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TESI IN EUROPEAN PRIVATE LAW

TITOLO: PROPOSAL FOR A REGULATION ON A COMMON EUROPEAN SALES LAW

RELATORE: Prof. Silvio MARTUCCELLI

CANDIDATO: Eliane CICERI

CORRELATORE: Prof. Barbara Santa DE DONNO

MATRICOLA: 102633

CORRELATORE (II): Prof. Domenico BENINCASA

Index

Chapter 1: Historical development.....	p.1
Par. 1.1: Base texts.....	p.1
Par. 1.2: CISG.....	p.3
Par. 1.2.1: Features.....	p.4
Par. 1.2.2: Application.....	p.5
Par. 1.2.3: Interpretation.....	p.6
Par. 1.3: PECL.....	p.6
Par. 1.3.1: Common core of European systems.....	p.7
Par. 1.3.2: Features.....	p.9
Par. 1.3.3: Freedom of contract and pacta sunt servanda.....	p.11
Par. 1.3.4: Good faith.....	p.12
Par. 1.3.5: Application.....	p.13
Par. 1.4: DCFR.....	p.13
Par. 1.4.1: The Study Group.....	p.15
Par. 1.4.2: Language.....	p.17
Par. 1.4.3: Accessibility and intelligibility.....	p.18
Par. 1.4.4: The four principles.....	p.18
Par. 1.4.4.1: Freedom.....	p.19
Par. 1.4.4.2: Contractual freedom.....	p.20
Par. 1.4.4.3: Limitations with regard to third party.....	p.20
Par. 1.4.4.4: Restrictions on freedom to choose contracting party.....	p.20
Par. 1.4.4.5: Security.....	p.21
Par. 1.4.4.6: Justice.....	p.21
Par. 1.4.4.7: Efficiency.....	p.22
Par. 1.4.5: The consumer and business.....	p.23

<i>Par. 1.4.6: Application</i>	p.25
<i>Par. 1.4.7: Interpretation</i>	p.26
<i>Par. 1.4.8: Critical aspects</i>	p.26
 Chapter 2: Five W of CESL	p.29
<i>Par. 2.1: Who wants CESL</i>	p.29
<i>Par. 2.2: Seven options: why and why not</i>	p.35
<i>Par. 2.3.1: Where...and how apply CESL</i>	p.37
<i>Par. 2.3.2: Where...citizen can choose</i>	p.38
<i>Par. 2.3.3: Where...the TFUE legitimates CESL</i>	p.39
<i>Par. 2.3.4: Subsidiarity principle</i>	p.40
<i>Par. 2.3.5: Proportionality principle</i>	p.41
<i>Par. 2.4.1: What</i>	p.44
<i>Par. 2.4.2: The working premises</i>	p.45
<i>Par. 2.4.3: Scope of application of the Feasibility Study</i>	p.45
<i>Par. 2.4.4: Material scope of the Feasibility Study</i>	p.45
<i>Par. 1.4.5: A self-standing instrument of European Contract Law</i>	p.46
<i>Par. 2.4.6: A user-friendly and clear text</i>	p.46
<i>Par. 2.4.7: A high level of consumer protection</i>	p.46
<i>Par. 2.4.8: The distinction between B2C and B2B contracts</i>	p.46
<i>Par. 2.5: Why- Goals</i>	p.47
<i>Par. 2.6: News</i>	p.50
 Chapter 3: Common European Sales Law	p.52
<i>Par. 3.1: Application</i>	p.52
<i>Par. 3.1.1: Material application</i>	p.52
<i>Par. 3.1.2: Territorial and personal application</i>	p.54
<i>Par. 3.2: Language</i>	p.57

Par. 3.3: The consumer	p.59
Par. 3.4: Structure: Definitions, general principles and Model rules	p.62
Par. 3.5: Interpretation	p.65
Par. 3.6: Good faith and fair dealing	p.69
Par. 3.7: Information	p.70
Par. 3.8: Offer, acceptance and termination of contract	p.75
Par. 3.9: Notice	p.77
Par. 3.10: Withdraw	p.79
Par. 3.11: Defects in consent	p.85
Par. 3.11.1: Mistake	p.86
Par. 3.11.2: Fraud	p.87
Par. 3.11.3: Threats	p.88
Par. 3.11.4: Unfair exploitation	p.88
Par. 3.12: Contents and effects	p.89
Par. 3.13: Unfair contract terms	p.97
Par. 3.14: Obligations and remedies of the parties to a sales contract	p.99
Par. 3.15: Seller's obligation	p.101
Par. 3.15.1: Delivery	p.101
Par. 3.15.2: Conformity of the goods and digital content	p.103
Par. 3.16: Buyer's remedies	p.106
Par. 3.17: Buyer's obligations	p.110
Par. 3.18: Seller's remedies	p.113
Par. 3.19: Passing of risk	p.114
Par. 3.20: Damages and interest	p.116
Par. 3.21: Restitution	p.120
Par. 3.22: Prescription	p.122
Chapter 4: Conclusions	p.125

Par. 4.1: <i>It really needs a European Code?</i>	p.125
Par. 4.2: <i>CESL: opt-in, opt-out or binding rule</i>	p.131
Par. 4.3: <i>CESL and Rome I Regulation</i>	p.134
Par. 4.4.1: <i>Form of the option</i>	p.139
Par. 4.4.2: <i>Conditions of the validity of choice</i>	p.140
Par. 4.4.3: <i>Application of CESL to a trader resident outside of Europe</i>	p.142
Par. 4.4.4: <i>The international public policy exception of the forum</i>	p.143
Par. 4.5: <i>CESL and national law</i>	p.144
Par. 4.6: <i>Legal-economic reason and institutional imagination</i>	p.150
Par. 4.7: <i>The many concepts of social justice in European contract law</i>	p.152
Par. 4.8: <i>Conclusion</i>	p.153

Chapter I

Historical development

Base texts

The necessity for a common regulation on sale contracts among EU Member States does not start the 11th of October 2011.

The contents of the Proposal for a regulation on a common European sales law have clear bases. In addition to common principles of EU, there are some traces of the Convention of Vienna in 1980 (Contracts for the International Sale of goods –CISG)¹, about the trade of goods.

A large contribution comes from ‘scholars elaboration’. About 30 years ago, research groups started to draft texts to cover parts of private law. These works can be considered as sources of knowledge of jurisprudence², playing a central role also in the reform of international contractual systems and in the area of European law. Among the research groups, essential was the contribution of Lando’s Commission, that from 1983 to 2003 created in three steps the “*Principles of European Contract Law*”(PECL)³.

Both works (CISG and PECL) did not consider an important part of contract law, essential in European area, that is consumer law. At the beginning of 80’s, the EU drafted a large number of Directives, but these were not enough

¹ F. GALGANO, *Contratto e impresa/ Europa 1-2012*, Chapter 1: Dai Principi Unidroit al Regolamento europeo sulla vendita.

² R. ZIMMERMANN, *Contratto e impresa/ Europa 1-2012*, Chapter 2: “Diritto privato europeo: Smarrimenti e disordini”, translated by Edoardo Ferrante.

³ R. ZIMMERMANN, *Principles of European Contract Law*, in BASEDOW, HOPT, ZIMMERMANN(cur.) , *Handwörterbuch*.



exhaustive and not coordinated. They had only a common scope: to improve consumer law inside the European trades⁴. Door to door sales(1985), general terms (1999), distance sales (1997), consumer sales (1999), distance financial services (2002). To lay out this law “jungle” has been found an international research group, the so-called European Research Group on Existing EC Private Law (the “Acquis Group”). The Acquis Group issued a text in 2007, reviewed in 2009, on the general part of contracts, giving importance to consumerist part, re-organizing the ‘scattered’ previous rules .

The text realizes just one of the purposes that the European Commission intend to achieve with the Communication of October 11, 2004⁵. The near-point of the Communication was the redaction of a Common Frame of Reference (CFR), a document that, in the Commission’s opinion, had to include “*main principles of contract law, definitions of more important abstract concepts and models of contractual rules*”.

During the drafting of CFR, in 2005, a research group took up an essential role. The Study Group on a European Civil Code created “*the so-called ‘drafts team’ of the CoPECL network*”⁶, giving forth to its final purpose, a “Draft Common Frame of Reference (DCFR), in close time, whereas it had to be finished within the end of mandate of Barroso’s Commission⁷. The Full edition consists in 6 volumes and was published in 2009. The DCFR, in addition to list of basic principles and definitions, includes a European Civil Code project that goes beyond the Civil contract law, including property rights already analyzed by the Study Group.

The texts above mentioned surely conditioned in different way the draft of CESL, but also they can be considered as a reworked version and a heap of

⁴BASEDOW, HOPT, ZIMMERMANN, *The same from Jansen*, in *Europäisches Privatrecht*, Handwörterbuch, p 548 and ss; and BASEDOW, *Gemeinschaftsprivatrecht/ Unionsprivatrecht*, in BASEDOW, HOPT, ZIMMERMANN, Handwörterbuch, p. 680 ss.

⁵ “*Europäisches Vertragsrecht und Überarbeitung des gemeinschaftlichen Besitzstands: weiteres Juristentag, Sammelband*, Wien, 2008, p 195 ss.

⁶ Cfr v. Bar, CLIVE, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, I, München 2009, p. 25.

⁷ “...with the result that the outcome inspires less confidence in [the instrument’s] maturity”: VOGENAUER, in ERCL, 2010, p. 158; critical on that point also RIESENHUBER, in ERCL, 2011, sub II.2.



previous texts. CESL includes all common principles -of the texts mentioned, but at the same time it renovates controversial areas and eliminates all the parts too far from the internal rules of Member States.

CISG⁸

The Convention of Vienna has been undersigned by Countries belonging to different geographic areas and with different development level. It was validated in Italy pursuant to the Law of 11th of December 1985, n. 768.

It is written in: Arabic, Chinese, English, French, Russian and Spanish.

Developed by the “*United Nations Commission on International Trade Law (UNCITRAL)*”, settled in Vienna on the 11th of April 1980 and entered in force the 1st of January 1988, as multilateral deal among 11 Member States (at present it has been ratified by 80 states). The “*Convention of United Nations for the International Sale of Goods*” sets out to realize one of general purposes of General Assembly in his VI ordinary session, that is the development of international trade on the base of equality and mutual advantages to improve relations among Countries.

Having regard to development of international trades that figure becomes the more impressive. In 2006, the worldwide merchandise export trade amounted to USD 11.783 billion and the import trade to 12.113 billion USD, about ten times as much as when the Convention was drafted⁹.

The CISG may be considered as the most successful law text that realized a fundamental goal: to unify the sales rules among all Countries, inside and outside the EU. This success is due to its flexibility, for instance giving the opportunity to the Countries that subscribed the Convention to exclude the application of some terms of the CISG. This ‘freedom’ of choice was one of the instruments that contributed to the diffusion of the text.

⁸ J. SCHWENZER and P. HACHEM, *The CISG – A Story of Worldwide Success*.

⁹ See the WTO trade statistics for 2006 http://www.wto.org/english/res_e/statistics_e/its2007_e/its07_world_trade_dev_e.pdf.



It is generally known that the adoption of common rules, in international sales contract of goods, compatible with different social, economic and juridical systems, will help the removal of hurdles and improve the development of international exchange. Therefore, the Convention is not just an agreement on applicable law, but a material uniform law that replaces, in part, various internal rules with a unique body of sales law.

The CISG is applicable only in sales contracts that could be defined as 'international, or, in other words, into the contracts where the parties come from two or more different Countries. Moreover, the Convention includes all the international sales contracts. So, it prevails on the Convention of Aja of 1955 and on the 'Rome I Regulation', naturally if are not involved consumers. The relations among the three texts are described in Art. 21 of "Rome I Regulation" and in art. 57, last part, L. 218/1995.

A group of researchers thought also that the use of this uniform material law could avoid a common habit of internal and external law, the so-called "forum shopping", that is the research of the most favorable jurisdiction.

Features

The Convention tried to find a compromise among various juridical systems (Common and Civil law), offering a juridical frame universally recognized.

This text was not born from the practical application of universally recognized principles, but offers a compromise solution. Therefore it can't be considered as an autonomous text, since it doesn't rule all the problems to face during the commercial negotiation, leaving some subjects still under national control.

An important characteristic of the Convention is the use of definitions and words that are part of common vocabulary in each legal system. Furthermore, not forgetting the role of link between different systems, the drafters interpreted each term in an elastic way, including all the meaning that each Country attributed to each term.

Application

The analysis of the Convention starts from its area of application. It could be applied on sales contracts, but what is a sales contract?

To understand what the expression “sales contracts” means, we can take into account articles 3, 30 and 53 of the Convention itself. According to previous articles, sale contract is the agreement that leaves to arise obligations on seller and buyer. These obligation are the ones described in contract and in the Covention. The seller has: to give the goods, to hand over property and to give all documents about the good; the buyer, on the other side, has to: pay the price of the good and to take it. The Convention adds also another rule: the good object of sell, at the moment of delivery, has to be movable and tangible.

Another main feature is the internationality of the contract itself. Therefore, parties, during the conclusion of the contract, have to choose a definitive headquarter or the place where is developed commercial activities. This choice is binding, because to apply CISG there must be two different parties from two different Countries.

As last requirement, it is essential that the Countries in which parties have their offices subscribed the Convention at the moment of conclusion of agreement (art. 1, par. 1, lett. a). Otherwise, the law applicable into the contract, on following the international private law, is the *law of a subscriber Country* (art. 1, par. 1, lett. b).

Into the text of the contract, Convention regulates only the development of sale itself and rights and duties that the agreement creates between seller and buyer”(Art 4). For instance, the use of rules that regulate effectiveness of contract, of its clause and common use (Art 4, lett A); the effects of contract on goods (Art 4 , let. B); the seller responsibility for the death or personal injuries caused from goods (Art. 5); and the parties can also exclude the application of Convention or, conditioned art. 12, change the effects of disposition(Art.6).



Interpretation

The drafting of a Convention was due to the necessity of uniform principles in international trades to help cross-border transactions. On applying it, we have not to forget its fundamental goal: to regulate international trades. So, central role would be given to terms as the respect of good faith in international trades.

On the other side, it is possible to find, in the Convention, controversial points, but, at the same time, it is not possible to solve it using the terms of the Convention itself. Then, the reader, that would solve these points, has to search the solution on the base of inspiring principles of the chart and, if also these not offer a solution, the reader may solve it on the base of applicable the internal law under the provision of international private law.

Besides the criteria of general interpretation, the Convention gives the reader some specific principles in order to interpret single terms of contract. So, behaviours of a party have to be interpreted giving importance to his/her intentions, when the other party knew it or was impossible to ignore it. Otherwise, the behaviours have to be interpreted on the sense of a reasonable person, with the same qualities of the party. To establish the intention of a party, it needs to regard on circumstances, like negotiations, habit or every following conduct (Art 8).

PECL

The “PRINCIPLES OF EUROPEAN CONTRACT LAW” is a set of model rules drawn up by leading contract law academics. It attempts to enucleate basic rules of contract law and more generally the law of obligations which Member



states of EU hold in common. The PECL was created by the Commission on European Contract Law (“Lando Commission”)¹⁰.

So, it is possible to define PECL as a “*set of general rules which are designed to provide maximum flexibility and thus accommodate future development in legal thinking in the field of contract law*”(Lando said).

The idea for the PECL was given to resolutions of the European Parliament of 1989 and 1994, that expresses the necessity to create a Common European civil law.

On pursuing this intent, the Commission (independently from any National influence) started work in 1992, under the control of Ole Lando, a lawyer from Denmark. The Commission consists on 23 Members from all States of EU and was financed in part directly from EU. The large majority of components are academics.

The first part of PECL was published in 1995, the second part in 1999 and the third was completed in 2002.

The PECL took inspiration from CISG of 1980, and as the Convention, it can be defined as an instrument of “soft law”, because it does not represent a legally enforceable regulation, but it suggests the goals that have to be achieved¹¹.

The PECL is also very similar to the Principles of International Commercial Contracts of UNIDROIT, which were published in 1994. PECL and UNIDROIT Principles try to obtain the same result: uniform legal principles as reference and for the development of national legal systems.

During the drafting of PECL, it was taken into consideration the Law of EU Member States, both common and civil law countries, and also the non-European Law.

¹⁰ LANDO OLE/BEALE HUGH: *Principles of European Contract Law*, Parts I and II, prepared by the Commission on European Contract Law, 2000, p. XXVII.

¹¹ "A European Private Law as a Mixed Legal System", *Maastricht Journal of European and Comparative Law* 5, 1998, p. 328-340.



“Common core of European Systems”

The Lando’s Commission compared the various European legal systems and tried to mix the national laws without preferring a particular jurisdiction, but creating a common core. This way to face the differences is due to the intention to eliminate insecurity in international trades. “ *The only way to really unify the market was and is that of having a common set of rules in order to overcome the traditional barriers of each national legal order having a distinct and disparate regulation on the subject*”¹².

According to this method, the PECL wanted to eliminate the gap between the Civil Law of the European continent and the Common Law of Anglo- American systems, by offering a regulation created to reconcile the opposite views of two systems¹³.

Secondly, PECL gave assistance to judges in national Courts that have to decide cross-border issues. If they do not find any solution from national laws, the Court may adopt the solution provided by the Principles, knowing that it represents “*the common core of the European systems*”(Lando Ole/Beale Hugh). Written in a language known to all parties and using a uniform terminology, the PECL would be the basis for a future European Code of Contracts, which may replace separate national laws¹⁴.

On the other side, PECL do not play a significant role in drafting of international sales contract, or as a law that control such contracts. The possibility to include the PECL in an agreement between parties has to be expressly mentioned in the contract. In practice, the PECL is rarely agreed upon as applicable law. In trades between two Members of European Union, the PECL nevertheless has a certain influence, since is was precisely created for such trades. At the same time, on the contrary, it is possible that national

¹² CASTRONOVO, Carlo, *Contract and the Idea of Codification in The Principles of European Contract Law*(in Festschrift til Ole Lando), 1997, p. 109-124.

¹³ LANDO OLE/BEALE HUGH, *Principles of European Contract Law*, Parts I and II, prepared by the Commission on European Contract Law, 2000, p. XXIII.

¹⁴ LANDO OLE/BEALE HUGH: *Principles of European Contract Law*, Parts I and II, prepared by the Commission on European Contract Law, 2000, p. XXIII.

legislative bodies should consult the PECL in order to give European features to its internal law¹⁵.

The PECL is created, as CISG and UNIDROIT principles, to be an example for contemporaneous and future national systems, especially in Central European and East European States. For example, parts of regulation of the PECL became part of the German Civil Code (BGB)¹⁶.

Features

It is possible to define the PECL as a first draft of a part of European Civil Code (ECC), but it surely can be considered the way to unify EU law.

To obtain this result, the Commission focused on two main points:

- a) *Simplicity on language*: as the Swiss Code, the Commission did not attempt completeness, in many topics it gave just an outline¹⁷.

Accuracy and comprehensibility are important, but it is not possible to apply both. Accuracy often may make the text difficult to understand. On the other side, if you try to use a comprehensible language, you risk to lose the accuracy. During the redaction of the PECL, there were in Commission's mind the words of an author of Swiss Civil Code, Eugen Huber, that affirmed: "*The Code must speak in popular ideas. The man of reason who has thought about his times and their needs should have the feeling as he reads it that the statute speaks to him from the hearth...its provisions must mean something to the educated layman*"¹⁸.

On pursuing this goal, the Commission tried to create a legal text with short sentences, short paragraphs and articles with few paragraphs, as Huber in Swiss Code.

¹⁵ CASTRONOVO, *Un contratto per l'Europa, Introduction to Italian Edition of "Principles of European Contract Law"*, Parts I and II, Milan, 2001, p.XXVI, "togliere il troppo e il vano di ogni disciplina nazionale che tale risultasse dalla prospettiva degli altri ordinamenti senza che ne residuasse una sensazione di immiserimento di ciascuna delle esperienze di partenza".

¹⁶ LANDO, *OLE: Some Features of the Law of Contract in the Third Millennium*, ch. III 22 A; http://www.cbs.dk/departments/law/staff/ol/commission_on_ecl/literature.htm

¹⁷ See, e.g., RESTATEMENT (SECOND) OF CONTS. (1981)

¹⁸ HUBER, SCHWEIZERISCHES CIVILGESETZBUCH, ERLÄUTERUNGEN ZUM VORENTWURF 2.12 (1902), quoting Konrad ZWEIGERT & Hein KÖTZ, *INTRODUCTION TO COMPARATIVE LAW*, 172 (Oxford 3d ed. 1998).



While English is the primary language, Lando's Commission had to consider that the text will be translated into other languages. So, as the CISG taught, they used factual language instead of legal terms. Factual language is easier to understand and to translate. The Commission also tried to avoid expressions that have a specific legal meaning in the English Common Law. For instance, it used the term *non-performance* instead of *breach of contract*. In addition, Commission was in the opinion that many definitions make the text complex and difficult to read, creating inflexible rules. It is known that the EU context needs flexibility, considering the differences between systems of EU Members. The Commission, therefore, avoided or tried to avoid many definitions¹⁹.

- b) *Rules rich in implications*: following ideas of the French Jean Etienne Marie Portalis, in his "*Discours preliminaire*" (1799), that said "*the articles of French Civil Code should be written as broad principles that may cover many situations and may face new developments in society*". Commission realized that times will change and rules could be used in situations still not considered. It, after all, had confidence in judges and arbitrators who apply the PECL. The text provides for the interpretation and the supplementation of itself. Article 1:106 (1) lays down that "*Principles should be interpreted and developed in accordance to their purposes*". Article 1:106 (2) provides, as Art. 7 CISG, that issues that are within the scope of PECL, but not expressly settled by them, are to be settled in accordance with the ideas underlying the PECL as far as possible²⁰.

The biggest absent of PECL is the *consumer*. During 1980, in effect, the actual Directive about consumer law did not exist. So, PECL not gave great importance to this topic. There was another reason for the exclusion of

¹⁹ See, e.g., PECL, art. 1:301 includes the meanings of: "act," which includes omissions; "intentional act," which includes reckless acts; "court," which includes arbitral tribunal; "non-performance" (breach) of a contract; "material" matter; and "written" statements; PECL, art. 1:302 defines "reasonableness;" PECL, art. 2:209(4) defines the expression "general conditions of contract."

²⁰ LANDO OLE: *Salient Features of the Principles of European Contract Law: A Comparison with the UCC*.

consumer right in the text. The *acquis communautaire* about consumers was not still integrated with national systems and with the PECL itself. Moreover, EU Directives broke the order of traditional private law and were not coordinated one with the other²¹.

Freedom of contract and *pacta sunt servanda*

A basic principle in the law of all countries is *to keep your contract*. Legislators and courts are still stick to this with vigor. A contracting party must be able to rely on the contract and to exercise the freedom and rights granted to contract. While the *pacta sunt servanda* rule is found in UNIDROIT principles, the Commission considered it so obvious and chose to not state it in a particular article. It is, however, implied in several articles, as the Art. 1:102 (1), that affirms “*parties are free to enter into a contract and determine its contents*” and Art. 6:111, “*a party is bound to fulfill its obligations even if performance becomes more onerous*”.

Another important principle of PECL is *to keep your promise*. There is consistency among the laws that an agreement only becomes a binding contract if the parties have intend to become legally bound. For example, a dinner invitation is morally, but not legally binding. Furthermore, the parties must have agreed on terms that are sufficiently definite. This rule seems to be accepted in the laws of the Member States and is stipulated in PECL Article 2:101. A problem that the Commission had to face is the *consideration* that, for Common Law, must support the binding. The English Courts had some problems with the doctrine of consideration and have tempered it by relying on commercial usages, estoppel and “*invented consideration*” to avoid some of the hardships arising under the doctrine²². For these reasons, Commission chooses

²¹ RESEARCH GROUP ON THE EXSISTING EC PRIVATE LAW (ACQUIS GROUP), *Principles of the existing EC Contract Law (Acquis Principles)*, *Contract I*, 2007, *Contract II*, 2009; and on the point, see also, GRIGOLEIT, TOMASIC, *Acquis Principles*, in BASEDOW, HOPT, ZIMMERMANN, *Handwörterbuch*, p. 12 ss.; in critical sense, JANSEN, ZIMMERMANN, *Grundlegen des bestehenden Gemeinschaftsprivatrechts?* In JZ, 2007, p.1113 ss.

²² See ROYSTON GOODE, *COMMERCIAL LAW* 74 (2d ed. 1995) (for promises inducing non-requested reliance and abstract payment undertakings, such as letters of credit and on-demand guarantees);



to follow the continental rule that does not require consideration. PECL Article 2:107 provides that "*a promise which is intended to be legally binding without acceptance is binding.*" PECL Article 2:101(1) provides that "*a contract is concluded if: (a) the parties intend to be legally bound, and (b) they reach a sufficient agreement without any further requirement.*" This passage disposes of consideration and of formal requirements. It is in accordance with CISG Article 11 and the laws of the United Kingdom, Germany and the Nordic Countries that do not require any form²³.

Other problem that the Commission faced is the possibility of a party to revoke its proposal, the Commission decided that a party may revoke its offer as long as the offeree has not accepted²⁴. However, proposals which the offeror has designated as irrevocable and offers specifying a fixed time for acceptance, create an expectation on the part of the offeree that they will not be revoked²⁵. This expectation should be protected. Similarly, if it is "*reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer*", it should not be revocable. PECL Art. 2:203 (3), following CISG Art. 16, provides that "*revocation of an offer is ineffective if: (a) the offer indicates that it is irrevocable; or (b) states a fixed time for its acceptance; or (c) it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.*" The difference between the two articles is the irrevocability of the offer previewed by CISG. That provision was the base for many debates among Civil and Common Law delegates. So, Lando's Commission decided to not adopt that rule and under PECL Article 2:202(3)(b), any specification of the time for the offer's acceptance will make it irrevocable.

Good faith

PECL Article 1:201 reads as follows: *"Each party must act in accordance with good faith and fair dealing."* However it covers not only performance, but also the formation, validity and interpretation of contracts.

Practical applications of this rule appear in several specific provisions of the PECL. For instance, an offer is irrevocable if who offer acted in reliance on the offer; specific performance is denied if performance would cause the obligor unreasonable effort and expense and a party's duty to perform its obligation may be modified or the party may be released when its obligations have become excessively onerous . The concept, however, is broader than any of these specific applications. Its purpose is to enforce community standards of decency, fairness and reasonableness in commercial transactions. It supplements the provisions of the PECL and it may take precedence over other Principles, when strict adherence to them would lead to a manifestly unjust result.

PECL Article 1:201 will sometimes lead to a conflict between law and justice. A law or a contract term that is otherwise valid may, under some circumstances, lead to injustice. It is not possible to give general guidelines specifying when the court should let the law prevail. That will depend on the extent to which certainty and predictability in contractual relationships would suffer by letting justice get the upper hand.

Application

Principles contained into PECL will be applied as general rules of Contract Law in EU, or better, when parties decide to insert them into the achievement²⁶. PECL could be used if there wasn't any other system or rule to govern contract, but also when the contract itself could not solve the contentious. Naturally, Principles will be used only if the national law allows

²⁶ PECL Article 1:101.



it. On the other side, imperative laws of national and international systems are ever applicable, as established from international private law²⁷.

DCFR (Draft Common Frame of Reference)²⁸

Last but not the least, the text that more than the others influences CESL.

In a Communication of October 2004, the Commission developed the idea of a Common Frame of Reference (CFR), a document that, as the Commission said, should have “*important principles of contract law ,definitions of most important juridical abstract concepts and model-contractual rules*”.

The reasons of the CFR are still unknown. It may be a sort of “*tool box*” for the future contractual laws.

In 2005, during the redaction of CFR, groups of scholars came together in Joint Network on European Private Law (s.c. *CoPECL Network*)²⁹. Among the groups, the “*Study Group on a European Civil Code*” and the “*Acquis Group*” used this opportunity to give importance to their work, a Draft Common Frame of Reference (DCFR). They created the “*so-called ‘draft team’ of the CoPECL network*”. The text had to be finished before the end of Barroso’s committal. In February 2008, appeared the “*Interim Outline Edition*”, in February 2009 the “*Outline Edition*” and during the autumn of the same year , the “*Full edition*”.

The final outline edition consists of an introduction, the names of the academic contributors and an acknowledgement of their funders and donors, an overview of the guiding principles underlying the model rules, a set of definitions (referred to in I. – 1:108 (Definitions in Annex) and listed later in the Annex to the model rules), tables of derivations and destinations, and the

²⁷ PECL Article 1:103.

²⁸ *Draft Common Frame of Reference, Outline edition.*

²⁹ *Joint Network on European Private Law* (CoPECL: Common Principles of European Contract Law), Network of Excellence under the 6th EU Framework Programme for Research and Technological Development, Priority 7 – FP6-2002-CITIZENS- 3, Contract N8 513351 (co-ordinator: Professor Hans Schulte-Nölke, Osnabrück).

Model Rules. The introduction explains the purposes pursued in preparing the DCFR and outlines its contents, coverage and structure. It describes the amendments to the 2008 Interim Edition and elucidates the relationship between the DCFR and the publications which have already appeared or will appear in the course of the preparatory work. Finally, it sketches out how the DCFR might flow into the development of the CFR.

Into the text, under the name of “*Model rules*”, there is the project of a European Civil Code that comes above the contract law and includes all the patrimonial rules that the Study Group considered during his work. It is integrated by 150 definitions and a paragraph about fundamental principles of DCFR (freedom, security, justice and efficiency).

Usually, is defined DCFR the central part of the text, consisting in 3 books with various influences. PECL influenced the redaction of books II and III, that are not re-elaborate during the redaction of DCFR.

The Study Group

The Study Group has had the benefit of Working (or Research) Teams – groups of younger legal scholars under the supervision of a senior member of the Group (a Team Leader). The Teams undertook the basic comparative legal research, developed the drafts for discussion and assembled the extensive material required for the notes.

The proposals drafted by Working Teams of scholar and critically read and improved in a series of meetings by the respective Advisory Council were submitted for discussion on a revolving basis to the actual decision-making body of the Study Group on a European Civil Code, the Co-ordinating Group. Until June 2004, the *Coordinating Group* consisted of representatives from all the jurisdictions belonging to the EU immediately prior to its enlargement in Spring 2004 and in addition legal scholars from Estonia, Hungary, Norway, Poland, Slovenia and Switzerland. Representatives from the Czech Republic, Malta, Latvia, Lithuania and Slovakia joined the Group after the June 2004 meeting in Warsaw and representatives from Bulgaria and Romania after the



December 2006 meeting in Lucerne. Others non-permanent members participated to the project. So each part of it was subject of discussion and only if it was not possible to find a common solution, majority votes were taken.

The *Study Group's Co-ordinating Group* had as members: Professor Guido Alpa (until 2005), Professor Christian von Bar, Professor Maurits Barendrecht, Professor Hugh Beale (Warwick), Dr. Mircea-Dan Bob (Cluj, since June 2007), Professor Michael Joachim Bonell (Rome), Professor Mifsud G. Bonnici (Valetta, since December 2004), Professor Carlo Castronovo (Milan), Professor Eric Clive (Edinburgh), Professor Eugenia Dacoria (Athens), Professor Ulrich Drobnig (Hamburg), Professor Bénédicte Fauvarque-Cosson (Paris), Professor Marcel Fontaine (Louvain, until December 2003), Professor Andreas Furrer (Lucerne, since December 2003), Professor Júlio Manuel Vieira Gomes (Oporto), Professor Viggo Hagstrøm (Oslo, since June 2002), Supreme Court Judge Torgny Håstad (Stockholm), Professor Johnny Herre (Stockholm), Professor Martijn Hesselink (Amsterdam), Professor Ewoud Hondius (Utrecht, until May 2005), Professor Jérôme Huet (Paris), Professor Giovanni Iudica (Milan, since June 2004), Dr. Monika Jurc̣ova (Trnava, since June 2006), Professor Konstantinos Kerameus (Athens), Professor Ole Lando (Copenhagen), Professor Kåre Lilleholt (Bergen/Oslo, since June 2003), Professor Marco Loos (Amsterdam); Professor Brigitta Lurger (Graz), Professor Hector MacQueen (Edinburgh), Professor Ewan McKendrick (Oxford), Professor Valentinas Mikelenas (Vilnius, since December 2004), Professor Eoin O'Dell (Dublin, until June 2006), Professor Edgar du Perron (Amsterdam), Professor Denis Philippe (Louvain, since June 2004), Professor Jerzy Rajski (Warsaw), Professor Christina Ramberg (Gothenburg), Supreme Court Judge Professor Encarna Roca y Trias (Madrid/Barcelona), Professor Peter Schlechtriem† (Freiburg i. Br.), Professor Martin Schmidt-Kessel (Osnabrück, since December 2004), Professor Jorge Sinde Monteiro (Coimbra, until December 2004), Professor Lena Sisula-Tulokas (Helsinki), Professor Sophie Stijns (Leuven), Professor Matthias Storme (Leuven), Dr. Stephen Swann (Osnabrück), Professor Christian Takoff (Sofia, since June 2007), Professor Luboṣ Tichy' (Prague, since June 2005),

Professor Verica Trstenjak (Maribor, until December 2006), Professor Vibe Ulfbeck (Copenhagen, since June 2006), Professor Paul Varul (Tartu, since June 2003), Professor Lajos Vékás (Budapest), Professor Anna Veneziano (Teramo).

The Working Teams were based in various universities and research centers. The Teams made research about especially three areas of private law:

- a) Law of specific contract.
- b) Law of extra-contractual obligations.
- c) Property law.

They sometimes stayed for one or two years only, but often considerably longer in order additionally to pursue their own research projects.

At the same time, but independently from DCFR, a Commission reviewed the *Acquis* of consumers rules, announced by Green Book of February 2007. It had to round up in one directive all the rules already in force. The *Acquis Group* texts result from a drafting process which involved individual Drafting Teams, the Redaction Committee, the Terminology Group, and the Plenary Meeting.

To co-ordinate between the Study and *Acquis* Groups, to integrate the PECL material revised for the purposes of the DCFR, and for revision and assimilation of the drafts from the sub-projects, they established a “*Compilation and Redaction Team*” (*CRT*) at the beginning of 2006.

