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Does a «Common European Sales Law» Constitute a New Step Towards the Harmonization of Contract Law in the European Union?

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DOES A *COMMON EUROPEAN SALES LAW* CONSTITUTE A NEW STEP TOWARDS THE HARMONISATION OF CONTRACT LAW IN THE EUROPEAN UNION?

The European Commission's Proposal for a Regulation on a Common European Sales Law (hereinafter: "CESL"), is a project that has provoked many discussions, both on academic and practical grounds. Numerous discussions and various issues are being raised at the numerous conferences being organised concerning the CESL– not only in the European Union. As an example, on 5 December 2012, at the Faculty of Law and Administration at the University of Silesia, there was a conference on "*Common European Sales Law (CESL)*". It was organised by the Private Law Society "*Sapere aude!*" in co-operation with the faculty's Department of Private and Private International Law.

The topics presented at the conference looked at a selected number of issues regarding the CESL.[1] The CESL, which can be traced back to the idea of a potential European Union Civil Code, is intended to serve as an "*optional instrument*", based on the "*opt in*" principle. It will be up to the parties making an active choice whether or not to choose the principles of the CESL provisions, or not. The CESL, as a result of long-standing work aimed at bringing about harmonisation in areas of contract law in the European Union, constitutes one of the most important developments in the European contact law harmonisation process. It covers solutions based on models proposed in the earlier European contract law (soft law) regulations, such as *the Principles of European contract Law*, (PECL, the 90ties)[2] and the *Draft Common Frame of Reference* 2008 (von Bar, Clive, Schulte-Nölke, 2008)[3] *and* 2009 (von Bar, Clive, Schulte-Nölke, 2009)[4] (DCFR). Primarily, the CESL considers contracts for the sale of goods, covering the supply of digital content and the provision of related services. The Optional Instrument will find its application in business-to-business relations (B2B) and business-to-consumer relations (B2C). However, in the first situation the CESL provisions will be applicable, where at least one of the parties is an SME (Small – Medium Enterprise).

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[1] Proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law from 11.10.2011, COM(2011) 635 final; 2011/0284 (COD); Also at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF

[2] First part issued in English in 1995, and harmonized parts I and II turned out together with O. Lando and H. Beale commentary [Lando O., Beale H.: *Principles of European Contract Law, Part I and II, Combined & Revised*, The Hague–London–Boston 2000.].

[3] von Bar Ch., Clive E., Schulte- Nölke H. et. al.: *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR). Interim Outline Edition*, Munich 2008.

[4] von Bar Ch., Clive E., Schulte- Nölke H. et. al.: *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR). Outline Edition*, Munich 2009.

The overall purpose of the CESL, by making uniform contract law rules available, is not only to improve conditions for the establishment and operation of the internal market and allowing traders to reduce unnecessary costs, but also to provide consumers with greater legal certainty and the possibility of cross-border e-shopping. This aim, in the European Commission's idea, is to be reached by making CESL principles available, as a uniform set of independent rules, enabling enhanced consumer protection. Those principles are to be considered as a second contract law regime within the national law of each Member State (Jagielska M., 2012: p. 23–30).[5]

The matters regulated in the *Common European Sales Law* were presented and vibrantly commentated on by the participants of the University of Silesia's CESL Conference. The speakers were divided into two speaking groups. In the first group, which covered the "*Selected matters on the contract law principles in CESL*", Prof. UŚ dr hab. Ewa Rott-Pietrzyk, who is also a supervisor of the "*Sapere aude!*" Private law Society in UŚ, analysed the combined (subjective-objective) interpretation method and the general principles for the interpretation of contracts provided for in the CESL. The students taking an active part in the conference presented the following topics: Łukasz Kuś presented the issues of the material and formal requirements as to the formation of the contract under the CESL, and Maria Łabno spoke about the problems related to the non-performance and justified non-performance under the CESL. The first part of the conference was closed with a presentation from Michał Mizioch, who considered the problems regarding the unfair contract terms under the CESL.

Concerning Professor Rott-Pietrzyk's presentation on the combined (subjective-objective) interpretation method for the interpretation of contracts provided for in the CESL, the Professor alleged that the regulation of the directives of interpretation applicable to the interpretation of an international sales contract introduced in CESL does not bring anything new, in the meaning that they comply with the commonly accepted methodology and standards of contract interpretation employed in unified acts of law (i.e. PECL, DCFR, UNIDROIT principles, the TRANS-LEX principles) and the major legal systems of the Member States of the European Union. A regulation on the interpretation proposed in the CESL would perfectly suit the widely accepted doctrine of the private law concept of contract interpretation using both the subjective element, i.e. the intent of the parties, as well as the objective one, expressed through applicable objective criteria, in order to determine the scope and meaning of complex contractual clauses. The professor considered whether the regulations of contract interpretation introduced in the draft directive are a functional and useful tool applicable for contract interpretation, or whether the concept they express should not be approved and should, therefore, not be transposed into legal language, both in the international area of law and in the laws of the Member States. Consideration of this question is also important under Polish Law because of the already published draft of Book 1 of the new Polish Civil Code, which expresses in its regulations concerning the interpretation of statements of intent and contracts also the combined method of interpretation, accepting the subjective criterion – the parties' intent communicated through a unilateral statement of intent – as well as the objective criteria – applied in given circumstances to protect the

