EU’s Proposed Sales Law Hits the Shelves

The Commission has, today, published its Proposal for a Regulation on a Common European Sales Law, as a consequence of its 2010 consultation on contract law in the EU and the work of the Commission’s (not uncontroversial) expert group. As expected, the proposed Common European Sales Law (CESL) takes the form of an optional instrument, which would apply only through the agreement of the parties to a contract falling within the scope of the instrument (which has contracts for the sales of goods at its core).

The Proposal marks the start of what seems likely to be a lively debate within and outside the institutions of the European Union. As a first reaction (and admittedly without having had sufficient time to explore the detail of the Proposal, which runs to 115 pages), it is suggested that two introductory points may be of particular interest to followers of this site.

First, the sole proposed legal basis of the measure is the internal market harmonisation power in TFEU, Art. 114. No reliance is placed on the civil justice power in TFEU, Art. 81.

Secondly, it is proposed that the Regulation should operate alongside (and not in lieu of) the choice of law regime established by the Rome I Regulation. According to Recital (10):

> *The agreement to use the Common European Sales Law should be a choice exercised within the scope of the respective national law which is applicable pursuant to Regulation (EC) No 593/2008 or, in relation to pre-contractual information duties, pursuant to Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Regulation (EC) No 864/2007), or any other relevant conflict of law rule. The agreement to use the Common European Sales Law should therefore not amount to, and not be confused with, a choice of the applicable law within the meaning of the conflict-of-law rules and should be without prejudice to them. This Regulation will therefore not affect any of the existing conflict of law rules.*

Recital (12) emphasises that, since the CESL contains a complete set of fully harmonised mandatory consumer protection rules, there will be no disparities between the laws of the Member States in this area where the parties have chosen to use the CESL. Consequently, Art. 6(2) of the Rome I Regulation, which guarantees to the consumer the protection of non-derogable provisions of the law of his country of habitual residence, is said to have "no practical importance for the issues covered by the Common European Sales Law". Recitals (27) and (28) emphasise that the national law applicable under the Rome I and Rome II Regulations (or other rules of private international law) will apply in any event to matters falling outside the CESL.

The exclusive character of the CESL, when chosen by the parties, is affirmed by the first sentence of Article 11 of the Regulation, which provides that, where the parties have validly agreed to use the CESL for a contract (see Art. 8), only the European Sales Law shall govern the matters addressed in its rules. The second sentence of Art. 11 addresses pre-contractual duties.

This seems all very well when the law applicable to the contract under Arts. 3, 4 or 6 the Rome I Regulation (as applicable) is the law of a Member State, but what if it is the law of a non-Member State? Can Art. 10 be taken at face value in preserving the integrity of the Rome I and Rome II Regulations, or must the CESL be understood as being superimposed on the law applicable under the Rome I Regulation and (if so) on what basis? Recital (14) touches on this issue. It states that the CESL should not be limited to cross-border situations involving only Member States, but should also be available to facilitate trade between Member States and third countries. It continues by suggesting that:

> *Where consumers from third countries are involved, the agreement to use the Common European Sales Law, which would imply the choice of a foreign law for them, should be subject to the applicable conflict-of-law rules.*

It appears, therefore, that the proposed Regulation may contemplate that the choice of the CESL would involve an implicit choice under the Rome I Regulation of a law other than that of the third country consumer's country of habitual residence. The question is "Which law?", as Art. 3(1) of the Rome I Regulation requires that the law chosen be the law of a country, and not a choice of non-national law such as the CESL? In a contract between a seller habitually resident

in an EU Member State and a consumer habitually resident in a non-Member State, one might argue that the choice of the law of the seller's State (including the CESL, as applicable in that State under the proposed CESL Regulation) may be demonstrated with sufficient clarity by the terms of the contract (Art. 3(1))? What, however, if the contract also (perversely) contains a choice of a third country's law? Does Art. 11 of the proposed Regulation then confer on the CESL rules the status of (party chosen) overriding mandatory provisions under Art. 9(2) of the Rome I Regulation, so as to trump the expressly chosen law, or does the CESL take effect as if incorporated by reference into the contract insofar as this is possible under the chosen law? Finally, even if a choice of a particular Member State's law can be clearly demonstrated, so as to give effect to the CESL, can the third country consumer still rely on more favourable protection under the law of his habitual residence, in line with Art. 6(2) of the Rome I Regulation (and in apparent contradiction of Recital (12))? These questions are likely to see more air time in the forthcoming legislative process. The point made here is that the proposed CESL and the Rome I Regulation do not, as Recital (10) and other parts of the Proposal appear to suggest, pass like ships in the night.

