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Editorial

Towards an Optional Common European Sales Law

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1. Introduction

On 11 October 2011, the European Commission published a Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law.[1] This issue of the European Review of Private Law (ERPL) is almost entirely devoted to this Proposal. Two years ago, ERPL already devoted a special issue to the Draft Common Frame of Reference (DCFR).[2] This editorial will briefly render the developments on the European harmonization scene ever since, culminating in the publication of a Feasibility Study with a draft text for an Optional Instrument on 3 May 2011 and the Proposal for a common European sales law on 11 October 2011 (section 2). The Feasibility Study has received a positive reception among European politicians (section 3), but academics have shown mixed feelings (section 4). Along this line, the authors in this issue of ERPL also show a mixed response, witness the overview given in sections 6 and 7. Before giving this overview, a few remarks are necessary as to the difficulty – from an editorial point of view – that the Optional Instrument is very much a work in progress, meaning that various versions have been circulating before the final Proposal was submitted (section 5). Actually, the Proposal for a Regulation was only published some days before this issue went into the press. As a consequence, some of the papers published in this issue, based as they are on earlier texts that, in the final Proposal, have either been amended or dropped, may already seem out of date. As will be set in some more details below, we think that when the discussion of the Commission Proposal begins, these papers may be very useful.

The remainder of this editorial is devoted to a preview of the other contents of this issue (sections 8–10). Under the heading *Future Developments*, a preview of forthcoming special issues of ERPL is given (section 11).

2. Development of the Optional Code

The story does not need to be retold. In the past century, various academics have come up with projects for the harmonization of contract law in Europe.[3] Perhaps

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[1] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final.

[2] 'The Draft Common Frame of Reference: Building Block or Stumbling Block for a European Civil Code?', 4 ERPL 2009, pp. 483–744.

[3] See A. HARTKAMP *et al.* (eds), *Towards a European Civil Code*, 4th edn, Ars Aequi, Nijmegen/Kluwer, Alphen aan den Rijn 2011, p. 1125.

the best known of these efforts are the Principles of European Contract Law elaborated by the Lando Commission.[4] They form the basis of the DCFR, which also contains influences of the Acquis Principles and, to a much smaller extent, Giuseppe Gandolfi's *Avant-projet*[5] and the comments by the French *Association Henri Capitant* and *Société de législation comparée*.[6] Once the DCFR had been finalized, the question arose whether the European Commission would go ahead with the next phase of drafting a Common Frame of Reference. Although many thought at the time that the project was bound to end in failure, the new Commissioner for Justice, Viviane Reding, vividly promoted the project to be one of her vanguard points.[5] Having offered her sympathy with the project, she instituted a Committee of Experts charged, which she commissioned, with the task of suggesting simplification and narrowing down the subject matter. On 3 May 2011, the Committee's Feasibility Study was published.[6] The name of the report is a bit of a misnomer because it encompassed nothing less than a Draft Contract Code. After this publication, the European Commission did not sit still but adopted various changes in the original text, witness the Committee's website, as Thomas Pfeiffer was so kind to point out. Then, earlier than anyone had anticipated, the Proposal was published. The first conferences to discuss the Proposal have already been announced.

3. Acclaim

The Feasibility Study has met with political and academic acclaim. The European Parliament has voted overwhelmingly in favour of the project.[7] An academic group, which basically is quite positive about the Study, is the *Acquis Group*, witness a paper by Gerhard Dannemann.[8]

4. . . . and Criticism

The Feasibility Study has also been criticized on various points. First, it has been observed that the Committee of Experts, which drafted the Study, was not

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[4] O. LANDO & H. BEALE (eds), *Principles of European Contract Law, Parts I and II*, Kluwer Law International, The Hague 2000, p. 561; O. LANDO, E. CLIVE, A. PRUM & R. ZIMMERMANN (eds), *Principles of European Contract Law, Part III*, Kluwer Law International, The Hague 2003, p. 291.