[5] Jagielska M.: *Optional Instrument and Private International Law: some remarks*, [in:] ed. Jagielska M., Rott-Pietrzyk E., Wiewiórowska-Domagalska A.: *Kierunki rozwoju europejskiego prawa prywatnego: wpływ europejskiego prawa konsumenckiego na prawo krajowe*, Warszawa, 2012.

justified expectations of the contracting party and his trust (the standards of a reasonable person, considerations of reason and equity). Prof. dr hab. Ewa Rott-Pietrzyk stated that the regulation concerning contractual interpretation in the CESL is "*the best solution*" because of its functionality, and that it favours the reasonable methodology of interpretation and the application of directives dealing with contractual interpretation.

Adapting the European Optional Instrument of the contract law is connected with various dilemmas and problems arising on the grounds of private international law. Those were highly discussed in the second part of the conference – "*The Common European Sales Law vs. private international law*". In this part, Prof. dr hab. Monika Jagielska of the University of Silesia discussed the topic *"The CESL and private international law",* and Małgorzata Pohl spoke about the potential competition between the CESL and the CISG (the United Nations Convention on Contracts for the International Sale of Goods). Further in the conference, Anita Strzebińczyk, talked about the "*Retention of title clauses and the CESL regulation*", and Paula Majcher gave a speech on the influence of the CESL on the improvement of the internal market.

One of the doubts arising from the question as to the nature of the CESL regulation is whether it is an instrument of an equivalent position to national legal systems, or whether it constitutes one contract law regime inside the national legal regime of the EU countries. As Professor Jagielska explained, the CESL regulation should be considered as a second contract law regime within the national law of each Member State (not the 28th regime). Where the parties choose the CESL provisions as an instrument regulating their legal relation, this relation will be excluded from the State's national legal regime. The parties' agreement as to the application of the CESL constitutes a choice between two sets of sale of goods rules within one national legal system, which is why this choice of law should not be mistaken with the choice of law in the understanding of private international law.

The discussion also considered issues relating to the potential competition between CESL and CISG, which was presented by Malgorzata Pohl. The CESL provisions are created not only for B2C contracts, but also for B2B. On 11 April 1980, the United Nations Convention for the International Sale of Goods was signed (CISG),[6] with its provisions covering B2B contracts for the international sale of goods. With respect to those Member States who signed the CISG Convention, it is to be "automatically" applied in the situations, where the parties to the international contract did not expressly "opt out" from its provisions. It also applies when at least one of the parties has its place of business in a CISG Member State, and private international law leads to the application of the law of this Contracting State. Despite the many varied advantages that the CISG presents, (including lower transactional costs and facilitating international commercial transactions), in practice it has been observed that parties have tended to opt-out of the CISG. Ms Pohl examined various, future possible problems with applying the CESL provisions to B2B contracts, based on the experience of problems faced by the CISG concerning its application to contracts for the international sale of goods between businesses.

[6] United Nations Convention on Contracts for the International Sale of Goods from 11.04.1980; Available at: http://www.cisg.law.pace.edu/cisg/text/treaty.html. In Polish, officially published in: Dz. U. z 1997, Nr 45, poz. 286.

The most frequently cited reasons for opting out of the CISG Convention were presented, and basing on that reasoning analogical situations were simulated with potential, similar problems that CESL may face in this respect in future. One of the most frequent reasons for resigning from the CISG provisions is its unfamiliarity, or more precisely the insufficient knowledge about its provisions to evaluate its beneficial application in particular circumstances (a "fear of the unknown"). This phenomenon is frequently described as "automatic opt-outs" or "blind opt-outs". Comparing the situation relating to "blind opt-outs", the future possibility of "opting in" for the CESL can be considered. There is a serious prediction that the parties will not decide to opt in to the CESL due to an unfamiliarity with the "very new European rules" – leading to the parties not taking the active choice of the Optional Instrument. There is also a second situation resulting from a lack of the parties' knowledge – namely ignorance over the very existence of the CISG, and the application of its rules to the international sale of goods contracts in particular business relations. In this situation, the CISG will apply automatically, as the parties' ignorance will mean that they do not opt out of its provisions. However, a different situation will appear in the case of the CESL, where its provisions can be applied only through an active choice, i.e. by opting-in to its provisions. Therefore, ignorance of the CESL's existence will never lead to it being applied in the international sale of goods cases. More arguments were presented as to the scepticism over the possible, future application of the CESL to B2B contracts. One more argument usually presented by sceptics, is the problem related to "start-up costs", which concerns redrafting contract forms and standardising them to the CISG/CESL rules. There are numerous potential problems with opting for the CESL regulations in B2B relations, one more problem relates to the large scope of consumer protection rules presented in the CESL. Doubts have been raised as to whether businesses would be scared off of an optional instrument containing provisions designed primarily for consumers.

