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The analysis of the recent improvement on Consumers protection level
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Summary:

The harmonization – The simultaneous presence of two instruments for the harmonization of the contract law – the Directive – The Proposal for Regulation – The legal base of Regulation – The amendment formulated – The impact of Regulation adoption – Art. 6 of Regulation Rome I: *directing activities* of professionals and the problem of sales *on line*

The Harmonization

For long time in Europe it has been discussed on the prospective of a major harmonization of the private law.

It seems that the direction stricken out over the years consists on the activity of harmonization of the rules already existing in the different systems trying to smooth the diversities and to push solutions closer; Secondly proposing a new base-model, uniform, by drawing from some system inside Europe or from outside systems.

The one made so far is a minimal harmonization, i.e. essential, just sufficient to eliminate those differences that may render distant the solutions between countries.

There are three acceptations defining the European private law: a) The one that alludes to the rules of the communitarian law regarding the private individuals and the relationship between private individuals and the private law institutions applied from/to the bodies of the European Union, i.e. to all the rules of Treaties and other sources of communitarian law with which institutions and relationships have been disciplined that according to the use implanted in the continental legal culture, belong to the area of the private law. b) The one that within the bounds of a system belonging to one of the Countries member of the European Union, hints to the set of rules of communitarian derivation composed by communitarian regulations that immediately come in force and by the actuation rules of communitarian directives and other sources of communitarian law, the rules introduced by the non-actuated directives but so sufficiently detailed and precise to establish rights and therefore claims laid by individuals, the principles of communitarian law recalled by the rules of the internal law, the legal models borne out by the communitarian judges. c) The acceptance that hints to the collection of traditions, to the values, to the principles that are peculiar or deem to be peculiar to the European legal culture and that gave rise to codifications and to the *case law* and therefore to the constitutional principles where the European Union lies. Communitarian law form one of the bases of the European private law, either for the rules that by means of the various production sources are destined to discipline the relationships of private individuals and for the repercussions induced in the internal law by the principles that may be obtained from the communitarian law itself. The spirit of the communitarian law consists primarily in the opening of markets and in the building of a unique market that implies the removal of barriers existing in the national systems¹.

The attention of the communitarian law has been mainly concentrated of the Consumers right that on one side has directly impact on relationships between private individuals and on the other side forms the heart of the European law in force.

Directives relevant to the consumers rights form the *l'acquis communautaire*².

The simultaneous presence of two instruments for the harmonization of contract law

The harmonization of the European private law is an unstoppable process³.

Currently, the main instrument of harmonization is the directive. It doesn't ensure a satisfactorily harmonization for several reasons, some of which correspond to a basic choice because directives may give options to the States and sometimes they are important options. The different choices of national legislators determine, by the way, the necessity of having recourse to the rules of the private international law and therefore generate some of the problems that the harmonization should try to surpass⁴. Even when the national legislator does not have any option, he/she sometimes actuates the directive in a faithful formal way, but with adaptations more or less significant, because he feels the need of integrating the actuation law in its system.

For the moment the base for the harmonization of the private law has been mainly the single market and its efficiency.

At the end of 2011, two important novelties were recorded: after a long elaboration, the Directive on Consumers Rights was born, preceded by the publication by the European Commission just two weeks before, of the Proposal of Regulation of the European Parliament and Council relevant to a common European law on sales.

The contextual publication of the two important documents gives the impression that the texts are strictly connected. As a background there is the recurring consideration on the techniques to pursue the targets of harmonization. Probably these two documents are really the witness of two opposite visions on the intensity of harmonization and on techniques to achieve it⁵.

In October 2008 the European Commission presented a Proposal for Directive⁶ with the aim of defining, through the revisiting of the four fundamental "consumerist" directives (dir. No. 577/1985 on contracts negotiated outside commercial buildings; dir. No. 137/1993 on the illegal clauses in the consumers contracts; dir. No. 7/1997 on consumers protection in distance contracts; dir. No. 44/1999 on certain aspects of sales and guarantees of consumer goods), a sort of European statute of consumer rights⁷ to achieve an internal market capable of reaching the "right stability between a high level of consumers protection and the competitiveness of companies", in compliance with the principle of solidarity⁸.

The need of intervening on the communitarian *acquis* on consumers rights (as identified in the four directives) was justified on one side with the need of removing incoherence and dyscrasia existing into and between the original texts of the above directives, on the other side with the necessity of solving a phenomenon of re-differentiation between systems, determined as a consequence of the fact that the mentioned directives contained norms of minimal harmonization⁹ and therefore left to the single legislator the faculty of introducing or maintain in the respective systems instruments of further protection¹⁰. From here, the choice of attributing the character and the nature of maximum harmonization¹¹ to the discipline this way redrawn.

