

CONTENT AND EFFECTS OF CONTRACTS: THE CESL IN THE EUROPEAN MULTI-LEVEL SYSTEM OF GOVERNANCE – GRONINGEN 31 May – 1 June 2013 – outline

THE MANY ADVANTAGES OF A COMMON EUROPEAN SALES LAW by Ewoud Hondius

1 Whatever may be its merits and demerits, the draft regulation on a common European sales law (CESL) has had one major effect. It has been discussed all over Europe and even outside. Whether or not an Optional Instrument should be introduced by the European Union, is a hotly debated issue.

Basically, the authors of the various publications referred to above have either given a positive appraisal of the project, albeit usually with reservations regarding specific proposals, or rejected the Optional Instrument. However, among the latter there is a widely held view that if the proposal does not help, it does not harm either. This is a view which I wish to challenge. I am myself in favour of the Optional Instrument – although in my view a two-year period of reflection to substantially improve the text would be necessary. But seen from the viewpoint of an adversary, it would in my mind be unwise to adopt the Instrument. The lenient attitude of opponents of the proposal is based on the understanding that if no one opts in, the Optional Instrument will have no impact. So, opponents argue, let the Regulation be adopted and the fact that no-one opt in, will defeat the project by itself. This view, I submit, with respect is incorrect. Thanks to interpretation in conformity with directives, provisions such as those on reasonableness and good faith (Article 2), if the proposal is adopted, may be applied outside the few directives where they have been introduced (unfair contract terms and commercial agents), whereas the rules on formation may be applied to forum choice clauses. It is most probable that the regulation's opponents have never considered this possibility.

2 Why it is that the Common European Sales Law seems to provoke the German speaking part of Europe so much more than other linguistic communities? The reason may be the following. Christian Müller-Graff has pointed out that the draft Regulation is available in all official languages including German. Until then, the Feasibility study and its drafts existed only in English. And although this is comprehensible to most German lawyers, it does make discussion of technical issues awkward. The present abundance of German language commentaries is most certainly attributable to this linguistic argument.

4 CESL was preceded by a feasibility study, drafted by a group of mainly academics. Although basically the CESL proposal is modeled after the feasibility study, there are also some differences. The major difference of course, is that whereas the Feasibility study dealt with Contract Law in general, CESL focuses on a sales plus contract. By 'sales plus' we should think of sales contracts and some related contracts. In the future CESL may serve as a building block for a future Civil Code. It may even contribute to the further development of CISG.

5 This also holds true for other parts of private law, although provisions on tort law for instance are more difficult to imagine the object of an option.

6 CESL may serve as a regional supplement to CISG.

7 When establishing the final text of CESL, no time constraints should be imposed.

8 CESL is great!

Work in progress – not for publication

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THE MANY ADVANTAGES OF A COMMON EUROPEAN SALES LAW¹

by Ewoud Hondius²

1 Introduction

Whatever may be its merits and demerits, the draft regulation on a common European sales law (CESL)³ has had one major effect. It has been discussed all over Europe and even outside. Whether or not an Optional Instrument should be introduced by the European Union, is a hotly debated issue⁴. The battle between partisans and antagonists reminds one of the strife between Proculians and Sabinians in ancient Rome. In this Editorial, I want to emphasize two points in the discussion. One is the question whether the introduction of an Optional Instrument will have any impact at all, if simply no trader proposes consumers to submit their contract to the optional regulation. The second point is not so much a thesis, but rather a statement as to the explosion of German legal literature on the subject. In order to illustrate this, I will try to provide the reader with an overview of some of the more interesting papers on the European Commission's proposal.

2 Conference all over the place

The draft regulation on an optional common European sales law has generated a large number of conferences, special issues of law reviews and books. Conferences and seminars have been organised in among others Amsterdam ('leap year conference')⁵, Bonn⁶, Frankfurt⁷, Groningen⁸, Hamburg⁹,

¹ This paper builds on an *Editorial in the European Review of Private Law* 2013/1.

² Professor of European Private Law, Utrecht University.

³ CM(2011) 635 final.

⁴ The European Parliament's Economic Affairs Committee on 11 October 2012 backed the proposal - <europa.eu/rapid/press-release_MEMO-12-777_en.htm>.

