CCBE debate on the proposed Common European Sales Law

17 December 2012

Simon James

The majority of the English legal profession is opposed to the CESL on principle because they do not believe that there is any evidence that it will improve the internal market, because it will impose considerable costs on business and the legal profession, and because it will create uncertainty. The UK Government has also recently taken the same view following a public consultation. The UK Government concluded that:

> "The Government... [is] concerned that there are fundamental flaws in both the principle and practical operation of CESL. Evidence indicates that it is most unlikely to produce the results the Commission claim. It is also clear that the proposal will be both time-consuming and cumbersome to negotiate and implement, rather than providing a simple and practical solution to the immediate challenges presented to businesses, consumers and the growth of the Single Market."[1]

I therefore find myself in a minority - in truth, a small minority - in not being opposed to CESL as a matter of principle. I see no objection to the CESL, not least because there is business demand for a European contract law.[2] This does, however, depend upon the EU having the power to legislate for the CESL and upon the EU going about the preparation of the CESL in a proper way in order to produce an instrument that meets the needs of users. Both these issues gives rise to problems. I also think there is a third problem, namely the scope of the proposal.

The first problem I mentioned is the legal basis under EU law. This is not simply an abstract or legalistic issue that can be left to the CJEU to sort out afterwards:[3] it is a practical problem that will affect people's willingness to use the CESL. Parties enter into contracts to provide

[1] *A Common European Sales Law for the European Union - a proposal for a Regulation from the European Commission: The Government Response*, paragraph 6.

[2] For example, a survey by Clifford Chance LLP showed that 83% of businesses across Europe viewed favourably or very favourably the concept of a harmonised European contract law. The figure for the UK was 64%. See Vogenauer and Weatherill, *The European Community's Competence to Pursue the Harmonisation of Contract Law - an Empirical Contribution to the Debate*, in Vogenauer and Weatherill (Eds), *The Harmonisation of European Contract Law*, Hart Publishing, 2006.

[3] Though it is intrinsically important that the European Union, as a community of laws, recognises and abides by limitations on its own capacity: article 5 of the Treaty on European Union.

certainty. That certainty will manifestly be lacking if there is a continuing question mark over the validity of the law chosen to govern the contract. Contracting parties will be reluctant to choose a law that may be invalid, and lawyers will be reluctant to advise clients to use that law.

The Commission will doubtless object that its advice is that article 114 of the Treaty on the Functioning of the European Union provides a sound legal basis for the CESL. But that does not address this problem. The Commission might ultimately be proved right or it might be proved wrong - as it was wrong, for example, in relation to European Cooperative Societies.[4] There are serious reservations about the legal basis that cannot be ignored. Unless and until that doubt is resolved people will be reluctant to use the CESL because doing so will not offer certainty. An optional instrument of dubious legality cannot compete with long-standing national laws in the legal market place. The legal position of CESL must, therefore, be sorted out at the beginning, not at the end.

The second problem is as to the manner of production of the CESL. My initial involvement in the Commission's project started in late 2004 as a stakeholder in relation to what was then called the Common Frame of Reference (CFR) - a contract code the name of which, as Professor von Bar put it, "had the charm of the unknown and, at least on the face of it, the politically innocent."[5] The stakeholders met to debate - indeed, argue over - parts of the draft CFR with the drafters. That process can only have been set up because the Commission recognised that contract law is not a technical matter that can be left to academics. Contract law raises numerous practical and policy issues, that must be debated widely - by lawyers, by businesses, by consumers and by politicians. It requires the kind of iterative process that the Commission then contemplated.

The stakeholder process did not, however, last long. I suspect that we stakeholders were too unruly. Instead, the text of the CFR was taken back behind closed doors and, eventually, transmuted into the CESL. That has led to the unsatisfactory draft that has been published. Peter Csoklich has mentioned some of the issues with this draft. Even the European Law Institute - not a body that can be dismissed as hostile to the project - has produced a long

[4] *Parliament v Council*, Case C-436/03.

[5] Professor Christian von Bar, *A Common Frame of Reference for European Private Law - Academic Efforts and Political Realities*, vol. 12.1 ELECTRONIC JOURNAL OF COMPARATIVE LAW (May 2008), <http://www.ejcl.org/121/art121-27.pdf>.

report setting out practical recommendations to make the CESL simpler, more coherent and more certain.[6] The ELI did not, however, address in the main the major political choices made in the proposal. These choices need to be identified and discussed; drafting should be the last stage, not the first.[7] Debate may be time time-consuming, but it is far better to have a good law slowly than a bad law quickly.

My third point relates to scope. Employment contract law used to be considered a main stream part of general contract law. The legislation that now enmeshes employment law means that it is rightly treated as separate - it was, eg, regarded as outside the scope of the CFR.[8] Consumer contract law and commercial contract law should also, in my view, be recognised as having long since parted company. They have different aims. Consumer law is about regulation; commercial law is about freedom of choice. The EU has an extensive consumer law acquis, and there may be something to be said for consolidating that into a consumer contract code, notwithstanding the political difficulties involved. There is also something to be said for producing a European commercial contract code. But treating them as one adds conflict and complication, and makes it more likely that the project as a whole will fail.

[6] *Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law COM(2011) 635 final* (http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Regulation_on__a_Common_European_Sales_Law.pdf).

[7] See, for example, Professor Martijn Hesselink, *The Politics of a European Civil Code*, European Law Journal, Vol 10, No 6, November 2004, p675.

[8] *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference, Outline Edition* (Sellier, 2009), article 1.-1:101(2)(e).