This choice caused the strongest resistances, most of all due to the fear that it could cause in many of the member Countries, a recession on the consumers protection¹².

In this prospect it was underlined how the hypothetic intervention of the Proposal of Directive was not justified based on the principles of proportionality and subsidiarity. In particular the legal Commission of the European Parliament, in its advice of 15th April 2009, observed that the proposed instrument of maximum harmonization would have had practically the effects of a regulation and therefore the States had no margin of discretionary power on norms in this field and that it would have caused an effective and clear distinction between contracts "*business to consumer and business to business and consumer to consumer*"

¹³.

Clearly, the maximum harmonization approach, especially if horizontal, implies the complete transfer of legislative competence to the European Union with reference of the sectors dealt. If not adequately justified, the question of constitutional legitimacy and compatibility arises in respect of the principles of proportionality and subsidiarity that should guide the harmonization interventions.

The current Directive justifies the intervention adducing that the aim of contributing to the correct operation of the internal market by obtaining of a high level of Consumers protection cannot be achieved sufficiently by the member States, but can be better realized at Union level; for this reason, it could act according to the subsidiarity principle of art. 5 of the EU Treaty.

The Directive specifies to limit to what is necessary to do to achieve this aim in compliance with the proportional principle.

This justification did not fully convince the exponents.

Even the legal Commission shows to be in favour of a less problematic solution, represented by the introduction of an optional instrument that would allow the companies to offer consumers the possibility of applying the European law on contracts and retails on their purchasing and to be therefore protected by its regulations that would have the quality of being extended over contract *business to consumers*, with the opportunity of fully using the Common Frame of Reference.

In essence, the legal Commission of the Parliament asked the European Commission to go back to the original proposal lined up in the Action Planning of 2003 and in particular to the idea of building, on the base of the *Common Frame of Reference*, an optional instrument, i.e. “a modern *corpus* of rules particularly suitable for cross-border contracts in the internal market in order to offer the parties an acceptable and adequate solution, without insisting on the necessity of applying the national law of one of the parties¹⁴”.

It is beyond dispute that the consumer *acquis* shows the sign of age and of a defective coordination, however the subjects adduced in favour of the line embraced by the Proposal of Directive revealed much less convincing than expected.

In view of the criticisms, it was found that the concept of maximum harmonization is indeed relative because, it is true that the Proposal of Directive asserted its mandatory articulations in the development of a law on contracts of consumers exhibiting an expansive vocation with no comparison with previous experiences, but even with all its ambitions, it concentrated the attention on four directives and anyhow sketched out a discipline that would have been included in the national normative systems.

The rules imposed at European level, in fact, are to be included inside national contexts and are inevitably influenced by the juridical systems that import them. Therefore, if a full harmonization may have a resolute effect with reference to detail rules, it is not so in reference to more general and abstract norms, especially if connected to the legal concepts of each system. Rules cannot be isolated by the wider legal and economical context they are comprised and cannot be taken in by abstracting the application that will be given by the legal authority.

Criticisms addressed to the Proposal of Directive are the ground of the *revirement* to which the Commission gave life at a certain point deciding to limit the object of the Directive on Consumers Rights and the projected maximum harmonization to the revision of the Directive on Contracts negotiated outside the commercial premises and to distance contracts (although the title of the directive keeps on reflecting the ambition of a general restyling) as well as to propose again the idea of an optional instrument.

But also the Proposal of Regulation for a common law on sales of 11th October, 2011 raised a negative reaction of the national Parliaments. In fact, the adoption of an optional instrument as provided by the Proposal for regulation does not mean renunciation of asserting the

supremacy of European contractual law with respect to the national laws, but simply the choice of another instrument in order to pursue, maybe with longer times, the same result of superseding the national disciplines.

In May 2011 the Commission began a Study of feasibility elaborated by a group of experts having the aim of elaborating a common frame of reference in the field of contracts European law¹⁵; more precisely in the preparation of a proposal relevant to a common frame of reference in the sector of European contracts law, including the consumer and companies contract law, by selecting the parts of the project of common frame of reference that interest directly or indirectly the contracts law and restoring, reviewing and completing the selected contents of the project of common frame of reference, taking into account other studies made in this subject and by the Union *acquis*. The idea seemed to be the elaboration of the text of a sort of a general part of the contract, reduced version of the wider object presupposed to the elaboration of the DCFR.

It is not clear when the project had been modified to be transformed in the more reduced simple European common law on sales.

The solution adopted by the Commission represents a phenomenon of commixture in the same legal text of rules referred to the contract in general and rules belonging to a single type, for the same reasons that brought to an analogue choice at the time of Vienna convention on the international sales of movable goods. The main one is that in real situations, both general norms and norms referred specifically to the single contract type are simultaneously applied to a contract.