Commentaire romand LDIP/CL

Commentaire Romand. Loi sur le droit international privé. Convention de Lugano, is the first comment that involves both the analysis of the law on private international law and the new Lugano Convention. Thanks to the emphasis on case law, the practitioner and the researcher will find a comprehensive data base on Swiss private international law.

The book covers a wide range of topics, such as family law and inheritance, property rights and securities, contract law, trusts and corporations and bankruptcy. It also includes an updated review of the law of international arbitration. All these matters are also discussed in the context of the Lugano Convention, insofar as it applies to them.

Edited by Andreas Bucher, professor emeritus of the Faculty of Law, University of Geneva. Authors: Andrea Bonomi, Andrea Braconi, Andreas Bucher, Philippe Ducor, Louis Gaillard, Florence Guillaume and Pierre-Yves Tschanz.

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Ruehl on Statut und Effizienz: Ökonomische Grundlagen des Internationalen Privatrechts

Giesela Ruehl (Friedrich-Schiller University Jena and our new editor for Germany) has published her *Habilitationsschrift* on **Statut und Effizienz: Ökonomische Grundlagen des Internationalen Privatrechts [Applicable Law and Efficiency. Economic Foundations of Private International Law]**. Here's an English description (the monograph itself is in German):

> *Is private international law an efficient answer to the problems of international transactions? In her recent book on the economic foundations of private international law, Giesela Rühl explores this question in great detail.*
>
> *She analyses choice of law-rules on a broad comparative basis and uses economic theory to tackle fundamental conceptual issues just as well as specific problems in the private international law of contracts and torts. Focusing on the recently adopted Rome I- and Rome II-Regulations she contributes to the understanding of the developing European private international law.*
>
> *The book is organized in four parts. In the first part, the author analyses the problems of international transactions from an economic perspective. She takes a closer look at the specific problems associated with international transactions and asks whether private international law – as compared to other governmental, non-governmental, regulatory or non-regulatory mechanisms – is a suitable or at least necessary instrument to deal with these problems. In the*

second part, the author lays the theoretical foundation for an economic analysis of private international law. She explores whether economic theory may be used to analyse issues in private international law and whether the basic assumptions and assessment criteria of economic theory may claim application. In the third part, the author re-conceptualises private international law from an economic perspective. She develops a general economic framework for the determination of the applicable law essentially based on free choice of law. In the fourth and final part, the author applies this framework to specific issues in choice of law, most importantly contracts and torts.

ISBN 978-3-16-150698-7. Leinen € 99.00. More information is available on the publisher's website.

The Controversial Succession of Dali

Prof. Pilar Jiménez Blanco (University of Oviedo) published recently an article on the *Dali* ECJ's ruling, a case referred to the Court by the Tribunal de Grande Instance de Paris, af. C-518/08. I have asked her to summarize her opinion. Here it goes:

> The most important aspect of the ECJ judgment in the *Dali* case (C-518/08) is what the Court of Justice *does not say*: which law determines the beneficiaries of the resale right of Dali's original work . The problem is analysed within French law, which establishes a specific system of succession to the *droit de suite*. But, is French law applicable to the instant case?. Actually, neither the approach from the perspective of intellectual property rights nor the approach from the viewpoint of succession law justify determining the beneficiaries of the resale right under French law. It should be for Spanish law, as the law applicable to the succession, to determine both the validity of Dali's will and whether the Spanish State is beneficiary of the resale right. However, it is unlikely that the French judge, who is the one to rule on the merits, obviates

the special rule of the *Code de la propriété intellectuelle*. Even if this will be a wrong solution that does not correspond neither with the will of the artist, nor with the assumed trend in the European Union towards a unitary conception of the succession.

Pilar Jiménez's article appeared in *Noticias de la Unión Europea*, 2011, núm. 220.

Cuadernos de Derecho Transnacional, Issue 2/2011

The second issue for 2011 of the Cuadernos de Derecho Transnacional, the Spanish journal published twice a year by the Área de Derecho Internacional Privado of Univ. Carlos III of Madrid under the editorship of *Alfonso Luis Calvo-Caravaca* (Univ. Carlos III) and *Javier Carrascosa-González* (Univ. of Murcia), has been recently published. It contains seventeen articles, shorter articles and casenotes, encompassing a wide range of topics in conflict of laws, conflict of jurisdictions and uniform law, all freely available for download. The journal's website provides a very useful search function, by which contents can be browsed by issue of publication, author, title, keywords, abstract and fulltext.

