

Ladies and Gentlemen,

Let me first thank the Institute for having me invited here and giving me an opportunity to talk to you.

Is it possible that the European Commission finds itself today, regarding European contract law, in the position of having a very powerful tool in its hands but not knowing how to use it or in which direction to steer it ?

After having regulated many specific areas and having followed, during many years, a selective approach adopting directives on specific contracts or specific marketing techniques where a particular need for harmonization was identified, the European Commission took on an interest in to farther-reaching EC action on contract law as such. It therefore raised, in 2001 several questions:

- (1) Whether the proper functioning of the internal market may be hindered by problems in relation to the conclusion, the interpretation and application of cross-border contracts,
- (2) Whether different national contract laws increase the costs of or discourage cross-border transactions
- (3) Whether the existing approach of harmonization of contract law in specific areas can lead to inconsistencies at EC level or to problems of non-uniform implementation of EC law and application of national transposition measures.

The Commission did not only raise questions but suggested also possible solutions if concrete problems were to be identified:

- (1) to leave the solution of any identified problems to the market,
- (2) to promote the development of non-binding common contract law principles useful for contracting parties in drafting their contracts, national courts and arbitrators in their decisions and national legislators when drafting new pieces of law,
- (3) to review and improve existing EC legislation in the area of contract law to make it more coherent or to adapt it to cover situations not foreseen at the time of adoption
or
- (4) to adopt a new instrument at EC level.

In 2003, after a process of consultation and discussion and the adoption of a Resolution by the European Parliament and a Report by the Council, the Commission published an action plan for a more coherent European contract law. This action plan suggested

- a) to increase the coherence of the EC acquis in the area of contract law,
- b) to promote the elaboration of EU-wide general contract terms and
- c) to examine further whether problems in the European contract law may require non-sector specific solutions, such as an **optional instrument**.

And there we are, the word has been pronounced: the optional instrument. A lot of vague words and phrases, but now, all of the sudden, things have become quite clear. Throughout these initiatives, it appeared more and more that there was – and still is - a strong political will to adopt an optional instrument. This has been confirmed in the white paper published by the Commission in July 2010: where seven different solutions have been proposed, the Commission designated, even before publication of the white paper, a small group of experts to work on the fourth solution: an optional instrument in the area of European contract law.

So what exactly is this optional instrument and can it help to increase cross-border transactions ? As to what it is, the general idea is to have a set of common rules, in this case, on the conclusion, the interpretation, the performance and the extinction of contracts, which are adopted through a EU-regulation and which do not replace national law, but which come as an alternative to national law. When a German company is contracting with an Estonian company, they could therefore chose to apply their national law (German or Estonian law) or, to apply instead of a chosen national law the EU common contract law as provided for by the optional instrument. So there would actually be 28 different contract laws, the 27 of the National Member States and the 28th resulting from the optional instrument.

So the next question, which is of course of peculiar interest for business, is “*Does this work?*”

Now, as this is one of the more controversial questions and as we lack of practical experience in this field, I can only give you my personal view here. I do not believe it to have all the qualities many people tend to see in it.

- The optional instrument has been presented at many conferences and in many debates as the ultimate solution to all problems. All contractual parties need to do, if such an instrument were to be adopted, is to choose the EU common contract law in order to govern their contractual relationship. This diminishes costs for cross-border transactions, no need for costly translations anymore, and brings legal certainty because parties do not need to bother about the content of foreign legal systems with which they are not accustomed. I do not believe this. It sounds a little bit like some of those new cloud systems in computing, where data are stocked somewhere on the internet, “in the clouds”, which sounds very nice because you don’t have to bother any more on which computer you are working and how much space you have left on your hard drive...that is until you want to get access to the data and you start downloading them...and then trouble will start. The optional instrument gives the illusion of a legal system without borders, floating over the various national legal systems...but nobody says what happens when, sitting on your nice cloud, you have to land in one of those systems...which is inevitable when you have to bring your case before a national judge, especially since the optional instrument would not govern all aspects of the contract, so for some aspects you still would have to refer to national law...and that’s when all the trouble starts over again. In fact it is the ultimate solution to another problem: the fact that, politically, it does not seem to be possible to harmonize contract law, but that’s another story;
- The optional instrument, as presented today, would include consumer protection. So consumers buying online would have a choice, at the stage of check-out, they would have to click on a button to choose either their national legal system, either click on the so-called blue button or choosing for the optional instrument. Clicking on the blue button means *“Yes I accept that my contract will be governed by a European regulation, of which the content is totally new, which is up to a certain point quite different of my national law, but how different is difficult to explain, but trust us this is European stuff so we have done this to the benefit of all consumers including you”*. Now how many consumers would make such a choice today? You have to be fairly optimistic to believe that this will interest consumers, not to forget consumers, don’t want to go to court in general. If they buy a tv that is not working, they want to get a new tv in replacement or to have the actual tv repaired, and not to get into some complicated legal stuff which they do not understand most of the times.
- Even in B-to-B relations, the usefulness of the optional instrument seems highly questionable as we have had another example of such an instrument with the Unidroit principles. The Unidroit Principles are such a set of general rules on contracts, which parties in a contract can refer to. It appears however that they very seldom do so. So what would yet one more set of international rules on

contracts bring and are there reasons to believe that this time business would have more reasons to refer to the European rules ?

Following many critics on this option as set out in the white paper, the Commission decided to step back and to propose an optional instrument with a more limited scope. On October the 11th of this year, the Commission published the proposal of an optional common European sales law, which is an important setback for the goal of taking initiatives in the field of general contract law, as this approach is once more a selective one.

Does this mean that there is no point in these initiatives? No of course not. Every cloud has its silver line and though the optional instrument is all but a dream, one of the main advantages of all this is that a lot of work has been done in order to understand the differences and the common points between the various legal systems in Europe, as is shown by the Draft Common Frame of Reference and by the Common Frame of Reference which serve already as toolboxes for national legislators; And eventually this understanding of our differences will bring legal systems closer together. But this understanding is a necessary and will take a lot more time than the Commission might have imagined.

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