Even having decided of limiting the extent of the normative intervention only to the sales contracts, the European legislator took care of suggesting, with reference to this more limited object, at least an organic discipline organic¹⁶, although not completely self-sufficient, comprehensive of the general norms common to any other contract and of specific norms of contractual type, waiting to include it in the general European contract, conveyed at this point by a not merely optional instrument.

The Directive

The Directive, destined to be absorbed within 13th December 2013 by the European States to which an additional semester has been allowed to make the implementation measures¹⁷ operative, is substantially the reorganization of the discipline of some pieces united by structural characteristics, the absence of a contract between parties entered in a company and by the main protection mean, the granting of the withdrawal right with the addition of other *random* measures¹⁸.

Scopes of the Directive are essentially the contracts concluded at distance and contracts negotiated outside commercial areas. Among those at distance the Commission picked on the contracts of the electronic trade: in fact the *on-line* cross-border traffics are in fact those strongly sub-dimensioned with respect to the potentiality offered by the European market and the tentative of promotion carried out by the Directive is addressed to them.

As for the products sectors, the Directive is applied also on supplies of water, gas and electricity, when these products are sold in limited quantity; it is not applied instead to contracts relevant to the transfer of rights on real estate. Games of chance are excluded as for them it is supposed to have legal interventions, even national, more targeted and rigorous. Areas regulated by other directives are also excluded in particular financial services, all inclusive travels and time sharing. The Directive is not even applied to passenger transport service, any means of transport is used.

The Proposal for Regulation

The feasibility Study and the Proposal for Regulation do not contain a discipline of contracts and of obligations in general, but only of the movable goods sales.

The seesaw between program assertions, referred to the general law on contract and obligations and the concrete actuation as resulting from the Annex 1 of the Proposal for Regulation, which core is constituted by the discipline of sales on movable goods from companies to consumers or to small or medium enterprises, originate an interpretation doubt about the real area of application of the Proposal for Regulation transcending the sales area.

Its structure consists of three parts: the first one is relevant to the actual project of Regulation composed by 16 articles indicating the purpose, the content and the area of application of the Proposal; the second one contains the Annex 1 of the Regulation including 187 articles, divided into eight parts on sales common right; the third part contains Annex II relevant to the *standard* information note, i.e. the document that reveal to the consumer the circumstance that the contract will be finalized with CESL norms only further to specific consent.

The regulation aim is introducing in the States systems an optional instrument, which could be adopted according to a choice made by the contracting parties and is addressed to the regulation of cross-border contracts only, provided that the State do not decide otherwise, of national contracts.

The application area is limited to contracts on supplies of movable goods, to which the contracts on digital contents and those for services connected to the sales except for the transport services, education services, support to telecommunications and financial services are associated.

Specifically non included are mixed contracts containing elements different from the sales of goods, from the supply of digital contents and of connected services, as well as contracts between professional economical operators where the one gives the other a credit in form of delay of payment, loan or any other financial facilitation.

The CESL does not include a general part of obligations, a discipline of types of contract different from the sale of movable goods and the one of obligation sources different from the contract, but a general regulation of the contract, even if considerably circumscribed: it excludes questions on legal capacity, on property conveyance, on discipline of obligation subjectively complex, on obligation extinction modes different from fulfilment, on representation, on contract invalidity due to immorality, on the extra-contractual responsibility. For these issues it is to make reference with unavoidable complication, to the national system defined according to the international law norms.

Art. 4 of the Proposal for Regulation states that the European Common Law on sales can be applied only to cross-border contracts between professionals having residence in different Countries, one of which is to be a member State; or between a professional and a consumer, if the address indicated by the consumer, the address of delivery of goods or the invoicing address is in a Country different from the one where the professional economical operator has his residence and at least one of the above mentioned addresses that can be related to the consumer is in a member State.

Under the terms of art. 13 letter a), however, the member States can choose to extend the CESL applicability even when the residence of professionals (in case of contracts B2b) or professional, the address indicated by the consumer, the address of delivery of goods or the address of invoicing (in case of contracts B2C) are in that same member State. It is possible anyhow to extend the application also to internal sales¹⁹.

There is no denying that the cross-border element is a limit intrinsic to the CESL, capable of limiting the applicability of regulations. These cannot be used by those PMI that, by operating

within the territory of a State that did not employ extension to internal negotiations provided by art. 13, cannot make reference to the European Common law on sales.

From the subjective point of view, the operation of the Regulation is conditioned by two assumptions: *in primis* that the seller is to be a “professional”, i.e. a subject who finalizes the contract to sell the movable goods in the execution of his commercial activity. Moreover, the purchaser/buyer can be a “consumer” or even a professional but in this case one of the two parties is to be configured as a “small or medium enterprise”.

The introductory report of the Proposal explains the target: improving the establishment and functioning of the internal market by simplifying the exchanges *cross-border* for consumers, as for PMIs that do not have sufficient *bargaining power* in relationships with big multinationals²⁰.