Language

The DCFR is being published first in English. This has been the working language for all the Groups responsible for formulating the Model Rules. However, for a substantial portion of the Books (or, in the case of Book IV, its Parts), teams have already composed a large number of translations into other languages. These will be published successively, first in the PEL series and later separately for the DCFR. In the course of these translations the English formulation of the Model Rules has often itself been revised. In autumn 2008,



the *Fondation pour le droit continental* (Paris) published a translation of the first three Books of the DCFR (in the version of the Interim Outline Edition)³⁰. A Czech translation of the interim outline addition appeared shortly afterwards³¹. The research teams are intent on publishing the Model Rules of the DCFR as quickly and in as many languages as it is possible. However, the English version is the only version of the DCFR which has been discussed and adopted by the responsible bodies of the participating groups and by the Compilation and Redaction Team.

Accessibility and intelligibility

In the preparation of the DCFR, every attempt was made to achieve not only a clear and coherent structure, but also a plain and clear wording. Whether the model rules and definitions are seen as a tool for better lawmaking or as the possible basis for one or more optional instruments, it is important that they should be fit for their purpose. The terminology should be precise and should be used consistently. The word “*contract*” for example should be used in one sense, not three or more. The terminology should be as suitable as possible for use across a large number of translations. It should therefore try to avoid legalese and technicalities drawn from any one legal system. An attempt has been made to find, wherever possible, descriptive language which can be readily translated without carrying unwanted baggage with it. It is for this reason that words like “*rescission*”, “*tort*” and “*delict*” have been avoided. The concepts used should be capable of fitting together coherently in model rules, whatever the content of those model.

The four principles

The principles of justice, security, freedom and efficiency characterize all the DCFR. Freedom is the most important principle in relation to contracts and unilateral undertakings and obligations. Security, justice and efficiency have the same importance in all areas. After all, efficiency is less fundamental than

³⁰ By Professor Jacques Ghestin.

³¹ By a team led by Professor Prěmysl Raban, published in *Karlovarská Právní Revue* 2/2008, 1-222.

the others, but law is a sort of practical science. So, the idea of efficiency underlines lot of the model Rules and they cannot be fully explained without reference to it.

In a first analysis, freedom, security and justice have an importance in themselves. People fought and died for it. Efficiency is less dramatic. In context of private law, these values are regarded not only as ends in themselves, but as means to other ends, as promotion of welfare, empowering of people to pursue their legitimate aims.

These principles sometimes could enter in conflict one to each other. So, justice in particular case may have to make way for legal security or efficiency, as happens under the rules of prescription. Or sometimes, rules designed to promote security have to be balanced by considerations of justice, as in the case of a reduction of liability on equitable grounds. In particular, freedom of contract may be limited by justice, for example to prevent some forms of discrimination. Principles can also conflict with themselves, for instance one aspect of justice, as equality of treatment, may conflict with another, as protection of weak. So, principles can never be applied in a rigid way.

Often a rule can consist on more than one principle. Especially, rules which are designed to ensure genuine freedom of contract can also be explained in terms of contractual justice.

Freedom:

Several aspects of freedom are considered in private law. Freedom can be protected by not laying down mandatory rules or other controls and by not imposing unnecessary restrictions of a formal or procedural nature on peoples' legal transactions. It can be promoted by improving the capabilities of people to do things. These aspects are both considered in DCFR. We can find the first in the general approach to party autonomy, as in rules on contracts and contractual obligations. Also the opportunity to enhance capabilities is considered in DCFR. Default rules make easier and less costly for people to enter into well-regulated legal



relationships. Moreover the promotion of freedom overlaps with the promotion of efficiency.

Contractual freedom:

As rule, person (natural and legal) should be free to decide if contract or not and whom to contract. They also should decide the content of contract. This rule is contained in DCFR. In this case, the freedom is subject to any applicable mandatory rules. Parties have also the opportunity to change the terms of contract, ever in accord one to each other, and to put an end to their relationship. Sometimes freedom of contract leads to justice. For example, if the parties to a contract are fully informed and in an equal bargaining position when including it, the content of their agreement can be presumed to be in their interest and to be just between themselves.

Limitations with regards to third party:

A contract can produced its effects only if these not lead to third party rights. The DCFR doesn't contain any explicit provision on the relation of contracts to third parties. It takes it as self-evident that parties can contract only for themselves, unless otherwise provided and that contracts, as a rule, regulate only the rights and obligations between the parties who conclude them. The DCFR merely spells out the exceptions, principally the rules on representation and the rules on stipulations in favor of a third party³².

Restrictions on freedom to choose contracting party

Person should remain free to contract or to refuse to contract with anyone else, this freedom may need to be qualified where it might result

³² See II. – 9:301 to II. – 9:303. The rules in Book III, Chapter 5 on change of parties (assignment and substitution of new debtor) and the rule in III. – 5:401 on indirect representation (under which, when the representative has become insolvent, the principal and the third party may acquire rights against each other) can also be seen as exceptions to the rule that a contract can produce effects only for the contracting parties.

in a non-sense indiscrimination, as for race or ethnic origin. This anti-social form of denying the contractual freedom, does not respect also the human rights of contracting party. The DCFR prohibits these form of discrimination and provides remedies (II. – 2:101 to II. – 2:105 and III. – 1:105).

Security:

The importance of the principle of security in private law can be understood by considering some of the ways in which the security of natural and legal persons in the normal conducting of their lives and affairs can be threatened. The ingredients of contractual security are too much, as the obligatory force of contract, the right to enforce performance of the contractual obligations in accordance with terms of contract or the fact that parties must respect the situation created by the contract and may rely on it.

An aspect of security that appears in different parts of DCFR is the *protection of reasonable reliance and expectations*. It firstly appears in relation to contract formation. It may happen that one party does not intend to undertake an obligation when that party's action suggest to the other party that an obligation is being undertaken. The protection of reasonable reliance and expectations is a core aim of the DCFR, just as it was in PECL. Usually this protection is achieved by holding the mistaken party to the obligation which the other party reasonably assumed was being undertaken.

Justice:

It is a principle that pervade all the DCFR and can conflict with other principles, but it is not lightly be displaced. Justice is hard to define, impossible to measure and subjective at the edges, but cases of injustice are universally recognized and abhorred.



It is possible to find this principle into DCFR in some rules, as: not allowing people to take undue advantage of weakness, misfortune or kindness of others, not making grossly excessive demands, holding people responsible for the consequences of their own actions or their own creation of risks. Justice can also refer to protective justice.

The most obvious manifestation of this aspect of justice in the DCFR is in the rules against discrimination but it is an implicit assumption behind most of the rules on contracts and contractual obligations that parties should be treated equally by the law unless there is a good reason to the contrary. The biggest exception to that rule of equal treatment is that there are situations where businesses and consumers are not treated alike. Ever to respect the principle of justice, the DCFR protects vulnerable, as in the special protection afforded to consumers.

Efficiency:

The principle of efficiency was added to DCFR after many discussions and debates. There are two aspects of this principle that we can consider relevant: efficiency for the purposes of the party who could use the rules and efficiency for wider public purposes.

The DCFR tries to keep formalities to a minimum, but, as ever, there are few exceptions, where protection seems to be specially required. It is also recognized that in some areas of DCFR, as testaments, national laws may need writing or different formalities.

An aid to efficiency is to use extensive rules for common types of contract and common types of contractual problem. This is useful in

particular for small and individuals business that haven't the same opportunities of big ones.

There is one aspect of efficiency and security which deserves separate consideration: *stability*. People feel more secure when can use solutions familiar, tried, tested and traditional. Such solutions also promote efficiency, because there is no need to understand new rules and work out. This aspect of security and efficiency was particularly important in legal sphere. So, as a famous judge said after a long oration "*I hope I have said nothing news*", the DCFR would to be perfectly familiar to private lawyers from any part of Europe, as an alien product that shared their tradition and legal culture.

The consumer and business

In 2007, the European Commission published a *Green Paper* on the review of the consumer acquis³³. It asked questions at a number of different levels: for example, whether full harmonization is desirable, whether there should be a horizontal instrument and whether various additional matters should be dealt by the Consumer Sales Directive³⁴. The Green Paper on the review of the consumer acquis has been followed by the publication of a draft proposal for a '*horizontal*' directive. In its present form, however, and perhaps for reasons of timing, the latter does not make any explicit use of the DCFR. Whereas terminology and drafting style are rather different, there are nevertheless some characteristic similarities with regard to substance.

Most of the consumer protection rules in the DCFR come from the acquis. They are, in substance, if not in actual wording, part of EU law and of the laws of Member States and seem likely to remain so.

The figure that has a central role in DCFR is the "*consumer*". A "*consumer*" means any natural person who is acting primarily for purposes which are not related to his or her trade, business or profession³⁵. On the other side,

³³ "Grünbuch: Die Überprüfung des gemeinschaftlichen Besitzstands im Verbraucherschutz", COM (2006) 744 def.

³⁴ COM (2008) 614 def.

³⁵ DCFR Outline Edition Book I. – 1:106(1).



“*business*” means any natural or legal person, irrespective of whether publicly or privately owned, who is acting for purposes relating to the person’s self-employed trade, work or profession, even if the person does not intend to make a profit in the course of the activity³⁶.

The consumer is the weak party and all the DCFR tries to protect him/her.

For instance, the Art. 1:110 provides that, in a contract between a business and a consumer, “*the business bears the burden of proving that a term supplied by the business has been individually negotiated*” and the “*terms drafted by a third person are considered to have been supplied by the business, unless the consumer introduced them to the contract*”.

In modern society, the trades are characterized by information, about quality of goods, how to use it or how conclude contract. The consumer has usually less information than business and the DCFR would equilibrate this gap. So, when a business markets goods, other assets or services to a consumer, the business has the duty to not give misleading information. Information is misleading if it misrepresents or omits material facts which the average consumer could expect to be given for an informed decision on whether to take steps towards the conclusion of a contract. In assessing what an average consumer could expect to be given, account is to be taken of all the circumstances and of the limitations of the communication medium employed. Where a business uses a commercial communication which gives the impression to consumers that it contains all the relevant information necessary to make a decision about concluding a contract, the business has a duty to ensure that the communication in fact contains all the relevant information³⁷. Where it is not already apparent from the context of the commercial communication, the information to be provided comprises:

³⁶ DCFR Outline Edition Book I. –1:106(2).

³⁷ II. – 3:101 to II. – 3:107. In DE GEEST and KOVAC: “*The Formation of Contracts in the DCFR – A Law and Economics Perspective*” (publication forthcoming in Chirico/Larouche (eds.), *Economic analysis of the DCFR – The work of the Economic Impact Group within the CoPECL network of excellence* (Munich 2009)) the authors cast doubt on the continued value of rights to avoid contracts on the basis of defects of consent and on the way in which the rules on invalidity for mistake etc are formulated in the DCFR.

- (a) the main characteristics of the goods, other assets or services, the identity and address, if relevant, of the business, the price, and any available right of withdrawal;
- (b) peculiarities related to payment, delivery, performance and complaint handling, if they depart from the requirements of professional diligence; and
- (c) the language used for communications between the parties after the conclusion of the contract, if this differs from the language of the commercial communication.

A duty to provide information under this Article is not fulfilled unless all the information to be provided is provided in the same language.(Art. 3:102).

In case of transactions that take place with a physical distance, the consumer has more disadvantages and the gap of information becomes bigger. So, the Study Group decides to attribute more warranties to the weaker party. The business has a duty to provide clear information about the main characteristics of any goods, other assets or to supplied, the price, the address and identity of the business with which the consumer is transacting, the terms of contract, the rights and obligations of both contracting parties, and any available right of withdrawal or redress procedures. This information must be provided in a reasonable time before the conclusion of the contract (Art. 3: 103). The business has also the duty to provide at the outset explicit information on its name and commercial purpose of the contact.

Application

The rules contained in DCFR are intended to be used primarily in relation to contracts and other juridical acts, contractual and no-contractual rights, obligations and related property matters. This rules are not used in relation to a public law nature or in relation to status or legal capacity of natural persons, wills and succession, family relationships, bills of exchange, employment



relationships, the creation, capacity, internal organization, regulation or dissolution of companies and other bodies corporate or unincorporated. (Art 1:101).

Interpretation

These rules have to be interpreted and developed autonomously and in accordance with their objectives and principles. They have to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms and any applicable constitutional laws.

In their interpretation and development, the rules need to promote: a) uniformity of application, b) good faith and fair dealing, c) legal certainty. In particular, the term “*good faith and fair dealing*” refers to a standard of conduct characterized by honesty, openness and consideration for the interests of other party to transaction. It is contrary to good faith and fair dealing for a party to act inconsistently with that party’s prior statements or conduct when the other party has reasonably relied on them to that other party’s detriment. (Art 1:103).

The rules, that are not possible to interpret in a sure way, have to be interpreted in accordance with the principles of DCFR.

Critical aspects

The DCFR is surely a text that considers the greatest part of contract law. On the other side, it is too ambitious. It, as the PECL, tries to create new rules and concepts that are not in accord with any European system and with the *acquis communautaire*³⁸. It re-conceptualize the general part of contract, also trying to introduce in law systems the concept of “*juridical act*”. So the DCFR removes itself from what the EU Commission thought about contains of CFR:

³⁸ See to *Principles of European Law of the Study Group on a European Civil Code*, on which are based Books IV-X of *Draft Common Frame of Reference*.

the idea was not of a general and special discipline of obligate report, but of general part of contract that contains special prescriptions about sales³⁹.

Another point that has to be analyzed is the way used to re-elaborate PECL to write DCFR. The Study Group surely did not consult the general doctrine about European private law and in particular the one arose on PECL or PICC. So usually happens that DCFR rejects his predecessors exactly where they obtained much approvals and, at the same time, leaves unchanged debatable rules. The redactors of DCFR normally not gave reasons for that choice. A reason could be the desire to not disavow Lando's Commission in which there were many scholars of Study Group.

We can also consider as a problem the effort to transform the legal text in a "dogma". A first analysis about conclusion of contract and mistake discipline lets understand that new form of DCFR has not advantages then past textual experiences (PECL, PICC).

It is possible to affirm that the contents of DCFR have to be modified before the redaction of CFR.

EU Commission, in April 2010, understood that the project of a CFR must be reduce. It has to consider only parties relevant for contract regulation. The scholars group has to face an ambitious program: after a year, Commission wants some results. The jurists are the same, more or less, of the Study Group of DCFR. So, the question appears obvious, how they can criticize and modify a text wrote just few years before?

Secondly, the Commission needs a text of about 150 articles⁴⁰. It probably would create an outline of civil law useful for all confident consumer⁴¹.

³⁹ Rules about insurance contracts, described also by the Communication of EU Commission of 11 October 2004, COM (2004) 651, are not considered. About this topic a *Project Group of Restatement of European Insurance Contract Law* organized the *Principles of European Insurance Contract Law (PEICL)*, the PEICL was published in 2009, independently from DCFR: reasons of this choice were described by BASEDOW, in *ZEUP*, 2008, p.626.

⁴⁰ The summary of the first meeting of expert groups in 21 May 2010, p. 1, http://ec.europa.eu/justice/policies/consumer/policies_consumer_into_en.htm.



Therefore, rules about compensation, subjectively complex oblige, successions in debt and assignment of contract must be deleted, or the other rules about prescription, agency and assignment of debt. So with these “cut” the goal of a text with just 150 may be achievable.

Finally, what is the goal of CFR?

The experts group started to work without knowing what is aim of that project. Surely a law immediately applicable must be redact in a different way, not as a scientific text⁴². At the same time, must be clear if it has to consider or not consumer contracts⁴³.

The “Common Europeans Sales Law” takes inspirations from all these text.

EU Commission asked to a group of experts a Feasibility Study (FS), in other words, a text with specific features. This Study would be the base for a European Contract Law, but practically became the base for CESL.

⁴¹ “Die neue Arbeitsgruppe erarbeitet einen benutzerfreundlichen Text mit einfachen Formulierungen”: in that sense the press release of 21 May 2010; *ZEuP*, 2010, p.954; on the figure of symbolic figure of “Confident consumer” cfr ROTH, *Europäischer Verbraucherschutz und BGB*, in *JZ*, 2001, p 478 ss.

⁴² JANSEN, ZIMMERMANN, *Vertragsschluss und Irrtum*, cit. p. 743 ss.

⁴³ Cfr. COM (2010) 348 def. About the juridical nature of CFR, ERNST, *Common Frame of Reference’ aus juristischer Sicht*, in *AcP*, 2008, p. 258 ss.

Chapter II

Five W of CESL

(Who ,When, Where, What, Why)

Who wants CESL⁴⁴

After long debates about the idea of a common law about contract right and even about a European Civil Code, the EU Commission made in 11th October 2011 a proposal for Parliament and Council about common rules in sales contract⁴⁵.

Since 80's, EU institution -Parliament⁴⁶ and Council⁴⁷-, not ever with the same intensity, shared the common project of common rules in private law, but

⁴⁴ RITA ROLLI, *Contratto e impresa/ Europa 1-2012*, "La proposta di regolamento europeo sulla vendita nel processo di codificazione europea", p. 373.

⁴⁵ COM, 2011, 635 def.

⁴⁶ Resolution of 26 May 1989, in G.U.C.E., 28 June 1989, C 158, p. 400; Resolution of 6 May 1994, in G.U.C.E., 25 July 1994, C 205, p.518, underlined by ALPA, "L'Armonizzazione del diritto contrattuale e il progetto di codice civile europeo, in *Nuova giur.civ.*, 2003, II, p.169, that said " si deve, dunque, al Parlamento europeo il merito, tra le altre istituzioni comunitarie, di avere dapprima incentrato l'attenzione del mondo politico, del mondo degli operatori economici e degli operatori del diritto sulla opportunità di affiancare alle iniziative dirette a realizzare uno spazio economico e uno spazio giuridico europeo, anche uno spazio di diritto sostanziale e di poi, di aver proposto, mediante lo strumento della risoluzione, il perseguimento di un obiettivo tanto ambizioso quanto utile, cioè il "riavvicinamento", a cui può conseguire l'armonizzazione e, se ritenuto possibile, la unificazione del diritto privato"; Resolution of 15 November 2011, A5-0384/2001, about " putting the Civil Law next to Commercial law in Member States"; Resolution of 8 June 2011, in which were expressed the support to an instrument that develops internal market and brings benefits to businesses, consumers and juridical systems of Member States.

⁴⁷ The Commission, firstly, made a study of EU private law systems (*Jur. Ser. JURI*, 103) : cfr. ALPA, cit.op., p. 169, and after expressed some Communication, as COM (2001) 11 July 2001; COM (2004) 651 def., 11 October 2004; COM (2010) 348 def. 1 July 2010; *The single Market Act*, COM (2011) 206 def., 13 April 2011;



European doctrine had a central role in that creation of a European contract law.

Correct is the use of the term “European law” then “community law”, because it underlines the birth of this juridical experience from the bottom and not from the top. It comes from the idea of a scientific community that joins different aims of European law (French Roman Law, Dutch Roman Law, civil and common law).

The renewed role of doctrine is due to actual economic process, for instance the elaboration of UNIDROIT Principles for international commercial contract of 1996 and 2004.

The crisis of State law is also due to the presence of a sovereign structure, the European Union, and its need of a unique law that they can apply in all the EU territory. The birth of common rules is hard to realize also because national laws change in every moment, for innovation of EU laws, internal laws and jurisprudence interpretations⁴⁸.

So, the role of scholars is to find few common principles in private law, in particular contractual rules, and to solve the problem of a possible European Codification. Lando's Commission in 1995 elaborated PECL⁴⁹; the Study Group of Christian von Bar redacted in 1998 the Principles of European Law (PEL); but also the Project Group on a Restatement of European Insurance Contract Law elaborated Principles of European Insurance Contract Law (PEICL), Acquis Group of Gianmaria Ajani and Hans Schulte-Nölke with Principles of Existing Contract Law (ACQP), the EU Commission proposed the creation of a Common Frame of Reference (CFR)⁵⁰ in 2003 that brought to Joint Network on European Law (CoPECL Network of excellence) that

The Annual Growth Survey, Annex I, Progress Report on Europe 2020, COM (2011) 11- A1/2, 12 January 2010.

⁴⁸ VISINTINI, *La circolazione delle giurisprudenze*, in *Contratto e impresa*, 2011, p. 73 ss.

⁴⁹ About that topic see, C. CASTRONOVO, *I principi di diritto europeo dei contratti e il codice civile europeo*, in *Vita not.*, 2000, p. 1219 ss.; ID., *Verso un codice europeo: i Principi di diritto europeo dei contratti*, in *Vita not.*, 2000, p. 18 ss.

⁵⁰ COM (2003) 68 def., 12 February 2003, *Communication from the Commission to the European Parliament and the Council: a more coherent European Contract Law, An Action Plan*, 17.



includes many universities and European institutions, Study Group, Acquis Group, Insurance Group and a group of French, Association Henri Capitant. In 2008 was published the Draft Common Frame of Reference (DCFR): ten books about general contract rules, oblige rules, special contract, property etc.⁵¹

The various academic projects not had a common goal: some would elaborate cultural instruments to create “European” jurists; others would adopt normative text harmonized by EU. European institutions encouraged study groups, but especially they would elaborate practical juridical instruments to control and regulate European trades.

In 2004, the Commission affirmed that the creation of a Code is not the central project⁵², they want “just” to “*harmonize contract law in Member States*”⁵³. It established, with the Decision of 26 April 2010, to create an experts group that had to find a common frame in European contract law. The Commission asked to experts also to develop a Feasibility Study (FS) for a future instrument of European contract rules, about principal aspects of international trades. These aspects should be the content of a simple text about contract in general and sale contract.

The work of FS was published the 3rd May 2011 with the title “*A European contract law for consumer and business: Publication of the result of the feasibility study carried out by Expert Group on European contract law for stakeholders’ and legal practitioners’ feedback*”(FS), and it gave space to the idea of an imminent European Civil Code.

Moreover, after new consultations about the FS and two new versions of FS during the Summer of 2011. The Commission made a “definitive” Proposal for a Regulation about “European Sales Contract”, the 11th October 2011, proposing only common rules about European sales contract.

⁵¹ See, ALPA, IUDICA, PERFETTI, ZATTI: *Draft Common frame of Reference del diritto privato europeo*, Milan, 2009; MAUGERI, *Alcune perplessità in merito alle possibilità di adottare il DCFR come strumento opzionale (o facoltativo)*, in *Nuova giur.civ.*, 2011, II, p. 253 ss.

⁵² IORATTI FERRARI, voce *Codice Civile europeo*, cit., p. 269.

⁵³ COM (2004) 651 def., 11 October 2004, p. 8.



Why this change of goal from EU institutions?

Probably, it was due to the absence of general competences of EU institutions for private law⁵⁴. So, the idea of a codification was abandoned. The institutions decided to consider a single kind of contract: sales. The sale is characterized by exchanges, of goods or services, also from a Country to another. As the Commission said: “*differences of contractual legislation among Member States obstacles consumers and businesses that would make transactions in EU market*”⁵⁵. The necessity of unique rule appeared in many experiences: in USA with the Uniform Commercial Code, that it is used as model for legislation in single Country; or the Vienna Convention (CISG) in 1980, about international trade of goods; but also in UK, Country of non-written rules, they feel the need of a restatement in sales contract, with the two editions of Sale of Goods act in 1893 and 1979.

Since the Communication of 2001⁵⁶, the Commission adopted many ways to realize the harmonization of contract law in European trades, with instruments of soft and hard law. The options for European contract law were offered from the “*Green Book*” of 2010:

- 1) Simple publishing of results of Expert Group that may happen without the opinion of other EU institutions. It could bring to natural convergence of national systems, but it will be ever a text without any kind of authority⁵⁷;

⁵⁴ BASEDOW, *Un comune diritto dei contratti per il mercato comune, Contratto e impresa/ Europa*, 1997, p.81 ss; as Commissioner BANGMANN, *Privatrechtsangleichung in der Europäischen Union*, in *ZEuP*, 1994, p. 377 ss; WHEATERILL, *Diversity between National Laws in the International Market*, in DROBNIG, SNIJDERS, ZIPPRO, *Divergences of Property Law, an Obstacle to the Internal Market?*, 2006, p.138; GERVEN, *Codifying European Private Law: Top Down and Bottom up*, in GRUNDMANN, *An Academic Green Paper on European Contract Law*, 2002, p. 423; ID., *Harmonization of Private Law: Do We Need It?*, in *Common Market Law Rev.*, 2004, p. 525.

⁵⁵ COM (2011) 635 def., *Explanatory Memorandum*, p.10.

⁵⁶ COM (2001) 208 def.

⁵⁷ See, VON BAR, CLIVE, SCHULTE-NOLKÉ, *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, München, Sellier, 2009; AA.VV., *I Principi del diritto comunitario dei contratti. Acquis Communautaire e diritto privato europeo*, Torino, 2009.



- 2) Creation of an official toolbox: a) with a Communication or a Decision of Commission that will be used to guarantee the quality and the coherence of future rules, but it could not oblige the Parliament or the Council, or b) with an inter-institutional accord among Commission, Parliament and Council, used as a toolbox . The advantage is to oblige the institutions to consider also the accord in case of future contract laws;
- 3) A Recommendation of Commission to encourage Member States to a) exchange their national laws with the European instrument or b) include into national systems the European system as optional rules offered to parties. The advantage of this option is the opportunity of Member States to adopt the instrument gradually;
- 4) A Regulation that introduces an optional instrument of European contract rules: the so-called 29th regime, next to the other 28 of Member States;
- 5) A Directive of minimum harmonization about European contract laws, giving also the opportunity to EU Members to notify differences between internal system and EU system ;
- 6) A Regulation that replaces contract laws of each single State, this Regulation would have direct efficacy and could replace national laws;
- 7) A Regulation that introduces a European Civil Code, that considers also non-contractual oblige.

Into “Green Book”, missed totally the option of “*Action Plan*” (2003): the promotion of general contractual conditions⁵⁸. The development of CFR and the role of academic DCFR clearly show that the Commission’s goal is a legal text and not just a simple toolbox. Therefore, the “Green Book” anticipates the choice of normative contents and lets appear the preference of Commission and Parliament for an optional instrument; and the *consultation of Green Book not considers the production of standard contract made by economic operators*. Moreover, this not means to exclude

⁵⁸ COM (2003) 68 def.



private sources, because the idea of self-regulation or co-regulation was still considered in Commission Communication of 20th November 2007, “*Unique market for Europe of XXI sec.*”⁵⁹; and the Communication of 10th June 2009, s.c. “*An area of freedom, security and justice serving the citizen*”, among the instruments that it needs to elaborate for security of contractual relationships in judiciary European area, the Communication considers the elaborations of typical contracts among natural person and small business, next to optional European rules for business (29th regime)⁶⁰.

Reasons for a normative harmonization, in Green Book, are linked to evolution of consumer law. The first part of the Book underlines that difficulties for free exchange of goods, services and money are due also to different contractual rules applied in these economic operations⁶¹. Same considerations are possible for small business: to know laws of different Members States means more costs for each transaction, because they cannot influence, as big business, the clients and cannot choose the law to apply. On the other side, the introduction of a common instrument could be an advantage for big business themselves. This point of view is the same of the FS and of Communication of 11th October 2011. In particular, the FS shows three examples to demonstrate the necessity of only one system of rules: a) a small business that sells on-line just in two different Country for the high costs of transaction; b) a consumer that renounces to acquire a good more convenient in a foreign Country because she/he not knows

⁵⁹ COM (2007) 724 def.; See also *Staff working paper SEC (2007) 1518*, that suggests to adopt a mix on soft and hard law, as code and standards contracts. Also EU Parliament, with Resolution on Stocholm Program, cit. n. 10. In doctrine, CAFAGGI: *La regolazione privata nel diritto europeo dei contratti*, in *Contratto e impresa/ Europa*, 2008, p. 104 ss.

⁶⁰ Stockholm Program, n. 99[P7_TA(2009)0090], European Digital Agenda 2010 [COM(2010)245], the Commission’s work program for the 2011 [COM(2011)623, p.7]. The importance of the so-called 28th (now 29th) regime is underlined by Mario Monti in to EU Commission President *Una nuova strategia per il mercato unico*, in 9 May 2010, p. 102-104, in <http://www.politicheeuropee.it/comunicazione/17368/rapporto-monti-una-nuovastrategia-per-il-mercato-unico>, and the Recommendation into the Report to EU Council from the Reflexion Group for the Future of EU in 2030, *Progetto Europa 2030: challenge and opportunities* of May 2010, p.49, in <http://www.reflectiongroup.eu/2010/05/08/project-europe-2030-challenges-and-opportunities/>.

⁶¹ Cfr. Communication of 11 October 2011, COM (2011) 606 def., p.13.



her/his right; c) a small business is not sure to sell products in foreign Country because is not sure to cover the expense for a juridical advise⁶².

7 options: why and why not

The choice of one option among the seven purposed in Green Book is essentially politic and is affirmed by Commission with the Communication of 11th October 2011⁶³.

What are the reasons of Commission that brought to this choice?

The simple publishing of a text or the creation of a toolbox (options 1 and 2) could be useful as a model for future legislators and as trace for judges and lawyers, but could not produce results for harmonization of rules and their uniform interpretation, especially during the first period of application. On the other side, a soft law instrument, as a Recommendation to Member States to introduce new rules as unique regime or as optional choice (option 3), could create different law systems in different times, all out of control of European institutions. Moreover, the cost of the change of rules cannot be covered from benefits of simplification, or better from the creation in a short time of a uniform frame in all internal market.

If really the institutions would obtain the juridical harmonization in not a long time, the ideal option should be the n. 6 of Green Book (a Guideline that introduces a European Contract Code). It is clearly a not practicable option, because it abolishes completely the rich cultural patrimony of juridical traditions of Member States. The same traditions that EU puts at the center of his policy and considers as a treasure. Then, following the promotion of various internal juridical culture, is not possible to apply the

⁶² Presentation of the study, *A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback*, p.3 s., in http://ec.europa.eu/justice/news/consulting_public/news_consulting_0052_en.htm.

⁶³ COM (2011) 636 def. The Communication of Commission consists in a) Memorandum, b) text for the Proposal of Regulation, c) Annex I, with the text of CESL, d) Appendix, e) Annex II.



option 7 that overcomes the contract law till the unification of private law *in toto* with the introduction of a European Civil Code (ECC).

It appears clear that the harmonization of contract law cannot erase completely juridical barriers. So, the options that still guarantee a reasonable reduction of barriers among different contract law are option 4 (optional instrument) and option 5 (Directive of minimum harmonization of European contractual law). About option 5, to obtain a harmonization in European market needs long time due to adoption of Directive from each State. Moreover, the barriers due to consumers law would resist and will be applied ever the most favourable law with the uncertainty of relation between businesses ⁶⁴. It is not possible to understand how they can obtain a minimum harmonization into relation between businesses of same dimension, but also has no-sense the freedom of State to choose a higher level of protection: protection for which party? In relation between business of same dimension, or there are same rules for all the market or EU institutions leave large space to free choice of States: the harmonization or is complete or there is no harmonization.

So, it easy to understand that option 4 (optional instrument of European contract law) is the only one that conciliates interests of States respecting subsidiarity and proportionality principles. The Green Book defines the optional instrument as *“an exhaustive and autonomous group of prescriptions in contractual subject”*. Mario Monti in his Report in 2010 affirmed that *“the advantage of 29th regime is the great number of opportunities for business and citizens active in European market: if the unique market is their main goal, they may choose a standard frame for all member States, on the other side, if they deal in national market, it is possible to use just internal rules. This model has also the advantage to become focus for national systems.”*⁶⁵ The description talks about the so-called opt-in system, just for international rapport. It is a text that parties may choose freely, depending only on their needs. It is the system chosen by

⁶⁴ See Green Book, par 4.1.

⁶⁵ *“Una nuova strategia per il mercato unico”*, cit.,p.102.

Communication of October 2011 that delineates the scope of optional instrument or international trades, leaving the opportunity for Member States to adopt these rules also for internal trades⁶⁶.

Where ...

...and how apply CESL

The FS, a text drafted by Expert group appointed in April 2010⁶⁷, contemplates the adoption of an optional instrument (OI) dealing with sales, some related services and general contract law⁶⁸. The OI will not be more than an entry in the Official Journal unless contracting parties will make it their choice. The choice will be that of businesses, they decide whether they want to make an offer to the market on the basis of the OI. It is very unlikely that they make alternative offers to the market and permit, in B2C transactions, to choose either a national law or the OI. Consumers may be in a position to choose between an offer of A based on the OI and another offer made by B on the basis of national law, but they will not be in a position to decide whether they accept A's offer on the basis of either national law or the OI. It follows from the operation of the OI that consumer protection only becomes an issue after the business has opted for OI.

The OI must appeal to businesses in the first place i.e. it must meet a demand. It is difficult to assess the existence of such a demand in advance: it may depend on numerous factors of a commercial, managerial, psychological or legal kind, and their significance may vary from sector to sector and from business to business.

⁶⁶ About the role of optional instrument in harmonization process cfr. ALPA and CONTE: *"Dal progetto generale di Common Frame all'acquis communautaire, in Il diritto europeo dei contratti tra parte generale e norme di settore*, NAVARRETTA, Milan, 2008, p.693 ss. For the evolution of that instrument cfr. ROCCO: *L'istituzione di uno strumento opzionale di diritto contrattuale europeo, in Contratto e Impresa/Europa*, 2011, p.798 ss.

⁶⁷ Commission Decision of 26 April 2010, setting up the Expert Group on a Common Frame of Reference in the Area of European Contract Law, OJ 2010 L 105/109.

⁶⁸ See the Press Release IP/11/523; a link to the feasibility study contains the draft rules as an annex.



...citizen can choose

The biggest part of contract in which it is possible apply the OI are the B2C contract. The consumer may choose OI especially in distance contract with a “*blue button*”, a button with the EU flag colors with 12 golden stars⁶⁹.

The consumer can push the blue button (probably at the time of payment)⁷⁰ when buying a product over the internet, and the benefits of the choice are relatively low in view of the already high minimum⁷¹ level of protection throughout the European Union on which the consumer can rely: this makes it irrational for consumers to put efforts into informing themselves about other possible regimes: they are protected anyway⁷².

In addition to being a conscious choice, the consent of a consumer to the use of the Common European Sales Law should be an informed choice. The trader should therefore not only draw the consumer's attention to the intended use of the Common European Sales Law, but should also provide information on its nature and its salient features. In order to facilitate this task for traders, thereby avoiding unnecessary administrative burdens, and to ensure consistency in the level and the quality of the information communicated to consumers, traders should supply consumers with the standard information notice provided for in this Regulation and thus readily available in all official languages in the Union. Where it is not possible to supply the consumer with the information notice, for example in the context of a telephone call, or where the trader has failed to provide the information notice, the agreement to use the CESL should not be binding on the consumer until the consumer has received the information notice

⁶⁹ *Contratto e impresa/ Europa 1-2012*.