[5] G. GANDOLFI, *Code Européen des contrats: Avant-projet*, Livre premier, Giuffrè, Milano 2004.

[6] Association Henri Capitant des amis de la culture juridique française/Société de législation comparée, *Principes contractuels communs*, Société de législation comparée, Paris 2008, p. 853; *id.*, *Terminologie contractuelle commune*, Société de législation comparée, Paris 2008, p. 532 (also available in English in a single volume).

[5] V. REDING, 'The Next Steps Towards a European Contract Law for Business and Consumers', in R. Schulze & J. Stuyck (eds), *Towards a European Contract Law*, Sellier, Munich 2011, pp. 9–20.

[6] <http://ec.europa.eu/justice/policies/consumer/policies_consumer_intro_en.htm>.

[7] IP/11/683.

[8] European Research Group on Existing EC Private Law (Acquis Group), Draft for a First Chapter (Subject Matter, Application, and Scope) of an Optional European Contract Law, prepared by Gerhard Dannemann, Oxford University Comparative Law Forum 2, 2011.

sufficiently independent. Most experts, it has been suggested,[9] cannot – because of previous involvement in harmonization projects – be considered neutral, nor is this the case with the two special experts appointed by Viviane Reding.[10]

Second, various specific criticisms have been raised. Thus, the Committee's arguments to drop the agency provisions from the text have been criticized.[11]

There will be more critical reactions. The Commission has actually invited all interested persons to come up with suggestions before 31 July 2011. At the time of writing of this editorial, the reactions were not yet available, so they could not be taken into account.

In June 2011, the Society of European Contract Lawyers (SECOLA) held a meeting in Leuven on the Feasibility Study. The two convenors, Reiner Schulze and Jules Stuyck, have recently published a volume with the papers given at this meeting.[12] On 21 September 2011, Reiner Schulze presented the volume at a meeting in Brussels. At that occasion, Hugh Beale criticized the new drafts, which the European Commission has published in July and August 2011, without consulting the Committee of Experts, which drafted the 3 May text. Further on in this issue, the reader will find brief reports of both the SECOLA conference, the book that the conference resulted in, and the presentation of the conference volume.

5. Work in Progress

The European codification of contract law is very much a work in progress. From an editorial point of view, this has some advantages and disadvantages. An advantage is that if, in time, a comment may influence the opinion of the legislature and of those who vote on it. The disadvantage, as set out above, is that one always runs the risk of running behind. Because of time constraints, the changes brought about in the Feasibility Study after the initial publication could, in general, not be taken into account in this issue of ERPL. The criticism by Marco Loos and others in this issue of ERPL of the absence of rules on digital content in the Feasibility Study is an example. The authors based their criticism on the 3 May text. After their paper was written, the working team of the European Commission added rules on digital content. It might, therefore, be argued that this comment comes too late. The Editorial Board has considered it useful to publish this paper, however, because (1) what the political fate of the Commission's amendment will be is still unclear

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[9] W. DORALT, 'Strukturelle Schwächen in der Europäisierung des Privatrechts', *RabelsZeitschrift* 2011, pp. 260, 279 (an English language version of this paper is to be found on the website of the Max Planck Institute in Hamburg); K. RIESENHUBER, 'A Competitive Approach to EU Contract Law, SECOLA Conference: A European Optional Contract Law/Policy Choices', Leuven, 14-15 Jan. 2011.

[10] Christian von Bar and Bénédicte Fauvarque-Cosson.

[11] J. KLEINSCHMIDT, 'Stellvertretung: IPR und ein optionales Instrument für ein optionales Instrument für ein Europäisches Vertragsrecht', 75. *RabelsZeistchrift* 2011, pp. 497-540.

[12] R. SCHULZE & J. STUYCK (eds), *Toward a European Contract Law: An Introduction*, Sellier, Munchen 2011, p. 279.

and (2) the suggestions by Loos and others have not all been taken up by the Commission. Some other authors have been able to consult the latest Commission text, including the 11 October 2011 Proposal.