Application restrictions that have incidence on subjective point of view are not clear of blame. Classification of one of the parties in the B2b relationships, as PMI requires a complex activity of investigation to verify if the turnover and the number of employees correspond to the parameters defined by art.7, making the CESL discipline defective, uncertain and hardly applicable.

The Regulation can find application to all those contracts where a) a professional of any dimension sells a movable good to a consumer; b) a small or medium enterprise sells a movable good to a professional, of any dimension as regards turnover and number of employees; c) a professional sells a movable good to a small or medium enterprise. This way, sales of movable goods concluded between professionals both of them having more than 249 employees or an annual turnover equal to 5 billions Euros or higher are taken over from the Regulation.

The member States anyhow have the possibility of applying the regulation even to movable good sales contracts concluded by professionals that have characteristics and dimensions that qualify them as small and medium enterprises.

The legal base of the Regulation

The Proposal includes the institution of a European common law on sales not by imposing a modification of the national rights, but taking on a second regime of contract law that will be applied in agreement between parties.

The background of legal elements of the Proposal, however, seems not to be easy, being not solved, among the others, the issue on the legal base onto which it should be established, in accordance to the principle of attribution sanctioned by art. 5, par. 2 of the Treaty on European Union²¹. This explains why four member States such as Austria, Belgium, Germany and United Kingdom officially declared themselves contrary to the approval of the Proposal, deeming that it is in contrast with the principles of subsidiarity and proportionality²².

In the introductory report of the Proposal, the Commission makes a precise choice identifying in art. 114 of the TFEU²³ the legal base of the regulation, which introduces a uniform set of norms of contractual law, with measures to protect the consumers, to be considered as a second regime of contract law inside the national system of each member State. The EU executive claims that according to par. 3 of the same article²⁴, the European common law on sales will ensure a high level of protection of consumers, thanks to a *corpus* of mandatory norms that maintains or improves the safety degree already provided by the EU norms in force.

The choice of setting the legal base of art. 114 TFEU has been criticized considering the case record analyzed by the Court of Justice, according to whom taking into account the optional instrument should be set instead art. 352 of the TFEU²⁵. This norm would authorize in fact the

adoption of measures when the EU action becomes necessary for the achievement of objective stated by the Treaties which have not the necessary power to do it²⁶.

It has also to be noted that the concept of “drawing closer” of art. 114 TFEU implies an action by the EU to harmonize the national legal measures by means of a directive or by replacing them by means of a regulation, without anyhow authorizing the EU in introducing a separate legal regime only destined to be placed besides the internal law, without being harmonized or integrated.

The Court of Justice jurisprudence admitted that the authors of the Treaty wanted to assign to the communitarian legislator, based on the general context and on the specific circumstances of the subject to be harmonized, a margin of discretionary power as regards the method of drawing closer to obtain the desired best result, in particular in sectors characterized by complex technical particularities²⁷, but it remains to be verified if the optional nature of the common discipline is coherent with the aim of drawing closer of the legal system of member States, considering that the drawing closer may be only potential if the parties of the cross border sales contract do not opt for the application of the discipline contained into Annex 1.

Besides this first problematic aspect, that could be maybe taken over thanks to the subject *a maiore ad minus* and in compliance with a wider meaning of drawing the legal systems closer that also include the norms applicable only further to the choice of the parts, the main obstacle to the adoption of the regulation based on art. 114 TFEU is that the regulation actually does not modify the national legislations on cross-border sales, but adds a new European discipline to the other national disciplines with the *escamotage* of the regulation instruments. This way the national disciplines will continue being applied *telles quelles* where the parties don't opt for the European discipline.

On the other side, the discipline contained in Annex I is not exhaustive with respect to the subjects it regulates, so in view of the fact that the harmonization of the TFEU could be achieved without modifying the national system but integrating them with a second regime for some contracts, in this case it cannot be performed because the optional cross-border sales contract regime would not be identical all over the Union and therefore necessarily integrated, for aspect not necessarily secondary, by the national legal regimes.

In the prospect adopted by the Commission instead, the appropriated legal fundament of an act must be determined in relation to its contents, i.e. to its main object. So, while art. 352 of TFEU should be used as a legal base of an act only when any other measure of the Treaty assigns to communitarian Institutions the necessary competence to adopt it, art. 114 TFEU would enable the communitarian legislator to adopt orderings to improve the conditions of establishment and the functioning of the internal market, if really these orderings have this aim, by contributing in the elimination of obstacles to the economical liberties ensured by the Treaty e to the exchanges due to a heterogeneous development of the national systems.

The choice of a correct legal base has a considerable importance. To this depends the procedure of adoption of an optional instrument on sales, which norms will have to be constantly adjusted considering the frequent change social, economical and technological changes to which the consumer issue is subject.

