

HARMONISATION OF EUROPEAN CONTRACT LAW: SLOWLY BUT SURELY?

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Abstract

This paper deals with the harmonisation of European Contract Law from a gradual point of view. The main objective is to show the different academic and official steps carried out in this field. The so called Commission on European Contract Law under the leadership of Professor Ole Lando was the starting point in 1982. Some international research teams set up by European scholars and lawyers have been devoted to this aim for two decades. Time and effort have been made in the academic level to get a serious advance on bringing closer contractual national rules. This bottom-up approach met a stronger support in the last years although the European Parliament had "requested" the creation of a European Civil Code already in 1989. The momentous time comes in 2010 with a Green Paper from the European Commission on policy options for progress towards a European Contract Law for consumers and businesses. This Green Paper opened a public consultation period in 2011 and afterwards an expert group was appointed to draft a feasibility study for a future Instrument in European Contract Law. After all, a Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law was adopted in October 2011 arising not few doubts, worries and misgivings from different points of view. This will be not the last step in this process.

Keywords: *Harmonisation, European Contract Law, Private Law, Common Sales Law, Consumer Acquis.*

Introduction

In the next pages we will try to give an overall impression of the harmonisation of European Contract Law from a gradual perspective from the beginning to the current proposal for a Common of European Sales Law. Academic works and European official rules have paved the way for more than two decades since the well-known Principles of European Contract Law were published. These Principles were drafted by an international research team under the leadership of Professor Ole Lando. It started in 1982 and later on some international research teams set up by European scholars and lawyers have devoted time and effort to this aim in several projects. We will track these academic works interrelated with the European Commission initiatives. The paper deals with the most relevant academic literature on these initiatives.

This issue is relevant now, more than ever, because it is drawing the attention of every European Private Law jurist since a Green Paper from the European Commission on policy options for progress towards a European Contract Law was published in 2010. A public consultation period was launched for a short period of time. In a few months European Commission decided to appoint an expert group to draft a feasibility study for a future Instrument in European Contract Law and soon we all could read a Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law in the European Official Journal (October 2011). It is the first time we are before an initiative of this kind: a set of European Common rules on sales law (including related services such as instalment or repair, and digital content supply). As a Regulation the Proposal is considered a relevant step forward

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in this field. This Proposal offers a single set of rules for cross-border contracts in all 27 EU countries. CESL will work as a second national legal system in all European countries, not as the 28th regime and Member States could be able to extend it for domestic contracts.

This Proposal is currently under debate. The voting during the Justice and Home Affairs Council meeting held in 7-8th June 2012 was the starting shot and it is still on-going. Eleven Member States were for and 10 against in that meeting. This implies that Member States look at the Proposal as a controversial issue. Great divergences among the European traditions may complicate its success. Even more, the optional instrument itself arises so many doubts and misgivings that its future is by now uncertain.

1. First steps in European Contract Law harmonisation

The background of the European Contract Law harmonisation began in the eighties with two important projects. First and most important were the “Principles of European Contract Law” (PECL). The PECL were prepared by the Commission on European Contract Law under the leadership of Professor Ole Lando since 1982. These Principles are divided in three parts and they have been published between 1995 (Part I and II, revision in 1998) and 2002 (Part III in 2002). The harmonisation work in Europe has an important weight of academic work (bottom-up) from the very beginning. This perspective helps to understand the way harmonisation tries to make progress in a multilevel framework, official and no official or academic. On the other hand, the insight of the Contract Law harmonisation from this first approach does not deal with special rules on consumer rights. This will change in the future.

Secondly, and with lower influence, the “Contract Code” drawn up on behalf of the English Law Commission by Professor Harvey McGregor must be mentioned. In this case, it was a personal commitment, not a team work, which was published in 1993 and it has been translated into different language.

In 2001 a Communication on “*European Contract Law*” by the European Commission launched a process of extensive public consultation on the problems arising from differences between Member States' Contract Laws and on potential actions in this field. This moment may be considered as the “official starting point” for European Contract Law harmonisation although the European Parliament had “requested” the creation of a European Civil Code already in 1989.