⁵ University of Amsterdam, Conference of 29 February 2012. The papers by Caroline Cauffman and Marco Loos have been published in *NTBR* of May 2012. Other Dutch-language papers may be found in the *Maandblad voor Vermogensrecht*. This Editorial is partly based on my contribution to that special issue.

⁶ *Tagung der Zivilrechtslehrer*, papers by Stefan Grundmann, *Kosten und Nutzen eines optionalen Europäischen Kaufrechts*, *AcP* 2012, p. 502-544 ; Brigitta Zöchling-Jud, *Acquis-Revision, Common European Sales Law und Verbraucherrechterichtlinie*, p. 550-574 ; Dirk Looschelders, *Das Allgemeine Vertragsrecht des Common European Sales law*, *AcP* 2012, p. 581-693 ; Stephan Lorenz, *Das Kaufrecht und die damit verbundenen Dienstverträge im Common European Sales Law*, *ACP* 2012, p. 702-847 ; Astrid Stadler, *Anwendungsvoraussetzungen und Anwendungsbereich des Common European Sales Law*, *AcP* 2012, p. 473-501 ; Brigitta Zöchling-Jud, *Acquis-Revision, Common European Sales Law und Verbraucherrechterichtlinie*, *AcP* 2012, p. 550-574.

⁷ Goethe Universität Frankfurt am Main, Seminar *Neue Entwicklungen im europäischen Vertragsrecht*, 25 June- 1 July 2012. In Frankfurt the German Ministry of Justice also organised a

Leiden¹⁰, Luxembourg¹¹, Maastricht¹², Marburg¹³, Münster¹⁴, Paris¹⁵, Prague¹⁶, Rome,¹⁷Trier¹⁸, Vienna¹⁹, Würzburg²⁰, and even Chicago²¹. Law reviews such as the *Common Market Law Review*²², *Contratto e impresa Europa*²³, the *European Review of Contract Law*²⁴, *ERPL*²⁵, the *Journal of International Trade Law and Policy*²⁶, the *Maandblad voor Vermogensrecht*, the *Maastricht Journal*²⁷ and *RabelsZeitschrift*²⁸. There is a surprisingly large number of German language books already on the market²⁹ and even a full-fledged Commentary, in English, but likewise originating in Germany³⁰.

conference – see (Jörg-Uwe Hahn (ed.), *Gemeinsames Europäisches Kaufrecht/Moderner Ansatz oder praxisferne Vision ?*, München : Beck, 2012, 223 p.

⁸ 31 May – 1 June 2013.

⁹ Symposium *Optionales europäisches Privatrecht* for the *Verein der Freunde und Förderer des Max Planck Instituts*, 18 June 2011. The papers have been published in an updated version in *RabelsZeitschrift* April 2012.

¹⁰ Annual conference of the Leiden student association *Suum cuique*, 26 April 2012.

¹¹ Presentation by Christian Twigg-Flesner, 'The proposed Common European sales law – a common law perspective', 20 March 2012.

¹² On its Brussels Campus. The papers have been published in the *Maastricht Journal* 1-2012.

¹³ Universität Marburg, Rechtsvergleichendes Seminar im Sommersemester 2012, Ein einheitliches europäisches Kaufrecht, Sonia Meier.

¹⁴ Conference "European Law Days – The European law of obligations at a turning point", 17 -19 October 2012.

¹⁵ Conference *Université Paris II*, 28 November 2011.

¹⁶ November 2013.

¹⁷ See Guido Alpa et al. (eds), *The proposed common European sales law – the lawyers' view*, München : Sellier, 2013, 251 p.

¹⁸ *Europäische Rechtsakademie*, An optional European sales law, 9-10 February 2012.

¹⁹ *European Law Institute*, first workshop on the proposal for a Common European sales law, 17-18 November 2011 (with papers by Christian Alunaru, Carole Aubert de Vincelles, Fabrizio Cafaggi, Lars Edlund, Bénédicte Fauvarque-Cosson, Johan Gernandt, Paul Gilligan, Peter Limmer, Hans Schulte-Nölke, Pilar Perales Viscasillas, Matthias Storme, Sir John Thomas, Anna Veneziano, Christiane Wendehorst, Reinhard Zimmermann and Fryderyk Zoll).

