

Editorial

Fatal Attraction

On 3 May 2011, the European Commission, under the unambitious title ‘Feasibility Study for a Future Instrument in European Contract Law’, published the Expert Group’s Draft for an Optional Instrument for Contracts for the Sale of Goods and Related Services. Readers of this journal know a great deal about the developments that preceded this event. The Draft is, to a large extent, based on the Draft Common Frame of Reference (DCFR, which also included the work of the Acquis group) but is also clearly influenced by the Vienna Sales Convention, especially as to its structure. Compared to the DCFR, most of the changes in this Draft can be seen as an attempt to make the text more attractive for users unacquainted with the law of contracts, as well as for consumers – or, to be more correct, for politicians applying a consumer perspective. The reverse side of the picture is that it becomes less attractive for those who will need to interpret and apply the rules, on the one hand, and for the world of business, on the other hand. Let me briefly illustrate both aspects.

When reading the Draft, it immediately becomes apparent that it has rendered many DCFR rules less general in scope and fragmented them into specific rules. By framing the rules almost exclusively in contractual terms, the rules applying to other legal acts – especially unilateral legal acts such as unilateral promises, acts of avoidance or termination, and so on – become much more fragmented and, thus, less certain. The main step backwards in this regard is the removal of a general system of rules on non-performance and remedies applying to all contractual obligations. What remains is merely a set of separate rules on non-performance and remedies for each of the main obligations, that is, the obligation to pay the price, the obligation to supply as specified, and the obligation to perform services. This is quite surprising, since all national civil codes, as well as the UNIDROIT Principles for international commercial contracts and the Principles of European Contract Law, precisely have at their core general rules on non-performance and remedies that apply to all contractual obligations at the least. Even the Code Napoleon of 1804 had already made this step. In the Draft Instrument, some of these rules have been fragmented, while others have remained at a more general level. The result is that, perversely, an attempt at simplification has only made matters infinitely more complicated – simplistic rather than simple. To verify this, one only needs to consider those rules that need to be taken into account when terminating a contractual relationship for non-performance. In the Draft, one first has to consult Chapter 10, 11, or 16 – depending on the obligation of the other party whose non-performance is pleaded – to find the requirements for terminating a contract for non-performance of the obligation to supply as specified, to pay the price, or to perform related services. In the same chapters, the question of the scope of termination is also dealt with separately (in Articles 119 and 140). It

is unclear whether termination is possible for non-performance of any other obligations that may arise from the contractual relationship. The user then has to consult Chapter 9 to verify whether the non-performance can be excused or not, as well as the impact this has on the possibility of termination. To discover the effects of termination, the user then has to return to the so-called definition of the term 'termination' in the less-than-helpful section on definitions (an unfortunate habit in European legislation), which, as usual, does not contain definitions but rather operative rules. Article 6 is indeed anything but a definition of termination – it merely spells out some of its effects. The Article provides that sums due before termination remain payable; the user will have to turn to Chapter 18 on restitution to discover that these sums, nevertheless, have to be returned. We then move from Chapter 1 to Chapter 18 to find once again, in Article 176(3), a misleading rule on the scope of termination, which overlaps with Articles 119(1) and 140(1) but, at the same time, contains a different rule on the same question. Assuming this hurdle is cleared, one can then find in the remainder of Chapter 18 the specific rules on restitution following termination (Articles 176–180). Finally, the user has to turn to Chapter 17 for the rules governing damages. As to the contractual clauses on related services, matters are even more complicated owing to the absence of a general system of rules governing non-performance. As Professor F. Zoll puts it, trying to solve a merely aesthetic problem in this way causes substantive difficulties. Moreover, it renders the instrument unfit to be a first building block that could, at a later stage, be applied to other specific contracts.

The attempt to please the consumer champion can be illustrated by many examples. In the chapter on unfair terms, the relevant blacklist has become much longer. However, even the basic rules on non-performance and remedies have been differentiated to a large extent. Under a consumer sale, the seller is liable for any failure to conform to specification, even if the buyer knew this at the time of concluding the contract (Article 106), and remains so where the buyer was aware of this non-conformity at the point of supply; the buyer has no duty to inspect the goods nor is he bound to notify non-conformity within a reasonable time after discovery (Article 108(3)(a)). In addition, he does not have to allow cure by the seller within a period of two years of supply (Article 108(3)(a), except for additional services); he may terminate the contract for any non-conformity, whether fundamental or not, as long as it is not insignificant (Article 115(2)); termination does not have to be effected within a certain time limit (neither the reasonable time nor prescription applies); and the buyer who terminates does not have to pay for the use of the goods prior to the time he became aware of the ground for termination. Considering that the instrument is an opt-in instrument, which will apply only where both parties opt in, one wonders whether businesses will ever do the latter. Should this not be the case, making the instrument so very attractive for consumers may turn out to have been fatal.

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