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(Many thanks to Federico Garau, Conflictus Legum blog, for the tip-off)

4th Max Planck PostDoc-Conference on European Private Law

The Max Planck Institute for Comparative and International Private Law in Hamburg calls for applications for the 4th Max Planck PostDoc-Conference on European Private Law. The conference will take place on 7 and 8 May 2012. Applicants are expected to be working on their senior thesis or second book in the wide field of European private law, including private international law, commercial law, company law, capital market law, and competition law. The deadline for application is 31 October 2011. More information are available here.

Kuipers on Cross-Border Infringement of Personality Rights

Jan-Jaap Kuipers, an Assistant Professor of European Law at the Radboud Universiteit Nijmegen, has written an interesting article on cross-broder infringement of personality rights. It has just been published in the German Law Journal and can be downloaded here. The abstract reads as follows:

> *Globalization has led to the emergence of broadcasting services and books aimed at a global audience. Authors of books, journals, and articles have gained readers worldwide. Due to the Internet, the spreading of ideas on a global level has never been easier. The other side of the coin is that authors run a risk of*

being exposed to civil proceedings in many jurisdictions. What is considered to be proactive journalism, or a provocative academic comment in some jurisdictions is considered to be libel or defamation in others. Although both the freedom of speech and the right to private life have received constitutional protection in all Member States, different balances have been struck between the competing fundamental rights. In a cross-border context, the infringement of the right to private life by foreign media becomes an international horizontal conflict between fundamental rights. The issue is therefore extremely sensitive and during the Rome II negotiations no consensus could be reached on the appropriate conflict of laws rule. The infringement of personality rights was therefore excluded from the scope of that Regulation. The present paper attempts to analyze to what extent it is necessary to revise the "defamation exclusion" of Rome II. If it would be necessary to include defamation in Rome II, what would be the most appropriate conflict of laws rule?

Fornasier on European Contract Law and Choice of Law

Matteo Fornasier, a senior research fellow at the Max Planck Institute for Comparative and International Private Law in Hamburg, has written an interesting article on the optional instrument of European contract law and choice of law. The article is forthcoming in Rabels Zeitschrift für ausländisches und internationales Privatrecht and can be downloaded here. The English abstract reads as follows:

Ten years after placing the idea of a European contract law on the political agenda, the European Commission has announced its intention to take legislative action soon. A proposal for a regulation on an optional instrument of European contract law is expected in the fall of 2011. The regulation would create a set of European contract rules which would exist alongside the various

national regimes and could be chosen as the applicable law by the parties to the contract. Such an instrument raises a number of questions with regard to private international law in general and the Rome I Regulation in particular. Should the choice of the European contract law be subject to the general rules on party choice under Rome I or does the new instrument call for special rules? Also, should the European contract law be eligible only where the relevant choice of law rules refer the contract to the law of a Member State or should the parties also be allowed to opt for the European rules where private international law designates the law of a third state as the law applicable to the contract? And finally, how does the optional instrument relate to the CISG and other uniform law conventions? The following paper discusses possible models of how to fit the optional instrument into the system of private international law. In particular, it examines which solution is the best suited to achieve the primary goal of the optional instrument, i.e. to improve the functioning of the internal market.

Towards a Coherent European Approach to Collective Redress

The Commission's consultation on collective reddress, aiming to identify common legal principles on collective redres, ended in April 2011. On 15 July 2011, the European Parliament published a draft report on collective redress. I might be wrong, but I think the document has gone unfairly unnoticed. You can have a look at it here.

Twenty Years' Work by GEDIP

A new book gathering 20 years of work by the European Group for Private International Law has just been published. Building European Private International Law. Twenty Years' Work by GEDIP was edited by Marc Fallon, Patrick Kinsch and Christian Kohler.

> *During the last 20 years, private international law has been significantly transformed in Europe. Since its creation in 1991, the European Group for Private International Law (EGPIL, also commonly known as GEDIP) sustained this evolution. Composed of specialists in private international law who are also interested in European law, the GEDIP focuses on the interaction between these two fields of research. The work of the GEDIP focuses on international instruments of various nature – in particular, those of the Hague Conference on Private International Law, and the European Convention for the protection of human rights and fundamental freedoms. The issues covered by the annual meetings are chosen and analyzed in an independent way without a mandate from European or international institutions. The aim is to foster progress of knowledge by using an issue-by-issue method. This working method allowed the GEDIP to develop new tools which turned out to sustain the preparation of several European acts in civil and commercial matters – namely, the Regulations Brussels II, Rome I, Rome II, and Rome III, as well as possibly the forthcoming regulation on succession or the revision of the Brussels I Regulation. GEDIP documents reflect the evolving debate on private international law in Europe for 20 years. Their publication into a monograph at the occasion of the GEDIP's 20th anniversary aims to improve their dissemination and is accompanied by a detailed index to facilitate their consultation.*

The full table of content is available here. More details are available here.