A contract law to a sales law perspective law european essay

Law

I. THE COMMISSION PROPOSAL: THE LONG WAY FROM A CONTRACT LAW TO A SALES LAW PERSPECTIVEThe EU, in order to achieve “an area without internal frontiers” , has constantly and increasingly, throughout its history, enacted harmonisation measures aiming at approximating Member States national legislations. Private law (and more specifically Contract law) represents one of the most important ramparts of national law and its cultural and symbolic value is stubbornly defended by a considerable part of Member States . The EU legislator has shown to be conscious of such characteristics and has drafted, with an increasingly intense and extensive method, several soft law provisions and, seldom, even hard law rules. As a consequence, it has been submitted that a new era for codification is looming , this time not deriving from Roman Law, but from EU Law . In the Private law field, the CESL constitutes the most recent instrument presented by the Commission. Such proposal represents a new kind of strategy for pursuing harmonisation, as stressed by Commissioner Reding: “in the past, the work on European Contract Law was important, but not a policy priority. Now [“] [w]e intend to move up a gear” . Before analysing the proposal, the major related stages of the EU integration process which led to its formulation will be briefly outlined. The first text to be mentioned is the 1989 EP Resolution , followed by the 1994 Resolution , inviting the Commission to verify the feasibility of a European Code in the field of Private Law. As regards the EU Contract Law harmonisation strategy, the leading document is represented by the 2001 Communication “on European contract law” , where it is possible to find for the first time a proposal on a possible “new instrument at Community level” in the area of Contract Law. This document

constituted a sort of positive reply to an on-going academic debate and, particularly, to advocates of a future convergence and harmonisation of Private European Law or at least of Contract Law, as a natural outcome of a process started with the Treaty of Rome. However, the real starting point of the process, culminated in the 2011 CESL Proposal, was the 2001 EP Resolution , before which the EU legislator had always dealt with specific contracts provisions only. In 2003 the Commission, with the Communication "A more coherent European contract law" presented an "action plan" to create a "Common Frame of Reference" (CFR) to increase the coherence of the EU acquis, as a possible premise for a subsequent optional instrument in the European Contract Law area. The Commission, with the Communication "European Contract Law and the revision of the acquis: the way forward" , outlined the development of the CFR as a "toolbox", offering thus a set of rules for a future optional instrument, if not even a future European Code . With the help of some private expert and scholars networks as the "Study Group on a European Civil Code" and the "Acquis Group" and the involvement of representatives of associations, the final outcome was the 2009 "Draft Common Frame of Reference" (DCFR) . The DCFR is inspired by the "Principles of European Contract Law" (PECL) and also the U. S. Contracts Restatements . The PECL have been formulated by the "Commission on European Contract Law" under the guidance of Professor Ole Lando of the Copenhagen Business School, who had been working on them since 1982. Contributions from academics and scholars have proved to be considerable: the 2011 Proposal is, therefore, a project that was born in an academic and intellectual context, which has then become a political

option . With the ﷺStockholm Programmeﷺ the European Council invited the Commission to present a proposal on European Contract Law.ﷺEurope 2020ﷺ has underlined the necessity of offering harmonised solutions for consumer contracts and of setting EU model contract clauses (the so called ﷺflanking measuresﷺ) having the same force and applicability in all the EU in view of a future EU optional instrument in the Contract Law field. Finally, the ﷺDigital Agenda for Europeﷺ makes reference to the adoption of an optional instrument that, together with the 2011/83 ﷺDirective on Consumer Rightsﷺ , would mitigate the fragmentation of European Contract Law . 1. A policy priority: the new strategy of the Commission. Its meaning and implicationsIn 2010, the Commission has started to promote a new active strategy (particularly on-line) in the field of Contract Law , with a novel voluntary (and complementary) approach towards Internal Market issues, that became effective in two initiatives preceding the CESL. The first one was a the Green Paper , aiming at strengthening the Internal Market. In view of a public consultation, seven possible options were formulated in reply to the question: ﷺwhat should be the legal nature of the instrument of European Contract Law ?ﷺ : 1)The (mere) publication of the results of the Expert Group on the Commission website; 2)an official " toolbox" for EU and national legislators; 3)a Recommendation on European Contract Law; 4)a Regulation setting up an optional instrument of European Contract Law; 5)a Directive on European Contract Law; 6)a Regulation establishing a European Contract Law; 7)a Regulation establishing a European Civil Code . The second one is the (previously set up) appointment of an ﷺExpert Groupﷺ with the task of publishing a ﷺFeasibility Study for a future instrument in European Contract