⁷⁰ See SCHULTE and NÖLKE, *Europäisches Vertragsrecht Als blauer Button Im Internet---Shop*, ZGS 2007, 81.

⁷¹ And Increasingly maximum level: see e.g. Directive 2011/83 On consumer rights.

⁷² See WALTER DORALT, *Rote Karte Oder grünes Licht Für den Blue Button?*, AcP 211 (2011), 1---34, at 22.

together with the confirmation of the agreement and has subsequently expressed consent⁷³.

...the TFUE legitimates CESL

This Proposal is based on Article 114 Treaty on the Functioning of the European Union (TFEU).

The proposal provides for a single uniform set of fully harmonized contract law rules, including consumer protection rules in the form of a Common European Sales Law which is to be considered as a second contract law regime within the national law of each Member State available in cross-border transactions upon a valid agreement by the parties. This agreement does not amount to, and must not be confused with, a choice of the applicable law within the meaning of private international law rules. Instead, this choice is made within a national law which is applicable according to the private international law rules⁷⁴.

This solution has as its objective the establishment and the functioning of the internal market. It would remove obstacles to the exercise of fundamental freedoms which result from differences between national laws, in particular from the additional transaction costs and perceived legal complexity experienced by traders, when concluding cross-border transactions, and the lack of confidence in their rights experienced by consumers, when purchasing from another EU country, all of which have a direct effect on the establishment and functioning of the internal market and limit competition.

In accordance with Article 114 (3) TFEU, the Common European Sales Law would guarantee a high level of consumer protection by setting up its own

⁷³JAN M. SMITS, *Paper for the conference European Contract Law: A Law-and-Economics Perspective*, University Of Chicago Law School, 27-28 April 2012.

⁷⁴“*Proposal for a Regulation on a Common European Sales Law*”, Legal Elements of the Proposal, p.8.



set of mandatory rules which maintain or improve the level of protection that consumers enjoy under the existing EU consumer law.

Subsidiarity principle⁷⁵

The proposal complies with the subsidiarity principle as set out in Article 5 of the Treaty on European Union (TEU).

The objective of the proposal – i.e. to contribute to the proper functioning of the internal market by making available a voluntary uniform set of contract law rules – has a clear cross-border dimension and cannot be sufficiently achieved by the Member States in the framework of their national systems⁷⁶.

As long as differences of national contract laws continue to create significant additional transaction costs for cross-border transactions, the objective of completing the internal market by facilitating the expansion of cross-border trade for traders and cross-border purchases for consumers cannot be fully achieved.

By adopting un-coordinated measures at the national level, Member States will not be able to remove the additional transaction costs and legal complexity stemming from differences in national contract laws that traders experience in cross-border trade in the EU. Consumers will continue to experience reduced choice and limited access to products from other Member States. They will also lack the confidence which comes from knowledge of their rights.

The objective of the Proposal could therefore be better achieved by action at Union level, in accordance with the principle of subsidiarity. The Union is best placed to address the problems of legal fragmentation by a measure taken in the field of contract law which approximates the rules applicable to cross-border transactions. Furthermore, as market trends evolve and

⁷⁵ "Proposal for a Regulation on a Common European Sales Law", Legal Elements of the Proposal.

⁷⁶ "Proposal for a Regulation on a Common European Sales Law", Legal Basis.

prompt Member States to take action independently, for example in regulating the emerging digital content market, regulatory divergences leading to increased transaction costs and gaps in the protection of consumers are likely to grow.

Proportionality principle

The proposal complies with the principle of proportionality as set out in Article 5 TEU.

The scope of the proposal is confined to the aspects which pose real problems in cross-border transactions and does not extend to aspects which are best addressed by national laws. In respect of the material scope, the proposal contains provisions regulating the rights and obligations of the parties during the life-cycle of the contract, but it does not touch for example, upon the rules on representation which are less likely to become litigious. In terms of territorial scope, the proposal covers cross-border situations where the problems of additional transactions costs and legal complexity arise. Finally, the personal scope of the proposal is limited to transactions where the internal market problems are mainly found, i.e. business-to-business relations where at least one of the parties is an SME and B2C relations. Contracts concluded between private individuals and contracts between traders none of which is an SME are not included, as there is no demonstrable need for action for these types of cross-border contracts. The Regulation leaves Member States two options: to decide to make the Common European Sales Law also available to parties for use in an entirely domestic setting and to contracts concluded between traders neither of which is an SME.

The proposal is a proportionate action, when compared to other possible solutions analyzed, because of the optional and voluntary nature of the Common European Sales Law. This means that its application is dependent upon an agreement by the parties to a contract whenever it is jointly considered beneficial for a particular cross-border transaction. The fact that the Common European Sales Law represents an optional set of rules



applying only in cross-border cases means also that it can lower barriers to cross-border trade without interfering with deeply embedded national legal systems and traditions. The Common European Sales Law will be an optional regime in addition to pre-existing contract law rules without replacing them. Thus the legislative measure will only go as far as necessary to create further opportunities for traders and consumers in the single market.

On the other side, some authors, but also some national Parliaments as the UK *House of Commons*, the German *Bundestag*, the Austrian *federal Council* or *le Senat* of Belgium, interpreted in a different way the text of Art 114 (3) TFUE that affirms “*The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.*” Especially Parliaments sent to EU a justify advise to inform institutions of their opinion on the project and its non-conformity to subsidiarity principle. It is possible to think that the CESL will not create relations among national laws.

In that case, the authors of CESL have to find another legal base, as the Art 352 TFUE, that authorizes the EU to take “properly measures” , on considering that “the action of the EU appears necessary to obtain one of goal described into the Treaty, but they can operate only if the text gives to them all the powers.”⁷⁷

If they applied as base the Art 352 TFEU, the unanimity of Council is necessary, because each State has a veto power. Therefore, if they apply

⁷⁷ Report made by the Justice Commission , M. DELPEREE, Senat, Ordinary Session 2011-2012, n. 5-1382/1, p. 1.

that article, the EU Commission everyday has to consult the EU Parliament, respecting the subsidiarity principle⁷⁸.

On favor of Article 352 TFUE, there is a juridical precedent: the analysis of Reg. 1435/2003 about the Statue for a European Cooperative Society. The provision introduced a 29th regime, additional respect the ones of Member States, with the Art. 38 CE (now Art. 352 TFUE) as legal base. The Court of Justice has been questioned about the juridical base of Reg. 1435/ 2003; in the sentence of 02 May 2006 the judges underlined that it is possible to find it just in Art. 308 CE and not in Art. 95 CE (now Art. 114 TFUE)⁷⁹.

The Art. 95 CE qualifies EU legislator to adopt measures to improve the conditions for creations and operation of internal market: these measures must effectively have this goal, co-operating to elimination of the obstacle for the certain economic freedom of Treaty. The recourse to this article is also possible if the goal is to prevent problems during exchange due to irregular development of national laws. The Reg. 1435/2003 , about European Cooperative Society (SCE), would introduce new juridical form. The SCE co-exists with the national Cooperative Society. The Regulation, in Court point of view, not modifies single national system and cannot be consider as an instrument to put in contact the systems of Member States. The Court affirms that the Article 95 CE (now Art. 114 TFUE) should not be the right base for the adoption of Regulation. So it is adopted on the base of Art. 308 (now Art. 352 TFUE)^{80 81}.

⁷⁸ French national Assembly, Commission of Europeans Affairs, "Examen du rapport d'information de Mme Marietta Karmanli sur la proposition de la Commission europeenne relative a la creation d'un droit commun europeen de la vente (E 6713), in the 7 Dicember 2011, <http://www.assemblee-nationale.fr/13/europe/c-rendus/c0231.asp>.

⁷⁹ EU Court, 2 May 2006, C-436/03, in Racc. 2006, p. I- 03733, par. 43-44: " Finally, it is apparent from the provisions in Article 9 of the contested regulation, pursuant to which a European cooperative society is to be treated in every Member State sas if it were cooperative formed in accordance with the law of the Member State in which it has its seat, that the European cooperative society is a form which coexists with cooperative societies under national law. In those circumstances, the contested regulation, which leaves unchanged the different national laws already in existence, cannot be regarded as aiming to approximate the laws Member States applicable to cooperative societies, but has its purpose the creation of a new form of cooperative society in addition to the national forms"

⁸⁰ Case C-436/03, European Parliament v. Council (2006) ECR I – 3733, par. 46.



Finally, a more pragmatic argument would support the use of Art. 114 TFEU and the choice for a regulation in the proposal. As the debate about the CRD has shown, technological, social and legal developments require frequent changes of (EU-) law. This has been particularly true with regard to including digital content in the provisions on consumer information in the final version of the Consumer Rights Directive (CRD) 2011/83/EU of 25.11.2011²⁰ which has been extended by the CESL and which now has a complete set of provisions tailored to the specifics of transactions with digital content⁸². As a consequence, the CRD and the CESL (once adopted) will have to be “updated” continuously and in parallel to avoid discrepancies in the protective ambit of the two instruments, and to prevent “cherry picking” by traders switching from one instrument to the other to avoid higher levels of protection. This requires the use of the same legislative mechanism to obtain an analogous level of protection. This should be the “ordinary legislative procedure” of Art. 114 TFEU which allows majority voting with the full participation of the EP, while the procedure of Art. 352 TFEU as proposed by the MPI study requires unanimity in the Council “after obtaining the consent of the EP” and with a special opt-in procedure for Germany imposed by the Lisbon-judgment of the German Bundesverfassungsgericht²² which makes parallel legislation on consumer matters in an eventual CESL and in special B2C directives almost impossible because of the veto power of every Member

What

The Commission asked the Expert Group to select those parts of the Draft Common Frame of Reference – the result of extensive comparative law research launched by the Commission and produced by a network of

⁸¹ See on <http://www.europarl.europa.eu/committees/en/juri/workingdocuments.html#menuzone>. About the juridical base is underlined “Your rapporteurs are aware that questions have been raised as to whether the proposal can indeed be based on Article 114 TFUE. However, they believe that, by creating a harmonised second regime within Member States’ law (see Recital 9), the proposal clearly qualifies as a “measure for [...] approximation” and therefore should be based on Article 114 TFUE, as has been confirmed by the Legal Services of the three institutions”.

⁸² Eui Working Papers, DEPARTMENT OF LAW European Regulatory Private Law Project (ERPL-03) European Research Council (ERC) Grant, THE COMMISSION PROPOSAL FOR A “REGULATION ON A COMMON EUROPEAN SALES LAW (CESL)” – TOO BROAD OR NOT BROAD ENOUGH?, 2014, p.



European contract law experts between 2005 and 2009⁸³ – which were of direct relevance to contract law and to simplify, restructure, update and supplement the selected content. In this process the Expert Group was also asked to take into consideration the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG), the Unidroit Principles of International Commercial Contracts, as well as other research work conducted in this area, such as the Principles of European Contract Law prepared by the Commission on European Contract Law and the *Principes Contractuels Communs* of the Association Henri Capitant and *Société de Legislation Comparée*⁸⁴.

The working premises

The Commission asked the Expert Group to conduct a feasibility study on a draft instrument of European contract law whatever its legal form or nature. Given that the Commission had yet to take a formal position on any of the options set out in the Green Paper, the Expert Group was asked to work on an “as if” basis drafting a study that could be used in different scenarios⁸⁵.

Scope of application of the feasibility study

The Commission asked the Expert Group to conduct its feasibility study on a potential European contract law instrument that could be applicable to business-to-consumer contracts and business-to-business contracts.

Material scope of the feasibility study

The Commission asked the Expert Group to focus its feasibility study on a potential European contract law instrument covering sales contracts and service contracts associated with sales, such as installation or maintenance,

⁸³ Von Bar, C., Clive, E. and Schulte Nölke, H. (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, Munich, Sellier, 2009.

⁸⁴ Bénédicte Fauvarque-Cosson and Denis Mazeaud (eds.), *European Contract Law, Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*.

⁸⁵ *Feasibility Study, Chap I, THE MANDATE OF THE EXPERT GROUP ON EUROPEAN CONTRACT LAW*.



provided by the seller or under the seller's responsibility (e.g. by a sub-contractor).

A self-standing instrument of European contract law

The Commission asked the Expert Group to conduct a feasibility study which would result in a self-standing and comprehensive text covering most aspects of a contractual relationship that would be of relevance for the contractual relationship in cross-border situations. Therefore certain topics which would be less relevant for cross-border contracts – such as rules on capacity, representation or assignment – were not covered by the Expert Group's work.

A user-friendly and clear text

The Commission asked the Expert Group to develop a text that would not only be concise, but also be user-friendly, both in its language and structure so it could be understood and used by businesses and consumers who would not necessarily be specialists in the area of contract law.

A high level of consumer protection

As part of the feasibility study, the Commission tasked the Expert Group with drafting contract law rules which would afford consumers a high level of protection in business-to consumer contracts. As a starting point, the relevant EU acquis (i.e. the existing Directives) as well as the proposed Consumer Rights Directive as it is resulting from the legislative process would need to be incorporated.

The distinction between business-to-consumer and business-to-business contracts

For business-to-consumer contracts, the contract law rules providing consumer protection content would need to have a mandatory character once the instrument was chosen. The mandatory character of these consumer protection rules would always need to be clearly pointed out. For business-to-business contracts, freedom of contract would prevail. Almost all rules of the instrument would be default rules from which contractual

parties could derogate. Notwithstanding this distinction, mindful of the weaker position of most SMEs, the Expert Group also drafted a number of rules which would afford businesses a degree of protection under certain circumstances. For example, if the other party included an unfair term in its standard terms and conditions that the SME had not expected, the law would give them some protection, by striking down the unfair term.

Why: Goals

The objective of the CESL is, first and foremost, to facilitate expansion of cross-border trade within the EU by lowering the related transaction costs and providing a higher level of legal certainty. Business that participate in cross-border trade must bear additional transaction costs due to legal complexity arising from the diversity of legal systems. It is too costly for parties to determine which legal provisions apply to relations and to familiarize themselves with the content and scope of potentially applicable laws. That is the same view of drafters of Proposal for a Regulation⁸⁶. The generation of high costs is particularly for SMEs, after all they often do not have the same resources to clarify the applicability and the content of foreign law. SMEs are therefore reluctant to enter into foreign Member States' markets⁸⁷.

This process becomes even more difficult in B2C sells. The Rome I Regulation provides for special conflict-of-laws rules for obligations arising from a consumer agreement, as the Article 3 of the Rome I Regulation prescribes that parties, by their own choice, may select the law that is applicable to their contract. There are also specific rules that determine the law to apply. For example, Article 6 of the Rome I Regulation previews specific set of conflict rules governing the consumer agreement⁸⁸. The

⁸⁶ Recitals 1-9; Article 1(1), Regulation.

⁸⁷ Press release: mention the sum of 10,000 EUR in translation costs and legal advice to adapt to each additional export market.

⁸⁸ This provision only applies to contracts between a consumer and a professional seller. Moreover, Article 6 only protects a 'passive consumer'. This protective regime only governs a situation in which the seller sets



higher transaction costs often means that the consumer is not free to buy from a foreign(especially internet) trader, who will not sell to him. Commission affirms that it is a missed opportunity for both consumer-buyer and trader, but it may also means a distortion of the development of the Internal market.

The CESL is meant to be a package of comprehensive rules in transactions between traders and consumers, insofar as they fall within the scope of the instrument. By choosing the CESL to govern their contract relations, traders as well as consumers give up their autonomy to negotiate the applicable law. Obviously, in practice this autonomy only exists for traders, not so much for consumers who are usually put in a take-it-or-leave position when contracting in consumer markets.

The CESL would eliminate this legally uncertain and expensive situation in which business and consumer⁸⁹ are held back from the potentially applicable sales and consumer law regimes. The introduction of a Europe uniform (29th) legal regime should reduce this legal complexity and , in the bargain, ensure an high level of consumer protection. It is clear however that with the Proposal for a Regulation the EU Commission has no intention of changing existing rules and recommendations, but also the Commission want not to replace the current sales laws or change private international law⁹⁰. On the contrary, the Regulation would offer a legal alternative for the cross-border trade within the EU that should co-exist with the already established framework.

up a commercial activity in a country where the consumer has his abital place of residency or when he directs his commercial activity to that country or to several countris including that country: RAGNO, *The law applicable to consumer contracts under the Rome I Regulation*, in FERRARI and LEIBLE (Eds.), *Rome I Regulation. The law applicable to contractual obligations in Europe*, Munich, Sellier, 2009, pp 144-149.

⁸⁹ The Eurobarometer report shows that consumers are insecure about their rights and, therefore, do not venture to shop in foreign markets. See, in this regars: Flash Eurobarometer 299, Consumer attitudes towards cross-borders trade and consumer protection, March 2011, on the website of European Commission, on http://ec.europa.eu/public_opinion/flash/fl_299_en.pdf, 186 pp. There is, however, also scientific research showing that consumers are rarely concerned about the variety of legal systems that might apply to their sale contract, simply because they are not sufficiently aware of the fact that this may cause problems.

⁹⁰ Recital 10 Regulation.



The use of the Common European Sales Law should not be limited to cross-border situations involving only Member States, but should also be available to facilitate trade between Member States and third countries. Where consumers from third countries are involved, the agreement to use the Common European Sales Law, which would imply the choice of a foreign law for them, should be subject to the applicable conflict-of-law rules.

Traders engaging in purely domestic as well as in cross-border trade transactions may also find it useful to make use of a single uniform contract for all their transactions. Therefore Member States should be free to decide to make the CESL available to parties for use in an entirely domestic setting.

A goal also pursued by European Commission with the Proposal for a Regulation was to introduce a widely known and uniformly applicability body of law. The CESL, ideally, would remove any uncertainty about the applicability and meaning of 'foreign' law. The Proposal for a Regulation does not intend to interfere further with the Member States internal law. The CESL will be part of the national law of the EU Member States and the national court will apply and interpret its provisions. It is obviously important that Member States use the CESL in a uniform manner if the Proposal for a Regulation would achieve legal certainty and cost reduction. The local judges interpreting the instrument will need a frame of reference against which they can assess the law on which they are basing their decisions⁹¹.

So, the European Commission decides to establish a database to that end. Article 14 introduces the obligation for all Member States to communicate the final judgments of their courts to Commission. The European Commission will set up a system which allows both national judgements and the relevant European Court of Justice's decisions to be accessed by the

⁹¹ MAUD PIERS, CEDRIC VANLEENHOVE, "*Contratto e impresa/Europa 1-2012, The Common European Sales Law. A critical assessment of a valuable initiative*".



public⁹². This database would be a useful tool for safeguarding uniform application of the CESL.

News

The 26 February 2014, EU Parliament adopted by 416 votes to 159, with about 65 abstentions, the Common European Sales Law.

“The European Parliament ,

- having regard to the Commission proposal to Parliament and the Council (COM(2011)0635),
- having regard to Article 294(2) and Article 114 of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C7-0329/2011),
- having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
- having regard to the reasoned opinions submitted, within the framework of Protocol No 2 on the application of the principles of subsidiarity and proportionality, by the Belgian Senate, the German Bundestag, the Austrian Federal Council and the United Kingdom House of Lords, asserting that the draft legislative act does not comply with the principle of subsidiarity,
- having regard to the opinion of the European Economic and Social Committee of 29 March 2012(1) ,
- having regard to Rule 55 of its Rules of Procedure,
- having regard to the report of the Committee on Legal Affairs and the opinions of the Committee on the Internal Market and Consumer Protection and the Committee on Economic and Monetary Affairs (A7-0301/2013),

1. Adopts its position at first reading hereinafter set out;

⁹² Article 14(2) Regulation.



2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text (the amendments proposed by Parliament are 264);
3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.”

....and now it is just time to wait.



Chapter III

Common European Sales Law

Application

The Articles from 4 to 7 of Common European Sales Law delimits the area of territorial, material and personal application⁹³.

Material application

A. Selection of contracts.

The Art. 5 of the proposal of Regulation affirmed that:

“The Common European Sales Law may be used for:

(a) sales contracts;

(b) contracts for the supply of digital content whether or not supplied on a tangible

medium which can be stored, processed or accessed, and re-used by the user,

irrespective of whether the digital content is supplied in exchange for the payment of

a price.

(c) related service contracts, irrespective of whether a separate price was agreed for the

related service.”

Using the definitions of Article 2 of the Proposal, it is possible to understand that the CESL is applicable to the sale of goods, enterprise contracts and

⁹³ BENEDICTE FAUVARQUE, COSSON, ZOE JACQUEMIN, “*Contratto e impresa/ Europa 1-2012, Regards sur le droit commun européen de la vente*”.

related service contracts, directly of by distance conclusions, in sellers location or outside.

On the other side, some contracts are expressly excluded from the material application scope of opt-in. The Article 6 of the Proposal of Regulation talks about two specific contracts: mixed-purpose contracts (for instance, leasing) and contracts linked to a consumer credit. It means in particular that the seller purposing to a consumer the pursuit of a good under the regime of Common European Sales Law cannot, with this regime, grant to the consumer credit in the form of a deferred payment, loan or other similar financial accommodation. Moreover, the same rule is applicable also in B2B contracts. The Article 6 is expressly dedicated to consumer credits, but the Article 2 defines “related services” and excludes the financial services entirely. It needs to conclude that all financial services, offered both to business or consumer, are excluded from the application area of CESL. The definitions in Article 2 have, furthermore, an important role inside the CESL.

It is not a code of contract, but a specific instrument for sales. This approach appears the best, because the specific rules are necessary for the application of “second regime” and the minimum application of the “first regime”, but also to ensure the autonomy of “second regime”⁹⁴.

The central part of the Proposal is the sale. It is the contract used much in Paneuropean exchange⁹⁵. The 50% of purchases in foreign States finish with messages like “that product is not sold in your Country”⁹⁶. This new optional instrument gives the opportunity to apply the CESL. The enterprises that usually use different kind of contracts in their transactions may organize all his contractual relations under the same regime. Moreover, it becomes possible to reduce juridical mistakes due to the application of a foreign law.

⁹⁴ BEHAR-TOUCHAIS, “Relations d’un instrument optionnel avec les lois nationales”. Relation to EU Parliament in 27 October 2010, PE 425.645, <http://www.europarl.europa.eu/webnp/cms/lang/en/pid/1483:jsessionid=E320EF674>.

⁹⁵ Communication of Commission to Parliament, Council and Economic and Social Commit, COM (2011) 636, 11 October 2011, p.8

⁹⁶ A valuation of YouGovPsychonomics, on 10964 proposals of transaction, the 61% were refused by businesses. “Mystery Shopping Evaluation of Cross-Border E-Commerce in the EU”, October 2009.



B. Selection of subject

The subjects excluded to the application area of European Sales Law are those written in “Recital 27”:

“All the matters of a contractual or non-contractual nature that are not addressed in the Common European Sales Law are governed by the pre-existing rules of the national law outside the Common European Sales Law that is applicable under Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict of law rule. These issues include legal personality, the invalidity of a contract arising from lack of capacity, illegality or immorality, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law and the law of torts. Furthermore, the issue of whether concurrent contractual and non-contractual liability claims can be pursued together falls outside the scope of the Common European Sales Law.”

The EU Commission refuses to choose the theory of consent in the moment of exchange of consensus and one of the real transfer during the transfer of goods. This absence will endanger the autonomy of EU regime, because parties have to use national law if there are conflict.

Territorial and personal application

A. Personal application area

The personal application area of optional instrument covers two kind of situation: contracts between business and consumer, or the B2C contract, and the contracts between business and business, B2B contract, but on the condition that one on enterprise is small or medium, a SME. This is what affirms the Article 7 of the Proposal of Regulation. It also defines the SME:

(a) employs fewer than 250 persons; and

(b) has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million, or, for an SME which has its habitual residence in a Member State whose currency is not the euro or in a third country, the equivalent amounts in the currency of that Member State or third country.

This large definition covers the 99% of European enterprises⁹⁷. On the other side, Member States may enlarge the application area to enterprises that are not SME and would negotiate with others under the OI. This is expressly previewed by Article 13 of the Proposal, letter b.

Some contracts are in every case excluded in the personal application area of Common European Sales Law. They are contracts concluded between consumers, the so-called C2C contract. For instance, a Tirol that sells his skis on E-Bay could not propose the application of European regime. The contracts excluded are also the so-called C2B⁹⁸ contracts, or better the contract in which the consumer is the seller and the business does the purchase. This exchange of role is not so exceptional as may appear at first sight. For instance, it is possible to think about return, as the return of a car during the purchase of a new one.

B. Territorial application area

The Article 4, paragraph 1 affirms the principle: “The Common European Sales Law may be used for cross-border contracts.” But what is a cross-border contracts? In the same Article , it is the contract in which one of the parties comes from the territory of EU. It means that the Optional Instrument is not just for EU States, but also for international purchases. The business may propose same contracts to EU consumers and consumers from third States, under the condition that the State recognizes the validity of optional

⁹⁷ Based on the Recommendation 2003/361 of the Commission of 6 May 2003 about the definition of small and medium enterprises.

⁹⁸ V. LEHMANN, “*Auf dem Weg zu einem europäischen Vertragsrecht: Die “Feasibility Study” der Expert Group on European Contract law*”, in *Gemeinschaftsprivatrecht*, in 2011 .



instrument. Therefore, a business could not take advantage of this opportunity to enlarge his activities, for instance, in Swiss and, after all, a Swiss consumer could not use European rules⁹⁹.

In reason of subsidiarity principle, the European Sales Law is not applicable to internal relations like contract between two parties of the same country. The Member States themselves have to decide if giving or not the opportunity to their enterprises to propose opt-in to national costumers. The Article 13, letter a of the Proposal for a Regulation provides expressly for that faculty:

“A Member State may decide to make the Common European Sales Law available for:

(a) contracts where the habitual residence of the traders or, in the case of a contract between a trader and a consumer, the habitual residence of the trader, the address indicated by the consumer, the delivery address for goods and the billing address, are located in that Member State; and/or

(b) contracts where all the parties are traders but none of them is an SME within the meaning of Article 7(2).”

It is possible to wonder if the Member States really will exploit that opportunity. The application only on cross border contract forces the business to use two different laws: national law for national customers and CESL for international customers. So a Member State may decide to open the application of opt-in to develop an internal competition among the national enterprises and giving them the opportunity to reduce costs. On the other side, in the first period, the application on 29th regime risks to appear as a competitor of internal rules. .

Another question arises spontaneous: what will happen if parties out of the application area of CESL decide to use in their contract the rules of this regime? This choice could not be seen as a really “submission”, but as an incorporation to contract of substantial content of opt-in system rules. The “incorporation” has not the same consequences if the contract is still ruled by

⁹⁹ V. GEBAUER, “*Europäisches Vertragsrecht als Option- der Anwendungsbereich, die Wahl und die Lücken Optionalen Instruments in Zeitschrift für Gemeinschaftsprivatrecht(GPR)*.”

national laws. In case of conflict between a disposition of CESL and an imperative rule of national law, logically the internal rule will prevail.

Difficulties of application area of CESL appear clear and they depend above all to what is excluded from that area. The practical utility of optional instrument is based on the reduction of national law application area, because only in that way is possible to create a uniform rules applicable all over EU territory and to reduce costs on imported goods. Or, on the contrary, the optional instrument limits its application area and gives space to national system. From choice of the application area depends the autonomy of opt-in and this autonomy conditions the success of the CESL.

The Proposition for a Regulation shows a model of innovative harmonization for contract law. The optional instrument could build a European juridical identity without destroying national identities. It promotes the convergence on EU law on respecting the particular juridical traditions¹⁰⁰.

Language

The Common European Sales Law has a language relatively simple and comprehensible. The phrases are short. It may doubt that expressions like “anticipated non-performance”¹⁰¹ and “stipulated payment for non-performance”¹⁰² are really easy to understand, colloquial and useful for non-jurists, as asked by Commission¹⁰³. Surely, it is more comprehensible then the EU laws of second level¹⁰⁴ and is certainly more useful to readers without a formal juridical education¹⁰⁵ then the DCFR that gives great importance to

¹⁰⁰ V. FAUVARQUE- COSSON, *European contract law through and beyond pluralism- the case of an optional instrument*, in *Symposium Pluralism and European Private Law*.

¹⁰¹ Articles 8 (2), 116 and 136 CESL.

¹⁰² Article 85 (e) CESL.

¹⁰³ V. LEHMANN, “Auf dem Weg zu einem europäischen Vertragsrecht: Die “Feasibility Study” der Expert Group on European Contract law”, in *Gemeinschaftsprivatrecht*, in 2011, p. 218-220.

¹⁰⁴ CUTTS, *Clarifying Eurolaw*, High Peak, Plain Language Commission, 2001, p. 5-6; TANNER, *Clear, Simple and Precise Legal Drafting: Australian Guidelines Using an EC Directive*, in *Statute Law Review*, 2004, p. 223; ID., *Clear, Simple and Precise Legal Drafting: How Does a European Community Directive Fare? In Statute Law Review*, 2006, p. 150.

¹⁰⁵ For a positive evaluation, See LANDO, *Comments and Questions Relating to the European Commission’s Proposal for a Regulation on a Common European Sales Law*, in *ERPL*, 2011, p. 717, 721: “On whole, the



technical terms, as “ unilateral juridical act”¹⁰⁶. The CESL talks about “unilateral statements or conduct”¹⁰⁷.

As an official Proposal of Commission, the CESL is translated in all the official languages of EU. It is too early to affirm that the different translations are coherent or of the same quality. The DCFR is just in English, but it is suggested to traduce it in other languages. Some translations are starting, a first version in French of the first three books is produced by Professor Ghestin.

Both documents try to avoid the use of words that have a particular meaning in a specific juridical system. This represents a particular challenge for the drafters of DCFR that examined various areas of law, with the exception of contract rules, in which there is not uniformity of definitions among Member States¹⁰⁸. These texts try to invent new artificial terms and in a way inconvenient as “Benevolent intervention in another’s affairs”¹⁰⁹. In contractual law it is more easy to avoid a terminology links to national contract law. For instance, Jacques Herbert shows the difficulties to translate concept of “consequential damage”. The drafters of CESL and of the general dispositions about obligations in DCFR avoid the use of that term. They used expression as “ foreseeability” and “foreseeability of loss”, translated as “ previsibilité du prejudice” (Art. 161 CESL).

It is impossible to square the circle in a multi- linguistic code: it needs to avoid incomprehension that grows from a similarity of meaning or the overlap with existing juridical terms¹¹⁰. On the other side, if the CESL really becomes law, it becomes also the object of Paneuropean juridical speech and its dispositions would be interpret by the EU Court of Justice.

rules in the CESL can be understood by business and consumers, who are not specialists in the area of contract law”.

¹⁰⁶ Article II.-4:301 DCFR.

¹⁰⁷ Article 12 CESL.

¹⁰⁸ DCFR Principles, par. 48. See also IORATTI FERRARI, *Draft Common Frame of Reference and Terminology*, in ANTONILLI e FIORENTINI, *A Factual Assesment of the Draft Common Frame of Reference*, Monaco, 2011, p. 313.

¹⁰⁹ Book V DCFR. ANTONIOLLI and FIORENTINI, p. 413, the terminology of DCFR is “*easily understandable (even if sometimes it may sound odd)*”.

¹¹⁰ Introduction to DCFR, par. 23.



The consumer

One of the main goal of the Common European Sales Law is to ensure an high level of protection to the consumer, to enhance consumer confidence in the internal market and encourage consumers to shop across borders (Article 1, n 3 of the Proposal for Regulation). The rules should maintain or improve the level of protection that consumers enjoy under Union consumer law.

The Commission has a traditional consumer protection approach by regulating transborder and national B2C transactions by means of hard law; this is to say by detailed Directives , which must be transported to the law of the Member States¹¹¹ or s an alternative by regulations separate from B2B contract law¹¹². The Commission continues it in the forthcoming Consumer Policy Strategy 2014-2020 and decides to switch from a minimal standard approach to a full harmonization approach. To implement the Strategy, the Commission adopted a proposal of a Consumer Rights Directive in 2008 (“ 2 horizontal instruments “)¹¹³, which included the scope of the Doorstep Sales Directive¹¹⁴, the Unfair Contract Terms Directive¹¹⁵, the Distant Selling Directive¹¹⁶ and the Sales of Consumer Goods Directive¹¹⁷. But due to resistance of Member States and legal literature¹¹⁸ against full harmonization the Commission failed its goal. The Consumer Right Directive, as finally adopted in October 2011 by Parliament and Council¹¹⁹, only includes the Doorstep Sales Directive and Distant Selling Directive. Exactly at the time when the Commission was aware that the original goal of the proposal of the Consumer Rights Directive would fail due to the resistance of Council and

¹¹¹ This is the traditional approach as foreseen in the present Consumer Policy Strategy 2007-2013, COM (2007) 99.

¹¹² A Regulation was already suggested by REICH, *A European contract law or an EU contract law regulation for consumers?*, in JCP,, 2005, p.383.

¹¹³ COM (2008) 614.

¹¹⁴ Directive 85/577/EEC.

¹¹⁵ Directive 93/13/EEC.

¹¹⁶ Directive 97/7/EC.

¹¹⁷ Directive 1999/44/EC.

¹¹⁸ MICKLITZ and REICH, *The Commission proposal for a Directive on consumer rights*, in CML Rv., 2009, p. 471; ROTT and TERRY, *The proposal for a Directive on consumer rights: no single set of rules*, in ZEuP, 2009, p. 456; TONNER and TAMM, *Der Vorschlag für eine Richtlinie über Verbraucherrechte und seine Auswirkungen auf das nationale Verbraucherrecht*, in JZ, 2008, p. 277.

¹¹⁹ Directive 2011/83/EU.



Parliament and not include core materials of consumer contract law as unfair contract terms and sales law, it launched a green paper, in which it announced an optional instrument for cross-border contracts between consumers and business¹²⁰. This paper combined the debate on European contract law and European consumer contract law. In fact, the Feasibility Study and the proposal for a CESL filled the gaps left by the failure of the CRD proposal.

The basic question of many scholars is: the level of consumer protection offered by legal instrument is sufficient? If it is sufficient, one cannot object to an inclusion of B2C contracts. “Sufficient” means, in this case, that there is no opt-in/opt-out clause, if the level of protection it is not guaranteed by other means of (hard) law. And “sufficient” also means that the level must be high enough.