In the light of the responses the European Commission issued an “*Action Plan*” in 2003 proposing on one hand, to review the *acquis* in the area of Consumer Contract Law, to remove inconsistencies and to fill regulatory gaps. On the other hand, to improve the quality and coherence of European Contract Law by establishing a Common Frame of Reference (CFR) containing common principles, terminology and model rules to be used by the Union legislator when making or amending legislation. We can say that this is the moment when both, Consumer Law versus Contract Law harmonisation, take two different tracks:

2. Consumer *acquis*: review and harmonisation

To start with the consumer *acquis* review, it was important to make a comparative analysis of the Member States legislation on Consumer Law in order to know how Directives had been implemented in (then) 25 Member States. It was an academic work known as Compendium prepared for the European Commission by an international research group directed by Prof. Schulte-Nölke in co-operation with Dr. Christian Twigg-Flesner and Dr. Martin Ebers (University of Bielefeld, Germany, February 2008)¹. The scope of the study was not arbitrary. It covered eight of the most important Directives:

¹ http://ec.europa.eu/consumers/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf

- The Doorstep Selling Directive (85/577/EEC);
- The Package Travel Directive (90/314/EEC);
- The Unfair Terms in Consumer Contracts Directive (93/13/EEC);
- The Timeshare Directive (94/47/EC);
- The Distance Selling Directive (97/7/EC);
- The Price Indication Directive (98/6/EC);
- The Injunctions Directive (98/27/EC); and
- The Consumer Sales Directive (1999/44/EC).

Apart from that, from 2004, another academic group, the “Acquis Group”, was created to focus on existing European Community Private Law. Its work has been published under the title *Principles of the Existing EC Contract Law (Acquis Principles)* in three editions already, *Contract I* (2007); *Contract II* (2009) and *Contract III* (2013).

In October of 2008, the European Commission submitted a Proposal for a Directive on Consumer Rights², a measure designed to boost the retail internal market focused only on four Directives:

- Doorstep Selling Directive 85/577/EEC
- Distance Selling Directive 97/7/EC
- Consumer Sales Directive 99/44/EC
- Unfair Contract Terms Directive 93/13/EEC

The planned Directive merged these four Directives (and only these four, not eight, as it was the original aim) 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 way. In contrast to the existing Directives, the proposal moved away from the minimum harmonisation approach introducing instead the controversial principle of full harmonisation. It means that Member States could not maintain or adopt provisions diverging from those laid down in the Directive.

But after four years a Directive on Consumer Rights was published in 2011³ merging in the end only two Directives:

- Doorstep Selling Directive 85/577/EEC
- Distance Selling Directive 97/7/EC

Therefore the scope of the proposal had been limited in a huge proportion compared to the original purpose and not maximum harmonisation, except for some aspects, had been implemented. It is not difficult to understand the disappointment.

Perhaps because of this unsatisfactory result and also owing to the effort to increase confidence in the Digital Single Market about consumer protection when acceding and using online services, a kind of “code” of online rights was published in December 2012. The “Code of EU online rights” is one of the 16 initiatives of the Digital Agenda for Europe. This “Code” is not a real Code. It only summarizes the existing digital consumer rights scattered across various European rules in a more clear and understandable way. The complexity of the legal framework makes many online consumers not be aware of them. This is the way to make citizens aware of their rights and principles recognised in EU law when entering into contracts online.

3. Contract Law harmonisation on “bottom-up effort”

On the other hand, the Communication of October 2004⁴ that followed the Action Plan 2003, abovementioned, outlined the plan for the development of a CFR intended to be a

² Brussels, 8.10.2008. COM (2008) 614 final.

³ OJ L 304/64, 22.11.2011.

“toolbox” for the European Commission when drafting proposals to improve the Contract Law. Once again, an international academic network was created by the Study Group on a European Civil Code (successor of the Lando Commission) and the Research Group on EC Private Law (Acquis Group) in 2004 to carry out a preparatory legal research in view of the adoption of this Common Frame of Reference (CFR)⁵. The research work was the “Draft Common Frame of Reference” (DCFR). It was handed in 2008. The final version was published in 2009 as an outline edition and as a full edition of six volumes containing comments and notes by national reporters. It is an overwhelming work which is being translated into some European languages. The DCFR covers principles, definitions and model rules of Civil Law including not only Contract Law but also Tort Law. DCFR contains provisions for both B2B (Business-to-Business) and B2C (Business-to-Consumer) contracts.

The DCFR was built on the several projects previously undertaken at European and international level. Not only PECL but also the UNIDROIT Principles drafted by the International Institute for the Unification of Private Law for international commercial contracts and strongly inspired by Vienna Convention 1980 (CISG), a creation by the United Nations Commission on International Trade Law (UNCITRAL), the almost worldwide standard for commercial contracts of sale. This CISG applies only by default whenever the parties have not chosen another law (opt out). At the moment there is no mechanism (i.e. supranational Court) to ensure their uniform interpretation.

Meanwhile, the *Association Henri Capitant des Amis de la Culture Juridique Française* and the *Société de législation comparée* joined the academic network on European Contract Law in 2005 to work on the elaboration of a "common terminology" and on "guiding principles" as well as to propose a revised version of the PECL (see supra).

