracts', such as online sales contracts, can be seen as repre-

20 Bar, Cive & Schulte Nölke (2009 p. 52) explicitly refers to offers and acceptances as juridical acts alongside with notices of termination, authorizations, guarantees, acts of assignment and unilateral promises.

21 For a more detailed examination of the notion 'competence' in the light of conceptual analysis, see Brouwer & Hage 2007.

22 *Lindeboom/Amsterdam* judgment (HR 19 December 1969, NJ 1970, 154).

**Figure 3** *Contract as binary concept*

representative of this model. Amazon offers a book at a certain price, with the intention of enabling customers to accept the offer. If I want to buy the book under the conditions set by Amazon, I will accept their offer with the intention of concluding the sales contract.

### 3.3 *A need for choice*

The previous sections have shown that the concept juridical act, as employed in the DCFR, allows for two conceptually different interpretations of contract formation. The bargaining model and the consensual model are mutually exclusive even when in the particular national legal systems they tend to reach similar results, something many writers in comparative law emphasize.<sup>23</sup> However, ambivalence concerning the direction of intent aimed at the legal effect in question does undermine a univocal reading of the formation of the contracts. This is particularly harmful when trying to establish a coherent and consistent set of model rules for European private law, since this is bound to yield different outcomes in the interpretation of the model rules at the national level, and also between the contracting parties, something the model rules explicitly sought to prevent. These differing models are not simply theoretically careless; they can also give rise to significant legal disputes as the Lindeboom/Amsterdam case shows in the context of the (ir)revocability of an offer under Dutch Law.<sup>24</sup> In this case, Lindeboom made an irrevocable offer to the Municipality of Amsterdam on the condition that the transaction would happen within a certain timeframe. The City Council wanted to accept the offer and informed Lindeboom thus. However, the City Council needed the County Council's approval for the acceptance to have legal effect. Just before obtaining this approval Lindeboom informed the Municipality that he wanted to revoke his offer. The municipality ignored his revocation, demanding Lindeboom's presence to conclude the transaction at the notary. The main question here is whether a valid contract can be concluded when Lindeboom's will is absent at the time of the transaction. Is consensus needed to conclude the contract or is it possible for a municipality simply to accept the irrevocable offer (see 3.1 v. 3.2 above). The Dutch Supreme Court confirmed the decision

23 Zimmermann 1996, p. 582; Zweigert & Kötz 1998, p. 362.

24 HR 19 December 1969, *NJ* 1970, 154. See also the annotation by Brouwer (2002).

by the Court of First Instance that the contract could be validly concluded on the grounds that

'by making an irrevocable offer, the offeror deprives himself of the competence to prevent the conclusion of an agreement when an offer is accepted within the time stipulated in the offer'.<sup>25</sup>

In his annotation to the judgement, Brouwer concludes that the effect of successfully performing the juridical act of making an offer under these circumstances can only be understood properly if one accepts that the offeror enables the offeree to accept the offer. Or in other words, when the offeror grants the offeree a competence to accept the offer. In the case of an irrevocable offer, the offeror cannot annul the offeree's competence to conclude a contract by accepting the offer. This effectively means that it is possible to conclude a contract while there is no 'consensus ad idem' at the time of the conclusion; the decision therefore opposes the unitary contractual model.<sup>26</sup> The point of this example is that two simultaneously existing contractual models can lead to significant disputes about the formation of contracts.

One can furthermore imagine difficulties arising in determining when the pre-contractual phase in the formative stages of contract formation ends and whether or not a contract has come into existence. This occurs, for example, when there is a long and intricate process of negotiation, and may even lead to disputes that concern the content of the contract. The answers to such questions are likely to differ depending on which contractual model (bargaining or consensus) is used.

The use of basic legal notions in order to ground the particular rules of the transnational legal frameworks under construction immediately clarifies the difficulties the framework is to encounter when put in practice. The theoretical and practical problems associated with ambiguity in a notion as central as juridical act in the DCFR are a clear sign that choices need to be made in determining clear concepts when drafting transnational legal instruments.<sup>27</sup>

25 HR 19 December 1969, *NJ* 1970, 154. The Dutch version reads 'dat immers degene die zijn aanbod onherroepelijk maakt, daarmee zichzelf de bevoegdheid ontnemt om alsnog te voorkomen, dat door een aanvaarding van het aanbod binnen de gestelde termijn de overeenkomst tot stand komt'.

26 This decision established a (partial) disambiguation of the contractual model in the Netherlands.

27 This is especially true when one drafts an instrument like the DCFR, which is meant to be a separate, so-called 28th, legal regime. Some other transnational instruments, such as the CESL, which followed the DCFR, are meant to stand alongside a national regime (see Rühl 2012). This will probably lead to the effect that the conceptual framework of the applicable national law is used to determine which contractual model will be applied. Nonetheless, conceptual clarity still remains an important issue on all transnational instruments. For an example of conceptual ambiguity in the CESL see Hage 2012.