The drafters considered the question what to do with the existing consumer acquis and decided to integrate relevant Directives into the DCFR. They followed the German reform of the law of obligations of 2001 which integrates the Directives into German Civil Code. This model exists in other Member States, for instance since 1992 in the Dutch Burgerlijke Wetboek. On the contrary, many Member States chose to transpose the consumer Directives in legal acts separate from their civil codes. For example, France¹²¹ and Italy¹²². So the question of integration or separation from the civil code was answered differently in the law of Member States. It is, moreover, surprising that the question was not discussed, but decided in the sense of integration. The FS and the proposal of CESL followed the DCFR insofar.

The CESL is based, as we said, on the studies of acquis group¹²³, and this means that the CESL has the same level of consumer protection of the one of the Group. So, the CESL transfers the existing acquis into its rules without

¹²⁰ COM (2010) 348. More exactly, the optional transborder instruments was only one of a couple of options, but it was obvious, that the Commission intended to follow the optional transborder model. Critical to the Green Paper Tamm, *Die 28. Rechtsordnung der EU: Gedanken zur Einführung grenzüberschreitenden B2C- Vertragsrechts*, in *GPR*, 2010, p. 281.

¹²¹ Code de la Consommation.

¹²² Codice del Consumo.

¹²³ Research Group on existing EC private law, *Principles of the existing EC contract law*, 2009.



raising any standard. This is due to the fact that CESL follows the FS, which is modeled according to DCFR, that follows the Acquis Group, whose only task was to assemble the existing acquis but not to review it with regard to its implementation in Member States¹²⁴.

To understand exactly what is the role of consumer in the CESL firstly, it needs to consider who is the consumer. The Article 2, letter (f) affirm that: *“consumer’ means any natural person who is acting for purposes which are outside that person’s trade, business, craft, or profession”*. Secondly, on considering Articles 8 and 9 of the Proposal, about the way to apply CESL in a contract. When there is a B2C contract, Article 8 establishes a specific achievement between parties. This has to be obtained with a declaration of the consumer, token out of the contract, and with a validation, possibly on a material document (a durable medium) of the enterprise. Article 9 previews for the business that would applies CESL a specific duty to inform the consumer. The Annex II previewed a formula in that sense. The Article 9 considers a more complex process in case that the contract is closed by phone or with any communication medium that cannot give the opportunity to inform previously the consumer about the application of CESL: in that case, the enterprise will send to consumer the “confirm” about the use of this specific contract law; after the confirm, it needs the consent of the consumer. The base of that cautious behave may be the idea that the application of CESL rules to contractual relations forbids the use of national rules, that should be applicable for the Article 6 of Rome I Regulation. Furthermore, properly the Annex II , that has in itself the formula for consumer acceptance of CESL, includes the statement that CESL rules are created to give the maximum protection to consumers. But considering the policy, it is too difficult for CESL to pledge the consumer in an high way¹²⁵.

¹²⁴ KLAUS TONNER, *Contratto e impresa/Europa 1-2012, CESL and consumer contract law: integration or separation?* , p.316.

¹²⁵ LANDO, *Comments and Questions*, cit. p. 772, the discipline of Proposal has a great level of protection for consumer, but not for medium and small business.



On the other side, it is possible to think that, if the CESL has the level of protection that drafters affirmed, its application will be common. Therefore, the choice of CESL cannot be considered against the consumer, especially if the level of protection is the same that guides the Feasibility Study and the Proposal itself. To use CESL in a contract, it would be sufficient a specific duty to inform considered among the others previewed in Article 13 of Annex I¹²⁶.

Structure: Definitions, general principles and Model rules

The guidelines made by the Commission and the Council establish that the instrument of European contract law was destined to be “a set of definitions, general principles and model rules”¹²⁷.

The CESL, as the FS before of it, adopts an integrated approach. It involves both general principles of contract law and many significant definitions. The first part of Chapter 1 underlines three “general principles” of contract law (contractual freedom, good faith, fair dealing, co-operation)¹²⁸. Another basic principle of contract law is the general freedom of form, in the same Chapter¹²⁹. The Proposal avoids any reference to law certainty, substantial justice and efficiency. The Chapter 1 of CESL includes definitions of key concepts as “Not individually negotiated contract terms”, “Termination of a contract”, “Mixed purpose contract” and “Notice”¹³⁰. Moreover, it tries to detail the concept of “reasonableness”¹³¹. The definitions of Chapter 1 are went through with other definitions. For instance, “achievement, proposal and acceptance” – in the chapter of termination of contract¹³². In a vague way,

¹²⁶ CASTRONOVO, *“La Proposta per un Diritto comune europeo della vendita: alcuni quesiti fondamentali”*, Audizione Pubblica, 2012.

¹²⁷ Eu Council, *Press release: 2863rd Council meeting, Justice and Home affairs*, Lussemburgo, 18 Aprile 2008 (8397) p.18. See also EU Commission, *Communication from the Commission to the European Parliament and the Council: a more coherent European Contract Law- an Action Plan*, Bruxelles, 12 February 2003 COM(2003) 68 def.; EU Commission, *Communication from the Commission to the European Parliament and the Council- European Contract Law and the revision of the acquis: the way forward*, Bruxelles, 11 October 2004, COM (2004) 651 def., par2.1.1 e Annex I.

¹²⁸ Artt. 1-3 CESL.

¹²⁹ Artt 6 CESL.

¹³⁰ Artt. 7-10 CESL.

¹³¹ Art. 5 CESL.

¹³² Artt. 30 (2), 31(1) and 34 (1) CESL.

another list of definitions is not included in CESL, but, rather, in Regulation to realize the Proposal. The list defines: contract, good faith, equity, business and consumer, etc. It is not possible to understand why these definitions contained in Article 2 of Regulation to realize Proposal, that defines the words used exclusively in CESL, are not put into CESL itself.

Less practical is the absence of any criteria to classify definitions. It is not possible to use an alphabetic series because is not the same for all official languages; anyway would be useful to organize the definitions in groups with any kind of criteria, for instance: people (business, consumer, debtor, etc.), words of general contract law (damages, loss, good faith, etc.), typical contracts (sales contract, contract out of commercial place) and words link to particular kind of contract (good, digital contents, price, etc.)¹³³.

The approach of CESL is similar to English and German law more than DCFR. In fact, for instance, the Arbitration Act of 1996 that starts:

Section1: General principles.

1. *The provisions of this Part are founded on the following principles, and shall be construed accordingly-*
 - a) *The object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;*
 - b) *The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;*
 - c) ...

The §1626 (1) of BGB is a good example of their legislative technical tradition, they write relevant definitions only where and when definitions are relevant and not in specific lists.

Anyway, English approach to redaction of law texts is quite similar to the one used in the Proposal of Regulation: it puts definitions in a small number of interpretative sections.

¹³³ S. VOGENAUER, *Contratto e impresa/ Europa, Elaborare il diritto europeo dei contratti* .



Innovative, on considering DCFR¹³⁴, is the structure more simple and useful for business and consumer. Part I considers some general dispositions, Parts II and III talks about general contract law, Parts IV and V consider specific contract formulas, Parts VI and VII some remedies and Part VIII about prescription. Some Parts contains many chapters. The organization of chapter in Parts II and III is essentially the same of PECL, that tries to adopt the sequence of the “life” of contract. Compare with national systems, the CESL seems to Sales of Good Act structure of 1979. On the contrary the DCFR has a strong Germanic influence¹³⁵.

The Common European Sales Law is divided in that way¹³⁶:

Part I *'Introductory provisions'* sets out the general principles of contract law which all parties need to observe in their dealings, such as good faith and fair dealing. The principle of freedom of contract also assures parties that, unless rules are explicitly designated as mandatory, for example rules of consumer protection, they can deviate from the rules of the Common European Sales Law.

Part II *'Making a binding contract'* contains provisions on the parties' right to receive essential pre-contractual information and rules on how agreements are concluded between two parties. This part also contains specific provisions which give consumers a right to withdraw from distance and off-premises contracts. Finally it includes provisions on avoidance of contracts resulting from mistake, fraud, threat or unfair exploitation.

Part III *'Assessing what is in the contract'* makes general provisions for how contract terms need to be interpreted in case of doubt. It also contains rules on the content and effects of contracts as well as which contract terms may be unfair and are therefore invalid.

¹³⁴ See V. VOGENAUER, *Common Frame of Reference and UNIDROIT Principles of International Commercial contracts: Coexistence, Competition, or Overkill of Soft Law?*, in ERCL, 2010, p. 161-164.

¹³⁵ V. VOGENAUER, *Besonderheiten des englischen Vertragsrecht*, in TRIEBEL, ILLMER, RINGE, VOGENAUER, ZIEGLER, Frankfurt, 2012, p.33-34.

¹³⁶ *Proposal of Regulation for a Common European Sales Law*, pp. 12-13.

Part IV *'Obligations and remedies of the parties to a sales contract'* looks closely at the rules specific to sales contracts and contracts for the supply of digital content which contain the obligations of the seller and of the buyer. This part also contains rules on the remedies for non-performance of buyers and sellers.

Part V *'Obligations and remedies of the parties to a related services contract'* concerns cases where a seller provides, in close connection to a contract of sale of goods or supply of digital content, certain services such as installation, repair or maintenance. This part explains what specific rules apply in such a situation, in particular what the parties' rights and obligations under such contracts are.

Part VI *'Damages and interest'* contains supplementary common rules on damages for loss and on interest to be paid for late payment.

Part VII *'Restitution'* explains the rules which apply on what must be returned when a contract is avoided or terminated.

Part VIII *'Prescription'* regulates the effects of the lapse of time on the exercise of rights under a contract.

Interpretation

The Common European Sales Law considers the interpretation under two different aspects:

- a) The interpretation of the sense of single Articles, on considering the principles that inspire the texts and;
- b) The interpretation of the contract itself.

The CESL has to be interpreted autonomously and in accordance with its objectives and principles. In case of contrast between two rules inside the CESL or two different interpretations of the same rule, it will prevail the one that is nearest the base principles of the law.



Issues within the scope of the Common European Sales Law, but not expressly settled by it, are to be settled in accordance with the objectives and the principles underlying it and all its provisions, without recourse to the national law that would be applicable in the absence of an agreement to use the Common European Sales Law or to any other law.

Naturally, as any legal system known, in case of discordance between a general and a special rule that is applicable in a particular situation within the scope of the general rule, the special rule will prevail in any case of conflict on the general one¹³⁷.

Too important for the main goal of CESL(to improve cross-border transaction), but also for an high level of consumer protection, it is the interpretation of the contract between parties.

The CESL, in Chapter 6, established general and special rules to interpret a contract in the most sure way. Firstly, a contract is to be interpreted according to the common intention of the parties even if this differs from the normal meaning of the expressions used in it. If a party uses in the contract an expression giving it a specific meaning, and the other party, on the moment of conclusion of contract, was aware, or could be expected to have been aware, of that intention, the expression is to be interpreted in the way intended by the first party. On the other side, if there is not common intention or the other party was not aware, it prevails the general rule affirming that the contract is to be interpreted according to the meaning which a reasonable person would give to it¹³⁸. Surely, the sense of each expression used in the contract may be find only analyzing all the contract and no single parts of it.

For a correct interpretation of contract by parties, but also by thirds who have to analyze contract, it may be regard to relevant matters, listed in Article 59 of CESL:

¹³⁷ Article 4, Section 2, CESL, p.33-34

¹³⁸ Article 58, Chapter 6 "Interpretation" of CESL, p. 60.

- “(a) the circumstances in which it was concluded, including the preliminary negotiations;
- (b) the conduct of the parties, even subsequent to the conclusion of the contract;
- (c) the interpretation which has already been given by the parties to expressions which are identical to or similar to those used in the contract;
- (d) usages which would be considered generally applicable by parties in the same situation;
- (e) practices which the parties have established between themselves;
- (f) the meaning commonly given to expressions in the branch of activity concerned;
- (g) the nature and purpose of the contract; and
- (h) good faith and fair dealing.”

The greatest part of problems are not due to an obscure or not clear clause of contract, usually the conflicts born for the different interpretation that any party gives to it. The CESL, for that reason, has some rules that discipline what kind of interpretation prevails on the others.

First problem, due to the applicability of CESL all over EU Member States, is the different language versions of the contract. None of which versions is stated to be authoritative and where there is discrepancy between versions, the version in which the contract was originally drawn up is to be treated as the authoritative one¹³⁹.

Applying the general principle of effectiveness, an interpretation which renders the contract terms effective ever prevails over one which does no,

¹³⁹ Article 61, Chapter 6 of CESL, p. 61.



because it reasonable to imagine that parties would ‘do’ something with a contract and not leave the reality as it is before the subscription of it¹⁴⁰.

In a B2C contract, there are some particular provisions to protect consumer. In case of doubt about the meaning of a contract term in a contract between a trader and a consumer, the interpretation most favorable to the consumer shall prevail unless the term was supplied by the consumer. Naturally, the trader would derogate to that rule. So, to prevent that possibility, the parties may not, to the detriment of the consumer, exclude the application of this rule or derogate from or vary its effects¹⁴¹.

The doubt about the meaning of a contract term which has not been individually negotiated could exist also in contracts that are not B2C. In that case, it shall prevail the interpretation of the term against who supplied it¹⁴².

The CESL , as autonomous text, defines also what terms may be considered as “not individually negotiated”. For instance, a term supplied by one party is “not individually negotiated” if the other party has not been able to influence its contents. On the contrary, it is impossible to consider as individual negotiation the selection by a party of some terms among a standard list. Naturally, the party who claims that a contract term supplied as part of standard contract terms has since been individually negotiated bears the burden of proving that it has been. The provisions about contract between traders and consumers are particular. Firstly, ever looking on the main goal of CESL that is to protect consumers, the trader bears the burden of proving that a contract term supplied by the trader has been “individually negotiated”. Secondly, if a third party drafted terms of contract, these has been considered as supplied by the trader, unless the consumer introduced them to the contract¹⁴³.

¹⁴⁰ Article 62, Chapter 6 of CESL, p.61.

¹⁴¹ Article 64, Chapter 6 of CESL, p.61.

¹⁴² Article 65, Chapter 6 of CESL, p.61

¹⁴³ Article 7, Section 2, Chapter 1 of CESL, p. 34.

Good faith and fair dealing

The part I of Common European Sales Law introduces the general principles of contract law that have to characterize the deal between parties, as good faith and fair dealing. They mean that parties should have a standard conduct characterized by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question¹⁴⁴.

The principle of good faith and fair dealing should provide guidance on the way parties have to cooperate. As some rules constitute specific manifestations of the general principle of good faith and fair dealing, they should take precedent over the general principle. The general principle should therefore not be used as a tool to amend the specific rights and obligations of parties as set out in the specific rules. The concrete requirements resulting from the principle of good faith and fair dealing should depend, amongst others, on the relative level of expertise of the parties and should therefore be different in business-to-consumer transactions and in business-to-business transactions. In transactions between traders, good commercial practice in the specific situation concerned should be a relevant factor in this context¹⁴⁵.

So any party has, in accordance to this principle, the duty to act with good faith and fair dealing. The Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other party. The application of the Article 2 of CESL, that contains these provisions, could not be excluded or derogated by parties.

The principle influences various Articles of the CESL. For instance, not to disclose to the other party information about goods and related services would be considered against good faith and fair dealing¹⁴⁶, but also if a party not points out a relevant information that causes mistake to the other there is a

¹⁴⁴ Article 2, lett. (b), “Definitions”, Proposal on a Common European Sales Law.

¹⁴⁵ Whereas 31 of the proposal on a Common European Sales Law.

¹⁴⁶ Article 23, Chapter 2 of CESL, p. 43.



violation of this principle¹⁴⁷. Analyzing still the Chapter 5 of CESL about the defects in consent, a contract may be avoided by a party if the other party has induced the conclusion of it by fraudulent non-disclosure of any information which good faith and fair dealing, or any pre-contractual information duty, required that party to disclose. In determining whether good faith and fair dealing require a party to disclose particular information, regard should be had to all the circumstances, including: (a) whether the party had special expertise; (b) the cost to the party of acquiring the relevant information; (c) the ease with which the other party could have acquired the information by other means; (d) the nature of the information; (e) the apparent importance of the information to the other party; and (f) in contracts between traders good commercial practice in the situation concerned.¹⁴⁸

As it affirmed before, the good faith and fair dealing are also relevant matters that may be regarded to interpret a contract. But it is possible to regard to this principle even if it is necessary to provide for a matter which is not explicitly regulated by the agreement of the parties, any usage or practice or any rule of the Common European Sales Law¹⁴⁹.

Moreover the term “good faith” and “fair dealing” may be useful to define other figures. For example, a contract term could be “unfair” if it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing¹⁵⁰.

Information

In relations between a trader and a consumer the trader shall draw the consumer's attention to the intended application of the Common European Sales Law before the agreement by providing the consumer with the information notice in Annex II in a prominent manner. Where the agreement to use the Common European Sales Law is concluded by telephone or by any other means that do not make it possible to provide the consumer with the

¹⁴⁷ Article 48, Chapter 5 of CESL, p.57.

¹⁴⁸ Article 49, Chapter 5 of CESL, p. 57.

¹⁴⁹ Article 68, Chapter 7 of CESL, p. 62.

¹⁵⁰ Article 86 (1) lett. b, Chapter 8 of CESL, p. 71.

information notice, or where the trader has failed to provide the information notice, the consumer shall not be bound by the agreement until the consumer has received the confirmation referred to in Article 8(2)¹⁵¹ accompanied by the information notice and has expressly consented subsequently to the use of the CESL. The information notice referred shall, if given in electronic form, contain a hyperlink or, in all other circumstances, include the indication of a website through which the text of the Common European Sales Law can be obtained free of charge¹⁵².

The ANNEX II has to inform consumers that on the contract will be applied the Common European Sales Law, which is an alternative system of national contract law. The common rules are identical throughout the European Member States and have been designed to provide consumers with a high level of protection. The consumer may agree to the contract on the telephone or in any other way (such as by SMS) that did not allow him to get this notice beforehand. In that situation, the contract will only become valid after the consumer has received this notice and confirmed his consent. Particular “*KEY CONSUMER RIGHTS*” is contained in that *standard information notice*. About information duty, the trader has to give to consumer the important information on the contract, for instance on the product and its price including all taxes and charges and his contact details. The information has to be more detailed when the consumer buys something outside the trader's shop or if he does not meet the trader personally at all, for instance if the consumer buys online or by telephone. He is entitled to damages if this information is incomplete or wrong¹⁵³.

So, a trader who deals with consumer has the duty to give him pre-contractual information. Information has been given in a clear and comprehensible

¹⁵¹ “In relations between a trader and a consumer the agreement on the use of the Common European Sales Law shall be valid only if the consumer's consent is given by an explicit statement which is separate from the statement indicating the agreement to conclude a contract. The trader shall provide the consumer with a confirmation of that agreement on a durable medium.”

¹⁵² Article 9, Chapter 1 of CESL, p. 27.

¹⁵³ ANNEX II of CESL.



manner before the contract is concluded or the consumer is bound by any offer. The information that a trader has to give to a consumer are¹⁵⁴:

(a) the main characteristics of the goods, digital content or related services to be supplied, to an extent appropriate to the medium of communication and to the goods, digital content or related services;

(b) the total price and additional charges and costs: the total price of the goods, digital content or related services, inclusive of taxes, or where the nature of the goods, digital content or related services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated and, where applicable, any additional freight, delivery or postal charges and any other costs or, where these cannot reasonably be calculated in advance, the fact that such additional charges and costs may be payable. In the case of a contract of indeterminate duration or a contract containing a subscription, the total price must include the total price per billing period. Where such contracts are charged at a fixed rate, the total price must include the total monthly price¹⁵⁵;

(c) the identity and address of the trader: the identity of the trader, the geographical address at which the trader is established, the telephone number, fax number and e-mail address of the trader, where available, to enable the consumer to contact the trader quickly and communicate with the trader efficiently¹⁵⁶;

(d) the contract terms: 1) the arrangements for payment, delivery of the goods, supply of the digital content or performance of the related services and the time by which the trader undertakes to deliver the goods, to supply the digital content or to perform the related services, 2) the duration of the contract, the minimum duration of the consumer's obligations or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract, 3) the existence and conditions for deposits or other

¹⁵⁴ Article 13, Chapter 2 of CESL, p. 33.

¹⁵⁵ Article 14, Chapter 2 of CESL, p. 39.

¹⁵⁶ Article 15, Chapter 2 of CESL, p. 40.

financial guarantees to be paid or provided by the consumer at the request of the trader, 4) the existence of relevant codes of conduct and how copies of them can be obtained;¹⁵⁷

(e) the rights of withdrawal: the conditions, time limit and procedures for exercising that right, it also must include the fact that the consumer will have to bear the cost of returning the goods in case of withdrawal and, for distance contracts, that the consumer will have to bear the cost of returning the goods in the event of withdrawal if the goods by their nature cannot be normally returned by post¹⁵⁸;

(f) the existence and the conditions of the trader's after-sale customer assistance, after-sale services, commercial guarantees and complaints handling policy;

(g) the possibility of having recourse to an Alternative Dispute Resolution mechanism to which the trader is subject and the methods for having access to it;

(h) the functionality, including applicable technical protection measures, of digital content; and

(i) any relevant interoperability of digital content with hardware and software which the trader is aware of or can be expected to have been aware of.

Special duty of information exists also for a trader that sells to another trader. This duty are quite different from the other because the level of knowledge between parties is similar and requests a lower level of protection. In that case, the supplier has a duty to disclose by any appropriate means to the other trader any information concerning the main characteristics of the goods, digital content or related services to be supplied which the supplier has or can

¹⁵⁷ Article 16, Chapter 2 of CESL, p.40.

¹⁵⁸ Article 17, Chapter 2 of CESL, pp. 40-41.



be expected to have and which it would be contrary to good faith and fair dealing not to disclose to the other party¹⁵⁹.

Additional duties to provide information are previewed in contracts concluded by electronic means. In that case, the trader provides information about some matters before the other party makes and accepts an offer. The trader indicates previously: (a) the technical steps to be taken in order to conclude the contract; (b) whether or not a contract document will be filed by the trader and whether it will be accessible; (c) the technical means for identifying and correcting input errors before the other party makes or accepts an offer; (d) the languages offered for the conclusion of the contract; (e) the contract terms. For CESL redactors, to ensure a full knowledge of point (e), the traders has to made available the contract terms in alphabetical or other intelligible characters and on a durable medium by means of any support which permits reading, recording of the information contained in the text and its reproduction in tangible form¹⁶⁰. For instance, ever to ensure the protection of consumer, if a trader makes a telephone call to a consumer, with a view to concluding a distance contract, he must, at the beginning of the conversation with the consumer, disclose its identity and, where applicable, the identity of the person on whose behalf it is making the call and the commercial purpose of the call. The information required are ever the same: characteristics of goods, digital contents or related services, identity of trader, price and right to withdrawal. The contract concluded by telephone is valid only if the consumer has signed the offer or has sent his written consent indicating the agreement to conclude a contract¹⁶¹.

There are some remedies for the breach of information duties. In fact, A party which has failed to comply with any duty imposed by Chapter 2 is liable for any loss caused to the other party by such failure¹⁶².

¹⁵⁹ Article 23, Chapter 2 of CESL, p. 43.

¹⁶⁰ Article 24, Chapter 2 of CESL, p. 44.

¹⁶¹ Article 19, Chapter 2 of CESL, p. 42.

¹⁶² Article 29, Chapter 2 of CESL, p. 46.

Offer, acceptance and termination of contract

To conclude a contract is fundamental the encounter of parties' wills. Naturally, to obtain a common consent, there are some offers from a party to the other, till a party accepts all the contract terms proposed without modifying it and it brings to the termination of the contract.

The encounter between offer and acceptance becomes binding in different moment, considering the systems of Member States. The Common European Sales Law adopts the method more coherent with its goals.

A proposal may be considered an offer if it is intended to result in a contract, if it is accepted or if it has sufficient content and certainty for there to be a contract. The offer could be made to one or more specific persons. Unless these circumstances, a proposal made to the public cannot be considered an offer¹⁶³.

The offer may be revoked if the revocation reaches the offeree before the offeree has sent an acceptance or, in cases of acceptance by conduct, before the contract has been concluded. Where a proposal made to the public is an offer, it can be revoked by the same means as were used to make the offer. The offeree can revoke his offer in any moment. In some cases previewed by CESL, the revocation is ineffective, if: a) the offer indicates that it is irrevocable; (b) the offer states a fixed time period for its acceptance; or (c) it was otherwise reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer¹⁶⁴. On the other side, the offeror can reject an offer reached in any moment and the offer lapses¹⁶⁵.

The mere offer is not the base of the contract. In fact, any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer. The CESL indicates specifically an active behave of the party who accepts. The simple inactivity or silence cannot constitute acceptance in itself¹⁶⁶.

¹⁶³ Article 31, Chapter 3 of CESL, p. 47.

¹⁶⁴ Article 32, Chapter 3 of CESL, p. 47-48.

¹⁶⁵ Article 33, Chapter 3 of CESL, p. 48.

¹⁶⁶ Article 34, Chapter 3 of CESL, p. 48.



When the acceptance reaches the offeror, the contract is considered concluded. On the contrary, where the offer is accepted by conduct, the contract is concluded when notice of the conduct reaches the offeror. On considering, the virtue of offer, the practices which the parties have established between themselves, or the usage, the offeree may accept the offer by conduct without notice to the offeror, the contract is concluded when the offeree begins to act¹⁶⁷. Naturally, the offeror cannot maintain the proposal valid for a long time and he can establish a time limit. The acceptance is effective only if it is reached before the deadline. Secondly, where no time limit has been fixed by the offeror, the acceptance is effective only if it reaches the offeror within a reasonable time after the offer was made. As we said before, the offer may be accepted by doing an act without notice to the offeror, the acceptance is effective only if the act is done within the time for acceptance fixed by the offeror or, if no such time is fixed, within a reasonable time¹⁶⁸. The CESL previewed also late acceptance that are effective if without undue delay the offeror informs the offeree that the offeror is treating it as an effective acceptance. The offeror may receive a late acceptance by letter or other communications, but it is effective as an acceptance unless, without undue delay, the offeror informs the offeree that the offer has lapsed¹⁶⁹.

The offeree's replies which states or implies additional or different contract terms that materially alter the terms of the offer of the offer is a rejection and a new offer. The different terms may be about: price, payment, quality and quantity of goods, place and time of delivery, extent of one's party liability to the other or the settlement of disputes that presumed to alter the terms of offer materially. Furthermore, a reply which states or implies additional or different contract terms is always a rejection of the offer if: (a) the offer expressly limits acceptance to the terms of the offer; (b) the offeror objects to the additional or different terms without undue delay; or (c) the offeree makes the acceptance conditional upon the offeror's assent to the additional or

¹⁶⁷ Article 35, Chapter 3 of CESL, p. 48.

¹⁶⁸ Articles 36-37, Chapter 3 of CESL, p. 48.

¹⁶⁹ Article 37 (2), Chapter 3 of CESL, p. 49.

different terms, and the assent does not reach the offeree within a reasonable time. In reverse, a reply which gives a definite assent to an offer is an acceptance even if it states or implies additional or different contract terms, provided that these do not materially alter the terms of the offer. The additional or different terms then become part of the contract¹⁷⁰.

Where the parties have reached agreement except that the offer and acceptance refer to conflicting standard contract terms, a contract is nonetheless concluded. The standard contract terms are part of the contract to the extent that they are common in substance. On the contrary, no contract is concluded if one party: (a) has indicated in advance, explicitly, and not by way of standard contract terms, an intention not to be bound by a contract on the basis of paragraph 1; or (b) without undue delay, informs the other party of such an intention¹⁷¹.

So, a contract is concluded if:

- (a) the parties reach an agreement;
- (b) they intend the agreement to have legal effect; and
- (c) the agreement, supplemented if necessary by rules of the Common European Sales Law, has sufficient content and certainty to be given legal effect.

Notice

When a party has a particular purpose about offer, acceptance or content of contract, has to inform the other party. The Common European Sales Law prescribes particular rules to regulate this exchange of information. The term 'notice' includes the communication of any statement which is intended to have legal effect or to convey information for a legal purpose.

¹⁷⁰ Article 38, Chapter 3 of CESL, p. 49.

¹⁷¹ Article 39, Chapter 3 of CESL, p. 49-50.



The party may freely establish what means use to inform the other party. Naturally, it has to be appropriate to circumstances. For example, to accept an offer reached by e-mail or any other electronic means, it is better to use ever an electronic means and not a simple letter.

The notice becomes effective when it reaches the addressee, unless it provides for a delayed effect. But what means “to reach the addressee”? It considers the moment when the other party materially reads the notice? Or it is sufficient that the notice reaches the destination? Or the moment in which the party sends the notice? Any legal system among EU Member States adopts the means that may appear more appropriate than the other or the means more coherent with its system. The CESL poses some rules to avoid disagreement between parties, but also to regulate in an uniform way this instrument. The text establishes that the notice reaches the addressee:

- (a) when it is delivered to the addressee;
- (b) when it is delivered to the addressee’s place of business or, where there is no such place of business or the notice is addressed to a consumer, to the addressee’s habitual residence;
- (c) in the case of a notice transmitted by electronic mail or other individual communication, when it can be accessed by the addressee; or
- (d) when it is otherwise made available to the addressee at such a place and in such a way that the addressee could be expected to obtain access to it without undue delay.

If the revocation of an offer reaches the addressee before or at the same time as the notice of offer, it has no effects.

Moreover, ever to forbid a detriment of consumer protection, in B2C contract, the party may not exclude the application of the principles previewed for the notice¹⁷².

¹⁷² Article 10, Chapter 1 of CESL, p. 36.

Withdraw

The purchase of a good by a consumer is not protect just in the first period with rules about information duties that describes in a complete way how the trader has to inform the consumer. The Common European Sales Law protect the consumer also in the period immediately after the purchase.

The consumer, in fact, has fourteen days to withdraw the contract without giving any reason and without any additional cost, a part the ones previewed by Article 45 CESL. The consumer may withdraw from a contract also if he/she makes an irrevocable offer, the trader accepts and this lead to the conclusion of a contract. This right is valid to withdraw from¹⁷³:

- (a) a distance contract;
- (b) an off-premises contract, provided that the price or, where multiple contracts were concluded at the same time, the total price of the contracts exceeds EUR 50 or the equivalent sum in the currency agreed for the contract price at the time of the conclusion of the contract.

Inspired by legal systems of Member States, as the Italian one, this right cannot be applied to all contacts, but only to contracts that not stand surety for the free choice of the consumer or to contracts which imply medium-high costs for the consumer. So, are excluded: (a) a contract concluded by means of an automatic vending machine or automated commercial premises; (b) a contract for the supply of foodstuffs, beverages or other goods which are intended for current consumption in the household and which are physically supplied by the trader on frequent and regular rounds to the consumer's home, residence or workplace; (c) a contract for the supply of goods or related services for which the price depends on fluctuations in the financial market which cannot be controlled by the trader; (d) a contract for the supply of goods or digital content which are made to the consumer's specifications, or are clearly personalized;

¹⁷³ Article 40, Chapter 4 of CESL, p. 51.



(e) a contract for the supply of goods which are liable to deteriorate rapidly; (f) a contract for the supply of alcoholic beverages, the price of which has been agreed upon at the time of the conclusion of the sales contract; (g) a contract for the sale of a newspaper, periodical or magazine with the exception of subscription contracts for the supply of such publications; (h) a contract concluded at a public auction; and (i) a contract for catering or services related to leisure activities which provides for a specific date or period of performance. There are also other situations in which, for the nature of goods, is not possible to withdraw from a contract, for instance contracts on goods sealed, have been unsealed by the consumer and are not then suitable for return due to health protection or hygiene reasons or on goods inseparably mixed with other items after delivery¹⁷⁴.

During the period of fourteen days, the consumer may withdraw in any moment. Naturally the choice to withdraw has to be noticed to trader. The CESL, to assist the consumer, has in itself, in Appendix 2, a “Model withdrawal form”, but the consumer may use any other unequivocal statement setting out the decision to withdraw.

“Appendix 2

Model withdrawal form

(complete and return this form only if you wish to withdraw from the contract)

– *To [here the trader’s name, geographical address and, where available, his fax number*

and e-mail address are to be inserted by the trader]:

– *I/We* hereby give notice that I/We* withdraw from my/our* contract of sale of the following goods*/for the supply of the following digital content/for the provision of the following related service**

¹⁷⁴ See note 173.



- *Ordered on*/received on**
- *Name of consumer(s)*
- *Address of consumer(s)*
- *Signature of consumer(s) (only if this form is notified on paper)*
- *Date*

** Delete as appropriate.*¹⁷⁵

The Appendix for the withdrawal right is not something totally new, because a standard model was included as an Annex also in the ‘Directive for maximal harmonization in multi-property’¹⁷⁶ contract’. The Appendix 2(this is the new element) is a facultative option, thought to help the consumer that would withdraw and describes the obligations that arise with the application of this right. The Appendix II, but more the Appendix I, facilitates also the business that has to prove the respect of information duties. In fact, to give to consumer the standard model, contained in Appendix I, is a way to inform the consumer about a fundamental right. This standard model helps also the unification of the behaves among EU Member States.

The trader should give the opportunity to consumer to withdraw electronically on his trading website. If the consumer does it, the trader has a duty to communicate to the consumer an acknowledgement of receipt of such a withdrawal on a durable medium without delay. In any case, trader is liable for any loss caused to the other party by a breach of this duty. The burden of

¹⁷⁵ Appendix 2 of CESL, p. 113.

¹⁷⁶ MALAGOLI, *La direttiva 2008/122/CEE sulla multiproprietà*, in *Contratto e impresa/ Europa*, 2009; CALEO, *Diritto di recesso, divieto di acconti e prospettive applicative nella dir. 2008/122/CEE in materia di contratti di multiproprietà*, in *Obbl. e contr.*, 2009, p. 917; and the same author, *Finalità, ambito applicativo e obblighi e obblighi informativi nella Dir. 2008/122/CEE in materia di contratti di multiproprietà*, in *Obbl. e contr.*, 2009; DOWNES, *More about Timeshare: A Revised Directive or a Regulation? Incidence of Other Instruments of Consumer Protection*, in *ERPL*, 2008, pp. 607-625.



proof that the right of withdrawal has been exercised in accordance with the principles of CESL bears on the consumer¹⁷⁷.