Mgr Anita Strzebińczyk in her paper, "*Retention of title clauses and the CESL regulation*", presented a topic touching upon the law of obligations and property law. She discussed retention of title clauses (*pactum reservati dominii*), which are widely included in sales contracts, especially those concluded between parties residing in different countries. These clauses are an effective way to secure the seller's interest – claims from the sales contract. The essence of this security lies in the modification of the rights and obligations of the parties to the sales contract, considered in light of the effects of the retention of title clauses in the area of law of obligations and property law. The transfer of property is made conditional, usually with a precedent condition, on the payment of the price by the buyer. The sales contract is instead unconditional and definitive. The problem of property is strictly combined with the obligational relation between the parties, because there is a dependence connected with the performance of the contract by the buyer, and the acquisition of ownership.

Pactum reservati dominii is in widespread use by small and medium companies that do not want to, or cannot use other possibilities of security that are widely known in international trade, especially such as bank guarantees or letters of credit and those involving third parties. The use of retention of title clauses is also used by large companies to secure trade credit. In her paper, Anita Strzebińczyk presented the use of retention of title clauses in international sales contracts, with particular emphasis on the subsequent problems. Her paper was enriched by case studies in which retention of title problems arose, where the court decisions were based on cases to which the applicable

law was the CISG. Anita Strzebińczyk encouraged the audience to come up with a viable answer to the question: does the CESL introduce a new regulation in this area of law, and does it solve the problems that arise through applying retention of title clauses in international sales contracts?

Retention of title is known both in continental and common law systems. However, there is still no harmonised regulation in the field of private international law (for example, it is excluded from the scope of CISG), which results in various problems in the application of law. These problems are connected with the applicable law in a given case in the fields of: contract law, property law and insolvency law. In particular, problems arise in connection with the requirement to register retention of title clauses in some countries in order to for them to become effective (because of sellers are unaware of that fact), as well as with the decentralisation of the regulations of this institution in other countries, where the average seller has little or no legal knowledge in this area. The uncertainty concerning the applicable law also means that buyers have to have the whole amount of the price ready at the moment of concluding the sales contract. The costs connected with legal advice in international sales are another barrier in the popularisation of international sales contracts between small and medium enterprises. The validity of retention of title clauses is often tested only in courts trials, which restricts the use of these clauses, and, in turn, leads to an inaccessibility of credit, as sellers are not willingly to sell to international buyers on credit.

In the face of the existing mosaic of possible legal solutions to that problem, and in light of the aims to be achieved by the CESL regulation, Anita Strzebińczyk suggested a need for reform and regulation in that area. She proposed that it be regulated especially through an act such as the CESL. As an example, she mentioned the Swiss Private International Law Act from 18 December 1987, and the choice of law included in Article 104 of that act.[7]

In the final discussion concerning the conference, it was generally agreed that CESL would play an important role in B2C contracts, especially in online sales. The common European framework on sales may well be an interesting alternative to national regimes, both from the point of view of companies offering their products to consumers in other Member States, as well as consumers learning to trust in a ”European” sales law. The conference was attended by 80 people: scientific employees, students, PhD candidates and practitioners. We hope that the conference will be a springboard for future events at our Faculty, looking further at dealing with the Europeanisation of Private Law.

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BIBLIOGRAPHY

von Bar Ch., Clive E., Schulte-Nölke H. et. al.: *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR). Interim Outline Edition*, Munich 2008.

[7] Bundesgesetz über das Internationale Privatrecht (IPRG) vom 18. Dezember 1987, the text is available at http://www.admin.ch/ch/d/sr/291/index.html

von Bar Ch., Clive E., Schulte-Nölke H. et. al.: *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR). Outline Edition*, Munich 2009.

Jagielska M.: *Optional Instrument and Private International Law: some remarks*, [in:] ed. Jagielska M., Rott-Pietrzyk E., Wiewiórowska-Domagalska A.: *Kierunki rozwoju europejskiego prawa prywatnego: wpływ europejskiego prawa konsumenckiego na prawo krajowe*, Warszawa, 2012.

Lando O., Beale H.: *Principles of European Contract Law, Part I and II, Combined & Revised*, The Hague–London–Boston 2000.