Another important project was outlined since 1999 to 2004: the “Code européen des contrats” drafted by the *Accademia dei Giusprivatisti Europei*. It was the Pavia Project directed by Prof. Giuseppe Gandolfi⁶. This Code contains no principles but “only” 173 articles strongly inspired in the Roman and civilian tradition and outlined as a Civil Code. There is no specific regulation for consumers unlike DCFR. It is currently «rot in oblivion».

In addition to all these projects, we should mention the “Common Core of European Private Law”⁷. The first general meeting held in Torino in 1995 and annually over two decades European lawyers and scholars have been working together, and still they are, on different topics related to Contracts, Tort and Property. They try to seek the “common core” of European Private Law. The methodology is inspired by Schlesinger’s monumental work on formation of Contract in the seventies based on cases and discussion and it is a very good example of the informal European approach in the harmonisation task.

4. Green Paper on policy options for progress towards a European Contract Law: A “toolbox” or anything else?

A momentous time comes in 2010. A Green Paper from the European Commission on policy options for progress towards a European Contract Law for consumers and businesses⁸.

⁴ 11.10.2004, COM (2004) 651 final.

⁵ The European Commission financed it through a grant under the 6th Framework Programme for Research.

⁶ <http://www.accademiagiurprivatistieuropei.it> The original version was French. It is translated also into English, German and Spanish.

⁷ For more information: See <http://www.common-core.org>. The general editors are Ugo Mattei and Manuro Bussani. Rudolf B. Schlesinger as the Late Honorary Editor and Rodolfo Sacco as Honorary Editor.

⁸ COM (2010) 348 final.

This Green Paper opened a public consultation period (from 1 July 2010 to 31 January 2011) on seven options:

Option 1: Publication of the results of the Expert Group to be used by European and national legislators as a source of inspiration when drafting legislation and by contractual parties when drafting their standard terms and conditions, also useful in higher education or professional training as a compendium drawn from the different contract law traditions of the Member States. However, if there is not endorsement at European level, the divergences would not be significantly reduced.

Option 2: An official "toolbox" for the legislator. This could be seen as a "toolbox" for the European Commission when drafting proposals for new legislation or when revising existing measures. Such an instrument would be effective immediately upon adoption by the Commission, without the approval of the Parliament and Council. It could be seen also as an inter-institutional agreement on a "toolbox" between the Commission, Parliament and Council to make consistent reference to its provisions when drafting and negotiating legislative proposals bearing on European Contract Law.

Nevertheless, a "toolbox" does not provide immediate, tangible internal market benefits since it will not remove divergences in Law and it cannot ensure a convergent application and interpretation of Union contract law by the courts.

Option 3: Commission Recommendation on European Contract Law addressed to the Member States, encouraging them to incorporate the instrument into their national laws. In this case, the disadvantage comes from considering a European Recommendation not having any binding effects on the Member States.

Option 4: Regulation setting up an optional instrument of European Contract Law. The Green paper considered a regulation setting up an optional instrument as "a second regime" in each Member State, thus providing parties with an option between two regimes of domestic contract law. It would insert into the national laws of the Member States as a self-standing set of contract law rules which could be chosen by the parties as the law regulating their contracts. It may be applicable in cross-border contracts only (internal market primarily, also useful in international private law), or in both cross-border and domestic contracts. Two important challenges arise from this solution: the rules must be very clear to the average user (consumer, specially) and secondly, it should provide legal certainty.

Option 5: Directive on European Contract Law. This option could harmonise national Contract Law on the basis of minimum common standards. Nevertheless, harmonisation through directives based on minimum harmonisation has not led to uniform implementation so far. The existing consumer *acquis* shows that. Therefore, harmonisation should be pursued through Regulations because directives can help decreasing legal difference among national legislations but this is not enough to get a major degree of European convergence.

Option 6: Regulation establishing a European Contract Law. This option would replace the diversity of national laws with a uniform European set of rules, not upon a choice by the parties, but as a matter of national law and for cross border transactions and domestic contracts. Subsidiarity and proportionality principles may be a problem in order to justify this option because replacing national laws on domestic contracts does not seem at least initially a proportionate measure to deal with the obstacles to trade in the internal market.

Option 7: Regulation establishing a European Civil Code. A Code includes not only Contract Law but also other types of obligations such as tort Law or benevolent intervention. A Civil Code is always a very extensive instrument. Subsidiarity and proportionality principles may be even more serious handicaps than for option 6.

Some of these options were ruled out at the first moment (i.e. European Civil Code). Other policy options, as we have said, were presented as binding or non-binding "toolbox" for

European politicians or legislators to be used in the adoption of new rules ensuring a more coherent and better regulation. The final option was done for setting up an optional instrument of European Contract Law (option 4) in 2010. An Expert Group was appointed by the European Commission in April 2010 to draft a Feasibility Study for a future Instrument in European Contract Law (published in May 2011)⁹.