²⁰ University of Würzburg, 20 January 2012 – see Remien/Herrler/Rimmer (2012); ZEuP-Tagung 3-4 April 2012.

²¹ University of Chicago, 2 May 2012. The papers are available on SSRN and will be published in the *Common Market Law Review* 2012/6 of 2013/1.

²² University of Chicago, *Conference on European contract law : a law-and-economics perspective*, 27-28 April 2012 – see *CMLR* 2012/6 of 2013/1.

²³ *Contratto e impresa Europa* 2012, p. 1-482.

²⁴ *ERCL* 2012, p. 30-87, with papers by Jürgen Basedow, Dorota Leczykiewicz and Ruth Sefton-Green, and p. 241-366, with papers by Stefan Grundmann, Guido Comparato, Ruth Sefton-Green, Ralf Michaels, Jan Smits, Hugh Collins, Chantal Mak and Martijn Hesselink.

²⁵ *ERPL* 2011, 6 (p. 709-1000).

²⁶ *Journal of International Trade Law and Policy* 11 (2012) Nr. 3, p. 222-305.

²⁷ *Maastricht Journal* 1-2012, with papers by Eric Clive, Nicole Kornet, Gary Low, Ursula Pahl and Giesela Rühl.

²⁸ *RabelsZ* April 2012.

²⁹ Remien/Herrler/Limmer (2012) ; Schmidt-Kessel (2012); Schulte-Nölke (2012); Staudenmayer (2012); Twigg-Flesner (2012); Wendehorst/Zöchling-Jud (2012).

³⁰ Reiner Schulze (red.), *Common European Sales Law (CESL)*, Baden-Baden: Nomos, 2012, 780 p., with chapters by Christiane Wendehorst (Vienna) on the 'chapeau' and art. 58-65 (interpretation), Hans Schulte-Nölke (Osnabrück) on art. 1-6 and 9-12 (general principles), Denis Mazeaud (Paris) and Natacha Sauphanor-Brouillaud (Versailles) on art. 7 and 79-86 (unfair contract terms), Fryderyk Zoll

Basically, the authors of the various publications referred to above have either given a positive appraisal of the project, albeit usually with reservations regarding specific proposals, or rejected the Optional Instrument. However, among the latter there is a widely held view that if the proposal does not help, it does not harm either. This is a view which in this Editorial I wish to challenge. I am myself in favour of the Optional Instrument – although in my view a two-year period of reflection to substantially improve the text would be necessary³¹. But seen from the viewpoint of an adversary, it would in my mind be unwise to adopt the Instrument. The lenient attitude of opponents of the proposal is based on the understanding that if no one opts in, the Optional Instrument will have no impact. So, opponents argue, let the Regulation be adopted and the fact that no-one opt in, will defeat the project by itself. This view, I submit, with respect is incorrect. Thanks to interpretation in conformity with directives, provisions such as those on reasonableness and good faith (Article 2), if the proposal is adopted, may be applied outside the few directives where they have been introduced (unfair contract terms and commercial agents³²), whereas the rules on formation may be applied to forum choice clauses³³. It is most probable that the regulation's opponents have never considered this possibility.

3 Germans set the tone

Now arriving at the second question, I will consider the issue why it is that the Common European Sales Law seems to provoke the German speaking part of Europe so much more than other linguistic communities? The reason may be the following. Christian Müller-Graff has pointed out that the draft Regulation is available in all official languages including German. Until then, the Feasibility study and its drafts existed only in English. And although this is comprehensible to most German lawyers, it does make discussion of technical issues awkward. The present abundance of German language commentaries is most certainly attributable to this linguistic argument.

