

LEGAL AND PRACTICAL IMPLICATIONS OF THE PROPOSED COMMON EUROPEAN SALES LAW

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Abstract

As sales contracts performed within EU are governed by national contract laws, differences between them result in costly and complex cross-border trade. In order to remove this barrier to smooth functioning of the Single Market, in October 2011 the European Commission has proposed a Regulation on a Common European Sales Law. This optional legal instrument would become effective only when by express agreement parties of a cross-border sales contract choose to apply it. Such single set of rules for cross-border contracts in all 27 EU member states is claimed to be beneficial both for companies and consumers.

Objective of this paper is to address the ratio, nature and overall context in which the proposed Regulation appears. Emphasis is placed in particular to the relation of this optional 28th regime to current system of European private international law, as well as to its relation to Vienna Convention on International Sale of Goods. Paper would briefly address the content and main line of Common European Sales Law provisions, in order to test its feasibility to enable favourable legal environment both for traders and consumers.

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1. Introduction

The key concern of the European Union is to ensure the smooth functioning of the common market. It follows that it is crucial to remove all legal barriers to the free movement of goods, and to provide legal certainty to all entities that use market freedoms.¹ In this regard the EU has been trying for a long time to ensure an adequate legal framework of contractual relations with an international element. As sales contracts currently performed within the EU are governed by national contract laws, the differences between them result in costly and complex cross-border trade. In order to remove this barrier to the smooth functioning of the Single European Market, in October 2011 the European Commission proposed a Regulation on a Common European Sales Law. This optional legal instrument would become effective only when, by express agreement, parties to a cross-border sales contract choose to apply it. Such single set of rules for cross-border contracts in all 27 EU Member States is claimed to be beneficial both to companies and consumers.

The purpose of this paper is to address the ratio, nature and overall context in which the proposed Regulation appears. One should bear in mind that this optional 28th regime comes side by side to the current system of European private international law, as well as to the Vienna Convention on the International Sale of Goods. The paper briefly addresses the content of Common European Sales Law provisions in order to test its feasibility to enable a favorable legal environment both for traders and consumers.

2. The existing legal *milleu* for international transactions

As economic integration presents the heart of the EU, contract law has been the focus of European legislative initiatives for a long period of time. The main harmonization technique since the 1980s and the 1990s has employed directives that have been targeted at certain aspects of national contract laws, particularly consumer law. Dispersed European contract law² has now been overwhelmed by the

¹ Craig, P., de Burca, G., EU Law: Text, Cases and Materials, Oxford University Press, 2011, p. 604 et.seq.

² Let us mention some: Doorstep Selling Directive No. 85/577 and Distance Selling Directive No. 97/7 – both repealed with the Consumer Rights Directive; Package Travel Directive No. 90/314, Unfair Contract Terms Directive No. 93/13, Sale of Consumer Goods Directive No. 99/44, Distance Selling of Financial Services Directive No. 2002/65, Life Assurance Directive No. 2002/83, Unfair Commercial Practices Directive No. 2005/29, Consumer Credit Directive No. 2008/48, Timeshare Directive No. 2008/112.

Consumer Rights Directive of 2011.³ Second legislative development in this arena started once the EU was given internal competence to regulate European private international law, i.e. with the Amsterdam Treaty in 1999. The existing framework of international conventions⁴ concluded among Member States has been replaced by regulations. In this context, Regulation No. 593/2008 on the law applicable to contractual obligations, the so-called Rome I⁵, was adopted. Despite the existing unification instruments, there is no body of uniform case law in the area of international agreements, nor do Rome I regulations cover all contractual matters.⁶ The method practiced by both the Rome Convention and the Rome I Regulation is a method of unification of the rules of conflict of laws. Member States still retain their national systems of contract law and harmonization is achieved only insofar as the application of the same *acquis* conflict of laws rule refers courts of each Member State to apply the same national substantive contract law. These conflict of law rules correspond to uniform rules on international jurisdiction,⁷ and ultimately bring a certain degree of legal certainty to internationally labeled contractual relations. Nevertheless, it remains true that individuals and companies use a range of different types of contracts in mutual trading to which various national regulations apply in the end. Application of 27 different national regimes increases transaction costs. It is disadvantageous to the extent that it increases legal uncertainty and reduces consumer confidence in the entire system. All this discourages both entrepreneurs and consumers from cross-border trade. In addition to the Rome I Regulation, i.e.

³ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (Text with EEA relevance), OJ L 304, 22.11.2011, pp. 64-88.

⁴ Convention 80/934/ECC on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, OJ L 266, 9.10.1980, pp. 1-19.

⁵ 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), OJ L 177, 4.7.2008, pp. 6-16.

⁶ For more details, see: Lookofsky, J., Hertz, K., EU-PIL, European Union Private International Law in Contract and Tort, Copenhagen, 2009, pp. 65-93.

⁷ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, pp. 1-22, is currently in force. It was replaced by a new Regulation (EC) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20.12.2012, pp. 1-32, that will apply as of 20 January 2015.

a regulation on international contractual relations, the Rome II Regulation, i.e. a regulation on damage claims arising from tort, also applies in the EU. The list of legal sources does not end here either, and we will only mention wide implementation of the UN Convention on Contracts for the International Sale of Goods.⁸ Significant efforts have been made in the field of “soft-law” unification of substantive law,⁹ but given the existing competence of the EU, adopting a European Civil Code is not likely.¹⁰

3. A way forward – new options and new solutions

Due to the great importance of this sector, EU institutions are systematically trying to find space in which they would provide a higher level of international unification of contract law. In the European Union’s ten-year growth strategy “Europe 2020 Strategy Paper”, the Commission encourages the project on European Contract Law as a component of economic development of the common market.¹¹ Hence in the mid-2010, the European Commission presented an optional instrument of European Contract Law as the optimal means to strengthening the internal market and full empowerment of freedom of movement.¹² Further to this, the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law was issued at the end of 2011.¹³ The Regulation Proposal consists of 15 articles, whereas an Annex to the Regulation contains another 186 provisions which introduce legal rules of substantive level.

⁸ Vienna Sales Convention – UN Convention on Contracts for the International Sale of Goods (CISG), 1980. For more details, see: Schlechtriem, P., Schwenger, I., eds., *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford: Oxford University Press, 2005.

⁹ Let us mention some: *The Principles of European Contract Law – Lando Commission on European Contract Law*; *Study Group on a European Civil Code* – available at: www.sgecc.net; *Common Core of European Private Law Project* – available at: <http://common-core.org/>.

¹⁰ For more details, see: Boele-Woelki, K., Grosheide F.W., eds., *The Future of European Contract Law: Essays in Honour of Ewoud Hondius to Commemorate His Retirement as Professor of Civil Law at the University of Utrecht*, Kluwer Law International, 2007.

¹¹ Europe 2020. A strategy for smart, sustainable and inclusive growth, COM(2010)2020 of 3.3.2010, p. 21.

¹² European Commission’s Green Paper on policy options for progress towards a European Contract Law for consumers and businesses, Brussels, 1.7.2010 COM(2010)348 final.

¹³ Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM/2011/0635 final - 2011/0284 (COD), 11.10.2011.

The Commission undertook a wide consultation process in order to find the most optimal path to accomplish the intended objectives of the European Contract Law project, and yet to stay true to principles of subsidiarity and proportionality.¹⁴ Legal ground referred to by the Proposal for a Regulation is Art. 114 of the Treaty on the Functioning of the European Union, which is used to “adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.”¹⁵ The doctrine openly questions the merits of the legal basis and warns of Tobacco Advertising III that ended up before the European Court of Justice because of a similar issue.¹⁶

CESL is referred to as “an optional instrument” or “the 28th Regime”. It means this is a supranational legal instrument which provides an alternative model for doing business, and leaves national laws untouched.¹⁷ CESL is not intended to replace the existing national sales laws, but it would exist together with and next to national contract systems.¹⁸ CESL would exist autonomously, and it is to be embedded into national systems as a “second national contract law”. We should point to a different character of the optional instrument in relation to the models already known to us. Unlike the UN Convention on Contracts for the International Sale of Goods, which has an optional character insofar as it applies “as a default system” when it comes to international agreements for the sale of goods, and that may be excluded by the parties in accordance with Art. 6 of Convention. Quite on the contrary, CESL will only apply if both parties voluntarily choose this set of rules, and they do so in form of an exclusive choice!¹⁹

¹⁴ Explanatory Memorandum to the CESL, COM(2011)635 final, p. 4.

