SSRN: New Papers on the Proposed Common European Sales Law

Several papers dealing with various aspects of the Common European Sales Law (CESL) have recently been published on SSRN:

A Numbers Game – The Legal Basis for an Optional Instrument in European Contract Law, Maastricht Faculty of Law Working Paper No. 2012/02, by *Gary Low,* University of Maastricht

The paper can be downloaded here. The abstract reads as follows:

> *"Despite the fact that it is an optional instrument, the proposed Common European Sales Law (CESL) is based on Art 114 TFEU. This article considers whether the measure approximates the contract laws of Member States, such that the continued use of Art 114 TFEU is justifiable. One possibility, using the lens of regulatory competition, is to suggest that CESL is an intermediate step towards harmonisation. However, it is questionable whether regulatory competition will lead to the required degree of harmonisation, and whether CESL's features demonstrate that is contributes within a wider context to that process of harmonisation. Another possibility is to distinguish CESL from other optional instruments on the basis that it is a second national regime. This is to say that since the regulation makes all second national contractual regimes the same, the contract laws of Member States are harmonised. The problem with this argument is that CESL leaves purely national contract laws unmolested.*
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> *Clearly, either justification for the use of Art 114 TFEU is plausible, just as they are open to debate. This is precisely the dilemma that must face the Commission if it is to defend its current choice of legal basis. If the issue is brought before the CJEU, CESL might end up as the Commission's Tobacco Advertising III, forcing it to re-experience tremors of competence anxiety. On the other hand, if it risks litigation and obtains a favourable judgment, one can surmise the future of positive integration to be one of unitas via diversitas."*

The Common European Sales Law and the CISG – Complicating or Simplifying the Legal Environment?, Maastricht Faculty of Law Working Paper No. 2012/4, by *Nicole Kornet*, University of Maastricht

The paper can be downloaded here. The abstract reads as follows:

> *"Businesses would undoubtedly prefer a legal environment with less complexity. In the European Commission's view, the legal diversity resulting from the 27 different national contract laws of the Member States creates unnecessary legal complexity and constitutes an impediment to the proper functioning of the internal market. While existing European contract law instruments mainly focus on harmonizing aspects of consumer law, with the proposed Common European Sales Law (CESL), the Commission has now firmly extended the scope of European contract law to also cover commercial sales contracts. However, the CESL is not the first instrument to create a set of uniform rules for cross-border commercial sales contracts. At the international level, there is already the United Nations Convention on Contracts for the International Sale of Goods (CISG). The current proposal consequently raises a number of pertinent questions concerning the relationship between the two instruments, as well as the necessity, desirability, choice for legal base and likely success of the European instrument. The introduction of a European instrument for cross-border commercial sales contracts essentially inserts a new, regional instrument between the divergent national laws of the Member States and the international sales convention. Rather than simplifying the legal environment, such a step adds to its complexity. This would only make sense if diversity of national contract laws is a serious problem for business that needs to be tackled by creating uniform (European) rules; the existing uniform rules (CISG) have significant shortcomings, and the new instrument has added value. This article examines the proposed CESL on this basis."*

The Proposal for a Regulation on a Common European Sales Law: Shortcomings of the Most Recent Textual Layer of European Contract Law, by *Horst Eidenmueller,* University of Munich/University of Oxford, *Nils Jansen,* University of Muenster, *Eva-Maria Kieninger,* University of Wuerzburg, *Gerhard Wagner,*University of Bonn; Erasmus School of Law; University of Chicago Law School, and *Reinhard Zimmermann,* Max Planck Institute for Comparative and International Private Law

The paper can be downloaded here. The abstract reads as follows:

> *"On 11 October 2011, the European Commission published a Proposal for a Regulation on an optional Common European Sales Law (CESL). This text represents a milestone for the further development of European contract law. Our essay critically examines and evaluates the Commission's proposal. It outlines the Commission's draft as well as its background and deals with some of the most pressing doctrinal and policy issues raised by it. We show that the suggested range of application and the technical mode for opting into the CESL are flawed. Further, the CESL incorporates many elements and doctrines of the current acquis communautaire, such as unduly extensive information duties and withdrawal rights as well as a policing of standard contract terms, without reconsidering their proper purposes and uses. With respect to the rules on sales law, it is particularly the mandatory character of most of them that poses grave problems. We also demonstrate that the CESL's optional character does not eliminate the quality concerns raised in this essay: The CESL might become a 'success' despite its shortcomings. Hence, notwithstanding its optional character, the proposed text should not be enacted. What is needed is a broad and thorough debate on the scope, forms and contents of contract law harmonization in Europe rather than the speedy legislative enactment of a flawed product."*