This updating will have to be performed in combination with Directive 83/2011 EU on Consumers rights (that is based, in turn, on art. 114 TFEU) with the aim of avoiding discrepancies in the communitarian protection system

If the choice is based on art. 114 TFEU, the CESL norms would be submitted to a legal ordinary procedure (already adopted for the unified Directive on consumers rights) and applied to all member States that could not make use of a special position to block the adoption of the measure, considering that unanimity of the Council is not required.

If art. 352 TFEU is chosen as a legal base, instead, the adoption of the instrument would require unanimity of the Council after the approval of the European Parliament.

Also, the adoption founded on a wrong legal base would have a negative impact on the instrument which, if hypothetically adopted would risk to be nullified if the competence issue is brought to Court of Justice²⁸.

The amendments formulated

The Commission for legal affairs of the European Parliament²⁹ and the Council Presidency identified some *focus points* to be discussed further from the political point of view, that can be summarized as follows: a) as regards the structure, unify the regulation and the Annex in order to obtain a consolidated and integrated instrument and ensure a higher linguistic coherence with other legal acts already in force; b) with reference to the application area, restrict further, at least during the initial phase, the European common law on sales only to distance contracts, by concentrating the main reference area to *on line* sales sector.

In September 2013, the legal Commission adopted again a report that proposed to limit the application of CESL to distance contracts, to define clearer the border line between CESL and contract rights of member States, to limit the application area.

The Commission for internal market and consumer's protection suggested then to modify the legal form of the Regulation in a directive so that to harmonize some aspects of seller responsibility towards consumers, this way completing the Directive on consumers rights.

Finally on 26th February 2014, during the first reading of the ordinary legal procedure, the legal Resolution of the European Parliament intervened. It contains 264 amendments to the Proposal of Regulation³⁰, among which stands up the amendment No. 9 limiting the action area of the European common law to the sales distance contract and in particular to the *on line* contracts, in order to "draw closer" and no longer "harmonize" the contract law of member States without imposing modifications to the first national regime of law on contracts, but creating a second regime of contract laws for the contracts included in its application area.

The impact of regulation adoption

Once the Regulation proposed is adopted, a second contractual regime will be established in each national system.

As in several national systems the Convention of Vienna is applied on the sales of movable goods, whenever the application of this latter and the Regulation discipline coincide³¹, there would be three regimes in the national systems.

For these three regimes, applicability would proceed as follows: based on art.3 and 11 of the Proposal, the CESL would be applicable only further to a choice by the parties that excludes the CVIM applicability, which in turn, according to its art. 6, having no contrary clause contained in the contract, excludes the national law that is applicable according to the Regulation of Rome I (Reg. CE n. 593/2008).

About the *CESL*, it has not to be confused with the choice of the applicable national law.

Once the Regulation is in force, if the parties opt for the application of the *CESL*, the national applicable law will continue to be necessary, but only as regards the part of discipline that is not provided by the *CESL*. This law is anyhow to be identified within Rome I.

After the CESL is chosen, the discipline to which the parties made reference to will be the one of the Regulation, i.e. a source of European law and no longer of national law: the European regulation is mandatory and directly applicable. It is not part of the national systems but it is over them as a supranational independent source of European law³².

For this reason, it seems inappropriate talking about second regime instead of European regime.

The application of the *CESL* to a contractual relationship may mean that the consumer cannot make use of norms of his/her national legal system that protect him/her, as according to art. 6 of Rome I the national legal system would not be applicable to the contract. The Regulation in fact, once in force, is not subject to limitations on the choice of national laws and therefore it does not preserve the application of mandatory norms for the consumer protection from the integral application of the national law, if *CESL* is not chosen.

It is to point out anyhow that Annex II, providing for the contract formula to be accepted by the consumer for the *CESL* application, contains the assertion that the rules of *CESL* have been conceived to give the consumer a high level of protection.

Being the Regulation optional, it has therefore a non-compulsory nature, it represents the main strong point of the Proposal that distinguishes as an element that can give the parties the liberty of choosing the contract regulation law³³. Anyhow it is actually the optional element that raises doubts as regards the legal nature of the act, a regulation with which the European law on sales would be adopted.

Art. 288 TFEU, par. 2 expressly establishes that “the regulation has a general area of application. It is mandatory in all its elements and directly applicable in each of the member States”.

It is therefore to be clarified how the optional nature may conciliate with a) the mandatory character of the Regulation, b) with the general principle of contract liberty contained in the preliminary regulations of European common law on sales (art.1).

The choice of the contract regulation law is considered free only in case the agreement is concluded further to negotiations performed at least hypothetically on the same level.

It is clear instead that the intention of applying the Regulation is deferred to the part of contract that being economically stronger with respect to the other, imposes its conditions both within relationships *B2C* and *B2b*.

