Towards a Common European Sales Law?

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Introduction

• The aim of this paper is to chart recent developments in the EU which may ultimately herald a Common European Sales Law.
• The background to these developments is the concern of some that differences in the contract laws of Member States negatively impacts on the development of the internal market. The Green Paper on policy options for progress towards a European Contract Law for consumers and businesses (COM(2010)348 final) states:
Background

“The internal market is built on a multitude of contracts governed by different national contract laws. Yet, differences between national contract laws may entail additional transaction costs and legal uncertainty for businesses and lead to a lack of consumer confidence in the internal market. Divergences in contract law rules may require businesses to adapt their contractual terms. Furthermore, national laws are rarely available in other European languages…” (p.2)
“Partly for these reasons, consumers and businesses, in particular small and medium enterprises (SMEs) having limited resources, may be reluctant to engage in cross-border transactions. This reluctance would in turn hinder cross-border competition to the detriment of societal welfare. Consumers and businesses from small Member States might be particularly disadvantaged.” (p.2)
Fragmentation

• Yet existing EU interventions in this area have led to fragmentation (see Devenney & Kenny (2012)).

• This has been, for example, the result of:
  • focusing on particular types of contract (e.g. consumer credit contracts or package travel contracts); or
  • focusing on discrete areas of contract law (e.g. unfair terms).
Min. Harmonisation Directives

• Fragmentation has also resulted from the way in which Member States have transposed directives, particularly minimum harmonisation directives:
Min. Harmonisation Directives

“The existing EU consumer protection rules are fragmented basically in two ways. Firstly, the current directives allow Member States to adopt more stringent rules in their national laws (minimum harmonisation) and many Member States have made use of this possibility in order to ensure a higher level of consumer protection.”

The Story So Far...

“The impact of... harmonisation... has not been the creation of a single, consistent and coherent body of consumer law... instead there are now 27 national rules on doorstep selling, distance selling...” (C. Twigg-Flesner (2011))
A Need For Greater EU Intervention?

• Some regarded the foregoing as evidencing a need for greater EU intervention in this area (cf. C. von Bar (2002)).

• One option was to use maximum harmonisation directives instead of minimum harmonisation directives. Thus when the Consumer Rights Directive was first introduced it provided for wide-ranging maximum harmonisation:
A Need For Greater EU Intervention?

A Need For Greater EU Intervention?

“Those Directives have been reviewed in the light of experience with a view to simplifying and updating the applicable rules, removing inconsistencies and closing unwanted gaps in the rules. That review has shown that it is appropriate to replace those four Directives by this single Directive. This Directive should accordingly lay down standard rules for the common aspects and move away from the minimum harmonisation approach in the former Directives under which Member States could maintain or adopt stricter national rules.” (Recital 2)
A Need For Greater EU Intervention?

“Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection.” (Proposed Article 3).

• Yet maximum harmonisation directives are not uncontroversial; and raise issues about legal diversity, competition of legal orders and legal polycentricity in cross-border trade.
The (D)CFR

- In recent years one of the most significant initiatives in the search for more coherence in European Private Law was the preparation and publication of C. von Bar and E. Clive, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (Sellier, Munich, 2009).

- The magnitude of this work is immediately apparent…
The (D)CFR

“The following volumes contain the results of the work of the Study Group on a European Civil Code…and the Research Group on Existing EC Private Law... Nearly two hundred and fifty people of different generations collaborated in the research groups over a period of more than twenty five years. They have reflected important areas of private law...The perspective is thoroughly European and...[m]odel rules, with comments and notes, bring together rules derived largely from the legal systems of the Member States and the over-arching Community law.” (p.1)
The (D)CFR

The (D)CFR is published in six volumes, spanning ten ‘books’ and includes provisions on:

- general contract law (Books II & III);
- specific contracts such as sales contracts (Book IV, Part A) and contracts relating to personal security (Book IV, Part G);
- non-contractual obligations (Book VI);
- unjustified enrichment (Book VII); and
- trusts (Book X).
The (D)CFR: Purpose?

