

Chapter 1

Introduction

Currently, the only tailor made international commercial law is non-state law, such as CISG,¹ the UPICC² or even the UCC³ and standard contract forms. At the same time, the current work on the DCFR⁴ focusses on both consumer and business law. The current recommendations tend to make this new instrument ‘optional’ (an Optional Instrument, OI), backed by Europe’s Justice Commissioner Viviane Reding⁵ while some only wish to go as far as to treat it as a ‘toolbox’ within private international law,⁶ and a third suggestion is even to combine the two.⁷ In any case, the outcome will be non-state or soft law or indeed some hitherto unknown form of optional state-endorsed law.⁸ The European Parliament has expressed a preference for the Optional Instrument in a vote of 8 June 2011.⁹

¹ United Nations Convention on Contracts for the International Sale of Goods, done at Vienna, 1980, therefore often referred to as the ‘Vienna Convention on the International Sale of Goods’, short CISG. It is non-state law in those countries who have not ratified it such as the UK.

² UNIDROIT Principles on International Commercial Contracts, 1994/2004.

³ Uniform Commercial Code (US American Law Institute).

⁴ Draft Common Frame of Reference.

⁵ Speech of 3 June 2011 in Leuven, see press release under link <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/11/411&format=HTML&aged=0&language=EN&guiLanguage=en> [14 Oct 2011].

⁶ As for instance the German Federal Justice Minister expressed adamantly in her recent contribution, Leutheuser-Schnarrenberger (2011), pp. 454–456.

⁷ This is the suggestion contained in a report by Diana Wallis MEP adopted by the Legal Affairs’ Commission on 12 April 2011 (MEMO11/236).

⁸ Answering the question of the legal nature of the new instrument would exceed the scope of this paper. The consultation following the Green Paper from the Commission on policy options for progress towards a European Contract Law for Consumers and Businesses, COM(2010)348 final (2010) closed January 2011. 320 responses were received. Some respondents rightly remarked that it would be premature to comment on an instrument the contents of which were unpublished and undetermined at the time of the consultation.

⁹ <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/683&format=HTML&aged=0&language=EN&guiLanguage=en> [15 Oct 2011].

The Commission has now formally issued the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law on 11th October 2011.¹⁰ The draft blueprint of this proposal which is the outcome of the Expert Group's work is currently available in the form of a 'feasibility study'.¹¹

So far, European law has concentrated on consumer law and touched on commercial matters in the form of financial regulation and competition law. So, both the questions of whether the issues covered by traditional commercial contract law will be covered by the new OI, whether the OI will make traditional commercial contract law redundant and how the application of such a potential new Optional Instrument will work in practice will have to be answered.

When Ole Lando set about drafting the European Principles of Contract Law he was expecting to draft a 'European Uniform Commercial Code'.¹² Meanwhile, the expert group that may be called a successor gremium to Lando's first project met almost once a month to draft the 'Common Frame of Reference' (CFR).¹³ These experts were aiming not only at reformulating and consolidating the 'consumer acquis' following the Green Paper of 2007¹⁴ but at providing more generally a European contract law including contracts between businesses.

The terminology denominating the respective constellations to be considered in the drafting of these rules is normally 'business to consumer', 'business to business' or even 'Business to business' indicating large to small business or SME,¹⁵ short forms in use are B2B, B2C, B2b.¹⁶

Surveying the protocols of these meetings¹⁷ one finds that despite the clear focus on consumer aspects in contract law, individual rules of the 'classic' uniform commercial contract law codified in the CISG and UPICC have been suggested to be preferred over the rules of the DCFR in order to suit both consumer and business contracts. The content of these rules can be said to be traditionally typical for commercial contracts such as notification rules, the order of payment and passing of risk Articles 6.1.3, 6.1.4, and 6.1.7 UPICC apart from the wording taken

¹⁰ COM(2011) 635 final.

¹¹ http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf [15 Oct 2011].

¹² Lando and Beale (2000), p. xi.

¹³ See the current website http://ec.europa.eu/justice/policies/consumer/policies_consumer_intro_en.htm from where a list of members and also the individual protocols can be accessed.

¹⁴ Green Paper on the Review of the Consumer Acquis, 8 Feb 2007, COM(2006) 744 final.

¹⁵ Small and medium sized business.

¹⁶ C2C for 'consumer to consumer', is also in use, see protocol of the third meeting of 22/23 July 2010, p. 2. It is not explained in much more detail in the protocol of that meeting why this constellation would need special attention. The protocols often use the capital and small letter spelling with no apparent intention to differentiate in the Above way, thereby deviating from established use in the literature. The protocols may of course have been drafted very speedily and not with a view to being published as academic papers, but nevertheless this use of inconsistent spelling is confusing.

¹⁷ See in more detail below, 2.2. et seq.

from CISG ‘could not have been unaware’ to replace the wording in Articles IVA 2:307b, 301 and 302 of the DCFR for greater clarity.¹⁸

This begs the question of whether the reasons for the separate traditions of commercial or merchant and civil or private contracts have been analysed sufficiently before embarking on the redrafting project for the prospective CFR/OI. Are the rules in both spheres interchangeable or do they each serve a separate purpose? Should businesses and consumers have separate contract law codifications in order to enhance the Internal Market?

I will discuss this question in the first part of this paper and then move on to discuss the current role of transnational contract law within the setting of private international law in order to explain the prospects of the Optional Instrument (CFR) in current international law.

¹⁸ Due to reference to the non-disclosed draft in the recorded discussions, now feasibility study, it is not straightforward to derive how the respective rules under discussion finally feature in the final product. It is however noteworthy and highly laudable that instructions were given early on by the EU drafters to effectively remove the longwinded counting method of the DCFR and create a simple structure with plain consecutive Article numbers.

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Heidemann, M.

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