The withdrawal period of fourteen days starts from:

(a) the day on which the consumer has taken delivery of the goods in the case of a sales contract;

(b) the day on which the consumer has taken delivery of the last item in the case of a contract for the sale of multiple goods ordered by the consumer in one order and delivered separately;

(c) the day on which the consumer has taken delivery of the last lot or piece in the

case of a contract where the goods consist of multiple lots or pieces;

(d) the day on which the consumer has taken delivery of the first item where the

contract is for regular delivery of goods during a defined period of time;

(e) the day of the conclusion of the contract in the case of a contract for related services concluded after the goods have been delivered;

(f) the day when the consumer has taken delivery of the tangible medium in accordance with point (a) in the case of a contract for the supply of digital content;

(g) the day of the conclusion of the contract in the case of a contract where the digital content is not supplied on a tangible medium.

The period of fourteen days may be extended till one year from the end of the ordinary period of withdrawal if the trader does not respect the duty of information contained in Article 17 of CESL. In addition, if the trader, in a second moment, provides the consumer with the information required by

¹⁷⁷ See note 175.

CESL, the period of fourteen days starts from the moment that the consumer receives the information¹⁷⁸.

The main effect of withdrawal is to terminate the obligation of both parties that stipulate the contract. So, none party has to perform contract and , in cases where an offer was made by the consumer, to conclude contract.

In the event of withdrawal, it arises obligations of the trader and of the consumer.

The trader must reimburse all payments received from the consumer, including the costs of delivery without undue delay and in any event not later than fourteen days from the day on which the trader is informed of the consumer's decision to withdraw from the contract. The trader must carry out such reimbursement using the same means of payment as the consumer used for the initial transaction, unless the consumer has expressly agreed otherwise and provided that the consumer does not incur any fees as a result of such reimbursement. If the consumer has expressly opted for a type of delivery other than the least expensive type of standard delivery offered by the trader, the latter is not required to reimburse the consumer. In the case of a contract for the sale of goods, the trader may withhold the reimbursement until it has received the goods back, or the consumer has supplied evidence of having sent back the goods. In an off-premises contract, where the goods have been delivered to the consumer's home at the time of the conclusion of the contract, the trader must collect the goods at its own cost if the goods by their nature cannot be normally returned by post¹⁷⁹.

On the other side, the consumer must send back the goods or hand them over to the trader or to a person authorized by the trader without undue delay and in any event not later than fourteen days from the day on which the consumer communicates the decision to withdraw from the contract to the trader, unless the trader has offered to collect the goods. This deadline is met if the consumer sends back the goods before the period of fourteen days has expired. The

¹⁷⁸ Article 42, Chapter 4 of CESL, p. 53.

¹⁷⁹ Article 44, Chapter 4 of CESL, p. 54.



consumer, also, must bear the direct costs of returning the goods, unless the trader has agreed to bear those costs or the trader failed to inform the consumer that the consumer has to bear them. The consumer has also any responsibility for any diminished value of the goods, but only where that results from handling of the goods in any way other than what is necessary to establish the nature, characteristics and functioning of the goods. He, on the contrary, is not responsible for diminished value where the trader has not provided all the information about the right to withdraw.

If the consumer exercises the right of withdrawal after having made an express request for the provision of related services to begin during the withdrawal period, he must pay to the trader an amount which is in proportion to what has been provided before the consumer exercised the right of withdrawal, in comparison with the full coverage of the contract. The proportionate amount to be paid by the consumer to the trader must be calculated on the basis of the total price agreed in the contract. Where the total price is excessive, the proportionate amount must be calculated on the basis of the market value of what has been provided¹⁸⁰.

Naturally, the use of the good during the withdrawal period is not borne by the consumer. Therefore, the consumer is not liable for:

(a) the provision of related services, in full or in part, during the withdrawal period, where:

(i) the trader has failed to provide information in accordance with Article 17(1) and (3); or

(ii) the consumer has not expressly requested performance to begin during the withdrawal period in accordance with Article 18(2) and Article 19(6);

(b) for the supply, in full or in part, of digital content which is not supplied on a tangible medium where:

¹⁸⁰ Article 45, Chapter 4 of CESL, p. 54- 55.

(i) the consumer has not given prior express consent for the supply of digital content to begin before the end of the period of withdrawal referred to in Article 42(1);

(ii) the consumer has not acknowledged losing the right of withdrawal when giving the consent; or

(iii) the trader has failed to provide the confirmation in accordance with Article 18(1) and Article 19(5)¹⁸¹.

Where the consumer withdraws from a distance or an off-premises contract any ancillary contracts are automatically terminated at no cost to the consumer, excepts for the cost described before. An ancillary contract is, as the CESL specifies, a contract by which a consumer acquires goods, digital content or related services in connection to a distance contract or an off-premises contract and these goods, digital content or related services are provided by the trader or a third party on the basis of an arrangement between that third party and the trader¹⁸².

In conclusion, as many rules contained in CESL, these have mandatory nature, or rather the parties, on detriment of consumer, may not exclude the application of them or derogate from or vary their effects¹⁸³.

Defects in consent

A part from the right of withdrawal, a party may avoid a contract after the period of fourteen days. It is fundamental for the right conclusion of any achievement, especially of the contract, that the party expresses it with his own free will. So, any party may avoid a contract for:

- a) Mistake;
- b) Fraud;
- c) Threats;

¹⁸¹ See note 179.

¹⁸² Article 46, Chapter 4 of CESL, p. 55.

¹⁸³ Article 47, Chapter 4 of CESL, p. 56.



d) Unfair exploitation;

The last figure is not typical of any system of Member States, it is characteristic of EU legal system.

Mistake

A party can avoid a contract for mistake of fact or law existing when the contract was concluded, if:

(a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different contract terms and the other party knew or could be expected to have known this; and

(b) the other party:

(i) caused the mistake;

(ii) caused the contract to be concluded in mistake by failing to comply with any pre-contractual information duty;

(iii) knew or could be expected to have known of the mistake and caused the contract to be concluded in mistake by not revealing the information, provided that good faith and fair dealing would have required a party aware of the mistake to point it out; or

(iv) made the same mistake.

It is treated as a mistake also an inaccuracy in the expression or transmission of a statement. This mistake is ascribed to the person who made or sent the statement.

Sometimes the risk of a mistake may be assumed by a party. In that case, the party cannot avoid the contract for mistake, also if the circumstances should be borne¹⁸⁴.

¹⁸⁴ Article 48, Chapter 5 of CESL, p. 57.

Fraud

The possibility to avoid a contract is given to a party if it has been induced to conclude the contract by fraudulent misrepresentation, whether by words or conduct, or fraudulent non-disclosure of any information which good faith and fair dealing, or any pre-contractual information duty, required by party to disclose.

Misrepresentation may be considered fraudulent just if it is made with knowledge or belief that the representation is false, or recklessly as to whether it is true or false, and is intended to induce the recipient to make a mistake. e. Non-disclosure is fraudulent if it is intended to induce the person from whom the information is withheld to make a mistake.

The non-disclosure of any information is not easy to analyze, especially because requires the absence of good faith and fair dealing. For this reason, the CESL fixes some circumstances that would help the interpret to understand if there is or not the good faith and the fair dealing into the non-disclosure of information. The circumstances are:

- (a) if the party had special expertise;
- (b) the cost to the party of acquiring the relevant information;
- (c) the ease with which the other party could have acquired the information by other means;
- (d) the nature of the information;
- (e) the apparent importance of the information to the other party; and
- (f) in contracts between traders, the application of good commercial practice in the situation concerned¹⁸⁵.

¹⁸⁵ Article 49, Chapter 5 of CESL, pp. 57-58.



Threats

A party may avoid a contract if the other party has induced the conclusion of the contract by the threat of wrongful, imminent and serious harm, or of a wrongful act¹⁸⁶.

Unfair exploitation

At the time of the conclusion of contract, a party may also avoid the contract if:

(a) that party was dependent on, or had a relationship of trust with, the other party, was in economic distress or had urgent needs, was improvident, ignorant, or inexperienced; and

(b) the other party knew or could be expected to have known this and, for the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or unfair advantage¹⁸⁷.

As any act of or about the contract, the avoidance is effected only by notice to the other party. the deadline to effective the avoidance depends on the defect of consent (six months in case of mistake, one year in case of fraud, threats and unfair exploitation). But the starting moment is ever the same: after the avoiding party becomes aware of the relevant circumstances or becomes capable of acting freely¹⁸⁸.

Where the party who has the right to avoid a contract confirms it, expressly or impliedly, after becoming aware of the relevant circumstances, or becoming capable of acting freely, that party may no longer avoid the contract¹⁸⁹.

A contract is valid until the party avoids it. But, once avoided, it is retrospectively invalid from the beginning. The avoidance may ,also, concern only certain contract terms. In that case, the effect of avoidance is limited to those terms unless it is unreasonable to uphold the remainder of the contract.

The party that is subjected to avoidance has the right to the return of

¹⁸⁶ Article 50, Chapter 5 of CESL, p. 58.

¹⁸⁷ Article 51, Chapter 5 of CESL, p. 58.

¹⁸⁸ Article 52, Chapter 5 of CESL, p. 58.

¹⁸⁹ Article 53, Chapter 5 of CESL, p. 59.

whatever has been transferred or supplied under a contract which has been avoided, or to a monetary equivalent. The return is regulated by the rules of restitution contained in Chapter 17 of CESL¹⁹⁰.

Moreover, the party who has the right to avoid a contract or also who had such a right before it was lost by the effect of the time limits or confirmation is entitled, whether or not the contract is avoided, to damages from the other party for loss suffered as a result of the mistake, fraud, threats or unfair exploitation, provided that the other party knew or could be expected to have known of the relevant circumstances¹⁹¹.

The remedies previewed for fraud, threats and unfair exploitation cannot be directly or indirectly excluded or restricted, above all in relations between a trader and a consumer to the detriment of consumer. The choice of remedies is entirely referred to the party that has the right to avoid, that can choose one of the remedies for non-performance¹⁹².

Contents and effects

The contract terms may derive from¹⁹³:

- (a) the agreement of the parties, subject to any mandatory rules of the Common European Sales Law;
- (b) any usage or practice by which parties are bound by virtue of Article 67;
- (c) any rule of the Common European Sales Law which applies in the absence of an agreement of the parties to the contrary; and
- (d) any contract term implied by virtue of Article 68.

The derivation form usage and practice is common in contract between traders. In these contract, the parties are bound by any usage which they have agreed

¹⁹⁰ Article 54, Chapter 5 of CESL, p. 59.

¹⁹¹ Article 55, Chapter 5 of CESL, p. 59.

¹⁹² Articles 56-57, Chapter 5 of CESL, p. 59.

¹⁹³ Article 66, Chapter 7 of CESL, p. 62.



should be applicable and by any practice they have established between themselves. The parties are bound by a usage which would be considered generally applicable by traders in the same situation as the parties. In a conflict between an usage or a practice and a individually negotiated term or any mandatory rules contained in CESL, the negotiated term or the mandatory rule will prevail¹⁹⁴.

The matter contained in a contract may derives, as we said, from an achievement between parties, usages and practices or any rule of CESL. But some contract terms may not be expressed, in other words, they may be implicit. To find and understand these terms, it has to regard in particular to:

- (a) the nature and purpose of the contract;
- (b) the circumstances in which the contract was concluded; and
- (c) good faith and fair dealing.

The parties, on the other side, may deliberately leave a matter unregulated, accepting that one or other party would bear the risk¹⁹⁵.

The trader could make a statement also before the contract is concluded, personally to the other party or publicly, about the characteristics of what is to be supplied by that trader under the contract. Naturally, a statement made by a person engaged in advertising or marketing for the trader is regarded as being made by the trader. Anyway, the statement made in these circumstances is incorporated as a term of the contract, unless:

- (a) the other party was aware, or could be expected to have been aware when the contract was concluded that the statement was incorrect or could not otherwise be relied on as such a term; or
- (b) the other party's decision to conclude the contract could not have been influenced by the statement.

¹⁹⁴ Article 67, Chapter 7 of CESL, p. 62.

¹⁹⁵ Article 68, Chapter 7 of CESL, pp. 62-63.

Particular is the case in which the other party is a consumer. In effect, a public statement made by or on behalf of a producer or other person in earlier links of the chain of transactions leading to the contract is regarded as being made by the trader unless the trader, at the time of conclusion of the contract, did not know and could not be expected to have known of it¹⁹⁶.

Contract terms may be individually negotiated by parties before the conclusion of the contract itself. To define an “individually negotiated contract term”, the redactors of CESL use the technique of describing the opposite concept. Article 7 CESL previews “A contract term is not individually negotiated if it has been supplied by one party and the other party has not been able to influence its content.” Contract terms supplied by one party and not individually negotiated, may be invoked against the other party only if the other party was aware of them, or if the party supplying them took reasonable steps to draw the other party's attention to them, before or when the contract was concluded. In relations between consumer and trader, a term cannot be considered as individually negotiated if the contract term is not sufficiently brought to the consumer's attention by a mere reference to it in a contract document, also if the consumer signs this document¹⁹⁷.

The protection of consumer is fundamental even if a contract provides additional payments. Indeed, a contract term which obliges the consumer to make any payment in addition to the remuneration stated for the trader's main contractual obligation, in particular where it has been incorporated by the use of default options which the consumer is required to reject in order to avoid the additional payment, is not binding on the consumer unless, before the consumer is bound by the contract, the consumer has expressly consented to the additional payment. If the consumer has made the additional payment, the consumer may recover it¹⁹⁸.

¹⁹⁶ Article 69, Chapter 7 of CESL, p. 63.

¹⁹⁷ Article 70, Chapter 7 CESL, p. 63.

¹⁹⁸ Article 71, Chapter 7 CESL, p. 64.



Other particular clause previewed in CESL is the merger clause. Where a contract in writing includes a term stating that the document contains all contract terms (a merger clause), any prior statements, undertakings or agreements which are not contained in the document do not form part of the contract. Unless the contract otherwise provides, a merger clause does not prevent the parties' prior statements from being used to interpret the contract. As in other occasion, to protect the consumer, in contract between traders and consumers, the consumer is not bound by a merger clause¹⁹⁹.

One of the most important clause is the one that establishes the price. Its determination may derive by unilateral decision of a party or of a third person. In case of determination unilateral by a party of the price, but also of other clauses, if the party's determination is grossly unreasonable, it is substituted by the price normally charged or term normally used in comparable circumstances at the time of the conclusion of the contract or, if no such price or term is available, a reasonable price or a reasonable term²⁰⁰. This particular price or term is also applicable where the amount of the price payable under a contract cannot be otherwise determined and in the absence of any indication to the contrary²⁰¹. Where a third party is to determine the price or any other contract term and cannot or will not do so, a court may, unless this is inconsistent with the contract terms, appoint another person to determine it. For court, it is intended also an arbitral tribunal. Naturally, if the price established by thirds is grossly unreasonable, it is substituted by a price normally charged or a term normally used²⁰².

The language used to the conclusion of the contract will be the same of the one used for communications relating to the contract or the rights or obligations arising from it cannot be otherwise determined²⁰³.

¹⁹⁹ Article 72, Chapter 7 CESL, p. 64.

²⁰⁰ Article 74, Chapter 7 CESL, p. 64.

²⁰¹ Article 73, Chapter 7 CESL, p. 64.

²⁰² Article 75, Chapter 7 CESL, p. 64.

²⁰³ Article 76, Chapter 7 CESL, p. 65.

The contractual obligations may involve continuous and repeated performances, although the contract terms do not stipulate when the contractual relationship is to end or provide for it to be terminated upon giving notice to that effect. The contract may be terminated by either party by giving a reasonable period of notice not exceeding two months²⁰⁴.

Usually, in a contract, the parties obliges one to each other, for instance, a party has to pay the price and the other party has to give a good to the first. Sometimes it may happens that the contract is in favor of third parties. Therefore, the contracting parties may, by the contract, confer a right on a third party. The third party need not be in existence or identified at the time the contract is concluded but needs to be identifiable. The contract determines the nature and content of the third party's right. This right may take the form of an exclusion or limitation of the third party's liability to one of the contracting parties. When one of the contracting parties is bound to render a performance to the third party under the contract, then:

- (a) the third party has the same rights to performance and remedies for nonperformance as if the contracting party was bound to render the performance under a contract with the third party; and
- (b) the contracting party who is bound may assert against the third party all defences which the contracting party could assert against the other party to the contract.

The third party may reject a right conferred upon them by notice to each contracting parties, if that is done before it has been expressly or impliedly accepted. On such rejection, the right is treated as never having accrued to the third party. The contracting parties may remove or modify the contract term conferring the right if this is done before either of them has given the third party notice that the right has been conferred²⁰⁵.

²⁰⁴ Article 77, Chapter 7 CESL, p. 65.

²⁰⁵ Article 78, Chapter 7 CESL, p.65-66.



Unfair contract terms

In a contract between a trader and a consumer, a contract term supplied by the trader which has not been individually negotiated is unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, contrary to good faith and fair dealing. To affirm the unfairness of a contract term, it is to be regarded to:

- (a) whether the trader complied with the duty of transparency;
- (b) the nature of what is to be provided under the contract;
- (c) the circumstances prevailing during the conclusion of the contract;
- (d) to the other contract terms; and
- (e) to the terms of any other contract on which the contract depends²⁰⁶.

Some contract terms are considered always unfair (black list), as the ones that:

- (a) exclude or limit the liability of the trader for death or personal injury caused to the consumer through an act or omission of the trader or of someone acting on behalf of the trader;
- (b) exclude or limit the liability of the trader for any loss or damage to the consumer caused deliberately or as a result of gross negligence;
- (c) limit the trader's obligation to be bound by commitments undertaken by its authorized agents or make its commitments subject to compliance with a particular condition the fulfilment of which depends exclusively on the trader;
- (d) exclude or hinder the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to an arbitration system not foreseen generally in legal provisions that apply to contracts between a trader and a consumer;

²⁰⁶ Article 83, Chapter 8 CESL, p. 68.

- (e) confer exclusive jurisdiction for all disputes arising under the contract to a court for the place where the trader is domiciled unless the chosen court is also the court for the place where the consumer is domiciled;
- (f) give the trader the exclusive right to determine whether the goods, digital content or related services supplied are in conformity with the contract or gives the trader the exclusive right to interpret any contract term;
- (g) provide that the consumer is bound by the contract when the trader is not;
- (h) require the consumer to use a more formal method for terminating the contract within the meaning of Article 8 than was used for conclusion of the contract;
- (i) grant the trader a shorter notice period to terminate the contract than the one required of the consumer;
- (j) oblige the consumer to pay for goods, digital content or related services not actually delivered, supplied or rendered;
- (k) determine that non-individually negotiated contract terms within the meaning of Article 7 prevail or have preference over contract terms which have been individually negotiated²⁰⁷.

There are some other contract terms that are presumed to be unfair (Grey list). Its object or effect has to be:²⁰⁸

- (a) restrict the evidence available to the consumer or impose on the consumer a burden of proof which should legally lie with the trader;
- (b) inappropriately exclude or limit the remedies available to the consumer against the trader or a third party for non-performance by the trader of obligations under the contract;

²⁰⁷ Article 84, Chapter 8 CESL, p. 68-69.

²⁰⁸ Article 85, Chapter 8 CESL, pp. 69-71.



(c) inappropriately exclude or limit the right to set-off claims that the consumer may have against the trader against what the consumer may owe to the trader;

(d) permit a trader to keep money paid by the consumer if the latter decides not to conclude the contract, or perform obligations under it, without providing for the consumer to receive compensation of an equivalent amount from the trader in the reverse situation;

(e) require a consumer who fails to perform obligations under the contract to pay a

disproportionately high amount by way of damages or a stipulated payment for nonperformance;

(f) entitle a trader to withdraw from or terminate the contract on a discretionary basis without giving the same right to the consumer, or entitle a trader to keep money paid for related services not yet supplied in the case where the trader withdraws from or terminates the contract;

(g) enable a trader to terminate a contract of indeterminate duration without reasonable notice, except where there are serious grounds for doing so;

(h) automatically extend a contract of fixed duration unless the consumer indicates otherwise, in cases where contract terms provide for an unreasonably early deadline for giving notice;

(i) enable a trader to alter contract terms unilaterally without a valid reason which is specified in the contract; this does not affect contract terms under which a trader reserves the right to alter unilaterally the terms of a contract of indeterminate duration, provided that the trader is required to inform the consumer with reasonable notice, and that the consumer is free to terminate the contract at no cost to the consumer;

(j) enable a trader to alter unilaterally without a valid reason any characteristics of the goods, digital content or related services to be provided or any other features of performance;

(k) provide that the price of goods, digital content or related services is to be determined at the time of delivery or supply, or allow a trader to increase the price without giving the consumer the right to withdraw if the increased price is too high in relation to the price agreed at the conclusion of the contract; this does not affect price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described;

(l) oblige a consumer to perform all their obligations under the contract where the trader fails to perform its own;

(m) allow a trader to transfer its rights and obligations under the contract without the consumer's consent, unless it is to a subsidiary controlled by the trader, or as a result of a merger or a similar lawful company transaction, and such transfer is not likely to negatively affect any right of the consumer;

(n) allow a trader, where what has been ordered is unavailable, to supply an equivalent without having expressly informed the consumer of this possibility and of the fact that the trader must bear the cost of returning what the consumer has received under the contract if the consumer exercises a right to reject performance;

(o) allow a trader to reserve an unreasonably long or inadequately specified period to accept or refuse an offer;

(p) allow a trader to reserve an unreasonably long or inadequately specified period to perform the obligations under the contract;

(q) inappropriately exclude or limit the remedies available to the consumer against the trader or the defences available to the consumer against claims by the trader;



(r) subject performance of obligations under the contract by the trader, or subject other beneficial effects of the contract for the consumer, to particular formalities that are not legally required and are unreasonable;

(s) require from the consumer excessive advance payments or excessive guarantees of performance of obligations;

(t) unjustifiably prevent the consumer from obtaining supplies or repairs from third party sources;

(u) unjustifiably bundle the contract with another one with the trader, a subsidiary of the trader, or a third party, in a way that cannot be expected by the consumer;

(v) impose an excessive burden on the consumer in order to terminate a contract of indeterminate duration;

(w) make the initial contract period, or any renewal period, of a contract for the protracted provision of goods, digital content or related services longer than one year, unless the consumer may terminate the contract at any time with a termination period of no more than 30 days.

In a contract between traders, a contract term is considered unfair just in two cases, if²⁰⁹:

(a) it forms part of not individually negotiated terms; and

(b) it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.

When assessing the unfairness of a contract term in B2B contract, it regard is to be had to:

(a) the nature of what is to be provided under the contract;

(b) the circumstances prevailing during the conclusion of the contract;

²⁰⁹ Article 86, Chapter 8 CESL, p. 71.

(c) the other contract terms; and

(d) the terms of any other contract on which the contract depends.

A contract term, in a B2C and B2B contract, which is supplied by one party and which is unfair is not binding on the other party. Where the contract can be maintained without the unfair contract term, the other contract terms remain binding. If the contract may be maintained without the unfair contract term, the other contract terms remain binding²¹⁰.

Obligations and remedies of the parties to a sales contract or a contract for the supply of digital content

Firstly, a non-performance of an obligation is any failure to perform that obligation, also if the non-performance is excused, and includes:

- (a) non-delivery or delayed delivery of the goods;
- (b) non-supply or delayed supply of the digital content;
- (c) delivery of goods which are not in conformity with the contract;
- (d) supply of digital content which is not in conformity with the contract;
- (e) non-payment or late payment of the price; and
- (f) any other purported performance which is not in conformity with the contract.

The non-performance of an obligation by one party is fundamental if it substantially deprives the other party of what that party was entitled to expect under the contract, unless at the time of conclusion of the contract the nonperforming party did not foresee and could not be expected to have foreseen

²¹⁰ Article 79, Chapter 8 CESL, p. 67.



that result; or it is of such a nature as to make it clear that the non-performing party's future performance cannot be relied on²¹¹.

The non-performance may be due also for extraordinary events or for any impediments. In those cases, the party's non-performance is excused if it is due to an impediment beyond that party's control and if that party could not be expected to have taken the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences. Where the impediment is only temporary the non-performance is excused for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the other party may treat it as such. The party that cannot perform has the duty to notice the impediment to the other party and its effect on the ability to perform reaches the other party without undue delay after the first party becomes, or could be expected to have become, aware of these circumstances. The other party is entitled to damages for any loss resulting from the breach of this duty²¹².

Performance could become more onerous and the party has, indeed, to perform it, whether because the cost of performance has increased or because the value of what is to be received in return has diminished. In case of a performance becomes too onerous for an exceptional of circumstances, the parties have the duty to enter in negotiations with a view to adapting or terminating a contract. The parties, during negotiations, may fail to reach an agreement within a reasonable time, under the request of a party the court may:

(a) adapt the contract in order to bring it into accordance with what the parties would reasonably have agreed at the time of contracting if they had taken the change of circumstances into account; or

(b) terminate the contract within the meaning of Article 8 at a date and on terms to be determined by the court (but also an arbitral tribunal).

²¹¹ Article 87, Chapter 9 CESL, p. 72.

²¹² Article 88, Chapter 9 CESL, p. 72-73.

The renegotiation of some terms of contract is not applicable ever. But only if (a) the change of circumstances occurred after the time when the contract was concluded, (b) the party relying on the change of circumstances did not at that time take into account, and could not be expected to have taken into account, the possibility or scale of that change of circumstances and (c) the aggrieved party did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances²¹³.

Seller's obligations

The seller of goods or the supplier of digital content must:

- (a) deliver the goods or supply the digital content;
- (b) transfer the ownership of the goods, including the tangible medium on which the digital content is supplied;
- (c) ensure that the goods or the digital content are in conformity with the contract;
- (d) ensure that the buyer has the right to use the digital content in accordance with the contract; and
- (e) deliver such documents representing or relating to the goods or documents relating to the digital content as may be required by the contract.²¹⁴

The seller could also entrust performance of the contract to another person, unless personal performance by seller is required by contract terms. The seller is ever responsible for performance also if entrusts it to another person²¹⁵.

Delivery

In the purchase of goods, fundamental is the delivery of goods. A contract could establish some rules about it, but may happens that there are no contract terms that regulate contract.

²¹³ Article 89, Chapter 9 CESL, p. 73.

²¹⁴ Article 91, Chapter 10 CESL, p. 74.

²¹⁵ Article 92, Chapter 10 CESL, p. 74.



About delivery, the contract terms may establish the place of delivery or it is possible to apply the rules contained into CESL. The place, if it cannot be otherwise determined, is the consumer's place of residence at the time of conclusion of the contract, in the case of a consumer sales contract or a contract for the supply of digital content which is a distance or off-premises contract, or in which the seller has undertaken to arrange carriage to the buyer. In any other case, where the contract of sale involves carriage of the goods by a carrier or series of carriers, the nearest collection point of the first carrier; or where the contract does not involve carriage, the seller's place of business at the time of conclusion of the contract²¹⁶. The business could have more than one place of business, so the place of business will be the one which has the closest relationship to the obligation to deliver. The method of delivery are too many. The seller fulfils the obligation to deliver (a) by transferring the physical possession or control of the goods or the digital content to the consumer, in the case of a consumer sales contract or a contract for the supply of digital content which is a distance or off-premises contract or in which the seller has undertaken to arrange carriage to the buyer; (b) by handing over the goods to the first carrier for transmission to the buyer and by handing over to the buyer any document necessary to enable the buyer to take over the goods from the carrier holding the goods, in other cases in which the contract involves carriage of the goods by a carrier; and (c) by making the goods or the digital content, or where it is agreed that the seller need only deliver documents representing the goods, the documents, available to the buyer, into all other cases²¹⁷.

The goods or the digital content must be delivered without undue delay after the conclusion of the contract, where the time of delivery cannot be otherwise determined. In contracts between a trader and a consumer, unless agreed otherwise by the parties, the trader must deliver the goods or the digital content not later than 30 days from the conclusion of the contract²¹⁸.

²¹⁶ Article 93, Chapter 10 CESL, p. 75.

²¹⁷ Article 94, Chapter 10 CESL, p. 75.

²¹⁸ Article 95, Chapter 10 CESL, p. 75.

About seller's obligations, one regards the carriage of the goods. En effect, if the contract requires the seller to arrange for carriage of the goods, the seller must conclude such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation. On other cases, in accordance with the contract, if the seller hands over the goods to a carrier and if the goods are not clearly identified as the goods to be supplied under the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods. The contract may also not require the seller to effect insurance in respect of the carriage of the goods, the seller must, at the buyer's request, provide the buyer with all available information necessary to enable the buyer to effect such insurance²¹⁹.

The buyer could leave in possession of seller the goods or digital contents, because has failed to take delivery. In this occasion, the seller must take reasonable steps to protect and preserve them. The seller is discharged from the obligation to deliver if the seller:

- (a) deposits the goods or the digital content on reasonable terms with a third party to be held to the order of the buyer, and notifies the buyer of this; or
- (b) sells the goods or the digital content on reasonable terms after notice to the buyer, and pays the net proceeds to the buyer.

If the seller is entitled to be reimbursed or to retain out of the proceeds of sale any costs reasonably incurred²²⁰.

Conformity of the goods and digital content

The goods and digital content, in order to conform with the contract, have to²²¹:

- (a) be of the quantity, quality and description required by the contract;
- (b) be contained or packaged in the manner required by the contract; and

²¹⁹ Article 96, Chapter 10 CESL, p. 76.

²²⁰ Article 97, Chapter 10 CESL, p. 76.

²²¹ Article 99, Chapter 10 CESL, p. 77.



- (c) be supplied along with any accessories, installation instructions or other instructions required by the contract.

These goods and digital content must also meet other requirements to conform with the contract. The goods and content must²²²:

- (a) be fit for any particular purpose made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for the buyer to rely, on the seller's skill and judgment;
- (b) be fit for the purposes for which goods or digital content of the same description would ordinarily be used;
- (c) possess the qualities of goods or digital content which the seller held out to the buyer as an example or model;
- (d) be contained or packaged in the manner usual for such goods or, where there is no such manner, in an adequate way to preserve and protect the goods;
- (e) be supplied along with such accessories, installation instructions or other instructions as the buyer may expect to receive;
- (f) possess the qualities and performance capabilities indicated in any pre-contractual statement which forms part of the contract terms; and
- (g) possess such qualities and performance capabilities as the buyer may expect. When determining what the consumer may expect of the digital content regard is to be had to whether or not the digital content was supplied in exchange for the payment of a price.

Under a consumer sale contract, if the goods or the digital content are incorrectly installed, any lack of conformity resulting from the incorrect

²²² Article 100, Chapter 10 CESL, p. 77.

installation is regarded as lack of conformity of the goods or the digital content if²²³:

- (a) the goods or the digital content were installed by the seller or under the seller's responsibility;
- (b) the goods or the digital content were intended to be installed by the consumer and the incorrect installation was due to a shortcoming in the installation instructions.

On the other side, it is not possible to consider as a lack of conformity, for instance, the sole reason that updated digital content has become available after the conclusion of the contract²²⁴ or, in a contract between traders, the seller is not liable for a lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of the lack of conformity²²⁵.

The good has to be free from third party rights and the digital content has to be cleared of any right or not obviously unfounded claim of a third party. About the intellectual property, the goods or digital content have to be free or clear under the law of the state where the goods or digital content will be used according to the contract or, in the absence of such an agreement, under the law of the state of the buyer's place of business or in contracts between a trader and a consumer the consumer's place of residence indicated by the consumer at the time of the conclusion of the contract; and also the ones that the seller knew of or could be expected to have known of at the time of the conclusion of the contract. In contracts between businesses, but also in B2C contract, if the buyer knew or could be expected to have known of the rights or claims based on intellectual property at the time of the conclusion of the contract, the rules described before are not applicable²²⁶.

²²³ Article 101, Chapter 10 CESL, p. 78.

²²⁴ Article 103, Chapter 10 CESL, p. 79.

²²⁵ Article 104, Chapter 10 CESL, p. 79.

²²⁶ Article 102, Chapter 10 CESL, p. 78.



Naturally not any time is relevant for establishing conformity. In a B2C contract, any lack of conformity which becomes apparent within six months of the time when risk passes to the buyer is presumed to have existed at that time unless this is incompatible with the nature of the goods or digital content or with the nature of the lack of conformity. In case the goods or the digital content were installed by the seller or under the seller's responsibility, the time when risk passes to the buyer is to be read as a reference to the time when the installation is complete. On the contrary, if the goods or the digital content were intended to be installed by the consumer, it is to be read as a reference to the time when the consumer had reasonable time for the installation. Another case is the one in which the digital content must be subsequently updated by the trader, in that occasion the trader must ensure that the digital content remains in conformity with the contract throughout the duration of the contract²²⁷.

Buyer's remedies

In occasion of a non-performance of his obligation by the seller, the buyer may use some remedies, as²²⁸:

- (a) require performance, which includes specific performance, repair or replacement of the goods or digital content.

The performance which may be required includes the remedying free of charge of a performance which is not in conformity with the contract and the performance cannot be required if it would be impossible or has become unlawful or the burden or expense of performance would be disproportionate to the benefit the buyer would obtain²²⁹. In a consumer sales contract, the consumer may choose between repair and replacement unless the option chosen would be unlawful or impossible or, compared to the other option available, would impose costs on the

²²⁷ Article 105, Chapter 10 CESL, p. 79.

²²⁸ Article 106, Chapter 11 CESL, p. 80.

²²⁹ Article 110, Chapter 11 CESL, p. 82.

seller that would be disproportionate taking into account: (a) the value the goods would have if there were no lack of conformity; (b) the significance of the lack of conformity; and (c) whether the alternative remedy could be completed without significant inconvenience to the consumer²³⁰;

(b) withhold the buyer's own performance.

The buyer who is to perform at the same time as, or after, the seller performs has a right to withhold performance until the seller has tendered performance or has performed. If the buyer is to perform before the seller performs and who reasonably believes that there will be non-performance by the seller when the seller's performance becomes due, may withhold performance for as long as the reasonable belief continues²³¹;

(c) terminate the contract and claim the return of any price already paid.

In a consumer sales contract and a contract for the supply of digital content between a trader and a consumer, where there is a non-performance because the goods do not conform to the contract, the consumer may terminate the contract unless the lack of conformity is insignificant²³². The buyer may also terminate the contract in case of delay in delivery which is not in itself fundamental, if the buyer gives notice fixing an additional period of time of reasonable length for performance and the seller does not perform within that period. It is previewed for the buyer to terminate the contract before performance is due if the seller has declared, or it is otherwise clear, that there will be a non-performance, and if the non-performance would be such as to justify termination²³³. The right to terminate is exercised by notice to seller²³⁴,

²³⁰ Article 111, Chapter 11 CESL, p. 82.

²³¹ Article 113, Chapter 11 CESL, p. 83.

²³² Article 114, Chapter 11 CESL, p. 83.