Intersection of dir. 2011/83 on consumers rights with *CESL* worries a lot.

As per art. 3, the Directive “applies to any contract concluded between a professional seller and a consumer” so to the majority of sales contracts to which the Regulation of Proposal is destined.

To this almost total identity on application area corresponds a set of norms with similar or even identical content: the information obligation, the withdrawal right for distance contracts or for contracts concluded outside commercial buildings, the delivery, the risk passage, the discipline of oppressive clauses. For all these profiles, in case the Proposal for Regulation is adopted and the *CESL* comes in force, there would be multiple disciplines formally different, substantially equal but not identical on the same subjects.

Art. 11 of the Regulation of Proposal states that once the *CESL* is chosen, the relationship will be only with it, but in any case there are many repeated rules that should be contained in one source only.

There are a lot of coordination problems, also with respect to Reg. n. 864/2007 on the law applicable on extra-contractual obligations (Rome II). The latter doesn't contain an ordering similar to art 6 Reg. Rome I, but makes the national law applicable according to objective criteria provided by it. As the *CESL* does not include regulations on extra-contractual obligations, the preclusive effect does not act with respect of the national norms in this area as included in the considering n. 27 to the Proposal³⁴.

The definition of relationships between the Proposal of Regulation and the private International law on contracts remains therefore complex. Qualification of the regulation proposed as a second regime does not solve the difficulties of coordination between the Proposal of Regulation and the norms of Regulation Rome I, in particular art. 6, par. 2.

Paragraph 1 of this article in fact establishes in fact that “except for art. 5 and 7, the contract concluded between a consumer and a professional is disciplined by the law of the Country

where the consumer has residence, provided that the professional: a) executes his/her commercial or professional activity in the Country where the consumer has residence; b) manages these activities with any means towards that Country or several Countries among which the latter; and the contract is included among these activities". Paragraph 2 of the same article specifies anyhow that contrary to art. 1, parties are free to choose the law applicable to a contract that satisfies the requisites of par. 1 in compliance with art. 3 that enunciates the liberty of the parties in designating the norms to be applied to the whole contract or to part of it. The choice carried out, however, cannot deprive the consumer of the protection ensured by the regulations which cannot derogate conventionally according to law that without this choice would have been applicable to par. 1.

In application of the principle of choice liberty, parties can therefore choose a law different from the one of the consumer residence Country as could be the CESL.

In any case the law deriving from the contractual choice of the parties could never deprive the consumer of the *standard* of protection ensured by the ordering of usual residence that would be applied in case no choice is made.

The question is that choosing the *CESL* as a second regime alternative to the internal regimes means making a choice of private law of international level that tends to replace the imperative regulations and disposition of laws otherwise applicable. It remains subject to the mechanism of art. 6, par.2 Regulation Rome I, which allows the application only if it is able to offer a protection *standard* higher to the one offered by the imperative norms of the consumer usual residence law.

Else, a norm consisting of CESL regulations and of imperative norms of the consumer usual residence will be applied and this will vary from State to State with the consequence of groundlessness of a uniform *corpus* of norms founded on the principles of transparency and legal certainty.

Complex is finally the configuration of the relationship with the Convention of Vienna (*United Nations Convention on Contracts for International Sale of Goods - CISG*), because it introduces a new instrument for the discipline in the cross-border commercial relationships that makes the panorama of norms on relationships *B2b* more complex.

Examining carefully the relationship between *CESL* and *CISG*, the first question to be faced is the necessity of an additional source that regulates the *cross-border* relationships between professionals.

The concrete need must be evaluated based on: a) if the diversity between contractual laws of the member Countries is an obstacle to the internal trade; b) if the uniform set of laws already existing, such as *CISG* connotes for significant lacks that justify a normative integration; c) if the normative integration connotes as innovation or not.

Discrepancies between systems of contractual law do not cause particular problems in the *cross-border* transactions between professionals because they don't seem to compromise the functionality of the internal market in consideration of the "standardization" of contracts, instruments through which the professionals reduce the negative effects of diversity between the orderings creating figures through which is it possible to operate a redistribution of risks providing guarantees, responsibility limitations, remedies for non-fulfilment, etc.. These *standard* contracts instead seem to neutralize the operation of supranational instruments such as *CESL* and *CISG* except for those norms regarding interpretation and execution.

The coexistence of the two different legal systems would be complicated by the different application area onto which they have impact³⁵.

Art. 2 letter a) of the *CISG* expressly states that "The present Convention does not discipline the sale of goods purchased for personal, familiar or domestic use, unless the seller, at any time before the conclusion or at the moment of the conclusion of the contract, doesn't know and is not supposed to know that these goods were purchased for this use", whereas the *CESL*

characterizes as a “mixed” set of norms where either regulations on consume and commercial relationships between businessmen coexists even if not provided of the same contractual power.