The Proposed Common European Sales Law: Legal Framework and the Agreement of the Parties, Oxford Legal Studies Research Paper No. 10/2012, by *Simon Whittaker,* University of Oxford

The paper can be downloaded here. The abstract reads as follows:

> *"Economic integration remains at the heart of the European Union, and it is not surprising, therefore, that contract law has increasingly formed the object of European legislative initiatives. During the 1980s and 1990s, the resulting legislation was particular in its scope, targeted in its aims, and its main technique was the harmonization by directive of aspects of the national contract laws of Member States. Over the last decade, increasing dissatisfaction with this technique prompted a move towards 'full harmonization' in EU consumer law, seen first as regards the Unfair Commercial Practices Directive 2005, and later as regards the reshaped versions of the Timeshare Directive and*

Consumer Credit Directive. However, when in 2008 the Commission sought in its Consumer Rights Directive Proposal to extend 'full harmonization' to four of the most important directives in the consumer acquis, the proposal met with very considerable opposition. The Consumer Rights Directive as promulgated in late 2011 is therefore much reduced in scope, its provisions leaving aside almost entirely change to earlier (minimum harmonization) directives on unfair terms and consumer guarantees in sale. However, a second legislative development of importance for the present discussion was the new competence established by the Amsterdam Treaty, which allowed the EU to bring existing European private international law instruments on jurisdiction and on applicable law in contract within the framework of EU law and to add to them new instruments on applicable law. As a result, EU law now possesses uniform laws governing the law applicable to cross-border contracts and cross-border torts, whose justification was again the needs of the internal market. It is in this somewhat crowded legislative arena which we must place the recent Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. Broadly, the proposal would set up an optional contract law instrument (the 'Common European Sales Law' or 'CESL') governing sales of goods, the supply of digital content and certain related services for contracts between traders (where one is a small or medium size business (SME)) and contracts between traders and consumers. This note will outline the purposes and the scope of this initiative and then examine two of its central features: its technical legal framework, particularly as regards its relationship with private international law, and its approach to the agreement required of the parties to use the CESL to govern their contract."

The Commission Proposal for a 'Regulation on a Common European Sales Law (CESL)' – Too Broad or Not Broad Enough?, EUI Working Papers LAW No. 2012/04, by *Hans-W. Micklitz,* European University Institute, *Norbert Reich*, University of Bremen

The paper can be downloaded here. The abstract reads as follows:

"The paper which was commissioned by the Austrian Ministry of Consumer Affairs but written under the exclusive responsibility of the authors consists of three parts: The first part written jointly by the authors gives an analysis of the so-called "chapeau" of the Commission proposal on a Regulation (EU) for a

“Common European Sales Law” (CESL), published as COM (2011) 635 final of 11.10.2011. The chapeau, that is the legal instrument putting into effect the eventual CESL, concerns such fundamental questions as legal basis, namely Art. 114 TFEU on the internal market, importance of the subsidiarity and proportionality principles, personal, territorial and substantive scope of the proposal, the mechanism of “opting-in” in cross-border B2C (business to consumer) transactions, its relation to the “acquis”, in particular the recently adopted “Consumer Rights Directive” (CRD) 2011/83/EU of 25.10.2011, to existing Member State law under conflict-of-law provisions of Art. 6 on consumer protection of Regulation (EU) 593/2008, and to options left to them. The second part, written by Hans Micklitz, analyses the substantive provisions of the so-called Annex I, namely the text of the CESL itself which with some modifications took over over the results of the EU expert group on a “feasibility study on an optional instrument” of 3.5.2011. It is concerned with B2C provisions on so-called “off-premises” and distance contracts with respect to information obligations of traders and withdrawal rights of consumers which are particularly relevant in e-commerce. Also the new proposals on unfair terms are discussed which go beyond the existing acquis of Dir. 93/13/EEC. The third part, written by Norbert Reich, is concerned with provisions on consumer sales and related service transactions, also based on the feasibility study with an extension to “digital content”. Some of them go beyond the existing acquis of Dir. 99/44/EC, while the concept of “related service contracts” remains rather obscure and controversial.”