¹⁵ Treaty on the Functioning of the European Union, consolidated version. OJ C 115, 9.5.2008, pp. 47-198.

¹⁶ Low, G., *Unitas via Diversitas: Can the Common European Sales Law Harmonize Through Diversity?*, Maastricht Journal of European and Comparative Law, Vol. 1, 2012, p. 134 *et seq.*

¹⁷ Fleischer, H., *Optionales europäisches Privatrecht (“28. Modell”)*, Rabel Journal of Comparative and International Private Law (RabelsZ), Vol. 76, No. 2, pp. 235-252.

¹⁸ Piers, M., Vanleenhove, C., *Another Step Towards Harmonization in EU Contract Law: the Common European Sales Law (15 March 2012)*. Available at SSRN: <http://ssrn.com/abstract=2151256> or <http://dx.doi.org/10.2139/ssrn.2151256>, p. 3.

¹⁹ Magnus, M., *CISG and CESL*, in: Michael Joachim Bonell, Marie-Louise Holle, and Peter Arnt Nielsen, eds., *Liber Amicorum Ole Lando*, Djøf Forlag, 2012, p. 228; Schwenger, I., *The Proposed Common European Sales Law and the Convention on the International Sale of Goods*. UCC Law Journal, Vol. 44/2012, p. 459.

4. Cost and benefits of CELS

In its Proposal for a Regulation, the Commission claims CESL would create a legal environment that stimulates the intra-Community trade and is adapted to the most appropriate manner to cross-border trade. It is claimed that CELS maximizes benefits both to consumers and companies.²⁰

Companies would be able to choose one legal regime specially created for cross-border transactions and set aside uncertainty of a variety of national contractual regimes. Small and medium-sized enterprises (SMEs) would expand more easily to new markets. Their costs would also be reduced as the need for legal practitioners having knowledge of each national contractual system would vanish. Consumers would be more confident in engaging cross-border contracts. They could rely on CESL regarding a free choice of remedies in case they buy a defective product, which is nowadays provided for only in national laws of few Member States. Consumers' expectations of the Single European Market would be fulfilled, as traders would no longer refuse to sell and deliver goods across borders. Legal uncertainty in cross-border transactions discourages them from such actions. Confirmation of these advantages is found in figures.²¹

In a hypothetical case, we may present a scenario with CESL usage. A Polish baker buys a machine from a Hungarian firm that later on appears not to be in full conformity with the contract. The Hungarian firm admits the mistake and accepts the remedy by replacing the machine. Once the Polish firm sends the machine back, the Hungarian firm rejects to pay for transport costs and requires the Polish firm to pay for the usage of the machine in the period of 2 weeks (i.e. the time that took the Polish firm to realize they received a machine not conforming to a contract). The Polish firm claims that in the regular course of business these costs are to be paid by the seller. According to contemporary legal instruments provided by the EU *acquis*, we must see if the parties have agreed on applicable law (Art. 3, the Rome I Regulation). If there is a valid choice, one should resort to the relevant

²⁰ Proposal for a Regulation, *op.cit.*

²¹ Currently only 9.3% of all EU companies sell across EU borders and thereby forego at least €26 billion per year. It is notable that average prices for consumer goods differ across EU Member States cca 24% (Eurostat, Statistics in Focus 50/2009). Only 7% of consumers buy online from another Member State, compared to 33% who buy by internet in their own country (Flash Eurobarometer 299, Consumer attitudes towards cross-border trade and consumer protection, p.15).

substantive regime for the answer to the aforementioned disputed questions. If the parties fail to agree on applicable law, Rome I would use the criteria of characteristic performance and lead to the law of the habitual residence of the seller. One must bear in mind that Polish and Hungarian law respectively may provide completely opposite legal solutions to this situation. If CESL were applied, the answer deriving from Art. 110²² and Art. 112²³ would be immediate and clear.

Numerous pages suggesting improvement of this draft have been written.²⁴ Simulation of its accurate implementation has been conducted, and analyses may suggest outcomes on its cost and benefits that somewhat differ from the ones of the Commission.²⁵ First of all, CESL is limited in its scope of application.²⁶ Regarding the material scope, it covers sales between professional sellers and consumers as well as sales between professional traders only if one of them is a small or medium-sized enterprise. CESL is not intended to be a sales regime for all international sales transactions, but to provide a protective sales regime for consumers and smaller enterprises.²⁷ Regarding the territorial scope, it is confined only to cross-border contracts.

