

TOWARDS A NEW EUROPEAN LEGAL FRAMEWORK: THE PROPOSAL FOR A REGULATION ON A COMMON EUROPEAN SALES LAW

Bénédicte Fauvarque-Cosson

Professor of Law at the University Panthéon-Assas (Paris)

President of the Société de Législation Comparée, Vice President of the International Academy of Comparative Law, former Vice President of the European Law Institute and co-President of the European network Trans Europe Experts

How will European law develop over the coming years of the 21st Century?

Raoul van Caenegem: *'The answer to [this] crucial question is difficult to forecast, not only because it involves a good deal of crystal ball gazing . . . because different nations have traditionally approached this issue in different ways. Indeed, the age-old English instinct is to say, with Lord Denning, 'trust the judges, for they are the true guardians of the law'. The German feeling, which also goes back several centuries, is to say, with Savigny, 'trust the learned jurists, for they are the best guides through the thickets of the law'. The French instinct, on the other hand, is to say, in true Jacobin and Napoleonic vein, 'trust the legislator and beware of judges and jurists who pervert the codes. As none of these traditions [and I add here the many other traditions across Europe] is the sole road to salvation, a truly European law ought to contain the most helpful elements of each one of them.'*

R. van Caenegem, *European Law in the Past and the Future*, (CUP) (2002) at 134 ; quoted by Lord Neuberger of Abbotsbury, Master of the Rolls, EUROPEAN LAW INSTITUTE CONFERENCE – 01 JUNE 2011 , "Why a European Law Institute?"

The European Law Institute (ELI) is an independent non-profit organisation established to

- initiate, conduct and facilitate research,
- make recommendations and
- provide practical guidance in the field of European legal development.

Building on the wealth of diverse legal traditions, its mission is the quest for better law-making in Europe and the enhancement of European legal integration.

By its endeavours, the ELI seeks to contribute to

- the formation of a more vigorous European legal community,
- integrating the achievements of the various legal cultures, endorsing the value of comparative knowledge, and
- taking a genuinely pan-European perspective.

As such its work covers all branches of the law: substantive and procedural; private and public.

An illustration of the work accomplished by ELI: ELI Statement on the Proposal for a Common European Sales Law (CESL) and 1st Supplement

- Sir John Thomas, Lord Chief Justice of England and Wales, chair of the Working Group for the ELI Statement on the Proposal for a Common European Sales Law (CESL)
- Statement adopted in September 2012. It provides the European Institutions with a set of concrete proposals for amendments, arranging them in a comprehensive format as a full redraft of the CESL in order to demonstrate how the proposal might work in context
- The work of ELI's working group is continuing, with a **new focus on e-commerce**, digital content, **cloud computing**, in a 1st Supplement to the Statement

Examples of the proposed revisions in the 1st Supplement of ELI

Chapter 2 of CESL on **pre-contractual information** will need to be substantively reformulated in order to combine, in a more coherent manner the pre-contractual information and related duties that have their origin in Directive 2011/83/EU on consumer rights,

- the requirements from Directive 2000/31/EC on electronic commerce,
- some general information duties that must be given under the 'Services' Directive (2006/123/EC), and
- the requirements that have to be met in order to make terms which are not individually negotiated a part of the contract.

Such revision may also need to be accompanied by a paradigm shift away from the terms and principles underlying the Consumer Rights Directive to those underlying the Electronic Commerce Directive.

Examples of the proposed revisions (ctnd)

- **A number of further rules** will necessarily have to be incorporated into the Proposal. These rules should address, for example:
 - the language to be used for communications between the parties;
 - the means of distance communication that may be used;
 - internet auctions;
 - a prohibition of the use of the buyer’s personal data after withdrawal, avoidance or termination by the buyer;
- **Cloud computing and other issues relating to digital content**

See European Commission’s *Communication on Unleashing the Potential of Cloud Computing in Europe* (COM(2012) 529 final)

The formation of a European contract law

- “Strengthening the single market” and “Making Europe's consumers safer”: two main political justifications for the development of European Contract Law.
- **Regulation Proposal on a Common European Sales Law:**
“Differences in contract law between Member States hinder traders and consumers who want to engage in cross-border trade within the internal market. The obstacles which stem from these differences dissuade traders, small and medium-sized enterprises (SME) in particular, from entering cross border trade or expanding to new Member States' markets. Consumers are hindered from accessing products offered by traders in other Member States”.