²³³ Article 116, Chapter 11 CESL, p. 83.



but the buyer loses that right if the notice of termination is not given within a reasonable time from when the right arose or the buyer became, or could be expected to have become, aware of the non-performance, whichever is later. The exclusion is not valid if the buyer is a consumer and no performance at all has been tendered²³⁵

(d) reduce the price.

The buyer could also accept a performance not conforming to the contract. In this case, the price may be reduced. The reduction is to be proportionate to the decrease in the value of what was received in performance at the time performance was made compared to the value of what would have been received by a conforming performance. If the buyer has already paid a sum exceeding the reduced price, may recover the excess from the seller. After the reduction of the price, the buyer cannot also recover damages for the loss thereby compensated but remains entitled to damages for any further loss suffered²³⁶.

(e) claim damages.

If the buyer is a trader:

(a) the buyer's rights to exercise any remedy except withholding of performance are subject to cure by the seller; and

(b) the buyer's rights to rely on lack of conformity are subject to the requirements of examination and notification.

On the contrary, if the buyer is a consumer:

(a) the buyer's rights are not subject to cure by the seller; and

(b) the requirements of examination and notification request if the buyer is a trader are not applicable.

²³⁴ Article 118, Chapter 11 CESL, p. 84.

²³⁵ Article 119, Chapter 11 CESL, p. 84.

²³⁶ Article 120, Chapter 11 CESL, p. 85.

These remedies, if are not incompatible, may be cumulated.

May happen that the seller's non-performance is excused, but the buyer could ever resort any of the remedies previewed by the CESL, except requiring performance or damages. If the non –performance of seller is due to behaves of buyer, it is not possible for buyer to resort to any of the remedies.

The seller, who has tendered performance early and who has been notified that the performance is not in conformity with the contract, may make a new and conforming tender if that can be done within the time allowed for performance. In other cases, the seller, who has tendered a performance which is not in conformity with the contract may, without undue delay on being notified of the lack of conformity, offer to cure it at its own expense. The offer to cure, in that case, is not precluded by notice of termination. The buyer cannot refuse the offer to cure in any case, but only if (a) the cure cannot be effected promptly and without significant inconvenience to the buyer, (b) the buyer has reason to believe that the seller's future performance cannot be relied on or (c) the delay in performance would amount to a fundamental non-performance.

Moreover, the buyer may withhold performance pending cure, but the rights of the buyer, which are inconsistent with allowing the seller a period of time to effect cure, are suspended until that period has expired²³⁷.

In a contract between traders, the buyer is expected to examine the goods, or cause them to be examined, within as short a period as is reasonable not exceeding 14 days from the date of delivery of the goods, supply of digital content or provision of related services. If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination²³⁸. The period is so short because the trader-buyer that buys the good surely knows better than a simple consumer- buyer the real qualities and the characteristics of the goods or digital content that is going to purchase.

²³⁷ Article 109, Chapter 11 CESL, p. 81.

²³⁸ Article 121, Chapter 11 CESL, p. 85.



In these contract (B2B), ever considering the particular qualities of the buyer and the real equality between the parties, the buyer may not rely on a lack of conformity if the buyer does not give notice to the seller within a reasonable time specifying the nature of the lack of conformity. The time starts to run when the goods are supplied or when the buyer discovers or could be expected to discover the lack of conformity, whichever is later. The right of rely is lost if the buyer does not notice the lack of conformity within two years from the time at which the goods were actually handed over to the buyer in accordance with the contract. Where the parties have agreed that the goods must remain fit for a particular purpose or for their ordinary purpose during a fixed period of time, the period for giving notice does not expire before the end of the agreed period. The seller is not entitled to rely if the lack of conformity relates to facts of which the seller knew or could be expected to have known and which the seller did not disclose to the buyer²³⁹.

Buyer's obligations

The main obligations of the buyer are to²⁴⁰:

- (a) pay the price (this point is not applicable to contracts for the supply of digital content where the digital content is not supplied in exchange for the payment of a price).

Payment shall be made by the means of payment indicated by the contract terms or, if there is no such indication, by any means used in the ordinary course of business at the place of payment taking into account the nature of the transaction. The seller who accepts a cheque or other order to pay or a promise to pay presumably does so only on condition that it will be honoured. The seller may enforce the original obligation to pay if the order or promise is not honoured.

The buyer's original obligation is extinguished if the seller accepts a promise to pay

²³⁹ Article 122, Chapter 11 CESL, pp. 85-86.

²⁴⁰ Article 123, Chapter 12 CESL, p. 87.

from a third party with whom the seller has a pre-existing arrangement to accept the third party's promise as a means of payment.

In a B2C contract, the consumer is not liable, in respect of the use of a given means of payment, for fees that exceed the cost borne by the trader for the use of such means²⁴¹.

The place of payment, if cannot otherwise be determined, s the seller's place of

business at the time of conclusion of the contract. Naturally, if the seller has more than one place of business, it will be the place which has the closest relationship to the obligation to pay²⁴².

The payment of price is due at the moment of delivery and the seller may reject an offer to pay before payment is due, if it has a legitimate interest in so doing²⁴³.

A person different from the buyer may be entrusted payment, but, in any case, the buyer remains responsible for payment. The seller may refuse the payment by another party, made exception when (a) the third party acts with the assent of the buyer; or (b) the third party has a legitimate interest in paying and the buyer has failed to pay or it is clear that the buyer will not pay at the time that payment is due.

Anyway, the payment by another party discharges the buyer from liability to the seller. If the seller accepts the payment by a third party out of the cases previewed by CESL, the buyer is ever discharged from liability to the seller, but the seller is

liable to the buyer for any loss caused by that acceptance²⁴⁴.

Sometimes the buyer has to make several payments to the seller and the payment made does not suffice to cover all of them. Therefore, the buyer may at the time of payment notify the seller of the obligation to which the payment is to be imputed. In absence of notification, the seller

²⁴¹ Article 124, Chapter 12 CESL, p. 87.

²⁴² Article 125, Chapter 12 CESL, pp. 87-88.

²⁴³ Article 126, Chapter 12 CESL, p. 88.

²⁴⁴ Article 127, Chapter 12 CESL, p. 88.



may, by notifying the buyer within a reasonable time, impute the performance to one of the obligations. In the absence of an effective imputation by either party, the payment is imputed to that obligation which satisfies one of these criteria in this sequence: (a) the obligation which is due or is the first to fall due; (b) the obligation for which the seller has no or the least security; (c) the obligation which is the most burdensome for the buyer; (d) the obligation which arose first. If is not applicable none of these criteria, the payment is imputed proportionately to all the obligations. In relation to any one obligation a payment by the buyer is to be imputed (unless the seller makes a different imputation): first, to expenses, secondly, to interest, and thirdly, to principal²⁴⁵;

(b) take delivery of the goods or the digital content.

The buyer fulfils the obligation to take delivery by: (a) doing all the acts which could be expected in order to enable the seller to perform the obligation to deliver and (b) taking over the goods, or the documents representing the goods or digital content, as required by the contract²⁴⁶.

The seller may deliver the goods or supplies the digital content before the time fixed or delivers a quantity of goods or digital content less than that provided for in the contract, the buyer, in any case, must take delivery unless the buyer has a legitimate interest in refusing to do so. On the contrary, if the seller delivers a quantity of goods or digital content greater than that provided for by the contract, the buyer may retain or refuse the excess quantity. In case the buyer retains the excess quantity, it is treated as having been supplied under the contract and must be paid for at the contractual rate. In a consumer sales contract, the buyer cannot retain the excess quantity, if it is reasonably to believe that the seller has delivered the excess quantity intentionally and without error, knowing that it had not been ordered²⁴⁷.

²⁴⁵ Article 128, Chapter 12 CESL, pp. 88-89.

²⁴⁶ Article 129, Chapter 12 CESL, p. 89.

²⁴⁷ Article 130, Chapter 12 CESL, p. 89.

- (c) take over documents representing or relating to the goods or documents relating to digital content as may be required by the contract.

Seller's remedies

When the non-performance of an obligation is from the buyer, the seller has some remedies²⁴⁸:

- (a) require performance.

As we said before, the seller is entitled to recover payment of the price when it is due and to require performance of any other obligation undertaken by the buyer. If the buyer has not yet taken over the goods or the digital content and it is clear that the buyer will be unwilling to receive performance, the seller may nonetheless require the buyer to take delivery and may recover the price, unless the seller could have made a reasonable substitute transaction without significant effort or expense²⁴⁹;

- (b) withhold the seller's own performance.

Until the buyer has tendered performance or has performed, the seller who is to perform at the same time as, or after, the buyer performs has a right to withhold performance. A seller, who is to perform before the buyer performs and who believes reasonably that there will be non-performance by the buyer, when the buyer's performance becomes due may withhold performance for as long as the reasonable belief continues. Anyway, the right to withhold performance is lost if the buyer gives an adequate assurance of due performance or provides adequate security. The buyer's obligations may also be performed in separate parts or are otherwise divisible. So, the seller may withhold performance only in relation to that part which has not been performed,

²⁴⁸ Article 131, Chapter 13 CESL, p. 90.

²⁴⁹ Article 132, Chapter 13 CESL, p. 90.



unless the buyer's non-performance is such as to justify withholding the seller's performance as a whole²⁵⁰;

(c) terminate the contract.

The termination of the contract by the seller is possible if the buyer's non-performance is fundamental²⁵¹. A seller may terminate in a case of delay in performance which is not in itself fundamental, if the seller gives a notice fixing an additional period of time of reasonable length for performance and the buyer does not perform within that period. In relations between a trader and a consumer, the additional time for performance must not end before the 30 day. The notice may provide for automatic termination if the buyer does not perform within the period fixed by the notice. In this case, the termination takes effect after that period without further notice²⁵².

The termination may be declared by the seller before performance is due if the buyer has declared, or it is otherwise clear, that there will be a non-performance, and if the non-performance would be fundamental²⁵³;

(d) claim interest on the price or damages.

If the buyer's non-performance is excused, the seller may resort to any of the remedies, except requiring performance and damages. The remedies may be cumulated and the seller cannot resort to any of the remedies if contributes to non-performance of the buyer.

Passing of risk

Loss of, or damage to, the goods or the digital content after the risk has passed to the buyer does not discharge the buyer from the obligation to pay the price, unless the loss or damage is due to an act or omission of the seller²⁵⁴.

²⁵⁰ Article 133, Chapter 13 CESL, p. 91.

²⁵¹ Article 134, Chapter 13 CESL, p. 91.

²⁵² Article 135, Chapter 13 CESL, p. 91-92.

²⁵³ Article 136, Chapter 13 CESL, p. 92.

²⁵⁴ Article 140, Chapter 14 CESL, p. 93.

Fundamental for the pass of the risk is the identification of goods or digital content. En effect, the risk does not pass to the buyer until the goods or the digital content are clearly identified as the goods or digital content to be supplied under the contract, whether by the initial agreement, by notice given to the buyer or otherwise²⁵⁵.

Special rules are previewed in B2C contract about passing risk, the risk passes at the time when the consumer or a third party designated by the consumer, not being the carrier, has acquired the physical possession of the goods or the tangible medium on which the digital content is supplied. In a contract for the supply of digital content not supplied on a tangible medium, the risk passes at the time when the consumer or a third party designated by the consumer for this purpose has obtained the control of the digital content. Except where the contract is a distance or off-premises contract, if the consumer fails to perform the obligation to take over the goods or the digital content, the non-performance is not excused and the risk does not pass in the way described before. In this case, the risk passes at the time when the consumer, or the third party designated by the consumer, would have acquired the physical possession of the goods or obtained the control of the digital content if the obligation to take them over had been performed. If the consumer arranges the carriage of the goods or the digital content supplied on a tangible medium and that choice was not offered by the trader, the risk passes when the goods or the digital content supplied on a tangible medium are handed over to the carrier, without prejudice to the rights of the consumer against the carrier²⁵⁶.

Other rules are established in B2B contract. Firstly, the risk passes when the buyer takes delivery of the goods or digital content or the documents representing the goods²⁵⁷. When the goods or the digital content are placed at the buyer's disposal and the buyer is aware of this, the risk passes to the buyer at the time when the goods or digital content should have been taken over,

²⁵⁵ Article 141, Chapter 14 CESL, p. 93.

²⁵⁶ Article 142, Chapter 14 CESL, p. 93-94.

²⁵⁷ Article 143, Chapter 14 CESL, p. 94.



unless the buyer was entitled to withhold²⁵⁸. On the contrary, if the goods or the digital content are placed at the buyer's disposal at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods or digital content are placed at the buyer's disposal at that place²⁵⁹.

A contract of sale may involve the carriage of the goods. If the seller is not bound to hand over the goods at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract. On the contrary, if the seller is bound to hand over the goods to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passing of the risk²⁶⁰.

Some contracts may involve of sale which involves goods sold in transit. The risk passes to the buyer as from the time the goods were handed over to the first carrier. However, the risk passes to the buyer when the contract is concluded. If at the time of the conclusion of the contract the seller knew or could be expected to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller²⁶¹.

Damages and interest

A creditor is entitled to damages for loss caused by the non-performance of an obligation by the debtor, unless the non-performance is excused. The loss for which damages are recoverable includes future loss which the debtor could expect to occur²⁶².

²⁵⁸ Article 144, Chapter 14 CESL, p. 94.

²⁵⁹ Article 145, Chapter 14 CESL, p. 94.

²⁶⁰ Article 145, Chapter 14 CESL, p. 94.

²⁶¹ Article 146, Chapter 14 CESL, p. 94.

²⁶² Article 159, Chapter 16 CESL, p. 101.

The general measure of damages for loss caused by non-performance of an obligation is such sum as will put the creditor into the position in which the creditor would have been if the obligation had been duly performed, or, where that is not possible, as nearly as possible into that position. Such damages cover loss which the creditor has suffered and gain of which the creditor has been deprived²⁶³.

The debtor is liable only for loss which the debtor foresaw or could be expected to have foreseen at the time when the contract was concluded as a result of the non-performance²⁶⁴. On the other side, the debtor is not responsible for loss suffered by creditor to the extent that the creditor could have reduced the loss by taking reasonable steps. The creditor that tries to reduce the loss is entitled to recover any reasonable expenses incurred in attempting to reduce the loss²⁶⁵.

The creditor may terminate a contract in whole or in part and, if it is possible, could make a substitute transaction within a reasonable time and in a reasonable manner. There is the opportunity for the creditor to recover the difference between the value of what would have been payable under the terminated contract and the value of what is payable under the substitute transaction, as well as damages for any further loss²⁶⁶.

The payment of a sum of money may be delayed. The creditor is entitled, without the need to give notice, to interest on that sum from the time when payment is due to the time of payment at the rate. The interest rate for delayed payment is: (a) if the creditor's habitual residence is in a Member State whose currency is the euro or in a third country, the rate applied by the European Central Bank to its most recent main refinancing operation or the marginal interest rate resulting from variable-rate tender procedures for the most recent main refinancing operations, plus two percentage points and (b) if the creditor's habitual residence is in a Member State whose currency is not

²⁶³ Article 160, Chapter 16 CESL, p. 101.

²⁶⁴ Article 161, Chapter 16 CESL, p. 101.

²⁶⁵ Article 163, Chapter 16 CESL, p. 101.

²⁶⁶ Article 164, Chapter 16 CESL, p. 102.



the euro, the equivalent rate set by the national central bank of that Member State, ever plus two percentage points. In all cases, the creditor may recover damages for any further loss²⁶⁷.

The rules described may be applied for delay in payment, in a B2C contract, only when the non-performance is not excused. In this kind of contract, interest does not start to run until 30 days after the creditor has given notice to the debtor specifying the obligation to pay interest and its rate. The notice may be given before the date when payment is due.

A term of the contract which fixes a rate of interest higher than the one provided in Common European Sales Law or that previews or accrual earlier than the time specified law text, is not binding to the extent that this would be considered as an unfair contract term. However, interest for delay in payment cannot be added to capital in order to produce interest²⁶⁸.

In B2B contracts, the trader may delay the payment of a price due under a contract for the delivery of goods, supply of digital content or provision of related services without being excused, as previewed in Article 88 of Common European Sales Law(“*Excused non-performance*”). The evaluation of the interest rate for delayed payment is quite similar the one previewed for B2C contract. The unique difference is the addition of percentage points that are not two but eight. The interest at the rate starts to run on the day which follows the date or the end of the period for payment provided in the contract. If this date or period are not indicated, the interest at the rate starts to run 30 days after the date when the debtor receives the invoice or an equivalent request for payment or 30 days after the date of receipt of the goods, digital content or related services, if the first date is earlier or uncertain, or if it is uncertain whether the debtor has received an invoice or equivalent request for payment. The conformity of goods, digital content or related services to the contract may be ascertained by way of acceptance or examination, the 30 days period previewed for starting to run the interest begins on the date of the

²⁶⁷ Article 166, Chapter 16 CESL, p. 102.

²⁶⁸ Article 167, Chapter 16 CESL, pp. 102-103.

acceptance or the date the examination procedure is finalized. The maximum duration of the examination procedure cannot exceed 30 days from the date of delivery of the goods, supply of digital content or provision of related services, unless the parties expressly agree otherwise and that agreement is not unfair. The period for payment could not exceed 60 days, unless the parties expressly agree otherwise²⁶⁹.

In case of interest payable in accordance with previous rules, the creditor is entitled to obtain from the debtor, as a minimum, a fixed sum of EUR 40 or the equivalent sum in the currency agreed for the contract price as compensation for the creditor's recovery costs. The creditor is also entitled to obtain from the debtor reasonable compensation for any recovery costs exceeding the fixed sum²⁷⁰.

In a contract term relating to the date or the period for payment, the rate of interest for late payment or the compensation for recovery costs is not binding to the extent that the term is unfair. A term is defined unfair if it grossly deviates from good commercial practice, contrary to good faith and fair dealing, taking into account all circumstances of the case, including the nature of the goods, digital content or related service. For instance, a contract term is presumed to be unfair if it provides for a time or period for payment or a rate of interest less favorable to the creditor than the time, period or rate previewed by CESL if or a term provides for an amount of compensation for recovery costs lower than the amount specified in Article 169 CESL. At the same time, it is ever considered unfair the term that exclude the interest for late payment or compensation for recovery costs²⁷¹.

Rules and effects about interest and late payment have a mandatory nature, in other words, the parties may not exclude their application or derogate from or vary the effects²⁷².

²⁶⁹ Article 168, Chapter 16 CESL, p. 103-104.

²⁷⁰ Article 169, Chapter 16 CESL, p. 104.

²⁷¹ Article 170, Chapter 16 CESL, p. 104.

²⁷² Article 171, Chapter 16 CESL, p. 104.



Restitution

Where a contract is avoided or terminated by either party, each party is obliged to return what that party (“the recipient”) has received from the other party. The obligation to return what was received includes any natural and legal fruits derived from what was received. On the termination of a contract for performance in instalments or parts, the return of what was received is not required in relation to any instalment or part where the obligations on both sides have been fully performed, or where the price for what has been done remains payable, unless the nature of the contract is such that part performance is of no value to one of the parties²⁷³.

Where what was received, including fruits, cannot be returned, or, in a case of digital content whether or not it was supplied on a tangible medium, the recipient must pay its monetary value. Sometimes, the return is possible, but would cause unreasonable effort or expense, then the recipient may choose to pay the monetary value, provided that this would not harm the other party’s proprietary interests. The monetary value of goods is the value that they would have had at the date when payment of the monetary value is to be made if they had been kept by the recipient without destruction or damage until that date. Where a related service contract is avoided or terminated by the customer, after the related service has been performed or partly performed, the monetary value of what was received is the amount that the customer saved by receiving the related service. In a case of digital content, the monetary value is the amount the consumer saved by making use of the digital content.

If the recipient obtained a substitute in money or in kind in exchange for goods or digital content when the recipient knew or could be expected to have known of the ground for avoidance or termination, the other party may choose to claim the substitute or the monetary value of the substitute. On the contrary,

²⁷³ Article 172, Chapter 17 CESL, p. 105.

if the recipient did not know and could not be expected to have known of the ground for avoidance or termination may choose to return the monetary value of the substitute or the substitute²⁷⁴.

The recipient may also made use of the goods before the termination or avoidance of the contract. Usually, the recipient has not to pay for this use, but in some cases, recipient must pay to the other party the monetary value of that use for any period. It happens when:

- (a) the recipient caused the ground for avoidance or termination;
- (b) the recipient, prior to the start of that period, was aware of the ground for avoidance or termination; or
- (c) regarding to the nature of the goods, the nature and amount of the use and the availability of remedies other than termination, it would be inequitable to allow the recipient the free use of the goods for that period.

The recipient, obliged to return money, has also to pay interest when:

- (a) the other party is obliged to pay for use; or
- (b) the recipient gave cause for the contract to be avoided because of fraud, threats and unfair exploitation²⁷⁵.

The recipient could not know and could not be expected to know of the ground for avoidance or termination and may incur expenditure on goods or digital content. In this occasion, the recipient is entitled to compensation to the extent that the expenditure benefited the other party. On the other hand, if the recipient knows or could be expected to know of the ground for avoidance or termination, may be entitled to compensation only for expenditure that was necessary to protect the goods or the digital content from being lost or

²⁷⁴ Article 173, Chapter 17 CESL, p. 105-106.

²⁷⁵ Article 174, Chapter 17 CESL, p. 106.



diminished in value, provided that the recipient had no opportunity to ask the other party for advice²⁷⁶.

The obligation to return or to pay could be grossly inequitable, taking into account in particular whether the party did not cause, or lacked knowledge of, the ground for avoidance or termination. If it happens, the obligation may be modified²⁷⁷.

Prescription

It is subjected to prescription by the expiry of a precise period of time the right to enforce performance of an obligation and any right ancillary to such a right²⁷⁸.

The periods of prescription pointed out by Common European Sales Law are two²⁷⁹:

- (a) a short period of two years; and
- (b) a long period of ten years that becomes of thirty years in the case of a right to damages for personal injuries.

The commencement of the two period is different. The short period of prescription, in fact, starts from the time when the creditor has become, or could be expected to have become, aware of the facts as a result of which the right can be exercised. Instead, the long period of prescription begins to run from the time when the debtor has to perform or, in the case of a right to damages, from the time of the act which gives rise to the right. If the debtor is under a continuing obligation to do or refrain from doing the whole performance, the creditor is regarded as having a separate right in relation to each nonperformance of the obligation²⁸⁰.

²⁷⁶ Article 175, Chapter 17 CESL, p. 106.

²⁷⁷ Article 176, Chapter 17 CESL, p. 106.

²⁷⁸ Article 178, Chapter 18 CESL, p. 108.

²⁷⁹ Article 179, Chapter 18 CESL, p. 108.

²⁸⁰ Article 180, Chapter 18 CESL, p. 108.

In case of judicial and other proceedings, the running of both periods of prescription is suspended from the time when judicial proceedings to assert the right are begun. The suspension lasts until a final decision has been made, or until the case has been otherwise disposed of. If the proceedings end within the last six months of the prescription period without a decision on the merits, the period of prescription does not expire before six months have passed after the time when the proceedings ended. These rules are valid also for arbitration proceedings, for mediation proceedings, for proceedings whereby an issue between two parties is referred to a third party for a binding decision and to all other proceedings initiated with the aim of obtaining a decision relating to the right or to avoid insolvency²⁸¹.

In case of negotiation about the right, or about circumstances from which a claim relating to the right might arise, the period of prescription expires after one year has passed since the last communication made in the negotiations or since one of the parties communicated to the other that it does not wish to pursue the negotiations²⁸². Also if the a person subject to an incapacity is without a representative, neither period of prescription of a right held by that person expires before one year has passed since either the incapacity has ended or a representative has been appointed²⁸³.

The short period of prescription begins to run again if the debtor acknowledges the right vis-à-vis the creditor, by part payment, payment of interest, giving of security, set-off or in any other manner²⁸⁴.

After expiry of the relevant period of prescription, the debtor is entitled to refuse performance of the obligation in question and the creditor loses all remedies for non-performance except withholding performance. Naturally, whatever has been paid or transferred by the debtor in performance of the obligation in question may not be reclaimed merely because the period of prescription had expired at the moment that the performance was carried out.

²⁸¹Article 181, Chapter 18 CESL, p. 109.

²⁸²Article 182, Chapter 18 CESL, p. 109.

²⁸³Article 183, Chapter 18 CESL, p. 109.

²⁸⁴Article 184, Chapter 18 CESL, p. 110.



The period of prescription for a right to payment of interest, and any other right of an ancillary nature, expires not later than the period for the principal right²⁸⁵.

The rules of prescription contained in CESL may be modified by agreement between the parties, in particular by either shortening or lengthening the periods of prescription, but with some limits that the parties cannot exclude or reduce. The short period of prescription may not be reduced to less than one year or extended to more than ten years and the long period of prescription may not be reduced to less than one year or extended to more than thirty years²⁸⁶.



²⁸⁵ Article 185, Chapter 18 CESL, p. 110.

²⁸⁶ Article 186, Chapter 18 CESL, p. 110.

Chapter IV

Conclusions

It really needs a European Code?

The Proposal for a Regulation on a Common European Sales Law is a too innovative law text that would change and unify the internal market among EU Member States. The debates about the Proposal, but also about any legal text that has the goal to innovate the Civil Law or part of it, characterize the last 30 years. The doubts of scholar are not only about the contents of the law, but also if a European Civil Code or something like this may be really useful for EU market²⁸⁷.

It is a well-established fact that any state worldwide tends to cling to its own contract rules and to ban any other authority from interfering with these rules. To a certain extent this eagerness to decide autonomously about contract law is even noticeable within the European Union, as the legislative competence of the Union in the field of contract law is still quite limited, basically to the strengthening of the single European market and to guaranteeing a high level of consumer protection. Therefore it is by no means astonishing that even decades after the early days of the European Community there is still no comprehensive unified contract law in force. So, it might be suggested that what the EU needs, instead of putting into place a common set of legal rules, is to consider the underlying values and principles²⁸⁸. Rules do not sit in a vacuum with a neutral and universal meaning, because any lawyer from different legal traditions will have quite

²⁸⁷ ROLLI, “Il “codice” e i “codici” nella moderna esperienza giuridica: il modello del codice del consumo”, in *Contratto e impresa*, 2007, p. 1469 e ss; LEGEND, *Sense et non-sense d’un code civil européen*, in *Rev. Int. Dr. Comp.*, 1996, p. 779.

²⁸⁸ COLLINS, *The European Civil Code*, Cambridge, 2008.



divergent views on what a particular rule might mean, based on a context set by their own national tradition²⁸⁹. The problem is that there is not a common *European* legal culture²⁹⁰ or there is a culture not sufficiently matured to form as one distinct from the many national legal cultures. Surely many of the European legal systems may share common roots, but there are also considerable differences in legal culture. The differences create a context in which any European-wide codification would be read, interpreted and applied. It is possible to create consensus on general principles, if these principles permeated the existing national systems and prompted a real shift in legal culture, that might be a better way forward. So, a European Code of Contracts could contribute to the establishment of a European identity, as some national codification inspired the creation of a degree of uniformity in newly-formed nations in the 19th Century²⁹¹. Moreover, as Professor De Castro clarifies “to make a good Code that organizes the rules among people, according to national principles, is too difficult: but, when realized, the Code will have an important role. It would be considered as a revolutionary ideal and would also create the unification of legislation, on applying models accepted and shared by people. If the goal is the first, in other words, if the idea is to introduce a system shared by all EU citizens, a European Civil Code will not be sufficient. Some areas of law, extremely important, should be excluded, as family law, property and successions. Furthermore, the codification will obtain the opposite effect. The coordination between the codification and the other areas would be difficult. On the opposite, if the goal of codification is to create a legal uniformity applying accepted models, the problem could be the will of Member States to replace their internal rules with a European Code of Contract. On observing the works of scholars and jurists, as the “Unidroit Principles”, the

²⁸⁹ ALPA, *Il codice civile europeo: “e pluribus unum”*, cit., p. 695 ss. VOLTAIRE, *Dialogues Oeuvres de Voltaire*, VII, 1838, p.5 “...et n’est pas une chose absurde et affreuse que ce qui est vrai dans un village se trouve faux dans un autre? Par quelle étrange barbarie se peut-il que des compatriotes ne vivent pas sous le même loi?(...) Il ne est ainsi de poste en poste dans le royaume; vous changez de jurisprudence en changeant de chevaux”.

²⁹⁰ TUORI, *EC Law: An independent Legal Order or a post-modern Jack-in-the-box?* In ERIKSSON and HURRI (eds), *Dialectic of Law and Reality*, Helsinki, 1999.

²⁹¹ CHRISTIAN TWIGG-FLESNER, “*Debate on a European Code of Contract*”, in *Contratto e impresa/Europa*, 2012.



Principles of European Contract Law or the Draft Common Frame of Reference, a European Code of Contract would be, actually, more useful to go on with the sequence of sectorial action. So, the Contract Code will develop just concrete and specific aspects that characterize the EU market shared by Member States, as consumer law, this area is the one developed earlier than the others. The *acquis communautaire* about consumers is based on scholars' writes and national practical cases. Although, also the proposal to work just for a unification of European consumer law is criticized by some authors, because the possibility to realize uniform consumer law cannot be considered as an autonomous juridical regulation (Font Galan) or an inter-disciplinary category (Garcia Garnica). Another critical point is due to the different level of adoption of the European Contract Code depending on the juridical system and tradition of each Member States, especially because the reaction to the adoption of a Code is different between Civil and Common Law States. Probably, it will better follow two different ways: 1) to specialize a European Contract Code just in the most relevant areas, as consumer law, but not forgetting the economic scope that they would regulate; 2) to develop a course with stages to reach the unification of European Private Law, as in the process of monetary unification, and the last word has to be of EU Member States. The first stage may be the adoption of a non-binding text, as UK "restatements", the second should be the legislative adoption of previous texts and, step by step, to make is a binding text. This process, on the other side, is too slow and complex. Then, next to the unification process, there must be some soft law instrument²⁹². The 1st July 2010, with a Green Book, the EU Commission would identify the right way for an internal coherence of European Contract Law²⁹³.

²⁹² MANUEL IGNACIO FELIU REY, "Un codice europeo dei contratti: alcune riflessioni e qualche dubbio", in *Contratto e impresa/ Europa*, 2012.

²⁹³ ALESSANDRO ZACCARIA, *Presa di posizione sul futuro del CFR*, in *Contratto e impresa/ Europa*, 2011; "Besondere Vertragstypen am Beispiel des Maklerrechts", in *Der Gemeinsame Referenzrahmen*, München, 2009, p. 113 ss.; "Acertados y desaciertos en la construcción de un Derecho contractual europeo", in *Principios de Derecho contractual europeo y principios de Unidroit sobre contratos comerciales internacionales*, by M. A Pilar Ferrer Vanrell and Anselmo Martínez Cañellas, Madrid, 2009.



The foregoing comments have already suggested that all-including European Code of Contracts does not seem desirable²⁹⁴. Instead, it is suggested that more limited action would be more appropriate. The predominant propose is to encourage greater utilization of the internal market by consumers and traders alike. At the present time, the greatest need for any European action is in the field of on-line consumer transactions.

The Commission clarifies that the emanation of a Code is not in its program²⁹⁵. The Expert Group, named by Commission, makes a frame as base for European Contract Law and develops a Feasibility Study for the possible future of this Law. Although, after some consultations, the Commission reduces still more the area of the new law text. Probably the Commission realizes that there is still not a common juridical back-ground among the EU Member States. Principles and fundamental rules of private law are not shared by Common and Civil Law²⁹⁶ systems and to find large approvals, the rules have to be as less as possible²⁹⁷. So, the idea of codification is stopped. It is affirmed that the EU Community should emanate a European Code of Contract as a unique binding text for all Member States. This Code must have the form of Regulation and it should be emanate on the base of Art. 100 (now

²⁹⁴ BONELL, *Verso un codice europeo dei contratti?*, in *Contratto e impresa/Europa*, 1998, p. 189 e ss: “nell’Europa dei giorni nostri la coesistenza di differenti discipline nazionali in materia di contratti non dà luogo a problemi tali da far apparire come un’esigenza perentoria la loro sostituzione con un nuovo Codice uniforme europeo (...) Se si reputa che l’Europa necessita di regole uniformi in materia di contratti in generale, tanto vale ricorrere a strumenti non vincolanti come sono i Principi Europei, o Principi Unidroit. Come dimostra ampiamente il grande successo che i Principi Unidroit stanno riscuotendo a livello universale, siffatti prodotti di ‘soft law’, proprio perché son in grado di privilegiare il ‘better rule approach’ al posto del ‘common core approach’, lungi dal costituire una soluzione di ripiego, all’atto pratico possono rivelarsi addirittura più efficaci di qualsiasi codificazione legislativa”; see also RIEDL, “The Work of Lando-Commission from an Alternative Viewpoint”, in *ERPL*, 2000, p. 83; on the other sense, JORGES, “Un codice civile europeo è davvero l’unica soluzione?”, in *Riv. Crit. Dir. Priv.*, 2003, p. 8, translated by M.R. MARELLA, di *Ein europäisches Zivilgesetzbuch als einzige Lösung?* In *Frankfurter Rundschau* of 5th November 2002, in which is observed “i privatisti non devono assolutamente incapricciarsi del progetto di un codice civile europeo solo per tener dietro a quei ‘grand projects’. Un codice non può modificare le strutture politiche dell’Europa, ma potrebbe occultare le sfide del processo di europeizzazione”; FERRARESE, “Il diritto al presente, Globalizzazione e tempo delle istituzioni”, Bologna, 2022, p.67, note 8, that observes “l’idea di riforme dei codici civili esistenti o di un codice civile europeo sembra riportare ad un clima ottocentesco”.

²⁹⁵ IORATTI, FERRARI, voce *Codice Civile europeo*, cit., p. 269.

²⁹⁶ MENGONI, “L’Europa del codice o un Codice per l’Europa?”, in *Quaderni del centro studi e ricerche di diritto comparato e straniero*, n. 7, Rome, 1993, p. 517 ss; on the other sense, CASTRONOVO, “Verso un codice europeo: i Principi di diritto europeo dei contratti”, in *Vita not.*, 2004, p. 18 e ss.

²⁹⁷ BASEDOW, *Un comune diritto dei contratti per il mercato comune*, in *Contratto e impresa/ Europa*, 1997, p. 81 ss.; BANGEMANN, *Privatrechtsangleichung in der Europäischen Union*, in *ZEUP*, 1994.

