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sull'idea di
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più che a quella già evocata della Direttiva 99/44, verrebbe da dire poi che il destino unificatore del regolamento opzionale sia già segnato mestamente e che, almeno nei decadevoli a noi vicini, non si percepirà alcuna aprezzabile influenza sulle regole sinora applicate, né sulla disciplinandola vendita «co-
dicestica», né tanto meno su quella generale dei contratti. Sono infatti rarissime quelle sentenze del giudice italiano (ma lo stesso si potrebbe dire per molti manuali istituzionali sui quali gli studenti, e futuri avvocati e giudici, si formano), ove una questione interpretativa in tema di compravendita si trova risolta, o almeno argomentata, riferendosi alle soluzioni utilizzate nell’applicazione del testo convenzionale.

In più, si vorrebbe rinvenire il diritto per unificarlo proprio il dove già opera la Convenzione di Vienne, che si trova ratificata nella maggior parte dei Paesi che compongono l’Unione – pur con qualche limitazione, anche se rilevante, eccezione (Irlanda, Malta, Portogallo e Regno Unito (19)) – e che per giunta non si applica essenzialmente in quelle materie dove il diritto è già armato e l’autorità politica europea adoperarsi per procurare la ratifica della Convenzione da parte di chi l’ha sino a oggi rinviato e favorire occasioni di studio e pubblicazioni destinate a farla conoscere meglio, piuttosto che affinarla, riuscirebbe più o meno bene.

(19) Le ragioni che delportrebbero contro la ratifica sarebbero essenzialmente il timore di Londra di perdere il proprio prestigio esclusivo come sede arbitrale, il timore di insistere a un’espansione del contrattuale e dei relativi conti. v. Mons, Why the United Kingdom has not yet ratified the CISG, in Journal of Law and Commerce, 2005, p. 483 s.
This legal situation heavily contrasts with the interest of those market participants who envisage larger than just domestic markets for their goods and services. These are often interested in identical rules governing the contract law of all the places where they do business, at least within Europe if not all over the world (1), as this helps reducing transaction costs considerably.

3. The solution proposed

One might account for those interests by creating a binding European contract law that would replace all the national laws. However this would mean to authoritatively cut off the legal traditions of the various national contract laws without an obvious and urgent need for such a far-reaching step. In particular, the general principle of subsidiarity sets a limit to any over-ambitious legislative project that would result in the extinction of any national contract law, or even just in the abolition of principles that have been considered as an integral part of national law. A fine example for this is offered by the provision in Art. 165 Appendix I of the draft Regulation for a European sales law published in October 2011. This rule provides that there is no default of the seller needed for an action for damages, which is distinctively different from laws such as German law, whereas, as a rule, any action for damages requires fault of the liable party.

A much more prudent answer of the European Union to the conflict of interests mentioned above, i.e. state sovereignty on the one hand and homogenous legal frameworks on the other, has been chosen in the aforementioned European Commission’s proposal for a Common Sales Law, that is aimed at boosting cross-border trade. First of all in this document the Commission basically focusses on one kind of contract, whereas the Draft Common Frame of Reference provided for a far larger scope of application, including not only services but rules on non-contractual relationships and even property law. The second important self-limitation of the Commission in its latest proposal lies in the concept of an Optional Instrument, which is a complete set of rules similar to a national Civil Code but which is not simply to be considered as national law (2). The basic idea of the Optional Instrument is that the parties to a contract should be offered the possibility of choosing a set of rules, such as a contract of sales law, which is different from the national law that would normally govern their contract, according to private international law rules as laid down namely in the Rome I Regulation (3). The parties to the contract that choose an Optional Instrument will in many cases – but by no means necessarily, as will be discussed below – be based in different EU Member States (4).

The Optional Instrument, once it has been approved by the sovereign decision of the Member States involved, is a source of law which may be put into force for the relationship between individuals only by an autonomous decision of these very individuals concerned (5). With respect to the questions to be answered here this legal technique is highly interesting for several reasons. First of all it is worth examining how these sets of rules that an Optional Instrument consists of come into existence. The elaboration of such a set of rules, just as the European Sales Law as proposed by the Commission, or, perhaps in a more distant future, the Draft Common Frame of Reference, obviously involves a lot of comparative research, which aims at trying to find common principles shared by all the Member States that offer their subjects this option (6).

Within the European Union any such set of rules that offers an Optional Instrument will have to pass the European Parliament before individual parties will be able to agree on it (7). However once that step has been taken

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(7) See STEIN and SCHULTE, Introduction to the Principles of European Contract Law, ed. by Vogesauer and Weathersby, 2006, pp. 233-244 (238).
this choice will exist. That leads to a highly interesting phenomenon which
presumably is one of the ideas behind this concept: The existence of an Op-
tional Instrument challenges national legislators to enter into a comp-
petition between their laws and the rules offered by the Optional Instrument. Ob-
viously it would be quite frustrating for any state to see that parties to a con-
tract opt for the new transnational instrument instead of the rules that the
national law makers provided, typically considering them well-balanced
and fair. The escape from national law exercises a specific pressure as it is
the autonomous decision of both parties to state that they prefer the Op-
tional Instrument to govern their contract (*). This is especially interesting
because the choice of the Optional Instrument is not only offered to profes-
sional market participants but to consumers as well (**). Thus there is a cer-
tain pressure on national legislators to reform and perhaps modernize their
national contract law in order to make it more attractive for parties that do
have a choice (**).