• One of the most controversial aspects of the (D)CFR was its ultimate purpose.

• Yet the authors of the (D)CFR were keen to stress that:
The (D)CFR: Purpose?

“The Study Group and the Acquis Group alone, however, bear responsibility for the content of these volumes. In particular, they do not contain a single rule or definition or principle which has been approved or mandated by a politically legitimated body at European or national level (save, of course, where it coincides with existing EU or national legislation). It may be that at a later point in time the DCFR will be carried over at least in part into a CFR, but that is a question for others to decide.” (p.3)
The (D)CFR: Purpose?

• Yet the debate raged (see Vogenauer (2010)): would the (D)CFR be the precursor to a European Civil Code or would it, for example, merely be used as a toolbox?

• The controversy was inflamed by the EU Commission’s Green Paper on policy options for progress towards a European Contract Law for consumers and businesses (COM(2010)348 final).
• In that paper the Commission set out options for the future of European Contract Law which included:

• A Regulation establishing a European Contract Law (Option 6);
• A Regulation establishing a European Civil Code (Option 7);
• A Directive on European Contract Law (Option 5); and
• An optional instrument (Option 4).
An Optional Instrument

• It became clear that an optional instrument was the most likely option (see Devenney & Kenny (2012)).

• The essential idea of an optional instrument is set out in the EU Commission’s Green Paper on policy options for progress towards a European Contract Law for consumers and businesses (COM(2010)348 final)…
An Optional Instrument

“A Regulation could set up an optional instrument, which would be conceived as a ‘2nd Regime’ in each Member State, thus providing parties with an option between two regimes of domestic contract law. It would insert into the national laws of the 27 Member States a comprehensive… self-standing set of contract law rules which could be chosen by the parties…It would provide parties, primarily those wishing to operate in the internal market, with an alternative set of rules. The instrument could be applicable in cross-border contracts only, or in both cross-border and domestic contracts…”
A Narrower CFR

- It also became clear that the scope of any political ‘CFR’ would be much narrower than the DCFR (see Vogenauer (2010)).
A Period of Uncertainty

Yet a number of issues remained including:
• The extent to which such an instrument would cover both Business-to-Consumer and Business-to-Business contracts;
• Whether the instrument should be limited to cross-border transactions;
• The scope of the instrument; and
• The Private International Law dimension to such an instrument.
The Expert Group

The uncertainty continued with the appointment of the Expert Group in 2010 (See Commission Decision 2010/233/EU; 2010 OJ L 105/109), its task being:

“...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 scenarios.”

(Expert Group’s Feasibility Study, p.5)
What could / should be the appropriate legal (Treaty) basis for any OI?

What might be an acceptable and useful scope for any OI? For example, would it apply only to goods or to services as well? Would it be apply only to cross border transactions or could it operate domestically too? What are the advantages and disadvantages of wide or narrow scope?

How would the OI react with relevant national law and regulations?

What type of costs would be incurred?”

(Ministry of Justice Instruction to Law Commissions, May 2011)
UK Law Commissions

- An initial difference in approach between the Law Commissions?

“The adoption of a European OI would have potentially dramatic consequences. Firstly, the OI is designed to bypass existing rules of private international law which preserve mandatory rules in member states.”

UK Law Commissions

“A stimulus for our review of these topics is the publication in 2009 of the Draft Common Frame of Reference (DCFR). This sets out a contemporary statement of contract law, based on comparative research from across the European Union; it is written in clear English; and it offers a new and valuable opportunity to review some of the topics on which we have already worked and to examine the law in other, related areas too…”

(Scottish Law Commission website)
Leuven, June 2011

“I have come to the conclusion that as regards contract law, we need a new approach…that on the one hand helps bring about the single market…while on the other hand respects Europe’s legal diversity and the principle of subsidiarity. For me, this can be achieved by proposing a legal instrument on European Contract Law that is voluntary and optional. That can be chosen by businesses and consumers and then serves as basis for their transactions. That does not replace existing national contract law, but that would exist alongside it.”