Law" , which happened on May 2011. Its results, together with all the aforementioned works, and in particular the DCFR , flew into the CESL, published by the Commission on 11 October 2011 on a "record time" base . II. A REGULATION SETTING UP AN "OPTIONAL INSTRUMENT" OF EUROPEAN CONTRACT LAWRevealingly, the propelling phase of the harmonisation process of the European Private Law took place simultaneously with the SEA and the Treaty of Maastricht and the increase of international trade and globalisation. Twenty years after the establishment of the Internal Market, the Commission has deemed that mere communications or directives were no more enough suitable for pursuing harmonisation in this domain , for it was high time to present a proposal on a common European law concerning a particular contract: sales. The contract of sales constitutes the "contract" par excellence: in a market economy it represents the most typical and common contract, serving as a model for all other contracts: "cross-border contracts and contracts for the sale of goods [represent] the bulk of intra-EU trade ". Therefore, the choice of intervening in this sector is a deliberate one and reveals the will to give a political message and assume a certain international role as well. 1. The CESL objectives, among European trade and consumer protectionThe Commission, in its "Communication to facilitate cross-border transactions in the single market" has explained which objectives are pursued with the CESL. As one of the EU"s most important achievements is a single market comprising more than five-hundred million consumers, "the steady lowering of barriers between ["] States has brought numerous benefits to citizens ["] "in their capacity as consumers [to enjoy] economic benefits such as lower air fares

and mobile telephone roaming charges and the possibility to access a larger variety of products" . On the other side "traders have been able to expand their activity across borders, by importing or exporting goods [...]. Thus they benefit from the economies of scale and the greater business opportunities that the single market offers" . However the remaining barriers hindering cross-border trade "result from differences between national legal systems, [among which] contract law systems" . Economic considerations are arguably the rationale for the CESL; "contract-law-related barriers which prevent traders from fully exploiting the potential of the internal market ["] work to the detriment of consumers" lessening the demand and depressing competition. This ends up limiting consumers" choice and increasing prices. In fact, even though cross-border shopping can bring economic advantages, consumers are still "reluctant to engage in cross-border shopping, because of the uncertainty about their rights" . As a result, a great number of consumers prefer to shop domestically even at the cost of less choice and higher prices. Behind these economic concerns lie two important theorems that the Commission has probably taken into account. The first one relates to comparative and absolute advantages. The Portuguese economist David Ricardo demonstrated that international trade is profitable for two countries inasmuch it constitutes a form of indirect production; instead of producing all necessary goods for their own internal consumption, a country may produce only (or almost only) a single good and exchange it with other goods. This has the effect of enhancing the consumption possibilities of every country concerned, giving rise to reciprocal advantages. The choice of the good on which to specialize depends on the relative efficiency in the production of

that good with respect to the relative efficiency that the other country as in the production of that same good: this is the "comparative advantage" of the country having the lowest opportunity-cost in the production of the good. The revolutionary significance of the Ricardian model is that even if a country is more efficient than another in the production of all goods (i. e. has an "absolute" advantage), both countries are still expected to gain by reciprocal trade, provided that they have different relative efficiencies. This model provides us with an economic explanation as to why specialization is useful in the international economics. If we add that "real transactions" are fundamental for a State to be attractive towards foreign investments, it is possible to understand why sales are deemed to detain a boosting market function by the Commission and why their juridical framework is actually being addressed by a Proposal such as the CESL.