#### 4 Conceptual analysis in transnational law design

This simple analysis conducted above has established that the DCFR, despite its good intentions, gives rise to two mutually inconsistent models of contract formation. The unitary interpretation instigates a consensual model, whilst the binary interpretation produces a bargaining model of contract formation. This ambivalence is highly undesirable because it allows for different interpretations of the optional instrument based on preference rather than on a univocally defined set of concepts that are supposed to form the basis of a consistent legal framework. In sum, by employing a multi-interpretable set of concepts that constitute the formation of a contract, the DCFR misses the point in trying to establish a unified European private law based on clear concepts and terminology.<sup>28</sup> The source of the problem is a lack of conceptual analysis in the preliminary stages of concept-formation. In addition to comparative research, more emphasis needs to be put on rigorous conceptual analysis in developing transnational legal frameworks, particularly when they are implemented bottom-up as a transnational optional instrument that forms an addition to the existing legal frameworks.

Simply re-using terminology of the various national legal frameworks and conflating them into an internal-juridical concept of a transnational legal instrument will create problems in the application of the concepts, since there are differences in the exact scope of those concepts between different legal traditions. The foregoing exposition shows that by analysing a doctrinal concept central to the formation of contracts, the DCFR allows for two conceptually different interpretations of the notion contract that will yield confusion and legal disputes. In order to avoid such problems, in addition to a comparative legal approach, rigorous conceptual analysis needs to form a central method in devising transnational legal systems. Only by developing and using doctrinal concepts can transnational instruments minimize ambiguities and rightfully claim to form a viable alternative in overcoming externalities associated with competing national legal systems.

#### References

##### **Anscombe 1957**

G.E.M. Anscombe, *Intention*, Oxford: Basil Blackwell 1957.

##### **Bar, Cive & Schulte Nölke 2009**

C. von Bar, E. Cive & H. Schulte Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference*, Munich: Sellier 2009.

##### **Brouwer 2002**

B. Brouwer, 'Fundamentele rechtsbegrippen. De theorie van Wesley Newcomb Hohfeld', in: R. Janse., S. Teakema & T. Hol (eds.), *Rechtsfilosofische Annotaties, Ars Aequi Jurisprudentie*, Nijmegen: Ars Aequi Libri 2002.

28 See Bar, Cive, & Schulte Nölke 2009, p. 29f.

Rudolf Rijgersberg & Hester van der Kaaij

### **Brouwer & Hage 2007**

B. Brouwer & J. Hage, 'Basic Concepts of European Private Law', *European Review of Private Law* 2007, p. 3-26.

### **Com 2003/68**

Commission of the European Communities, 'A More Coherent European Contract Law: An Action Plan', in: *Communication From the Commission to the European Parliament and The Council*, Brussels, 12-02-2003 available at <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0068:FIN:EN:PDF>> (accessed 1 August 2012).

### **Davidson 1976**

D. Davidson, 'The Logical Form of Action Sentences', in: N. Rescher (ed.), *The Logic of Decision and Action*, Pittsburgh: University of Pittsburgh Press 1976.

### **Flume 1979**

W. Flume, *Algemeiner Teil des Bürgerlichen Rechts*, Bd II, Das Rechtsgeschäft (auf. 3), Berlin: Springer Verlag 1979, p. 10.

### **Hage 2011**

J. Hage, 'A Model of Juridical Acts, part 1 and part 2', *Artificial Intelligence and Law* 2011, p. 23-73.

### **Hage 2012**

J. Hage, 'Conceptual Tools for Legislators', *Legisprudence* 2012, p. 79-97.

### **Hart 1961**

H.L.A. Hart, *The Concept of Law*, Oxford: Oxford University Press 1961.

### **Hohfeld 1913**

W. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Legal Reasoning', 23 *Yale Law Journal* 16 (1913).

### **Ross 1957**

Ross, 'Tütü', 70 *Harvard Law Review* 812 (1957).

### **Rühl 2012**

G. Rühl, 'The Common European Sales Law: 28th Regime, 2nd Regime, or 1st Regime?', *Maastricht Journal of European and Comparative Law* 2012, p. 148-163.

### **Savigny 1840**

F.C. von Savigny, *System des heutigen Römische Rechts*, Berlin: Deit und Comp. 1840.

### **Searle 1969**

J.R. Searle, *Speech Acts: An Essay in the Philosophy of Language*, Cambridge: Cambridge University Press 1969.

**Searle 1976** J.R. Searle, 'A Classification of Illocutionary Acts', *Language in Society* 1979, p. 1-23.

### **Searle 1983**

J.R. Searle, *Intentionality: An Essay in the Philosophy of Mind* (vol. 9), Cambridge: Cambridge University Press 1983.

### **Smits, 2012**

J.M. Smits, *Mind and Method of the Legal Academic*, Cambridge: Edward Elgar Publishing 2012.

### **Zimmermann 1996**

R. Zimmermann, *The Law of Obligations*, Oxford: Oxford University Press 1996.

### **Zweigert and Kötz 1998**

K. Zweigert & H. Kötz, *An Introduction to Comparative Law* (3rd ed., trans. from German by T. Weir), Oxford: Clarendon Press 1998.