4 Sales as a building block for contract in general.

CESL was preceded by a feasibility study, drafted by a group of mainly academics. Although basically the CESL proposal is modeled after the feasibility study, there are also some differences. The major

(Cracow) on art. 8, 87-122 (digital content) and 140-158 (transfer of risk, rights and duties), Geraint Howells (Manchester) on art. 13-29 (precontractual relations), Thomas Watson (Münster) on art. 13-29 (precontractual relations) and 140-158 (transfer of risk, rights and duties), Evelyne Terryn (Leuven) on art. 30-39 (formation), Reiner Schulze (Münster) on art. 40-47 (right to withdraw), Thomas Pfeiffer (Heidelberg) on art. 48-57 (defects of consent), Eva-Maria Kieninger (Würzburg) on art. 66-78 (contents and effects), Gerhard Dannemann (Berlin) on art. 123-139 (duties of the buyer), Damjan Možina (Ljubljana) on art. 159-171 (compensation and interest), Matthias Lehmann (Halle) on art. 172-177 (restitution); Peter Møgelvang-Hansen (Copenhagen) on art. 178-186 (prescription). All chapters have the same order: A. function, B. context, C. interpretation, D. criticism.

³¹ In this sense also Eva-Maria Kieninger, *Allgemeines Leistungsstörungenrecht im Vorschlag für ein Gemeinsames Europäisches Kaufrecht*, in: Schulte-Nölke (2012), p. 205-228.

³² Michael Stürner, *Das Verhältnis des Gemeinsamen Europäischen Kaufrechts zum Richtlinienrecht*, in: Schulte-Nölke (2012), p. 47-84.

³³ Martin Gebauer, in Schmidt-Kessel (2012), p. 121-145.

difference of course, is that whereas the Feasibility study dealt with Contract Law in general, CESL focuses on a sales plus contract. By 'sales plus' we should think of sales contracts and some related contracts. The argument I wish to present here, is that once a regulation on one contract is in force, others may easily follow. This is particularly true for those specific contracts which have been dealt with in the Draft Common Frame of Reference.

5 Other parts of private law

The DCFR also included a number of other legal phenomena such as assignment and transfer of rights and obligations, which have been left out in CESL³⁴. Likewise, the presence of a regulation on sales may make it easier to adopt EU-wide legislation, once the framework has been established. The one objection is of course that not all DCFR-rules lend themselves to optional legislation. Those rules the application of which may not be made to depend on the exercise of an option, will need a different regime.

6 Europe and the world: CESL & CISG for example

Finally, much has already been written about CISG and CESL. It is clear that CISG is in need of an update. It is also quite evident that updating CISG by treaty will be an immense job. Therefore the question may be raised why CISG could not be updated by regional regulations such as CESL. The shortcomings of CISG need not be set out here. The Advisory council has done a great work in suggesting to get around such shortcomings and several supreme courts have done the same. But it is the text of CISG which in daily practice will be the first source of rights and obligations of the parties and this should be supplemented by a single source which is easy to use. CESL for instance.

7 Take your time

The second part of this conference will be devoted to an in depth discussion of the various articles of the proposed legislation. It must be admitted – even the supporters of CESL do so concede – that criticism is possible. One of the answers of the draftspersons is that the Feasibility study was made under enormous time pressure. This happens when legislation becomes part of the political process. Politicians are interested in short-term success. They expect their civil servants to draw up a Civil code from scratch. The experience with successful codification projects is that time is of the essence. Even the most famous codification project ever undertaken – that of the *Code Napoléon* – took some four years. A more recent recodification such as that of the Dutch Civil Code took forty-five years from the royal edict starting the project until the entry into force of the main part in 1992. This long gestation period had the great advantage that critical comments of early drafts could be heeded and the additional advantage that the public at large could prepare 1992 with cram courses, legal commentaries adapted to the new code, and even the introduction of the new code in the curriculum of the law faculties long before the official introduction. In the case of CESL little seems to

³⁴ Hugh Beale, Wolf-Georg Ringe, Transfer of rights and obligations under DCFR and CESL: interactions with German and English law, in: Dannemann/Vogenauer 2013, p. ***-***.

prevent contracting parties to already adhere to CESL, not by way of a legal system, but as general conditions.

8 Conclusions

CESL is a great instrument. It has had at least one lasting effect: making lawyers all over Europe aware of the internationalisation of private law. The CESL text certainly is in need of improvement. There is nothing against taking our time to do so. Meanwhile, the use of CESL by way of general conditions makes it possible to experiment with the text.

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