6. ERPL: From Lando to Pfeiffer

We begin this special issue with a general comment of the whole proposal by Ole Lando. The author considers the proposed regulation a step forward towards unification of European Contract Law. However, a Common European Contract Law covering the general part of contract law would have been preferable. He does hope that the work will continue.

The other papers in this issue are mostly limited to specific questions. Part I is dealt with in the paper by Marco Loos, Natali Helberger, Lucie Guibault, and Chantal Mak (Amsterdam) on digital content. The authors are surprised that the original text of May 2011 did not contain rules on digital content contracts. They come up with detailed suggestions for amendments to the text. As I mentioned earlier, the Commission seems to have changed its mind. The revised August text does contain rules on digital content, although not all wishes from the Amsterdam team have been heeded. The next two papers deal with pre-contractual information. In their paper on Part II's pre-contractual information duties, Barbara Pasa and Chiara Cravetto compare the proposed rules with the corresponding provisions in the DCFR, Acquis Principles, Principles of European Contract Law (PECL), Principles of International Commercial Contracts (PICC), UN Convention on International Sales of Goods (CISG), and the Proposal for a consumer rights directive. The authors suggest that the whole structure of pre-contractual duties and its sanctions system are not suitable in case of non-concluded contracts. The Proposal of 11 October 2011 does introduce some important changes, especially in the 'negotiation' phase, which the authors have been able to incorporate in their paper.

Annick De Boeck (Brussels) deals with business-to-business (B2B) information duties in Article 23 of the proposed Instrument. Business-to-consumers (B2C) information duties have long been known in European directives. The DCFR turned these into a general duty. This line is maintained in the Optional Instrument. This is done in a well-balanced way, according to the author, who only has some minor criticisms. Erik Monsen (Bergen, Norway) criticizes the provision on breach of confidentiality in Article 28 of the original Optional Instrument. He argues that the Optional Instrument should provide for a wider application of disgorgement damages in line with Article VI.-6:101 DCFR. In the Proposal of 11 October 2011, the whole Article 28 has been left out. Still, the editors and the author are of the opinion that this paper is useful when in the forthcoming discussion of the Proposal the question of disgorgement for breach of contract is raised. This paper then indicates some areas in which the remedies *price reduction* and *damages for loss* do not offer adequate protection.

Two papers deal with the proposed Part III. Robert Hardy, an attorney in Amsterdam, uses an economic approach to analyse the rules on contract interpretation

in the Feasibility Study. He arrives at two conclusions. First, given that it will mainly be firms that will choose the instrument to govern their contract, a more objective approach – rather than the subjective approach of Article 56 of the Feasibility Study – should have been chosen. Second, the author deals with the Instrument's evidence rules. Thomas Pfeiffer (Heidelberg) deals with the issue of unfair contract terms or *non-negotiated terms*, as he prefers to call them. The author is positive as to the proposed rules on three grounds. First, the draft includes rules on the incorporation of non-negotiated terms into a contract. Second, the control is extended to business-to-business contracts. Third, the specific standard for business contracts is adapted to the needs of the commercial sector. Although the author also welcomes the black and the grey list of clauses deemed to be unfair, he still has some reservations in this regard.

7. ERPL: From Feltkamp to Sirena

We now turn to the papers on Parts IV–VII of the proposed Instrument. We have already signalled the criticism of the choice of the *Committee of Experts* not to come up with a general regulation of remedies. The question referred to by Ole Lando and taken up in the previous editorial by Matthias Storme, why the Feasibility Study does not contain a general part on remedies, is elaborated upon by Ilse Samoy, Tâm Dang Vu and Sanne Jansen (Leuven). The authors criticize the choice of the Committee of Experts only to regulate the remedies concerning sales law and related service contracts and not to take up the DCFR's general part on remedies. They also comment upon the user-friendliness of the Instrument, its consumer-friendliness, and the legal certainty achieved by the rules on remedies. The balance of the proposed Regulation is, in their view, negative. The way remedies are dealt with is not systematic or coherent.