(Commissioner Reding, The Next Steps Towards a European Contract Law for Businesses and Consumers, June 2011)
“We are still discussing the details of how this optional instrument should look like, and notably what should be its exact private international law effects. But one thing is clear: Nobody will be forced to use the optional instrument. The bottom line is choice. Only those who choose the instrument will be able to contract under it. Those who do not want to use it will continue to contract under national laws…It is…a very procompetitive way: the optional instrument will only become a success if many businesses and consumers will find it attractive to make use of it for their transactions.”

(Commissioner Reding, The Next Steps Towards a European Contract Law for Businesses and Consumers, June 2011)
Draft 19 August 2011

• The Commission draft of 19\textsuperscript{th} August 2011 contained:
  • Provisions of ‘general’ contract law (see Part II, III & VI);
  • Provisions on the obligations and remedies of the parties to a sales contract or a contract for the supply of digital content (Part IV); and
  • Provisions on the obligations and remedies of the parties to a related service contract (Part V).
“In the daily experience of traders and consumers, the legal diversity of Europe’s contract law systems, cherished though it may be from an academic perspective, can quickly transform itself into very concrete obstacles to cross-border transactions. I want to remove these barriers. This is why I will propose a optional European Contract law next week.”

(Commissioner Reding’s website, 8th October 2011)
October 2011 Proposal

“On October 11th 2011, the European Commission proposed an optional Common European Sales Law will help break down these barriers and give consumers more choice and a high level of protection. It will facilitate trade by offering a single set of rules for cross-border contracts in all 27 EU countries. If traders offer their products on the basis of the Common European Sales law, consumers would have the option of choosing a user-friendly European contract with a high level of protection with just one click of a mouse. The Commission's proposal now needs approval from EU Member States and the European Parliament…”

(Press Release IP/11/1175)
October 2011 Proposal

Article 3 of the Proposal:

“The parties may agree that the Common European Sales Law governs their cross-border contracts for the sale of goods, for the supply of digital content and for the provision of related services within the territorial, material and personal scope as set out in Articles 4 to 7.”

Article 7 of the Proposal:
October 2011 Proposal

“The Common European Sales Law may be used only if the seller of goods or the supplier of digital content is a trader. Where all the parties to a contract are traders, the Common European Sales Law may be used if at least one of those parties is a small or medium-sized enterprise (‘SME’).”

However, the Proposed Article 13 states:
October 2011 Proposal

“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).”
October 2011 Proposal

• Compare structure of OI (which is contained in Annex I of Proposal) with draft of 19th August 2011 (above).

• On matters outside of the optional instrument see the Proposed Recital (27):
October 2011 Proposal

“All the matters...that are not addressed...are governed by the pre-existing rules of the national law...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...the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties...set-off and merger, property law including the transfer of ownership, intellectual property law and the law of torts.”
Challenges / Issues

• Obviously there is some way to go before we get a final OI.

• There are a number of issues/challenges including:
  • The methodology adopted in the (D)CFR;
  • The drafting of the CESL;
  • The assumptions underpinning the need for an OI;
  • The precise Private International Law implications of an OI;
  • The ‘exportability’ of the OI; etc.
The Response of the UK Law Commissions

Issues surrounding the drafting of the CESL were also identified in the advice given to the UK Government by the UK Law Commissions:

“The European Commission’s draft is a complex document, which is not always easy to understand.”