Comparison with the 1980 UN Convention on the International Sales of Goods (Vienna Convention)

- wider scope than the 1980 UN Convention on the International Sales of Goods (Vienna Convention) ; consumer contracts, electronic contracts, sales of digital content included.
- autonomous European interpretation and European jurisdiction capable of imposing a uniform interpretation.
- all Member States concerned.
- opt in mechanism (comp. opt out of Article 6 of the Vienna convention)

Principle of Good Faith

Recital (31)

The general principle of good faith and fair dealing should provide guidance on the way parties have to cooperate (...)The general principle of good faith and fair dealing should set a standard of conduct which ensures an honest, transparent and fair relationship. While it precludes a party from exercising or relying on a right, remedy or defence which that party would otherwise have, the principle as such should not give rise to any general right to damages. Rules of the Common European Sales Law constituting specific manifestations of the general principle of good faith and fair dealing, such as avoidance for fraud or the non-performance of an obligation created by an implied term, can give rise to a right to damages, but only in very specific cases.

Matters covered and matters non covered

(art. 11, recital 27)

1. The Common European Sales Law addresses in its rules the following matters:
 - (a) pre-contractual duties to provide information;
 - (b) the conclusion of a contract including formal requirements;
 - (c) the right of withdrawal and its consequences;
 - (d) avoidance of the contract as a result of mistake, fraud, threat or unfair exploitation and the consequences of such avoidance;
 - (e) interpretation;
 - (f) contents and effects, including those of the relevant contract;
 - (g) the assessment and the effects of unfairness of contract terms;
 - (h) the rights and obligations of the parties;
 - (i) remedies for non-performance;
 - (j) restitution after avoidance or termination or in the case of a non-binding contract;
 - (k) prescription and preclusion of rights;
 - (l) sanctions available in the event of breach of the obligations and duties arising under its application.

New Art. 11 (a) contains a List of matters covered non covered

See also : 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 unless the reasons for such illegality or immorality are addressed in the Common European Sales Law , 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, the law of torts and the issue of whether concurrent contractual and non-contractual liability claims can be pursued together. In the interest of clarity and legal certainty, the Common European Sales Law should clearly refer to those issues which are, and those which are not, addressed therein”.

New focus on cloud computing

*** cloud computing** - New recital (17a) “Cloud computing is developing rapidly and has great potential for growth. The Common European Sales Law provides a coherent set of rules adapted to the distance supply, and in particular the supply online, of digital content and related services. It should be possible for those rules to also apply when digital content or related services are provided using a cloud, in particular when digital content can be downloaded from the seller's cloud or temporarily stored in the provider's cloud”.

New aspects

- **Redress mechanisms** – (34b) An additional obstacle to cross-border trade is the lack of access to efficient and inexpensive redress mechanisms. Therefore, a consumer and a trader concluding a contract on the basis of the Common European Sales Law should consider submitting disputes arising from that contract to an existing alternative dispute resolution entity within the meaning of point (h) of Article 4(1) of Directive 2013/11/EU of the European Parliament and of the Council 1. This should be entirely without prejudice to the possibility for the parties to initiate proceedings before the competent courts without first having recourse to alternative dispute resolution.
- **Model terms** – (34c) To help facilitate the use of the Common European Sales Law, the Commission should work towards the development of European model contract terms

Building European contract law

- a **political act**, a symbol of unity in a pluralistic environment
- originality of the **future European optional instrument for sales**.
Jürgen Basedow, “The optional instrument triggers a kind of referendum in business life”.
- **no unification of choice of law rules**
- a **regulation**, which originates from the European Commission, inspired by:
 - the UNIDROIT Principles of International Commercial Contracts,
 - the Principles on European Contract Law prepared by the Commission on European Contract Law (PECL),
 - the Draft Common Frame of Reference prepared by the Study Group on a European Civil Code (DCFR).

An optional European contract law regime in a broader context

- **Case law:** the ECJ has demonstrated how pregnant case law within the Union
- **Regulations and directives:** this is the classical method, particularly developed in the field of consumer contract law
- **“Optional instruments”** through a new sort of regulations, for European matters (cross border):
 - civil procedure: the European enforcement order, the European payment order, the European small claims procedure.
 - intellectual property law: Community trade-marks, Community designs, the European patent
 - commercial companies and economic interest groups: the European company (SE), European economic interest group (EEIG), European Cooperative Society (SCE)
 - projects: European foundations, European associations, European mutual society