It was rightfully observed that the concern of creating a uniform regulation as regards contracts for consumers tends to overlap to the commercial contracts subject, in relation to which the *CISG* already offers a set of uniform rules for the treatment of which the professionals are not due to face with the ensemble of the principles determining the *l’acquis communautaire* or the need of eluding the whole of imperative norms issued on consumers protection³⁶.

To this purpose it is to observe that the competition between the two different systems regulating the contracts *B2b* is determined also by a different mechanism of application: *CISG* operates according to a *opt-out* system, i.e. it regulates the contract unless the parties choose to submit it to a different norm that will belong by law to one of the contracting party. On the contrary *CESL* operates based on the specific intention of the parties – system *opt-in* – to submit the contract to the European common law of sales. About the delimitation of application of the two instruments, the considering no. 25 of the Proposal for Regulation specifies that from the choice of the European common law on sales the agreement of the parties originates to exclude the applicability of the Convention of the United Nations on contracts of international sale of goods.

However, it is important to note that the intention of the parties of managing the negotiation outside the application area of the *CISG* is to be evaluated only and exclusively within its area, as the choice of law of one of the contracting State that excludes the *CISG* and a considering to the Proposal of Regulation³⁷ are not sufficient.

Further difficulties arise in case parties choose to adopt *CESL* only partially, while the contract is regulated also by the *CISG*. The risk is having the negotiation submitted to different disciplines that can be hardly coordinated.

The professional not always chooses a uniform regulation and this seems to be due to a little familiarity with the *CISG* caused by the high cost of learning it can imply during the application phase.

In relation to the need of a normative integration, there are reasons of substantial order that induce the choice not to adopt a instrument of uniform discipline as the *CISG*, i.e. the absence of regulations about the validity of clauses of exclusion and limitation of responsibility or its inadequacy in the regulation of several sectors of the market such as the one of raw materials, concerning the role of good faith principle or the resolution in case of breach, price reduction and method of damage quantification³⁸.

The incompleteness of the Convention of Vienna does not determine the total absence of international regimes destined to the discipline of commercial transaction, as the professionals can submit their contract to a mixed regime characterized by the combination of *CISG* orderings with the *UNIDROIT* principles specifically destined to commercial contracts.

The incompleteness of the *CISG* induces anyhow to reflect on the lacks of *CESL*, which even if it aims to be qualified as a legal system potentially complete, does not include in its application area significant institutes of contractual law.

It would be rightful to doubt that the *CESL*, only destined partially to the discipline of commercial contracts can have a function of integration and innovation of the *CISG*.

Considering the above, the introduction of the *CESL* in a scenario already complex seems to be justified only in the hypothesis in gives an added value to the contractual dynamics between professionals and this depends in the majority by the appropriateness of the norms it contains, an evaluation that cannot be performed without a jurisprudential comparison by the Court of Justice.

Ultimately the Proposal shows as a first level of legal formalization of the long discussion on contract law and of obligations, limited for the moment to the adjustment of contents already approved³⁹.

Art. 6 of Regulation Rome I: directing activities of professionals and the problem of sales on line

Par. 1 of art. 6 of Regulation Rome I⁴⁰, as already explained, states that “except for art. 5 and 7, the contract concluded between a consumer and a professional is disciplined by the law of the Country where the consumer has residence, provided that: a) the professional executes his/her commercial or professional activity in the Country where the consumer has residence (*pursuing activities*); b) the professional manages these activities with any mean towards that Country or several Countries among which the latter (*directing activities*)”.

In the first case, *pursuing activities*, it is asserted that essential conditions are the physical presence of the professional in that Country and his/her local activity to be carried out continuously and systematically for a consistent volume of business.

Much more delicate is the interpretation problem arisen in the second case for *direction activities*.

It includes commercial or professional activities addressed to the residence Country of the consumer but not those carried out in the Country of the professional even if directed to consumers of other countries.

It follows that the Regulation of Rome I has little importance in the application of contracts concluded in the commercial building of the seller but not in the distance sales that create cross-border transactions.

But here arises the true legal and economical problem that caused the push for a proposal of regulation: the electronic trade, which absorbs a large part of cross-border transactions, excluding the financial ones. Does it constitute an activity directed by the professional towards the residence country of the consumer, i.e. towards countries among which the latter, according to art. 6 of the Regulation Rome I?

It is to say that the interpretation of art. 6 of the Regulation Rome I cannot be incoherent with the one of art. 15 par. 1, letter c) of the Regulation of Bruxelles I⁴¹, which contains an ordering almost identical as regards the competence on contracts concluded by the consumers⁴².

Trying to answer the question on art. 6, it is possible to make reference to the jurisprudence of the Court of Justice on art. 15 of the regulation of Bruxelles I and to the previous one of 2010⁴³.

