The Proposed Common European Sales Law - the Lawyers’ View

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The Role of CCBE and of the Legal Practitioners in the Process of Harmonization of Contract Law

Marcella Prunbauer-Glaser

1. Preliminary remarks

First of all, I would like to thank the Italian Bar Council (Consiglio Nationale Forense – CNF) for having co-arranged with the CCBE\(^1\) the very important conference on the Common European Sales Law (CESL), held in Rome the 11\(^{th}\) of April 2012, in order to debate specific issues of the CESL Regulation-Proposal\(^2\) from the viewpoint of legal practitioners. I was particularly honoured to address that distinguished audience in my capacity as President of the CCBE in 2012 at the opening of a conference which dealt with one of the most visionary, most interesting and in various aspects most challenging European law initiatives – challenging prospects for every lawyer in Europe and challenging equally for the lawyers’ clients, which are both consumers and businesses. I am equally honoured, now, to introduce this book which collects the reports of the conference.

For those, who are not yet familiar with the work of the CCBE please allow me a short introductory remark: the CCBE, Council of Bars and Law Societies of Europe, is the representative European organisation of around 1 million European lawyers through its member bars and law societies from 31 full member countries and 11 further associate and observer countries. During its now more than 50 years of existence the CCBE has worked hard to contribute towards a compact “corpus legalis” for European lawyers, to contribute to European draft legislation and European law developments, to intervene before European courts including the ECHR and to continuously promote the area of freedom, justice and the rule of law for the benefit of European citizens – the lawyers’ clients. This substantive work of the CCBE is being prepared in (currently 17) committees and (11) working groups.

The developments towards a potential European contract law have been closely followed within the CCBE under the guidance of a specifically established “European Contract Law Working Group” which has been established at the very beginning since the Commission’s ambitions in this direction became visible.

I am rather proud to inform you that the first – in principle positive and welcoming – CCBE resolution on European Contract law was passed already in

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\(^1\) Council of Bars and Law Societies of Europe, www.ccbe.eu.

\(^2\) COM 2011 (635) final.
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Nov 2006. The CCBE resolved that it was in full support of the initiative to create a Common Frame of Reference in order to improve quality and coherence of the existing acquis and future legal instruments in the area of contract law. The CCBE European Contract Law working group has meanwhile been upgraded within the CCBE to a European Private Law Committee with broader scope.

I know that many conferences have taken place since the CESL Proposal first was promulgated by the European Commission on October 11, 2011. These conferences, however, were mainly involving academics and politicians, both as speakers and attendees, but as it seems, hardly any lawyers as practitioners. That was one of the main reasons why the CCBE decided to go on and co-organise with Italian Bar Council the conference on CESL held in Rome.

The “success” of any new European Law, but in particular one being an optional instrument, must in my view, first of all, be achieved among and through the legal practitioners. I.e., the new optional instrument and its consequences must be understood and accepted by the legal profession, who will “translate” and recommend it to its clients.

Lawyers are the first port of call for citizens in need of legal advice or representation. Only if practicing lawyers after due consideration of all circumstances can and will recommend the CESL in their day-to-day-work as an option of sales law being superior or at least comparable to the otherwise applicable national law, CESL will come to substantial real life and will be voluntarily chosen by parties as a basis for their cross-border transactions, be it a b2c or a b2b-sales contract.

At present, some Member States seem to be rather hesitant and critical to accept the proposed CESL as an optional instrument for a Common European Sales Law. One of the main reasons seems to be that there have been some doubts whether the legal basis of Art. 114 TFEU that has been chosen by the Commission, would be valid. Since I heard that equally the Legal Service of the Council has confirmed that Art. 114 provides a solid basis, that might no longer be a reason for legal uncertainly or confusion. Another reason for the opposition against this Proposal is that it is contested whether CESL would be not violating the principles of subsidiarity and proportionality (Art. 5 Sec. 3 and 4 TFEU). Further arguments go more into the substantive law details of provision itself and other questions which may arise and will practicably arise out of the fact that certain legal areas are excluded, i.e. missing. And questions whether the proposal is sufficiently certain and balanced in view of an over protection of consumers.

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3 Art. 4 Draft of the Order (DO).
4 The österreichische Bundesrat, the deutsche Bundestag and the House of Commons have submitted Notices to the Commission holding that the Proposal violates the principle of subsidiarity pursuant to Art. 5 Sec. 3 TEUF and the principle of proportionality pursuant to Art. 5 Sec. 4 TEUF.
2. What is the CCBE's work done so far and is it reflected in the CESL?

2.1 The underlying idea of the CESL

As to the underlying idea of the CESL I am optimistic. Why? But first let me clarify again: I can and will certainly not prejudice the currently on-going substantive work and deliberations within the CCBE's European Private Law Committee in charge, and, whilst today expressing my personal views about the CESL, I certainly do not want to pre-empt any decision of the CCBE Standing Committee about it. But a view on the many Position Papers5 that have already been adopted by the CCBE since 2006 in consideration of the principle idea of a possible European Contract and European Sales Law – all were supported by the vast majority of the delegations – speak a very distinct language.