More specifically, Regine Feltkamp and Frederic Vanbossele (Vrije Universiteit Brussel) examine the buyer's remedies in the event of non-performance or defective performance by the seller (Article 108 of the project). They consider the Optional Common European Sales Law an impressive piece of work, but from a legal perspective, further improvements to the text should be made, according to them, to assure legal certainty. Sonja Kruisinga (Utrecht) compares the proposed seller's right to cure with the similar provision in the CISG. This is of interest, she suggests, because contracts between businesses within Europe could, in the future, be governed by either the CISG, the Optional Instrument, or national law. She concludes that on this point, the CISG is more favourable for the buyer, who would therefore be well advised to choose the application of the CISG rather than the Optional Instrument. Kare Lilleholt (Oslo) discusses the style of drafting, starting from Part IV's provisions on passing of risk. In his view, risk issues could be reduced to a question of conformity of the goods. The passing of risk, he suggests, is just 'legalese'.

As for Part VI, Jacques Herbots (Leuven) focusses on consequential or indirect contractual damage. In his view, the Anglo-American term *consequential damage* is ambiguous. At least five (!) meanings may be discerned. A translation

into the French *dommage indirect* is misleading and can turn out to be confusing. He advises to use a term in the target language that has no legal connotations, such as *dommage consécutif*. Anne Keirse (Utrecht) maintains that Articles 166 and 167 on contributory negligence and failure to mitigate damages do not present an adequate representation of the latest developments in the various European legal systems on this point. She argues that the legal consequences of a failure to avert or minimize a loss must be similar to those of any joint occurrence of a fault of the wrongdoer with neglect of the aggrieved party.

Part VII, finally, is represented in the essay by Pietro Sirena (Siena), who prefers the Common European Sales Law's parallel between terminated and avoided contracts over the binary model followed by the DCFR. However, according to him, it is necessary to make the text consistent with the general principles of unjustified enrichment. In order to do so, he comes up with a number of concrete suggestions.

8. Other Matters in This Issue

Although the Optional Instrument is the primary concern of this issue, we did have sufficient space not for a case note but for one additional paper, which actually is about a part of the DCFR, which has not been taken over in the Feasibility Study. It is Angel Carrasco's and Karolina Lyczkowska's paper on conflicts among creditors in the regulation of security interests. They argue that the DCFR may provide a useful guide to interpreting the Financial Collateral Agreements Directive.

9. Erfahrungsberichte

In this issue, we publish two Reports (*Erfahrungsberichte*), which are closely connected with the Optional Instrument. One is a Report of the SECOLA conference on the Feasibility Study held in Leuven in June of this year. The other is a Report of the presentation of the volume with the proceedings of this conference.

10. Book Reviews

Likewise, we publish two Book Reviews. One is the volume with the proceedings of the Leuven conference just referred to above. The other is Chen Lei's *The Making of Chinese Condominium Law* by Rebecka Zinser (Gottingen/Nanjing). The reader may question what a book on Chinese law with references to South Africa has to do with European private law. The missing link is the German *Erbbaurecht*, which prominently is dealt with.

11. Looking into the Future (of ERPL)

This is not the last issue of ERPL, which focusses on a specific theme. In a forthcoming issue, we hope to publish the General Report by Silvia Ferreri (Torino) and some of the National Reports on Complexity of Transnational Sources, written for the 2010 Washington conference of the International Academy of Comparative Law. Although the theme is not limited to private law, the emphasis lies on private

law texts such as CISG. Another issue of ERPL will be devoted to the proceedings of the Utrecht conference of this year on *Principles and the Law*. We also hope to publish the papers delivered at the commemoration of 200 years *Allgemeines Bürgerliches Gesetzbuch* at the 23d *Europäische Notarentage* in Salzburg earlier this year. Finally, our editor, Barbara Pozzo, has undertaken to edit a special issue on law and linguistics. Special issues that are also on our list of desiderate include subjects such as fundamental rights and private law, Eastern Europe, Latin America, and inheritance law.