The Response of the UK Law Commissions

Overall the UK Law Commissions concluded:
The Response of the UK Law Commissions

“The CESL offers the parties a free choice – which we welcome. Even if the CESL is hardly ever used, no harm would be done. On the other hand, we are not convinced that developing a CESL for commercial parties should be seen as a priority. We think efforts would be better spent on developing a European code for consumer sales over the internet, where there is stronger evidence that the current variety of contract laws inhibits the single market.”
The Response of the UK Law Commissions

More specifically in relation to distance sales:

“We think there is a case for a new optional code to cover distance selling across the EU… We are not sure, however, that the current text always strikes the right balance.”
The Response of the UK Law Commissions

“Distance selling needs its own clear rules, designed around automated processes. The CESL is based on more general contract law principles and we think that it would benefit from greater focus on distance sales. More could be done to clarify when the contract is formed; the effect of a change of circumstances; and unfair terms protection. Provisions on the transfer of property could also usefully be inserted.”
Challenges / Issues

• In the remainder of this presentation the focus will be on the following further challenges/issues:
  • Fragmentation;
  • Consistency of interpretation;
  • The impact of social, cultural and economic norms; and
  • The enforcement of consumer protection provisions.
Fragmentation

• As noted above, there is some way to go before we get a final OI but it seems that the OI will not cover all of Contract Law.

• This may lead to a fragmentation of Contract Law in this area and the problem of non-harmonised background rules (see below).

• In addition there is also the question of the interaction between the ‘Contract Law’ in the OI and (non-harmonised) areas of law outside of the OI…
Fragmentation: The Case of Sureties

- Reminded of work on protection of non-professional sureties (e.g. Kenny and Devenney (2011)).
- Surety transactions are polycontextual in nature; they transcend traditional legal boundaries.
- Thus surety transactions involve aspects of:
Fragmentation: The Case of Sureties

- specific suretyship law;
- contract law;
- consumer law;
- insolvency law;
- family law;
- constitutional law;
- property law.

...and are affected by the behavioural patterns of financial institutions in particular Member States.
Fragmentation: The Case of Sureties

• The key point for present purposes is that, whilst most Member States have attempted to increase surety protection, there is marked diversity in the means used;
• In particular surety protection in individual Member States involves different complex orchestrations of the various legal fields, concepts and mechanisms mentioned above;
• This may mean that tinkering with one of these elements may have very different consequences in different Member States (Kenny and Devenney (2011)).
Consistency of Interpretation

- One of the advantages of an OI advanced in the EU Commission’s Green Paper on policy options for progress towards a European Contract Law for consumers and businesses (COM(2010)348 final) was that:

  “Consistent reference to a single body of rules would remove the necessity for judges and legal practitioners to investigate in certain cases foreign laws, which is currently the case under conflict-of-law rules. This could not only reduce costs for businesses, but also alleviate the administrative load on the judicial system.”
Consistency of Interpretation

• One difficulty is, of course, ensuring consistency of interpretation throughout all Member States.

“The impact of… harmonisation... has not been the creation of a single, consistent and coherent body of consumer law… instead there are now 27 national rules on doorstep selling, distance selling...” (C. Twigg-Flesner (2011))
Consistency of Interpretation

• A particular challenge is in ensuring a ‘European’ approach to the interpretation of the OI.
• By contrast, under existing Europeanised Private Law, there has been some unevenness in interpretation even within the same Member State:
  e.g. on the question of whether or not the Unfair Terms Directive applies to contracts of surety…
Consistency of Interpretation

Compare:
• *Bank of Scotland v. Singh* (QBD, unreported, 17th June 2005) where on a literal approach to provisions the question was answered in the negative; with
• *Barclays Bank Plc v. Kufner* [2008] EWHC 2319 (Comm). where on a more ‘European’ approach to the provisions the question was affirmatively answered (expressly disagreeing with *Bank of Scotland v. Singh*).
Role of ECJ

• Of course a robust and efficient reference process to the European Court of Justice may act as an interpretative compass.
• Yet the reference procedure is not always perceived as having such qualities. Thus in *Page v. Combined Shipping and Trading Co Ltd* [1996] C.L.C. 1952 at 1956 Staughton LJ famously stated:
Role of ECJ