5. The choice for an optional instrument: CESL

Finally, a Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (CESL) was adopted in October 2011¹⁰. The Proposal includes an Annex (I) of 186 articles focused only on sales, related services (installment, repair) and digital content supply. Not every contract or other civil rules are included. After a voting during the Justice and Home Affairs Council meeting held in 7-8th June 2012¹¹) the debate on this Proposal started and it is still on-going. Eleven Member States were for and 10 against in that meeting.

This Proposal offers a single set of rules for cross-border contracts in all 27 EU countries. Member States will be able to extend it for domestic contracts. This may be very convenient otherwise sellers will have to be available in two models of contracts. CESL will work as a second national legal system in all European countries, not as the 28th regime.

Some worries, doubts and misgivings arise from this optional instrument. For instance,

1. The *material scope* is very limited.

Many important contracts for consumers like service contracts; leasing and insurance contracts are not included. On the other hand, sales are already regulated in CISG, therefore ¿what need for more rules on sales? However, CESL implies maximum harmonisation and incorporates the regulation of the whole life of the contract and a regulation of contractual damages. We can say that CESL scope is broader than CISG (e.g. defects of consent, period of time and unfair terms control –these three aspects were not regulated in CISG) and it has an added value.

2. The *personal scope* is for Business-to-Consumer (B2C) and Business-to-Business (B2B) where at least one party is an SMEs (small and medium enterprises)¹².

This is the way to break down trade barriers and to benefit consumers by providing increased choice and a high level of protection. CESL contains a high level of consumer protection, it implies maximum harmonisation usually higher than the consumer national Law of most European countries. Nevertheless, the choice for the Common European Sales Law requires an agreement of the parties to that effect (opt-in, unlike CISG) and the choice in B2C contracts is valid only if the consumer's consent is given by an explicit –written- statement separate from the contract indicating the agreement to conclude a contract. This is strongly criticized because it might complicate the legal environment by adding a parallel system¹³. In addition to that, can consumers choose CESL given that consumer contracts are usually standard term contracts? Consumers will not be able to choose for CESL, only if business gives them that option. Therefore the legal contract system will be likely be chosen by the trader (*take it or leave it*). And at last and non least, to think that consumers are able to choose between two legal systems is not real.

⁹ http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf A second non-official version was uploaded in the European Commission website in August 2011.

¹⁰ COM (2011) 635 final. 2011/0284 (COD).

¹¹ http://europa.eu/rapid/press-release_PRES-12-241_en.htm

¹² Maximum 250 persons or annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million.

¹³ If the contract is concluded by phone, consumers will not be obliged. The contract will not be binding.

3. The consistency with Rome I Regulation provisions (Art.6)¹⁴:

The Rome I Regulation will continue to apply and will be unaffected by the CESL. Under the conditions of Article 6(1) of the Rome I Regulation: If the parties in B2C transactions do not choose the applicable law, that law is the one of the habitual residence of the consumer under the normal operation of the Rome I Regulation. However, if the parties choose the law of another Member State than the consumer's law, such a choice may under the conditions of Article 6 (1) of the Rome I Regulation not deprive the consumer of the protection of the mandatory provisions of the law of his or her habitual residence according Article 6 (2). Therefore where the mandatory consumer protection provisions of the consumer's Law provide a higher level of protection, these rules need to be respected. As a result, traders will need to find out in advance whether the law of the Member State of the consumer's habitual residence provides or not a higher level of protection and ensure that their contract is in compliance with all requirements. If the parties choose CESL within the applicable national law, this will be by definition the same in every Member State and only in very few occasions CESL consumer rules give not so high level of protection than the national rules.

In consequence, Member States should agree the level of protection really wanted for their national consumers and how to ensure the same (and high, of course) level of protection. A high level of consumer protection considering his/her position as the weaker party does not mean the same at the moment for all Member States.

4. Language

Not a minor problem is the language because legal terminology is rooted in every national legal tradition. This may be a very important handicap to Private Law harmonisation. A major effort will be done in the next future on this issue.

5. The legal basis

Legal basis is also controversial on the provisions of the TFEU such as Article 114.

Conclusion

It is plain to see that European Commission tries to meet its economic goals and recover from the economic crisis¹⁵. A European Contract Law instrument can help the Single market of more than twenty million companies open to five hundred million consumers. The abovementioned projects and combined efforts have paved slowly the way.

A strategy for making easier and less costly for businesses and consumers to conclude contracts may work with European model contract rules and clauses such as the abovementioned CESL. However, many doubts arise from this proposal and it must be said without any doubt that European Contract Law harmonisation is after three decades a work still in progress but more attractive than ever. The future optional instrument is a step forward towards a future unification of European Contract Law but for sure not the last one. Its future is uncertain and we will see which will be the next stage.

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¹⁴ Regulation (EC) no 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

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