Such limitation in the scope of application suggests that the primary aim of the Regulation is easily abandoned, and that many issues remain again for the private international law technique and diverse national contract rules.²⁸ And there is

²² Art. 110. The buyer is entitled to require performance of the seller's obligations. The performance which may be required includes the remedying free of charge of a performance which is not in conformity with the contract.

²³ Art. 112. 1. Where the seller has remedied the lack of conformity by replacement, the seller has a right and an obligation to take back the replaced item at the seller's expense. 2. The buyer is not liable to pay for any use made of the replaced item in the period prior to the replacement.

²⁴ A really substantial and voluminous comment is provided for in the Statement of the European Law Institute on the Proposal for a Common European Sales Law, European Law Institute 2012. Available at: <http://www.europeanlawinstitute.eu/projects/publications/>

²⁵ Posner, E.A., *The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in Jurisdictional Competition*, University of Chicago Institute for Law & Economics Olin Research Paper No. 597, p. 4. Available at: <http://www.law.uchicago.edu/Lawecon/index.html>

²⁶ Schwenger, I., *op.cit.*, p. 461.

²⁷ Magnus, U., *CISC and CESL*, *op.cit.*, p. 227.

²⁸ E.g., the issue of precontractual obligations, proprietary effects of a contract of sale of goods. Cravetto Ch., Pasa, B., *Reflections on the Proposal for a Regulation on a Common European Sales Law*. CDCT Working Paper 7-2012. *European Legal Culture* 6, pp. 8-10, available at: <http://www.cdct.it/Pubblicazioni.aspx>

also the issue of coexistence of CESL with an already established framework of private international law and uniform sales law.²⁹ The debate starts with the fact that this new and unique instrument is introduced into a national system side by side to the regime of the Rome I Regulation³⁰ and the rules of CISG.³¹

From the consumer point of view, pluralism of legal sources still exists and the major concern for consumer rights protection lies in fragmentation of EU law that would remain even once CESL is enacted. A consumer would still be faced with the governing law which will to some extent be unknown or hardly accessible.

SMSs do not find this piece of legislation beneficial or cost-effective. Due to its complexity, they would still have to hire a lawyer. Hence from their point of view, emphasis should be given to shift the approach of EU intervention towards using standardized/model contracts!³²

CESL should be further supplemented by work on supporting actions such as alternative dispute resolution, online dispute resolution, organization of databases of court decisions, improved judicial cooperation and organization of training programs.³³

5. Conclusion

Equalization of international contract law is a challenge not only to European academic and political circles, but also to the EU institutions. The Commission has decided to remove legal barriers to the smooth functioning of the market by using solutions contained in the Proposal for a CESL Regulation. Compared to the

²⁹ Piers, M., Vanleenhove, C., *Another Step*, op.cit., p. 12 *et seq.*

³⁰ Behar-Touchais, M., *The Functioning of the CESL within the framework of the Rome I Regulation*, European Union, 2012.

³¹ Kornet, N., *The Common European Sales Law and the CISG – Complicating or Simplifying the Legal Environment?*, Maastricht Faculty of Law Working Paper No. 2012/4; Magnus, M., *CISG and CESL*, op.cit., p. 225 *et seq.*

³² European Association of Crafts, Small and Medium-sized Enterprises (UEAPME) *Position on the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011)653 final)*, p. 2.

³³ Thomas, J., *Proposal for a Regulation on a Common European Sales Law: Making the Proposal simpler and more certain*. European Parliament 2012, pp. 14-15.

existing legal regime, the Proposal for a Regulation introduces many advantages for both consumers and small and medium traders. An introduction of CESL is a component in the creation of a European identity! “The European model of justice between private parties” is realized through this Europeanization of private law.³⁴ The CESL Proposal has caused a wide-ranging debate which points to a number of uncertainties, ambiguities or shortcomings of this Regulation. Despite all efforts, the Commission is again facing a dilemma of the balance between consumer protection and protection of company’s legitimate interests.

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³⁴ Hesselink, M.W., *The Case for a Common European Sales Law in an Age of Rising Nationalism*, Center for the Study of European Contract Law, Working Paper Series No. 2012-01, p. 21.

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