“...the French, German and Italian versions all of which use the word ‘normal/normale’ instead of ‘proper’. That does not necessarily mean the same as ‘normal’ in English; similarities in language can be deceptive...we ought to conclude that Mr Page has a good arguable case...It may well be that when this comes to trial we shall have to refer the problem to the European court, and it will take another two years after that before a decision emerges as to what the regulation really means. Maybe the parties will think there are better methods of spending their time and their money than disputing that for a long period of time.”
Application of Rules

• A further difficulty is that even if a particular rule is being interpreted consistently throughout Member States, the application may be different as a result of local considerations.
• To some extent, this was recognised in Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ludger Hofstetter and Ulrike Hofstetter [2004] ECR-I 3403 at [22] where the ECJ noted that it “may interpret general criteria used by the Community legislation in order to define the concept of unfair terms. However, it should not rule on the application of these general criteria to a particular term”.

Background Rules

• This can be illustrated by the interaction of the unfairness test under the Unfair Terms Directive and background rules:

“the application of the same general criterion in two Member States may give rise to very different decisions, as a result of the divergences between the rules of substantive law that apply to different contracts. Hence harmonisation under the Directive is more apparent than real.”

Background Rules

• Thus in *UK Housing Alliance (North West) Ltd v Francis* [2010] EWCA Civ 117 the (non-harmonised) protection that could be offered by a Court in possession proceedings contributed to a finding that a term in a sale and leaseback arrangement was not unfair under the Regulations.
Social, Cultural and Economic Norms

• A related point is that the social, cultural and economic norms in a particular Member State may affect the application of particular tests under any OI.

• Again this may be illustrated by the Unfair Terms Directive, which is transposed in the UK by Regulation 5(1), Unfair Terms in Consumer Contracts Regulations 1999:
Social, Cultural and Economic Norms

“A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”

• Meaning of good faith?
Social, Cultural and Economic Norms

“Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. It looks to good standards of commercial morality and practice.”

(Director General of Fair Trading v. First National Bank plc [2002] UKHL 52 at [17] per Lord Bingham)

• Link between “good standards of commercial morality” and social, cultural and economic norms → differences in such norms throughout EU (see P. O’Callaghan (2007)).
Consumer Protection

“The right balance between business and consumer interests is for me key to the success of the optional instrument.”

(Commissioner Reding, The Next Steps Towards a European Contract Law for Businesses and Consumers, June 2011)

By contrast, the Expert Group’s Feasibility Study stated (at p.6):
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.”

• The reasoning seemingly being that in order to induce consumers to use the optional instrument, the level of consumer protection needs to be high.
Consumer Protection & Enforcement

• If so, careful thought needs to be given to the enforcement of consumer protection provisions in any OI.
• For example, the role of collective proceedings in the regulation of unfair terms, consumers often not having the information, resources and/or inclination to challenge ‘unfair’ standard terms in the courts (see Beale (1995)).
Closing Remarks

• A watershed moment for European Private Law:
"The optional Common European Sales Law will help kick-start the Single Market…It will provide firms with an easy and cheap way to expand their business to new markets in Europe while giving consumers better deals and a high level of protection…Instead of setting aside national laws, today the European Commission is taking an innovative approach based on free choice, subsidiarity and competition.“ (Commissioner Reding in Press Release IP/11/1175)
Closing Remarks

• Indeed, given the structure of the proposed OI, it may be the harbinger of a European contract law.
• Yet, as the proposed OI moves through the legislative process, caution needs to be urged.
• As this paper has sought to highlight, there are many issues and challenges for any EU OI, some of which cannot be solved solely through legislative intervention.
References


References

References

• C. Twigg-Flesner, “‘Good-Bye Harmonisation by Directives, Hello Cross-Border only Regulation?’ – A way forward for EU Consumer Contract Law”, (2011) ERCL 235.