The basic idea underlying behind all these CCBE Position Papers is simple: lawyers play and have to play a pro-active role in shaping any future legal act, be it a European Directive or a Regulation. This goal, however, can only be achieved by accepting that any such new optional CESL instrument will be and must be somewhat different than the respective national laws. Thus, a general impulsive “no” to new challenges and new developments has been rejected both by the members of the CCBE Committee in charge and by the national delegations. Truly speaking, not yet by all of them, but by the overwhelming majority.

The pro-active stance taken by the members of the CCBE European Private Law Committee could only be taken due to a considerable knowledge of lawyers in the field of comparative law. On that basis it was possible to find a common

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5 These position papers are available at the following website: http://www.ccbe.eu/index.php?id=94&id_comite=59&L=0.
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ground how to accept to shape general guidelines of European Contract Law, being a viable and accepted law for future generations.

As stated before this pro-active approach implies that the CCBE was and is of the opinion that lawyers have something to add and to contribute to the overall political debate. Lawyers know best what are the legal needs and demands of their clients, i.e. the ordinary citizen, as they day by day ask their lawyers to defend and represent their interests in the search for practicable, understandable, just and equitable solutions of conflicts that have arisen.

Finally, the CCBE believes that the approximation of the divergent private laws of the Member States should not necessarily be achieved by virtue of more and more new Directives and Regulations, as those will cut more and more – and very deeply – into the flesh of the national laws, thus creating inconsistencies and sometimes, as we have already witnessed, even systemic conflicts. Thus, to the view of the CCBE an optional instrument on an – and this is very important! – opt-in basis, could be more appropriate to overcome the complex issues of even more required harmonization of national laws and outbalance practical issues of potentially several applicable national laws for one transaction.

2.1.1 The large scale approach

The next Position Paper taken by the CCBE in January 2008 represents the work on four major problems areas, namely: on freedom of contract, on Standard Terms of Contract, on the Notion of Consumer and Professional,\(^6\) and on Remedies and Damages.\(^7\) This Resolution was not supported by the UK delegation, but by all others.

I cannot repeat here in detail what has been said in this Position Paper. But I would, at least, try to outline some main aspects in order to demonstrate how they indeed fit into the scheme of the Proposal of CESL which you will debate today.

The CCBE held that the “principle of freedom of contract” must be considered to be a “fundamental principle of contract applying to contracts with both European citizens and enterprises”.\(^8\) I may remind you that this principle is now enshrined in Art. 1 of CESL.

With regard to Standard Terms of Contract the CCBE stressed that the “grey list” of Art. 3 of the Directive 93/13/EEC on Unfair Terms in Consumer Contracts should be fully respected by all Member States in order to “achieve a higher level of consumer protection”. There is hardly any doubt that this pro-

\(^6\) The CCBE hardly ever used the now common term „trader“


\(^8\) Vide p. 3 ibid.
2. What is the CCBE’s work done so far and is it reflected in the CESL?

Proposal has basically been taken care of in Art. 83-85 of CESL, containing a general provision and a “black” and a “grey list” of standard contract terms to be either “always unfair” (Art. 84 CESL) or to be presumed to be unfair pursuant to Art. 85 CESL. However, the CCBE did not vote for a “black” list, but held that the Member States could do in order “to achieve a higher level of consumer protection, if so needed”.9

Moreover, I would like to underline that the CCBE maintained the position that due competence to “apply any terms of the grey list” should no longer be vested solely into the national courts,10 but rather to the ECJ.11 This is exactly the consequence of the Proposal of CESL.

It seems to be very important that the CCBE in the same Position Paper has also addressed the issue whether Standard Terms of Contract should be controlled by the courts in b2b-transactions. The CCBE so agreed and maintained the position that “gross deviations from legal principles and good commercial practice” should be the benchmark for the unfairness test.12 Thus, it was held that Art. 3 Sec. 3 of the Late Payment Directive No. 2000/35/EC should be taken as the legal basis, as this provision seemed to be “appropriate to protect the “weaker” party, e.g. a non-consumer”.13

If one now reads Art. 86 of CESL one will find a striking similarity. But the proposal of the CCBE goes one important step further. The benchmark is not only “good faith and fair dealing” in order to determine whether a clause “grossly deviates” therefrom. The stand taken by the CCBE requires a finding whether the respective Standard Contract Term contains a “gross deviation from the legal principle”, i.e. the respective provision of the applicable law.

I do not argue that this approach is better equipped than Art. 86 of CESL to adjudicate whether a specific Standard Term of Contract is unfair. But it must be stressed that the “legal principle” is a much more solid basis to adjudicate whether the deviation of the Standard Term is “gross” and thus unfair in comparison to the rather general test whether the rather unspecified principles of “good faith and fair dealing” have been violated.

I also admit that the definition of “good faith and fair dealing”, as contained in Art. 2 lit. b) of the CESL is rather rigid as it spells out that “good faith and fair dealing” must relate to a standard of conduct that respects the interests of the other party. This again is subject to on-going discussions.

Finally, I would like to draw your attention to the last proposal of the CCBE that has been made in the Position Paper of January 2008. The majority of the delegations held that it is inappropriate to spell out many, namely pre-contractual information duties to be observed by the professional towards the consum-

9 Vide p. 4 ibid.
10 EuGH 1.4.2004 – C-237/02 – Freiburger Kommunalbauten.
11 Vide p. 4 ibid.
12 Vide p. 4 ibid.
13 Ibid.