Art 114) of TEU²⁹⁸. But, on the base of Art. 114, cannot be create a European Civil Code, because the Private law in general does not obstacle the internal trades and does not exist a general competence to introduce remedies on the base of a mere diversity among national legal systems; and is excluded also that the Art. 352 TEU may be the base for the competence described before, there is doubt that the adoption of a European Civil Code, as an optional instrument, may be necessary to realize one of the goal of the treaties. On the opposite sense, the idea to realize a European Contract Law may be based on the Art. 100 (now 94) and 100A (now 95) of the Treaty establishing the European Economic Community (TEEC), that give the opportunity to EU institutions to use Directives for the unification of national contract rules. These uncertainties bring the Commission to follow a new project, smaller than the idea of a European Code of Contract, a Common European Sales Law.

It is easier to justify this text on the base of Art. 114 TEU, about the measures for the creation and organization of an internal market. The “sale” is the kind of contract more applied for exchanges, national or international. Moreover, as affirmed by Commission, the differences in contractual law among Member States are the obstacle for consumers and business that would have cross-border transactions. So, it is obvious that the object of the harmonization could be based fundamentally on the regulation of these transactions²⁹⁹. The interest about a common Regulation of Sales Contract is proved by a great number of experiences: for instance, the “Uniform Commercial Code” in USA, written from 1943 to 1952, adopted in 1963 by all States, made exception for Louisiana, is a model for the rules of each State, but regulates also the relations among subjects of a single State or among different States³⁰⁰. The Code represents also the opportunity for a common law system to adopt a Code, traditionally avoided by these systems, and the opportunity for a future sharing of juridical experiences by Civil and Common Law systems. Other examples may be the Vienna Convention of 1980, in which the States have to

²⁹⁸ See note: 292.

²⁹⁹ COM (2011) 635 DEF, *Explanatory Memorandum*, p. 10.

³⁰⁰ GALGANO, *Atlante di diritto privato comparato*, p. 29.



respect common rules for sales contract, or the restatement in UK of sales rules, realized by the two editions of Sales of goods act of 1983 and 1979. The idea of a Regulation about Sales Contract may potentially eliminate potentially the differences between civil and common law. For common law, the contract is the exchange based on “consideration” and there is not a theory about contract in general, it is possible to talk only on typical contractual models: sale, lease, exc. The French Roman Law creates a general definition of contract that includes the moment of exchange, as in sale contract, and the unilateral free disposition, as the donations. The German Roman Law also a general definition for contract, considering as unifying element the abstract declaration, also unilateral, of will. So, the sale contract may be the common point among the various rules on contracts. On the other side, the Proposal for a Regulation on a Common European Sales Law includes some general rules about obligation and contract in general, then the contents of the law text exceed the initial prospect³⁰¹. Surely, the Regulation on CESL, if will be adopted, could be useful for the development of a possible community codification. The Proposal, anyway, cannot be considered as a mere list of rules useful for cross-border transaction, but it involves many interests, as the ideals and the values common to Member States³⁰².

If the European legislator decides to adopt the instrument which includes consumer contracts. Consumer protection rules must be mandatory, they cannot be applicable only if both parties wishes (opt-in) or if they include an escape clause (opt-out). An optional regulation of B2C contracts means that the option is left effectively to business. This is especially the case in opt-in models, as proposed by CESL. Business takes the decision to offer an option for the CESL in the contract form or not. The consumer has just a unique choice: to take it or to leave it. Rules according to which the consumer has to confirm the option and that such a confirmation must not be hidden in the standard

³⁰¹ RITA ROLLI, “La proposta di regolamento europeo sulla vendita nel processo di codificazione europea”, in *Contratto e impresa/Europa*, 2012.

³⁰² ALPA, *L’armonizzazione del diritto contrattuale europeo e il progetto di codice civile europeo*, cit., p. 174 that underlines “i confini giuridici dell’Europa si assottigliano: e proprio uno degli elementi identificativi dell’identità europea potrebbe essere apportato dalla costruzione di un ordinamento di diritto sostanziale e processuale unitario”.



term, do not change the weak position of the consumer who is not able to insist on a contract without the opt-in. The opportunity to deny clicking the option button is given to consumer, but in that case there is no contract. Consequently, an optional instrument, which shall come into life, must be attractive for the 'stronger' party to the contract, and this party is the business. This contradicts the base principle of the Proposal for Regulation, the high level of consumer protection. A question appears obvious: why should business voluntarily escape from national law to a European legal order with a high level of consumer protection, possibly higher than the familiar national legal system? As long as the internal market competence (Article 114 TFEU) is used as a legal basis for a European contract law³⁰³ (and so the Commission did in the Proposal for a CESL), the Commission has to provide for a high level consumer protection according to the requirements of this provision³⁰⁴. The Commission may fulfill these requirements and, at the same time, risk the failure of the instrument, because it is not accepted by business, or may ignore the requirements of primary law. At the same time, the business could balance the disadvantages, from its point of view, of a high level of consumer protection in the European instrument against the advantage to be able to apply one contract form for all B2C contracts in the European Union and so decides to accept the high level of consumer protection³⁰⁵.

CESL: opt-in, opt-out or binding rule

The CESL may appear, moreover, a sort of return to past. The Commission abandons the idea to codify the whole contract law and establishes to regulate just sale contracts, although to unify sales is ever an important goal, but compared to goals of DCFR, the CESL is a small conquest. At a first analysis, the Proposal for a Regulation on a Common European Sales Law may appear to move on the sense of a non-conceptualistic direction. If the DCFR just left

³⁰³ GUTMAN, *The Commission's 2010 green paper on European contract law: reflections on Union's competence in the light of the proposed option*, in ERCL, 2011, p.151.

³⁰⁴ TAMM and TONNER, *Verbraucherrecht- Beratungshandbuch*, 2012, 4 nos, p. 12 and ss.

³⁰⁵ TONNER, *CESL and consumer contract law: integration or separation?*, in *Contratto e impresa/ Europa*, 2012.



the ‘cause’, the CESL leaves the concepts of ‘juristic act’ and ‘general theory of relations’³⁰⁶. On the opposite sense, there is a long list of definitions previewed in Art. 2 CESL, that from letter (a) to (y) shows small and big concepts; though, great number of definitions are included in the most part of European texts, the one of CESL has some new characteristics: first of all, the definition of ‘contract’ of Art. 2, let. (a), CESL, that ‘*means an agreement intended to give rise to obligations and other legal effects*’. This definition may appear too minimal for systems as the Italian one, that have millenary contract traditions. Furthermore, this and other definitions are valid just ‘*for the purpose of this Regulation*’ (Art. 2 CESL), so the definitions contribute not even to a solution for quarrels on the contents of DCFR³⁰⁷. The endless list of concepts contained in Art. 2 CESL is the clear example of what any European codification has to avoid: to regulate new dogmatisms just in part and to oblige jurists to fill empty spaces without stability and with the help of comparative elaborations³⁰⁸.

A point debates is if the text has to be optional or binding. Till now, the main idea is of an optional code. Also the Art. 3 CESL previews the optional nature of this law. Difficult is to affirm if the preference of soft law may be a sign of the youth or old age of our juridical tradition(also the Rome I Regulation has the same nature)³⁰⁹. The prompt may be to reach the European single market with the free choices of the consumers, instead with binding measures, not linked with the role of EU institutions. It easy to doubt that the optional instrument may warrant a future restatement of EU law, but also the future of CESL itself is in doubt. How is it possible to ‘really’ regulate a-symmetrical relations with binding rules contained in a non-binding text?

³⁰⁶ In fact, a general part about obligations does not exist as in the Book III of DCFR, but it exists just single rules about single obligation, as in Art 91 CESL. On the other side, the material re-organization from the bigger objectives of DCFR suggested a simplification of theoric part, now reduce more as possible. On that point, RODOTA', *Il codice civile e il processo costituente europeo*, pp. 200-201.

³⁰⁷ TROMBETTI, *I tentativi di uniformazione del diritto contrattuale a livello europeo. Prime riflessioni per un confronto tra il DCFR e il progetto preliminare del Code européen des contrats*, in *Contratto e impresa/Europa*, 2011.

³⁰⁸ CASTRONOVO-MAZZAMUTO, *L'idea*, in CASTRONOVO-MAZZAMUTO (cur.), *Manuale di diritto privato europeo*, I, cit., p. 16.

³⁰⁹ SENDMEYER, *The Freedom of Choice in European Private International Law. An Analysis of Party autonomy in the Rome I and Rome II Regulation*, in *Contratto e impresa/Europa*, 2009.



It is to conclude that binding rules for consumers' protection and opt-in may not coexist. The opt-in, anyway, is not compatible with any status legislation, in which the politic will to protect a party against another party (for instance, consumers and businesses, small and big enterprises) needs the application of binding rules. The scenario won't change if the institutions decide to apply the opt-out instrument, adopted by Vienna Convention (CISG). The opt-in may be applied just in symmetrical relations, because, in an asymmetrical ones, to give to stronger party the opportunity to avoid the application of some measures is a way to reduce the protection of the weak party.

Also if the opt-in system may be considered as a good choice, the business that would apply the Regulation has just to give to consumers the information contained in Annex II of Regulation, un the way and form previewed by Art. 9 of Regulation. The business, then, has only to focus the consumers' attention on the choice of CESL and to obtain consumers' 'explicit' consent. The consumer's consent consists on a separate subscription of the term that previews the application of the rules contained in CESL. But what consumer, in front of a business' proposal that includes the application of a specific law text, could refuse to subscribe the term or to show its own consent? Anyway, if the Proposal for a Regulation has been imposed to business to offer in any case the choice between Regulation of national law, it may be possible to talk about a 'real' faculty of choice for consumers.

On the other side, the CESL³¹⁰ analyzes the problems about economic and logistic differences that characterize B2B and B2C contracts. The Proposal for a Regulation gives the same importance to both the kind of contract, understanding that SMEs needs a level of protection as high as the consumer's one. In addition, the choice of a soft law system is the best to find general consent among Member States. So, the 'blue button' becomes an additional point in favor of CESL: it shows a 'gentle' system, freely chosen by parties, that not tampers with the internal systems of EU Member States. It interviews just

³¹⁰ JENSEN, ZIMMERMANN, *Restating the Aquis Communautaire? A Critical Examination of the 'Principles of the Existing EC Contract Law'*, in MLR, 2008, p. 505 and ss.; EIDENMÜLLER, FAUST, GRIGOLEIT, JANSEN, WAGNER, ZIMMERMANN, *Revision des Verbraucher-acquis*, Tübingen, 2011.



in cross-border contract, in which the risk to lose their own identity or diversity is at the lower level³¹¹.

In conclusion, the success, the real application and diffusion of the Proposal for a Regulation on a Common European Sales Law does not depend neither on EU Member States, neither on consumers, but on the exclusive business' will, especially on the big business' will. It has not to consider as a negative aspect, but EU institutions have to show to business all the positive aspects of the Regulation also with convention or any event that could attract business' interests. Especially because, in B2C contract, if businesses applies the Regulation, the EU Commission may consider, in a relative way, reached the ambitious goal of the Proposal of a 'Directive on a consumers' law'. In other words, the Commission may reach a 'complete' harmonization of the whole consumer's contract law system, excluding Member States from the opportunity to hold or introduce in their own systems rules that may give to consumer an higher level of protection³¹².

CESL and Rome I Regulation

Article 1(1) of the Rome I Regulation states that it applies *'in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters'*. The CESL, for its part, applies to cross-border contracts, as defined by Article 4 of the proposal for a Regulation³¹³. Anyway, a cross-border contract is a situation which involves a conflict of laws within the

³¹¹ SCHULTE-NÖLKE, *Der Blue Button kommt- Konturen einer neuen rechtlichen Infrastruktur für den Binnenmarkt*, in *ZeUP*, 2011, p. 749 ss.

³¹² GIOVANNI DE CRISTOFARO, *Il 'futuro' "Diritto comune europeo" della vendita mobiliare: profili problematici della Proposta di Regolamento presentata dalla Commissione UE*, in *Contratto e impresa/Europa*, 2012.

³¹³ Article 4 of the Proposal for a Regulation on a Common European Sales Law:

"2. For the purposes of this Regulation, a contract between traders is a cross-border contract if the parties have their habitual residence in different countries of which at least one is a Member State.

3. For the purposes of this Regulation, a contract between a trader and a consumer is a cross-border contract if:

(a) either the address indicated by the consumer, the delivery address for goods or the billing address are located in a country other than the country of the trader's habitual residence; and
(b) at least one of these countries is a Member State."

meaning of the Rome I Regulation. There is therefore no difficulty dovetailing these two texts. Nor would there be any difficulty if a State decided to extend the CESL to domestic contracts. In this case the Rome I Regulation would not apply, since the situation would not involve a conflict of laws.

Whether it is a question of choosing the applicable law on the basis of the Rome I Regulation or choosing the CESL, similar questions arise as regards the manner of choice. The Rome I Regulation allows the applicable law to be chosen after the conclusion of the contract³¹⁴. Article 3(2) of the Regulation in fact states *‘that the parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties’*.

The proposal for a Regulation on the CESL does not state expressly whether the CESL can or cannot be chosen later. At most, it seems that it is possible in a case referred to in Article 9(1) as follows:

‘Where the agreement to use the Common European Sales Law is concluded by telephone or by any other means that do not make it possible to provide the consumer with the information notice, or where the trader has failed to provide the information notice, the consumer shall not be bound by the agreement until the consumer has received the confirmation referred to in Article 8(2) accompanied by the information notice and has expressly consented subsequently to the use of the Common European Sales Law.’

In this situation, at the moment when the sale is concluded, the consumer is not bound by the CESL since he/she has not received the information notice. The sale is therefore subject to the 1st regime of the applicable law. Only if, after having received the notice, the consumer consents to the application of the CESL, will the sale be subject to the CESL. This subparagraph may

³¹⁴ This reflects the predominant jurisprudence from Member States: see TOMASZEWSKI, *‘La désignation, postérieure à la conclusion du contrat, de la loi qui le régit’*, in *Rev. Crit. Dr. Int. Pr.*, 1972, p. 567.



suggest that it is possible to choose the CESL after the conclusion of the sale³¹⁵. Conversely, it could be argued that choosing the CESL after a contract would be ‘temporal’ dépeçage, which would be prohibited in B2C relations. On the other side, it is possible to think that this reasoning should apply, in so far as Article 9(1) of the proposal for a Regulation on the CESL itself provides for a case where the CESL is chosen after a contract in B2C relations³¹⁶.

One might nevertheless wonder whether, in such cases, there would be difficulty dovetailing the two texts, if the timing of the choice does not correspond. Several situations must be identified:

1) Choosing the CESL at the time of the contract, in the absence of an express choice of an applicable law; change of the applicable law after the formation of the contract.

A contract can only be subject to the CESL if the law applicable to the contract is the law of an EU Member State³¹⁷. In the scenario envisaged where no law has been expressly chosen at the time of the sale, choosing the CESL is therefore necessarily an implicit choice of the applicable law of a Member State. This law may apply to certain issues which are outside the scope of the CESL³¹⁸.

In order to avoid legal uncertainty, scholars, as Professor Cuniberti, recommend expressly to stipulate this in the Regulation on the optional

³¹⁵, *Policy Options for Progress Towards a European Contract Law*, Comments on the issues raised in the Green Paper from the Commission of 1 July 2010, COM (2010) 348 final, Max Planck Institute for Comparative and International Private Law, p. 24.

³¹⁶ Some authors consider that choosing the CESL at the time of the trial would be equivalent to a kind of ‘dépeçage’, see HESSELINK, ‘How to opt into the Common European Sales Law?’ in *Brief comments on the Commission’s Proposal for a Regulation*, 26 October 2011, in *European Review of Private Law*, Vol.1, pp 195–212, 2012, Amsterdam law school Legal Studies Research paper No 2011-43, Centre for the Study of European Contract Law Working Paper Series No 2011-15, Electronic copy available at: <http://ssrn.com/abstract=1950107>.

³¹⁸ Recital 27: “All the matters of a contractual or non-contractual nature that are not addressed in the Common European Sales Law are governed by the pre-existing rules of the national law outside the Common European Sales Law that is applicable under Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict of law rule. These issues include legal personality, the invalidity of a contract arising from lack of capacity, illegality or immorality, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law and the law of torts. Furthermore, the issue of whether concurrent contractual and non-contractual liability claims can be pursued together falls outside the scope of the Common European Sales Law”

instrument (after Article 11). The professor himself proposes the following text:

(1) Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules. Provided that the contract was actually concluded, the Common European Sales Law shall also govern the compliance with and remedies for failure to comply with the pre-contractual information duties.

(2) Where the parties have validly agreed to use the Common European Sales Law for a contract, but have not chosen the applicable law, they are presumed to have chosen the law of a Member State.

(a) This law shall be the law designated by Article 4 or Article 6 of the Rome I Regulation or any other applicable choice of law rule.

*(b) If the law referred to in (a) is not the law of a Member State, this law shall be the law of the habitual residence of the buyer or the law of the habitual residence of the seller for contracts falling within the scope of Article 6 of the Rome I Regulation.*³¹⁹

Professor Cuniberti also purposes an alternative version of (b) which applies the *proximity principle*: *If the law referred to in (a) is not the law of a Member State, this law shall be the law of the Member State which is the most closely connected with the contract*³²⁰. Surely it is important to ensure that the introduction of the CESL is not hampered by any unnecessary debates, the effect that would be achieved by the wording *‘Where the parties have validly agreed to use the Common European Sales Law for a contract, but have not chosen the applicable law, they are presumed to have chosen the law of a Member State’* has in fact already been achieved by Article 3 of the Rome I Regulation and Article 6(2) of that regulation, which refers back to Article 3. The provisions establish that the choice of law does not necessarily need to be made expressly, but may also be *‘clearly*

³¹⁹ See *‘Common European Sales Law and Third State Sellers’*, <http://conflictoflaws.net/2012/common-europeansales-law-and-third-state-sellers/>; and *‘Common European Sales Law, Third States and Consumers’*, <http://conflictoflaws.net/2012/common-european-sales-law-third-states-and-consumers/>.

³²⁰ LAGARDE, *‘Le principe de proximité en droit international privé’*, RCADI, 1986, p. 196.

demonstrated by the terms of the contract or the circumstances of the case'. When the parties to a contract opt for the CESL, the fact that it was their intention to choose the law of a Member State is clearly demonstrated by the terms of the contract or the circumstances of the case. So, it may be sufficient to include in the Regulation an article previewing that 'in accordance with Article 3 of the Rome I Regulation and Article 6(2) of that regulation, which refers back to Article 3, opting for the CESL without expressly choosing the applicable law clearly reflects an implicit intention to choose the law of a Member State'.

Anyway, if, following the contract, the parties expressly choose the applicable law of a State outside the EU, this may render the choice of the CESL ineffective (and, where appropriate, make the overriding mandatory provisions of the 1st regime of the consumer's place of residence applicable).

2) express choice of the applicable law of an EU Member State, at the time of sale; subsequent choice of the CESL.

In this case there is no real problem with dovetailing. The only question which could arise would be knowing whether the choice of the CESL implies the retroactive application of the CESL from the date of sale, or whether the 1st regime should apply for the period before the CESL was chosen, and the 2nd regime after it was chosen. That will be up to case law. In any event, if it can be assumed that the change may be voluntarily retroactive, it must not under any circumstances affect the rights of third parties.

3) No express choice at the time of the sale; subsequent choice of the CESL.

The law applicable to the contract at the time the contract is entered into will be determined objectively under Article 6 of the Rome I Regulation. This will be the law of the consumer's habitual residence. The CESL can be chosen afterwards, and therefore this choice of the

CESL after the conclusion of the contract can be analysed as an implicit choice to submit to the law of an EU Member State.

But then, this means one of two things:

- ✓ either the law of the consumer's habitual residence was already the law of an EU Member State; in this case, the subsequent choice of the CESL will not change the law applicable to the contract within the meaning of private international law;
- ✓ or the law of the consumer's habitual residence was the law of a State outside the EU; in this case, the choice of the CESL will bring with it an implicit change in the law applicable to the contract within the meaning of private international law, in order to render the law of an EU Member State competent. In this respect, it should be borne in mind that Article 3(2) of the Rome I Regulation stipulates that '*any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties*'.

Form of the option

The Rome I Regulation allows an express or tacit choice of applicable law. Article 3 of the said Regulation in fact stipulates that: 1. *A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case*'. As shown, choosing the CESL neutralises the overriding mandatory provisions of the 1st regime. It is probably because of this effect that the proposal for a Regulation demands an express choice. Article 8(2) of the proposal for a Regulation in fact stipulates that: '*In relations between a trader and a consumer the agreement on the use of the Common European Sales Law shall be valid only if the consumer's consent is given by an explicit statement which is separate from the statement indicating the agreement to conclude a contract. The trader shall provide the consumer with a confirmation of that agreement on a durable medium.*' Furthermore, it is possible to observe that



the explicit statement must be separate from the agreement to conclude a contract, but the text does not demand that it be separate from the agreement on the law applicable to the contract. This is what infers that the choice of the CESL is the implicit choice of the law of an EU Member State.

Conditions of the validity of choice

In private international law, the '*contrat de choix*' is given validity by the Rome I Regulation³²¹. But this Regulation also adds, in Article 3(5), that '*the existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Article 10, 11 and 13*'. These texts refer to the law of the contract (Article 10) in respect of consent and the fundamental validity of the '*contrat de choix*', and to the law of the contract or the law of the place in which the contract was concluded (Article 11) in respect of its formal validity. In particular that implies that a lack of consent to the choice of applicable law will be assessed on the basis of the domestic law designated by the conflict-of-laws rule of the Rome I Regulation. However, the choice of the CESL is subject to the Regulation establishing the CESL.

Article 8 of the proposal for a Regulation on a CESL in fact stipulates that:

'The use of the Common European Sales Law requires an agreement of the parties to that effect. The existence of such an agreement and its validity shall be determined on the basis of paragraphs 2 and 3 of this Article and Article 9, as well as the relevant provisions in the Common European Sales Law'. Furthermore, Article 9 of the proposal for a Regulation provides for the

³²¹ LAGARDE, *Répertoire Dalloz de Droit Communautaire*, in *V° Convention de Rome (contractual obligations) No 44*, that said '*It should, however, be stressed that it is in the Rome Convention itself that the principle of the validity of the 'contrat de choix' is established. This principle cannot be challenged using one of the laws mentioned in Article 3(4), which are only applicable to the limited issue assigned to them*'. Furthermore, insofar as capacity is excluded from the Rome I Regulation, Article 13 provides that, 'in a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence'. This solution is based on the notion of appearances, as the party that contracted with the incapable party was legitimately able to trust that the law of the place where the contract was concluded would be applied: See Cass. Req. 16 January 1861, judgment from LIZARDI, D.P.61.1.193; S.61.1.305, Footnote by G. MASSE'; JOBARD-BACHELIER, M.-N., *L'apparence en droit international privé*, in L.G.D.J., 1983.

delivery of the Standard Information Notice in Annex II in contracts between traders and consumers.

Naturally, the first question that arises is whether the validity of the choice of the CESL can be subject to other requirements. It has already been indicated how some authors consider that the choice of the CESL should not be the product of an unfair commercial practice or result from an unfair term³²². In other words, whether the choice of the CESL can be subject to other conditions of validity than those provided for in Articles 8 and 9 and in the CESL itself (with the exception of something relating to matters excluded, such as capacity). In fact the optional instrument, such as it was conceived, is designed to be as autonomous as possible, with the exception of matters expressly excluded. The instrument itself provides for the protection of the consent of the consumer when choosing the CESL. Anyway, the fact that the consumer's choice must be made expressly and after the receipt of an information notice, shows that the requirement for loyalty in the commercial practice has already been taken into account by the CESL. Similarly, the fact that the CESL contains a high level of consumer protection also implies that a choice clause in the CESL does not bring a significant imbalance and must not be considered as an unfair term. But now, another question arises: the choice of the CESL depends on the validity of the choice of applicable law? As stated above, it is possible to distinguish between the choice of applicable law under the Rome I Regulation and the choice of the CESL. However, it is likely that in practice the two theoretical phases described above will take place over time. The trader will propose that the consumer accept the choice of the CESL, which will imply an implicit choice of the applicable law of an EU Member State. The question could then arise of knowing whether the choice of the CESL could be invalidated due to the voidness of the choice of applicable law in private international law. The question is firstly more theoretical than practical: in fact, in private international law, there is no case law on the invalidity of the

³²² WHITTAKER, *The Optional Instrument of European Contract law and Freedom of Contract*, in RDC, 2011, No 35.



choice of applicable law³²³, as the issue has not arisen. Then everything depends on the question of knowing whether the error³²⁴, or fraud, for example, are assessed very differently in the laws of the Member States (to which the choice of applicable law will be subject) and in the CESL. It is, however, likely that most often, if a lack of consent altered the consent given to choose the applicable law, it would also alter the consent given to the CESL. In any case, if the lack of consent only altered the choice of applicable law, without altering the choice of the CESL, then the latter choice could be maintained, provided that the law objectively applicable is the law of an EU Member State, since this law would also allow the CESL to be chosen.

Application of CESL to a trader resident outside of Europe

When the seller is resident outside Europe, in the absence of a choice of applicable law of an EU Member State, there are two scenarios:

- either he/she has directed his/her activities towards an EU consumer, and Article 6 gives competence to the law of the consumer's place of residence, which allows the choice of the CESL;
- or he/she has not directed his/her activities towards an EU consumer, in which case Article 4(1)(a) of the Rome I Regulation, which designates the law of the seller's residence, designates here the law of a third country. However, if the parties choose the CESL without giving any express indication as to the applicable law, this results in an implicit choice for the law of an EU Member State, which legitimises the application of the CESL.

³²³ However, there will probably be a dispute over the validity of choosing the CESL, either when a consumer has not been informed, or when, in B2B relations, a major trader has imposed this choice on a small trader in order to circumvent national overriding mandatory provisions.

³²⁴ This is the case for the error which is assessed very strictly in English law. A unilateral error is not a lack of consent, while an error made by both parties is only a reason for invalidity in exceptional circumstances. English law is concerned with legal certainty, while here French law is concerned with the quality of consent: WHITTAKER, *The Optional Instrument of European Contract law and Freedom of Contract*, in RDC 2011, Vol. 2, p. 36, No 3.1.

The international public policy exception of the forum

Article 21 of the Rome I Regulation stipulates that: *‘The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.’*

The difference between the overriding mandatory provisions (Article 6(2) and Article 9) and the exception of international public policy (Article 21) is methodological. These are two procedures which have the common objective of protecting crucial values. Overriding mandatory provisions are *‘provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation’* (Article 9(1) of the Rome I Regulation). Overriding mandatory provisions determine their scope unilaterally. Its application is not in principle subject to the content of the law applicable to the contract. In contrast, the public policy exception is a means which helps to disapply a foreign law that is normally applicable because its content clashes with the fundamental values of the forum. If, in theory, the public policy exception can be applied in consumer law, in practice the matter is dominated instead by the method of the overriding mandatory provisions³²⁵.

However, concerning the CESL, may the judge in a Member State wishing to supplant the optional instrument to apply his/her national mandatory rules could try to use the abovementioned Article 21?

³²⁵ However, learned opinion has in any case established a blurring between these two methods. Article 6(2) is an example, since it implies a comparison between the content of the protection of the consumer in the law chosen by the parties, and the protection to which he/she would have been entitled under the law of his/her residence. If the law chosen affords greater consumer protection, it will not be ousted by the overriding mandatory provisions of the consumer's place of residence. On the distinction between the public policy exception and the mechanism of overriding mandatory provisions : V. B. REMY, *Exception d'ordre public et mécanisme des lois de police en droit international privé*, in *Typed thesis*, Paris I, May 2006, National Library th., Dalloz, 2008. – N. NORD, *Ordre public et lois de police en droit international privé*, in *Typed thesis*, Strasbourg III, 2003. – D. ARCHER, *Impérativité et ordre public en droit communautaire et droit international privé des contrats*, in *Typed thesis*, Cergy-Pontoise, 2006.



The question could only arise if it is the 2nd regime of a law foreign to the forum which has been chosen. For example, the parties have chosen the CESL but they have also expressly chosen German law. The French court of the forum might question whether the German 2nd regime clashes with international public policy of the forum. But it will have to conclude this not to be the case because the same 2nd regime will also exist in French law, which will prevent the foreign law chosen by the parties from being manifestly incompatible with the fundamental values of the forum³²⁶.

In conclusion, there are not insurmountable difficulties dovetailing the Rome I Regulation and the CESL. In order to improve matters further, it would be desirable to transfer into an article of the Regulation establishing the optional instrument details on the interaction between the Regulation and the national overriding mandatory provisions which are currently included in the recitals or in the explanatory memorandum, without normative value. But also, the EU institutions have to restrict in Recital 27 of the proposal the exclusion of ‘illegality’ from the scope of the CESL in such a way that all the national overriding mandatory provisions sanctioned by invalidity are not deemed excluded from the scope of the CESL and therefore applicable to a sale subject to the CESL; this exclusion should be replaced by the exclusion of ‘invalidity of the sale of goods which are outside legal trade.

The mechanism established must be approved from the moment the consumer is protected by the mandatory rules of the 2nd regime, and provided that the level of protection of this second regime is a high level of protection³²⁷.

CESL and national law

The proposed CESL emphasizes the instrument’s strong regulatory nature and the considerable amount of mandatory consumer protection provisions

³²⁶ Accord Green Paper on European Contract Law. Responses from the Trans Europe Experts (TEE) network, under the direction of M. BEHAR-TOUCHAIS and M. CHAGNY, *Société de législation comparée*, in collection TEE, Volume 1, 2011, *Réponse du groupe D*, part drawn up by Pascal de Vareilles, SOMMIERES No 76.

³²⁷ DIRECTORATE-GENERAL FOR INTERNAL POLICIES POLICY DEPARTMENT C: CITIZENS’ RIGHTS AND CONSTITUTIONAL AFFAIRS, *The functioning of the CESL within the framework of the Rome I Regulation*, October 2012.



included in the proposal. As regards the first point, it is observed that ‘the Brussels

Commissioners do not explain why or how this one single strategy works better than a decentralized approach that continuously puts multiple Member States in direct competition with each other’³²⁸. As concerns the second point of criticism, it is stressed the ‘threadbare justifications’ given by the European Commission for CESL’s new consumer protection provisions that are ‘truly breathtaking in their scope’³²⁹. For instance, if a business of a Member State that does business both in its own Member State and in the EU market, firms the CESL, in any business it has to follow local rules in the national market and the CESL standard for cross-border transactions. The dual standard will create two negative consequences³³⁰: the firm would be forced to market goods on two different standards, which would entail higher costs. Moreover, the dual standard would make it more difficult to supply one of the key protections extended by firms in voluntary markets to consumers with limited knowledge only, namely a pledge of equal treatment to all of its customers regardless of location.

While the Commission’s motivation of the proposed CESL indeed continues to raise questions, the introduction of a dual standard in itself might not be as bad as it seems. First of all, also if many scholars consider it as a negative characteristic, the CESL has an optional nature. That means that firms will not be forced to use it, but may continue to apply national regimes to their contracts. The law applicable to a cross-border contract in the EU will be determined by the choice of the parties or by the rules of private international law governing the contractual relationship, as Rome I Regulation³³¹. At the begin, firms could choose to use their national law both for local and cross-border contracts. They would, thus, in principle not incur extra costs because

³²⁸ EPSTEIN, ‘*Harmonization, Heterogeneity and Regulation: Why the Common European Sales Law Should be Scrapped*’, p. 6.

³²⁹ See note 313, p. 7.

³³⁰ See note 313, p. 8.

³³¹ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.



of the co-existence of different standards for different markets³³². Secondly, opting into CESL will offer firms engaging in cross-border activities an advantage in comparison to contracting under any of the national sales laws of the Member States, insofar as the envisaged way of implementation of the proposed instrument ‘neutralizes’ Article 6 of the Rome I Regulation. In today’s European contract law, a firm always has to take into account consumer protection rules of the law of its customers. Article 6(2) of the Rome I Regulation stipulates that, although parties may make a choice of law, *‘such a choice may not (...) have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1 [i.e. the law of the country where the consumer has his habitual residence]’*. This means that firms cannot contract out of mandatory consumer protection rules existing in the laws of consumers. The application of the Regulation would bring change in this respect, given the fact that it will be introduced as a ‘2nd regime’ in the laws of the EU Member States. Anyway, for cross-border contracts, the applicable law can still be the one chosen by the parties (Article 3 Rome I Regulation). On the other side, if parties opt into CESL, the mandatory consumer protection rules will be the same in both the chosen law and the law applicable by default (Article 6 Rome I), since both legal systems encompass CESL as an optional regime. For any aspects of the contract falling within the scope of the optional instrument, parties will then not have to consult provisions of national law anymore³³³. Naturally, this could reduce the cost of doing business across borders. In the third place, the question arises what are the benefits of pledging equal treatment to customers regardless of their location. In this context, and in defence of CESL, attention may be drawn to the relation between the instrument’s optional nature and its substance. The choice of a harmonization

³³² POSNER, ‘The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in Jurisdictional Competition’, p 2.

³³³ M.W. HESSELINK, ‘How to Opt Into the Common European Sales Law? Brief Comments on the Commission’s Proposal for a Regulation’, in *European Review of Private Law* 2011, p. 198-201.

regime (full harmonization³³⁴, minimum harmonization³³⁵, or co-existence of national and EU standards) surely matters for the determination of the level of the harmonized standard in comparison to existing national standards³³⁶. A system of co-existing rules, such as the one foreseen by introduction of the CESL, according to their analysis would perform better than minimum harmonization (for instance, the setting of a minimum standard of consumer protection in EU law):

‘The reason is that in this case, the optimal harmonized standard under co-existence of harmonized and national standards allows the more efficient firms to be fully able to serve all markets: the market with the pre-existing lower standard will be served with that national standard, and the other market – that of the country with a previous higher standard – will be served with the harmonized standard, which will be exactly tailored for the consumers’ preferences of that country, given that it is being served by the more efficient foreign firms.’³³⁷

A choice between national sales law and the CESL could thus have the benefit of doing justice to the diversity of preferences of consumers. It would improve businesses’ market positions by giving them the opportunity to use the harmonized standard rather than local standards that do not fully correspond to consumer preferences. As Eric Clive observes on his blog:

‘To some extent this will be self-policing. The nature of the CESL as an optional instrument means that businesses will simply not choose it if it contains excessive consumer rights. They will have to balance the advantage of escaping from the possibly unknown mandatory consumer protection provisions of the consumer’s own country (already forced on them by article 6(2) of the Rome 1 Regulation if they direct

³³⁴ Full harmonisation means that a measure of EU law sets a standard that Member States are not allowed to deviate from.