In fact the idea of a competition of legal systems is a tempting one, and
it appears that it deserves to be given a try. However there are a number of
important questions yet to be discussed. One essential point is that obvi-
ously many consumers will find it difficult to assess the advantages and risks
of the decision they will have to take. For example the national law of the
consumer's place of residence might provide a more consumer-friendly
contract law than the Optional Instrument does. It is by no means obvious
that the consumer will be properly informed before agreeing to a set of rules

(*) See Van der Heijden, Kerber, Selecting the Best Instrument for European Contract
215-236 (222).

(**) See Max Planck Institute for Comparative and International Private Law, Policy Op-
tions for Progress Towards a European Contract Law: Comments on the issue raised in the Green
(422).

(*) See Steudensmeyer, European Contract Law - What does it mean and what does it not
mean, in The Harmonisation of European Contracts Law, ed. by Vogewoerde and Westerbeek,
2006, pp. 235-244 (242).

(**) See Van der Heijden und Kerber, Selecting the Best Instrument for European Contract
Law, in EURPL, 2011, Vol. 19, No. 5, 2011, pp. 565-578 (572); Max Planck Institute for Compara-
tive and International Private Law, Policy Options for Progress Towards a European Contract
Law: Comments on the issue raised in the Green Paper from the Commission of 1 July 2010, COM

he might not be familiar with. Even though the Commission's proposal
provides for a responsibility of the entrepreneur for rendering such infor-
mation there remains some doubt as to this possible obligation to offer ad-
vice, and as to the question which rules will govern his liability if he fails to
so do. Generally the risk of litigation based on a contract law that national
courts at least initially will not be familiar with, and that has to be interpret-
ed by the European Court of Justice, presents an additional burden for the
consumer but for the entrepreneur as well.

4. Conclusions

The aspects mentioned above lead to the following answers to the Que-
uestionnaire: Although by no means indispensable for cross-border
trade, it appears reasonable to create a common European sales law in order
to boost such trade. This should, however, in a first step not replace the tra-
ditional laws of the Member states but just offer an alternative. It appears
that a binding Regulation is more appropriate than an opt-in or opt-out
model, as only a framework that applies in all Member states will really al-
low an assessment of how the competition of the various national sales
laws with the Optional Instrument works. However if during the legislative
process it becomes obvious that some Member states are not prepared to
submit themselves without any reservation to the new rules, an opt-out
model seems more appropriate than an opt-in model, as it will require each
Member state that is not prepared to offer that choice to its citizens and
companies to make an express decision about this.

At the same time the choice of the European set of rules should be open
not only to cross-border transactions but to purely domestic contracts as
well. So far Art. 12 of the draft Regulation on a European sales law only al-

The possible intensifying competition between national sales laws and the
Optional Instrument could not be pursued effectively. Furthermore the
potential for reducing transaction costs would partly remain unused. In ad-
more convincing to generally apply the European rules whenever the par-
ties choose to do so, no matter where within the EU they are based. Other-
wise the aim of intensifying competition between national sales laws and
the Optional Instrument could not be pursued effectively. Furthermore the
potential for reducing transaction costs would partly remain unused. In ad-
dition there is no reason why a Member state should not offer the choice of
a set of rules that is deemed acceptable for cross-border contracts to do-

The possible intensifying competition between national sales laws and the
Optional Instrument could not be pursued effectively. Furthermore the
potential for reducing transaction costs would partly remain unused. In ad-

which appears inappropriate as the motives for cross-border trade should be different from the avoidance of a certain law.

As to the range of matters that are to be governed by European rules, it has already been pointed out that any highly fragmented legal framework such as the present one which has developed as the outcome of various Directives should be avoided. Therefore it seems reasonable not to limit the scope of application of any new sales law to certain groups of contracts such as consumer contracts or distance selling. This does by no means prevent the European legislator from providing for special rules that take into account the specific needs for protection that may exist in certain situations. However any new set of rules created should not exclude any kind of sales contract.

It seems prudent to follow a step by step strategy, which allows for the experiences made in practice to be assessed and used in the development of any further step forward. Therefore it is a good idea to begin with sales contracts, being the most significant kind of contract, and then to proceed towards more comprehensive rules.

Finally the same step by step strategy is appropriate with regard to the international scope of the creation of a unified contract law. Europe offers a well-established legislative structure for the promotion of any supranational contract law. Other States worldwide may draw some inspiration for their own legislative projects from the European rules, as well as from the experience which is to be obtained from their application in practice. However for the time being it appears to be too ambitious to try and implement those rules on a supra-European level.

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Scope and Content of an Optional European Contract Law

On 11 October 2011 the European Commission has presented the long awaited proposal for a Common European Sales Law (CESL) (1). Just one day earlier, the European Council had given its approval to the new Consumer Rights Directive (CRD) (2). This timely coincidence symbolizes that European contract law is standing at an important juncture. The two legislative acts represent two different models. The CRD stands for a continuation of the harmonization of national laws by means of directives. In contrast, the CESL stands for a new approach: the complementation of national laws by means of an self-contained optional contract law regime.

As the efforts to create a coherent contract law through harmonization of member state laws have not proven successful, preference should be given to the more innovative and less invasive complementation policy (par. 1). However, success or failure of the new approach very much depends on defining the right scope of the optional contract law (par. 2). If scope and content are wisely chosen, there is a fair chance that an optional instrument will improve both consumer protection and consumer choice (par. 3). Eventually, the optional instrument could even become an export product of European law making and a model for a global ‘blue button’ (par. 4) (3).

1. The need for a paradigm shift: From harmonization to complementation

For roughly thirty years there has been an ever growing impact of European law on the development of national contract law. Yet there is a marked contrast between the expanding quantity of EU legislative acts and the legislative quality of the acquis communautaire. The now more than fifteen di-