³³⁵ Minimum harmonisation leaves Member States the possibility to maintain or introduce stricter mandatory requirements than those provided for in the *acquis communautaire*, eg national rules offering a higher level of consumer protection than EU law.

³³⁶ F. GOMEZ and J.J. GANUZA, ‘An Economic Analysis of Harmonization Regimes: Full Harmonization, Minimum Harmonization or Optional Instrument?’, in *European Review of Contract Law* 2011, p. 287.

³³⁷ See note 321.



*their activities to that country) against the disadvantage of having to comply with the consumer rights provisions in the CESL.*³³⁸

It suggests that the likelihood of businesses offering contracts under the optional instrument depends on the standard of consumer protection provided by the instrument³³⁹. From an economic perspective, the question arises what might be the consequences of firms' 'self-policing' in terms of costs and benefits: If the level of mandatory consumer protection indicated by CESL is so high that firms will not be inclined to offer any contracts under this regime, the costs of introducing CESL might outweigh any possible benefits. On the other hand, firms might want to offer contracts under the CESL's consumer protection regime to signal to consumers that they are willing to contract under a regime that provides a high level of consumer protection and, thus, enhance consumer confidence. From a legal-political perspective, these considerations affirm the strong link between technical aspects of rules of contract law (form) and the social goals reflected and pursued in contract law (substance).

Part of scholars thinks that surely introduction of the CESL will increase rather than reduce transaction costs. Moreover, they also think that the CESL's potential benefits will probably not exceed these transaction-cost harms. This skepticism may be based on the consideration that transaction costs increase because parties must inform themselves of an additional body of law and negotiate over which of an increased number of alternative bodies of law will apply to their contract. The transaction costs would not increase because parties could ignore the CESL and continue using the national law they prefer: probably, parties will make costs to invest whether CESL is superior to the law they use in terms of efficiency and distribution³⁴⁰. Furthermore, although the uniformity costs (i.e. the costs of loss of variation of available bodies of law, where the people in different jurisdictions have different preferences over optimal contract law) may decline, the benefit of the

³³⁸ E. CLIVE, 'Edinburgh blog on European Private Law News', 17 April 2012.

³³⁹ LOW, 'Will Firms Consider a European Optional Instrument in Contract Law?', in *European Journal of Law and Economics* (forthcoming 2012), <http://www.springerlink.com/content/4183211716710j20/>

³⁴⁰ See note 317, p. 130.

CESL is likely to be slight. the reason for this is that businesses might not offer consumers the possibility to contract under CESL at all, in particular given the considerable number of mandatory consumer protection rules included in the instrument: 'The strong emphasis on consumer protection is at war with the main goal of encouraging cross-border transactions.'³⁴¹

Although it is true that contracting parties will have to make an initial investment to learn about the efficiency and distributive effects of CESL, it is not said that the balance of these costs with the benefits of using the optional instrument will be negative. It is possible to observe two different situations:

- 1) Businesses may already conduct cross-border trade. So, businesses offering their products in more than one EU Member State may be presumed to have learnt the laws of the Countries they are dealing with in order to capture potential gains under national laws (up to a maximum of 28 legal systems). In that case, the additional costs of studying CESL will be comparable to the costs of learning the law of a Member State that the business would like to extend its commercial activities to. In comparison to such a national law, an investment in learning CESL will have the benefit that it can be used in all EU countries and is available in all official languages.
- 2) Businesses that are not yet offering their goods and services to consumers in other countries may be encouraged to start doing so under the optional common regime. For these companies, taking full benefit of the European internal market might indeed imply having to study the laws of all Member States to see where they offer advantages. On the other hand, the gains of being able to serve a bigger market on the basis of the CESL might be such that businesses may choose to use only this optional instrument rather than invest in studying national laws.

Notwithstanding the importance of considering the potential economic disadvantages and advantages of CESL, finally, maximization of welfare is only one dimension of European contract law. Scholars acknowledges this to

³⁴¹ See note 317, p. 130



the extent that he considers (and rejects) the possible justification of CESL on grounds of political symbolism³⁴². Still, even the political argument of building a European identity through contract law might be considered to highlight only one side of the debate. The question arises whether it is possible to conceive of a theoretical framework for the evaluation of CESL that does justice to the interplay between its economic, political and legal dimensions.

Legal-economic reason and institutional imagination

The European Commission's agenda is strongly focused on market integration and refers to measures of contract law as being instrumental to the development of the EU's internal market. This technocratic approach has been criticized for remaining silent on the legal-political goals reflected in measures of EU contract law and the idea of social justice underlying this field³⁴³. In the words of the Study Group on Social Justice in European Private Law, it would conceal the 'real issues' raised by proposals for further harmonization, being that³⁴⁴:

- ✓ *'proposals for the construction of a European contract law are not merely (or even primarily) concerned with a technical problem of reducing obstacles to cross-border trade in the Internal Market; rather, they aim towards the political goal of the construction of a union of shared fundamental values concerning the social and economic relations between citizens;*
- ✓ *the governance system of the multi-level pluralistic European Union requires new methods for the construction of this union of shared fundamental values (which includes respect for cultural diversity) as represented in the law of contract and the remainder of private law.'*

³⁴² POSNER, 'The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in Jurisdictional Competition', p. 9-12, discussing Hesselink's defence of CESL as a contribution to the 'thickening' of the moral dimension of European identity; M.W. HESSELINK, 'The Case for a Common European Sales Law in an Age of Rising Nationalism', in *European Review of Contract Law* (forthcoming 2012), <http://ssrn.com/abstract=1998174>.

³⁴³ Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: a Manifesto', in *European Law Journal* 2004, p. 653-674; H. COLLINS, *The European Civil Code: The Way Forward*, in Cambridge: Cambridge University Press 2008, p. 33, Collins refers to a 'competence distortion'.

³⁴⁴ See note 329, p. 656-657.

The position may be criticized for legal as well as economic reasons. First, the relationship between values and European contract law is still the subject of debate: To what extent, for instance, is it possible to conceive of this field as relating all rule-solutions to one central value, or rather to describe and analyze it as endorsing a plurality of values?³⁴⁵ Secondly, the nature and place of value judgments in economic theory is not uncontroversial either: to what extent should the economic analysis of questions of contract law take a normative turn?³⁴⁶

Still, it may be argued that the Social Justice Group's Manifesto makes a convincing case for taking into consideration the effects that the enactment of rules of contract law have on the economic and social relations between European citizens. In particular, when comparing EU contract law with national legal systems, consideration has to be given to the impact of the harmonization of rules of (consumer) contract law on the balance of private autonomy and social solidarity between contracting parties³⁴⁷.

An important argument for broadening the methodological scope of analysis of measures of European contract law, moreover, is that it can provide insights into the institutional choices made to pursue certain social goals³⁴⁸. The 'real issues' identified by the Social Justice Group relate to the broader question of choosing the institutional framework for pursuing goals of social policy in European contract law. Simplifying to a large extent, institutional choice may involve the political process, the market process and the judicial process³⁴⁹. While the European Commission's agenda for European contract law focuses on market malfunction and ways to remedy this, it barely articulates the

³⁴⁵ C. MAK, 'Hedgehogs in Luxembourg? A Dworkinian Reading of the CJEU's Case Law on Principles of Private Law and Some Doubts of the Fox', in *European Review of Private Law* 2012, p. 323-346; M.W. HESSELINK, 'How Many Systems of Private Law are there in the European Union? Nationalist, Dualist/Pluralist and Europeanist Perspectives', in 'Presentation at the *Ius Commune* conference', Utrecht, 25 November 2011.

³⁴⁶ H. PUTNAM and V. WALSH, *The End of Value-Free Economics*, in Abingdon, Oxford: Routledge 2011; A. SEN, *The Idea of Justice*, in London: Allen Lane 2009.

³⁴⁷ See note 329, p. 653-657.

³⁴⁸ N.K. KOMESAR, 'Imperfect Alternatives. Choosing Institutions in Law, Economics and Public Policy', in Chicago: University of Chicago Press 1994; and N.K. KOMESAR, 'Law's Limits. The Rule of Law and the Supply and Demand of Rights', in Cambridge: Cambridge University Press 2001.

³⁴⁹ R. MANGABEIRA UNGER, 'Legal Analysis as Institutional Imagination', in *Modern Law Review* 1996, 1-23.



(reasons behind a) choice between markets and political processes (regulation). Furthermore, it leaves the role of courts in the development of European contract law unmentioned. Arguably, the justification for harmonizing measures of contract law would require the elaboration of the choice for regulation over other institutions.

The many concepts of social justice in European contract law

On the basis of a historical investigation into the emergence of 'social justice' in Western-European countries in the 19th Century, it is described the development of three patterns of justice: a) the English model, 'a liberal and pragmatic design fit for commercial use'; b) the French model, 'a forward-looking political design of a (just) society'; and c) the German model, 'an authoritarian paternalistic ideological though market-oriented design'. The EU law does not seem to correspond to any of the national models, but rather may be considered to put forward a concept of social justice of its own. *'In the European Court of Justice jargon, the "European legal order" and the "European constitutional charter" have yielded, over the last fifty years, a genuine model of justice'*³⁵⁰. The term 'access to justice' (Zugangsgerechtigkeit) means:

'that it is for the European Union to grant access justice to those who are excluded from the market or to those who face difficulties in making use of the market freedoms. European private law rules have to make sure that the weaker parties have and maintain access to the market – and to the European society insofar as this exists'. This type of justice, in Micklitz's view, has two constitutive elements, which both have a horizontal dimension, meaning that they may affect legal relationships between private parties: In the first place, EU law gives subjective access rights, such as those granted in labour, anti-discrimination and consumer law; and in the second place it incorporates antidiscrimination rights, concerned with the creation of equal access conditions to labour and consumer contracts. 'Access justice' must thus be distinguished from social distributive justice and allocative libertarian justice: It does not aim at social protection in a redistribute perspective, nor does it pursue a

³⁵⁰ H.-W. MICKLITZ, 'Introduction, in: *The Many Concepts of Social Justice in European Private Law*', in Cheltenham: Edward Elgar Publishing 2011

European principle of freedom of contract; rather, it affirms that '[t]he legal system is responsible for establishing tools which transform the theoretical chance [of participating in the market and reaping the benefits of the market] into a realistic opportunity, thereby eliminating all sorts of barriers which hinder the assertion of the claim to access'.³⁵¹

Comparing this distinct concept(ion) of social justice in EU law with the national models of social justice of the Member States offers an explanation for tensions between EU law and national laws on matters of contract law. Striking examples of such tensions can be found in employment law, e.g. the European Court of Justice's Viking and Laval judgments³⁵² (EU freedoms v. national social policies), and its Mangold and Küçükdeveci judgments³⁵³ (a general principles of EU law affecting national law on employment contracts). Moreover, the difficult legislative process leading up to the enactment of the Consumer Rights Directive³⁵⁴ forms an illustration of the collision of different EU and national ideas of consumer protection.

Conclusion

Having addressed some of the legal-economic concerns about CESL and having related them to the legal-political background to the proposed instrument insofar as it regards B2C contracts³⁵⁵, the following conclusions may be drawn:

1. The high number of mandatory consumer protection provisions included in CESL could, from a law-and-economics perspective, be considered to lead to overregulation of consumer sales contracts in Europe. On the other hand, the introduction of a dual standard for local and cross-border contracts gives firms the opportunity to offer contracts under a standard that is tailored to

³⁵¹ See note 335.

³⁵² Case C-438/05, ITF and Finnish Seamen's Unit v Viking Line, ECJ 11 December 2007, [2007] ECR I-10779; Case 341/05, Laval un Partneri Ptd v. v Svenska Byggnadsarbetareförbundet et al., [2007] ECR-11767.

³⁵³ Case C-144/04, Werner Mangold v Rüdiger Helm, CJEU 22 November 2005, [2005] ECR I-9981; C-555/07, Seda Küçükdeveci v Swedex, CJEU 19 January 2010, [2010] ECR I-365.

³⁵⁴ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ L 2011 304/64.

³⁵⁵ C. MAK, 'In defence of CESL', in Draft paper Conference 'European contract law: A law-and-economics perspective' Chicago, 27 and 28 April 2012.



consumer preferences in different markets. Moreover, CESL functioning as a '2nd regime' under the applicable law to a contract may mitigate costs, since this construction 'neutralizes' consumer protection provisions that would have applied on the basis of Article 6(2) of the Rome I Regulation.

2. Although short- to medium-term transaction costs may increase as a consequence of introducing CESL, the benefits of additional choice of products and increased cross-border trade should not be ignored as they may be high enough to lead to a positive balance. This depends on whether businesses will offer new cross-border contracts under the CESL and consumers will opt into the instrument.

3. The possible success of CESL should not be assessed on the basis of a legal-economic analysis alone. This analysis should be complemented with a legal-political analysis of the concept of social justice reflected in the rules of CESL, and its relation to national concepts of social justice.

BIBLIOGRAFIA

“Besondere Vertragstypen am Beispiel des Maklerrechts, in Der Gemeinsame Referenzrahmen, München, 2009, p. 113 ss.

A. SEN, *The Idea of Justice*, in London: Allen Lane 2009.

AA.VV., *I Principi del diritto comunitario dei contratti. Acquis Communautaire e diritto privato europeo*, Torino, 2009.

ALPA and CONTE, “*Dal progetto generale di Common Frame alla revisione dell’acquis communautaire*”, in *Il diritto europeo dei contratti tra parte generale e norme di settore*, NAVARRETTA, Milan, 2008.

ALPA, *Il codice civile europeo: “e pluribus unum”*, cit., p. 695 ss.

ALPA, IUDICA, PERFETTI, ZATTI, *See Draft Common frame of Reference del diritto privato europeo*, Milan, 2009.

ALPA, *L’armonizzazione del diritto contrattuale europeo e il progetto di codice civile europeo*, p. 174.

ANTONILLI and FIORENTINI, *A Factual Assestment of the Draft Common Frame of Reference*, Monaco, 2011.

ANTONIOLLI and FIORENTINI, p. 413, the terminology of DCFR is “easily understandable (even if sometimes it may sound odd)”.

BANGEMANN, *Privatrechtsangleichung in der Europäischen Union*, in ZEuP, 1994.

BASEDOW, *Gemeinschaftsprivatrecht/ Unionsprivatrecht*, in BASEDOW, HOPT, ZIMMERMANN, *Handwörterbuch, “Europäisches Vertragsrech und Überarbeitung des gemeinschaftlichen Besitzstands: weiteres Juristentag, Sammelband*, Wien, 2008, p 195 ss.

BASEDOW, HOPT, ZIMMERMANN, *Handwörterbuch*, Mohr Siebeck GmbH & Co. KG, 2011.

BASEDOW, *Un comune diritto dei contratti per il mercato comune*, Contratto e impresa/ Europa, 1997.

BEHAR-TOUCHAIS, “*Relations d’un instrument optionnel avec les lois nationales*”. Relation to EU Parliament in 27 October 2010, PE 425.645, <http://www.europarl.europa.eu/webnp/cms/lang/en/pid/1483:jsessionid=E320EF674>.

BONELL, *Verso un codice europeo dei contratti?*, in Contratto e impresa/Europa, 1998, p. 189 e ss

C. MAK, ‘*In defence of CESL*’, in Draft paper Conference ‘European contract law: A law-and-economics perspective’ Chicago, 27 and 28 April 2012.

C. MAK, ‘*Hedgehogs in Luxembourg? A Dworkinian Reading of the CJEU’s Case Law on Principles of Private Law and Some Doubts of the Fox*’, in *European Review of Private Law* 2012, p. 323-346.

CASTRONOVO C., *Contract and the Idea of Codification in The Principles of European Contract Law*(in *Festschrift til Ole Lando*), 1997.

CASTRONOVO C., *I principi di diritto europeo dei contratti e il codice civile europeo*, in *Vita not.*, 2000.

CASTRONOVO C., *Un contratto per l'Europa, Introduction to Italian Edition of "Principles of European Contract Law"*, Parts I and II, Milan, 2001.

CASTRONOVO, *"La Proposta per un Diritto comune europeo della vendita: alcuni quesiti fondamentali"*, Audizione Pubblica, 2012.

CASTRONOVO, *"Verso un codice europeo: i Principi di diritto europeo dei contratti"*, in Vita not., 2004, p. 18 e ss.

CASTRONOVO-MAZZAMUTO, *L'idea*, in Manuale di diritto privato europeo, I, cit., p. 16.

CHRISTIAN TWIGG-FLESNER, *"Debate on a European Code of Contract"*, in Contratto e impresa/Europa, 2012.

CUTTS, *Clarifying Eurolaw*, High Peak, Plain Language Commission, 2001.

D. ARCHER, *Impérativité et ordre public en droit communautaire et droit international privé des contrats*, in Typed thesis, Cergy-Pontoise, 2006.

De GEESR and KOVAC, *"The Formation of Contracts in the DCFR – A Law and Economics Perspective"* (publication forthcoming in Chirico/Larouche (eds.)).

Die neue Arbeitsgruppe erarbeitet einen benutzerfreundlichen Text mit einfachen Formulierungen, the press release of 21 May 2010; ZEuP, 2010, p.954.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS, *The functioning of the CESL within the framework of the Rome I Regulation*, October 2012.

DORALT W., *Rote Karte Oder grünes Licht Für den Blue Button?*, AcP 211 (2011), 1---34, at 22.

DROBNIG, SNIJDERS, ZIPPRO, *Divergences of Property Law, an Obstacle to the Internal Market?*, 2006.

E. ALLAN FARNSWORTH, *CONTRACTS* § 2.2 (Vol. 1, 1990).

E. CLIVE, *'Edinburgh blog on European Private Law News'*, 17 April 2012.

EIDENMÜLLER, FAUST, GRIGOLEIT, JANSEN, WAGNER, ZIMMERMANN, *Revision des Verbraucher-acquis*, Tübingen, 2011.

EPSTEIN, *'Harmonization, Heterogeneity and Regulation: Why the Common European Sales Law Shouldbe Scrapped'*.

ERNST, *Common Frame of Reference' aus juristischer Sicht*, in AcP, 2008.

F. GOMEZ and J.J. GANUZA, *'An Economic Analysis of Harmonization Regimes: Full Harmonization, Minimum Harmonization or Optional Instrument?'*, in European Review of Contract Law, 2011.

FAUVARQUE- COSSON, *European contract law through and beyond pluralism- the case of an optional instrument*, in Symposium Pluralism and European Private Law.

FAUVARQUE-COSSON B. and MAZEAUD D.(eds.), *European Contract Law, Materials for a Common Frame of Reference: Terminology, Guiding Principles, Model Rules*.

FERRARESE, *“Il diritto al presente, Globalizzazione e tempo delle istituzioni”*, Bologna, 2022, p.67, note 8.

FERRARI and LEIBLE (Eds.), *Rome I Regulation. The law applicable to contractual obligations in Europe*, Munich, Sellier, 2009.

GALGANO F., Chapter 1: “ Dai Principi Unidroit al Regolamento europeo sulla vendita, in *Contratto e impresa/ Europa* 1-2012.

GALGANO, *Atlante di diritto privato comparato*, p. 29.

GEBAUER, *“Europäisches Vertragsrecht als Option- der Anwendungsbereich, die Wahl und die Lücken Optionalen Instruments in Zeitschrift für Gemeinschaftsprivatrecht(GPR)*.

GERVEN, *Codifying European Private Law: Top Down and Bottom up*.

GIOVANNI DE CRISTOFARO, *Il ‘futuro’ “Diritto comune europeo” della vendita mobiliare: profili problematici della Proposta di Regolamento presentata dalla Commissione UE*, in *Contratto e impresa/ Europa*, 2012.

GRIGOLEIT, TOMASIC, *Acquis Principles*, in MAX PLANCK ENCYCLOPAEDIA OF EUROPEAN PRIVATE LAW, Jurgen Basedow, Klaus J. Hopt and Reinhard Zimmermann, eds., Oxford University Press, December 2012.

GRUNDMANN, *An Academic Green Paper on European Contract Law*, 2002.

GUENTER TREITEL, *THE LAW OF CONTRACT* 67 (London 10th ed., 1999).

GUTMAN, *The Commission’s 2010 green paper on European contract law: reflections on Union’s competence in the light of the proposed option*, in *ERCL*, 2011, p.151.

H. COLLINS, *The European Civil Code: The Way Forward*, in Cambridge: Cambridge University Press 2008.

H. PUTNAM and V. WALSH, *The End of Value-Free Economics*, in Abingdon, Oxford: Routledge 2011.

H.-W. MICKLITZ, *‘Introduction, in: The Many Concepts of Social Justice in European Private Law’*, in Cheltenham: Edward Elgar Publishing 2011.

HUBER, SCHWEIZERISCHES CIVILGESETZBUCH, ERLÄUTERUNGEN ZUM VORENTWURF 2.12 (1902), quoting Konrad ZWIEGERT & Hein KÖTZ, *INTRODUCTION TO COMPARATIVE LAW*, 172 (Oxford 3d ed. 1998).

ID., *Clear, Simple and Precise Legal Drafting: How Does a European Community Directive Fare?* In *Statue Law Review*, 2006.

ID., *Harmonization of Private Law: Do We Need It?*, in *Common Market Law Rev.*, 2004.

ID., *Verso un codice europeo: i Principi di diritto europeo dei contratti*, in *Vita not.*, 2000.

IORATTI FERRARI, *Draft Common Frame of Reference and Terminology*.

IORATTI- FERRARI, *voce Codice Civile europeo*, cit.

JAN M. SMITS, Paper for the conference European Contract Law: A Law-and-Economics Perspective, University Of Chicago Law School, 27-28 April 2012.

JANSEN, ZIMMERMANN, *Vertragsschluss und Irrtum*, cit.

JANSEN, ZIMMERMANN, *Grundlegen des bestehenden Gemeinschaftsprivatrechts?* In JZ, 2007.

JENSEN, ZIMMERMANN, *Restating the Acquis Communautaire? A Critical Examination of the 'Principles of the Existing EC Contract Law'*, in MLR, 2008.

JOBARD-BACHELIER, M.-N., *L'apparence en droit international privé*, in L.G.D.J., 1983.

JORGES, *"Un codice civile europeo è davvero l'unica soluzione?"*, in Riv. Crit. Dir. Priv., 2003, p. 8, translated by M.R. MARELLA, *di Ein europäisches Zivilgesetzbuch als einzige Lösung?* In Frankfurter Rundschau of 5th November 2002.

KLAUS TONNER, *CESL and consumer contract law: integration or separation?*, in Contratto e impresa/Europa 1-2012.

LAGARDE, *Répertoire Dalloz de Droit Communautaire*, in V^e Convention de Rome (contractual obligations) No 44.

LAGARDE, *'Le principe de proximité en droit international privé'*, RCADI, 1986, p. 196.

LANDO O., *Salient Features of the Principles of European Contract Law: A Comparison with the UCC*, RESEARCH GROUP ON THE EXISTING EC PRIVATE LAW (ACQUIS GROUP), *Principles of the existing EC Contract Law (Acquis Principles)*, Contract I, 2007, Contract II, 2009.

LANDO O., *Some Features of the Law of Contract in the Third Millennium*, ch. III
22 http://www.cbs.dk/departments/law/staff/ol/commission_on_ecl/literature.htm.

LANDO O./BEALE H.: *Principles of European Contract Law*, Parts I and II, prepared by the Commission on European Contract Law, 2000, *A European Private Law as a Mixed Legal System*, Maastricht Journal of European and Comparative Law 5, 1998.

LANDO, *Comments and Questions Relating to the European Commission's Proposal for a Regulation on a Common European Sales Law*, in ERPL, 2011.

LEHMANN, *"Auf dem Weg zu einem europäischen Vertragsrecht: Die 'Feasibility Study' der Exper Group on European Contract law"*, in Gemeinschaftsprivatrecht, in 2011.

LEHMANN, *"Auf dem Weg zu einem europäischen Vertragsrecht: Die 'Feasibility Study' der Exper Group on European Contract law"*, in Gemeinschaftsprivatrecht, in 2011.

LOW, *'Will Firms Consider a European Optional Instrument in Contract Law?'*, in European Journal of Law and Economics (forthcoming 2012), <http://www.springerlink.com/content/4l83211716710j20>.

M. A. PILAR FERRER VANRELL and A. MARTINEZ CAÑELLAS, *"Acertos y desaciertos en la construcción de un Derecho contractual europeo"*, in Principios de Derecho contractual europeo y principios de Unidroit sobre contratos comerciales internacionales, Madrid, 2009.

M. BEHAR-TOUCHAIS and M. CHAGNY, *Société de législation comparée*, in collection TEE, Volume 1, 2011, Réponse du groupe D, part drawn up by Pascal de Vareilles, SOMMIERES No 76.

M. DELPEREE, Senat, Ordinary Session 2011-2012, n. 5-1382/1.

M.W. HESSELINK, *'How to Opt Into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation'*, in *European Review of Private Law* 2011, p. 198-201.

M.W. HESSELINK, *'The Case for a Common European Sales Law in an Age of Rising Nationalism'*, in *European Review of Contract Law* (forthcoming 2012), <http://ssrn.com/abstract=1998174>.

MANUEL IGNACIO FELIU REY, *"Un codice europeo dei contratti: alcune riflessioni e qualche dubbio"*, in *Contratto e impresa/ Europa*, 2012.

MAUGERI, *Alcune perplessità in merito alle possibilità di adottare il DCFR come strumento opzionale (o facoltativo)*, in *Nuova giur.civ.*, 2011.

MENGONI, *"L'Europa del codice o un Codice per l'Europa?"*, in *Quaderni del centro studi e ricerche di diritto comparato e straniero*, n. 7, Rome, 1993.

MICKLITZ and REICH, *The Commission proposal for a Directive on consumer rights*, in *CML Rv.*, 2009.

N. NORD, *Ordre public et lois de police en droit international privé*, in *Typed thesis*, Strasbourg III, 2003.

N.K. KOMESAR, *'Imperfect Alternatives. Choosing Institutions in Law, Economics and Public Policy'*, in Chicago: University of Chicago Press 1994.

N.K. KOMESAR, *'Law's Limits. The Rule of Law and the Supply and Demand of Rights'*, in Cambridge: Cambridge University Press 2001.

PIERS M., VANLEENHOVE C., *The Common European Sales Law. A critical assessment of a valuable initiative*, in *"Contratto e impresa/Europa 1-2012"*.

POSNER, *'The Questionable Basis of the Common European Sales Law: The Role of an Optional Instrument in Jurisdictional Competition'*.

HESSELINK, *'How Many Systems of Private Law are there in the European Union? Nationalist, Dualist/Pluralist and Europeanist Perspectives'*, in *'Presentation at the Ius Commune conference'*, Utrecht, 25 November 2011.

R. MANGABEIRA UNGER, *'Legal Analysis as Institutional Imagination'*, in *Modern Law Review* 1996, 1-23.

REICH, *A European contract law or an EU contract law regulation for consumers?*, in *JCP*, 2005.

RIEDL, *"The Work of Lando- Commission from an Alternative Viewpoint"*, in *ERPL*, 2000.

RITA ROLLI, *"La proposta di regolamento europeo sulla vendita nel processo di codificazione europea"*, in *Contratto e impresa/Europa*, 2012.

RODOTA', *Il codice civile e il processo costituente europeo*.

ROTH, *Europäischer Verbraucherschutz und BGB*, in *JZ*, 2001.

ROTT and TERRY, *The proposal for a Directive on consumer rights: no single set of rules*, in *ZEUP*, 2009,

ROYSTON GOODE, *COMMERCIAL LAW* 74 (2d ed. 1995).

SCHULTE-NÖLKE, *Der Blue Button kommt- Konturen einer neuen rechtlichen Infrastruktur für den Binnenmarkt*, in ZeuP, 2011, p. 749 ss.

SCHULTE-NÖLKE, *Europäisches Vertragsrecht Als blauer Button Im Internet---Shop*, ZGS 2007, 81.

SCHWENZER I. and HACEM P., *The CISG – A Story of Worldwide Success*, in American Journal of Comparative Law (Spring 2009).

HESELINK, 'How to opt into the Common European Sales Law?' in Brief comments on the Commission's Proposal for a Regulation, 26 October 2011, in European Review of Private Law, Vol.1, pp 195–212, 2012, Amsterdam law school Legal Studies Research paper No 2011-43, Centre for the Study of European Contract Law Working Paper Series No 2011-15, Electronic copy available at: <http://ssrn.com/abstract=1950107>.

SENDMEYER, *The Freedom of Choice in European Private International Law. An Analysis of Party autonomy in the Rome I and Rome II Regulation*, in Contratto e impresa/Europa, 2009.

Stockholm Program, n. 99[P7_TA(2009)0090], European Digital Agenda 2010 [COM(2010)245], the Commission's work program for the 2011 [COM(2011)623].

TAMM and TONNER, *Verbraucherrecht- Beratungshandbuch*, 2012, 4 nos.

TANNER, Clear, Simple and Precise Legal Drafting: Australian Guidelines Using an EC Directive, in Statute Law Review, 2004.

TOMASZEWSKI, 'La désignation, postérieure à la conclusion du contrat, de la loi qui le régit', in Rev. Crit. Dr. Int. Pr., 1972.

TONNER and TAMM, *Der Vorschlag für eine Richtlinie über Verbraucherrechte und seine Auswirkungen auf das nationale Verbraucherrecht*, in JZ, 2008.

TONNER, *CESL and consumer contract law: integration or separation?*, in Contratto e impresa/ Europa, 2012.

TROMBETTI, *I tentativi di uniformazione del diritto contrattuale a livello europeo. Prime riflessioni per un confronto tra il DCFR e il progetto preliminare del Code européen des contrats*, in Contratto e impresa/Europa, 2011.

TUORI, *EC Law: An independent Legal Order or a post-modern Jack-in-the-box?* In ERIKSSON and HURRI (eds), *Dialectic of Law and Reality*, Helsinki, 1999.

V. B. REMY, *Exception d'ordre public et mécanisme des lois de police en droit international privé*, in *Typed thesis*, Paris I, May 2006, National Library th., Dalloz, 2008.

V. BAR, CLIVE, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, Full Edition, I, München 2009.

VOGENAUER, *Besonderheiten des englischen Vertragsrecht*, in TRIEBEL, ILLMER, RINGE, VOGENAUER, ZIEGLER, Frankfurt, 2012.

VOGENAUER, *Elaborare il diritto europeo dei contratti*, in Contratto e impresa/ Europa, 2012.

VOLTAIRE, *Dialogues Oeuvres de Voltaire*, VII, 1838.

VON BAR, CLIVE, SCHULTE-NOLKĚ, *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)*, München, Sellier, 2009.

WHEATERILL, *Diversity between National Laws in the International Market*.

WHITTAKER, *The Optional Instrument of European Contract law and Freedom of Contract*, in RDC, 2011.

ZACCARIA A., *Presa di posizione sul futuro del CFR*, in *Contratto e impresa/ Europa*, 2011.

ZIMMERMANN R., Chapter 2: “Diritto privato europeo: Smarrimenti e disordini”, translated by Edoardo Ferrante in *Contratto e impresa/ Europa* 1-2012.

ZIMMERMANN R., *Principles of European Contract Law*, in BASEDOW, HOPT, ZIMMERMANN(cur.), *Handwörterbuch*.

INSTITUTIONAL TEXTS:

Study Group on Social Justice in European Private Law, ‘Social Justice in European Contract Law: a Manifesto’, in *European Law Journal* 2004.

Summary of the first meeting of expert groups in 21 May 2010, p.

1, http://ec.europa.eu/justice/policies/consumer/policies_consumer_into_en.htm.

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

Presentation of the study, A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders’ and legal practitioners’ feedback, p.3 s.,

in http://ec.europa.eu/justice/news/consulting_public/news_consulting_0052_en.htm.

Joint Network on European Private Law (CoPECL: Common Principles of European Contract Law), Network of Excellence under the 6th EU Framework Programme for Research and Technological Development, Priority 7 – FP6-2002-CITIZENS- 3, Contract N8 513351 (co-ordinator: Professor Hans Schulte-Nölke, Osnabrück).

Resolution of 26 May 1989, in G.U.C.E., 28 June 1989, C 158.

Policy Options for Progress Towards a European Contract Law’, Comments on the issues raised in the Green Paper from the Commission of 1 July 2010, COM (2010) 348 final, Max Planck Institute for Comparative and International Private Law, p. 24.

French national Assembly, Commission of Europeans Affairs, “Examen du rapport d’information de Mme Marietta Karmanli sur la proposition de la Commission européenne relative a la creation d’un droit commun europeen de la vente (E 6713), in the 7 December 2011, <http://www.assemblee-nationale.fr/13/europe/c-rendus/c0231.asp>.

C-555/07, Seda Küçükdeveci v Swedex, CJEU 19 January 2010, [2010] ECR I-365.

COM (2003) 68 def., 12 February 2003, Communication from the Commission to the European Parliament and the Council: a more coherent European Contract Law, An Action Plan, 17.

COM (2011) 635 DEF, Explanatory Memorandum.

Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the Area of European Contract Law, OJ 2010 L 105/109.

‘Common European Sales Law and Third State Sellers’, <http://conflictoflaws.net/2012/common-europeansales-law-and-third-state-sellers/>; and ‘Common European Sales Law, Third States and Consumers’, <http://conflictoflaws.net/2012/common-european-sales-law-third-states-and-consumers/>.

Eu Council, Press release: 2863rd Council meeting, Justice and Home affairs, Lussemburgo, 18 Aprile 2008.

Eui Working Papers, DEPARTMENT OF LAW European Regulatory Private Law Project (ERPL-03) European Research Council (ERC) Grant, THE COMMISSION PROPOSAL FOR A “REGULATION ON A COMMON EUROPEAN SALES LAW (CESL)” – TOO BROAD OR NOT BROAD ENOUGH?, 2014.

Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ L 2011 304/64.

“Grünbuch: Die Überprüfung des gemeinschaftlichen Besitzstands im Verbraucherschutz”, COM (2006) 744 def.

CASES:

Case C-144/04, Werner Mangold v Rüdiger Helm, CJEU 22 November 2005, [2005] ECR I-9981;

Case C-436/03, European Parliament v. Council (2006) ECR I – 3733, par. 46.

Case C-438/05, ITF and Finnish Seamen’s Unit v Viking Line, ECJ 11 December 2007, [2007] ECR I-10779.

Case 341/05, Laval un Partneri Ptd v. Svenska Byggnadsarbetareförbundet et al., [2007] ECR-11767.