The decision of the Court of Justice has been effectively summarized in the following sentence “in order to establish if the activity of a trader, presented in its internet website or in the one of an intermediate person, can be considered “directed” to the member State domicile of the consumer in compliance with art. 15 n.1 letter c) of Regulation No. 44/2001, it is necessary to verify if before the conclusion of a contract with the consumer, it resulted from the internet sites and from the global activity of the trader that the trader wanted to deal with consumers domiciled in one of more member State/s among which the one of the consumer who was available for the conclusion of contracts with them”.

To this purpose, the Court of Justice acts based on the condition that “the simple accessibility to the Internet site of the trader or of the intermediate person in the member State domicile of the consumer is not sufficient. This applies also to the indication of an email address or other coordinates and to the use of a language or of a currency in use in the member State where the trader lives”.

Soon after however, the Court of Justice specifies that in compliance with art. 15 of the Regulation of Bruxelles I, the practice of a commercial activity by means of an Internet site must be considered as directed to the member State which is consumer domicile if before the

conclusion of the contract “it results from the internet sites and from the global activity of the trader that the trader wanted to deal with consumers domiciled in one of more member State/s among which the one of the consumer who was available for the conclusion of contracts with them”

The Court does not limit in the enunciation of this principle, but defines a list of elements even if not exhaustive, that can be considered as a clue of the international activity performed by the professional in an evaluation reserved to the Judges of each member State⁴⁴.

In presence of one of these only, the Italian businessman for example, performing his/her activity via an Internet site, will have to apply twenty-seven different contracts, as many as the member States are. i.e. of the State where a consumer who purchases by means of that Internet site lives.

The Proposal of Regulation is an answer to this question, because according to art. 11 “where parties agreed to apply the European Common law on sales, this and only this can discipline the subjects within its application area”

In other words the Proposal immunizes the future European common law on sales against the application of the Regulation Rome I , particularly against its art. 6⁴⁵.

This characteristic is its strong point that should boost the professionals in adopting it, especially in the *on line* sales and at the same time its weak point because it exposes it to the accusation of being in contrast with the principle of subsidiarity and to avoid competition between legal systems to which the EU also should be subjected at least when it is applicable based on the free choice of the parties⁴⁶.

The potential increasing of sales in Internet is the base of the above mentioned Proposal of legal resolution of the Parliament of 26.02.2014 that reduces the area of interest of the future Regulation of distance contracts and *on line* in particular. This regulation should not preclude the revision of the Directive on consumers rights concerning distance contracts and among them contracts of electronic trade to ensure the whole harmonization at a high level of protection.

Notes and bibliography

¹ A. Camardi, *Integrazione giuridica europea e regolazione del mercato. La disciplina dei contratti di consumo nel sistema del diritto della concorrenza*, in *Europa e dir. priv.*, 2011, p. 715.

It is obvious that the European private law, in particular the communitarian private law, constituted as an actuation instrument of the four Freedoms of movement and therefore as an instrument of sanction and expansion of the market economical logic and of competition

² M. Franzoni, *Dal codice europeo dei contratti al regolamento sulla vendita*, in *Contratto e Impresa/ Europa*, 2012, p. 350, the French expression *droit acquis communautaire*, i.e. established communitarian law, is the ensemble of rights and legal obligations and of political objectives that unites and binds the member States of the European Union and to be received with no reservations by the Countries that want to belong to.

³ S. Banakas, *The contribution of comparative law to the harmonization of European Private Law*, in *Comparison and civil law*, p. 23 ss. «*The political process of European legal harmonization involves three major Community players, i.e. the Commission, the European Parliament and the Economic and Social Committee*», but «*It is legal culture that will in fact determine the degree to which harmonisation will be effective*».

⁴ Actually, the maximum harmonization principle opens a question on the traditional role of the communitarian directive as an instrument that preserves a manoeuvre space of the national policies. To this purpose G. Howells, *European Consumer Law – The Minimal and Maximal Harmonisation Debate and Pro Independent Consumer Law Competence*, in S. Grundmann, J. Stuyck (eds.), *An Academic Green Paper on European Contract Law*, 2002, p. 74 ss.

⁵ G. D'Amico, *Il Diritto comune europeo della vendita, Direttiva sui diritti dei consumatori e Regolamento sul Diritto comune europeo della vendita: quale strategia dell'Unione Europea in materia di armonizzazione?*, in *I contratti*, 7/2012, p. 612.

⁶ COM (2008) 614 def., on which L. Delogu, *La proposta di direttiva sui diritti dei consumatori: la situazione a un anno dalla sua presentazione*, in *Contr. e Impresa/Europa*, 2009, p. 953.

⁷ «It is a great day for the 500 billions of European consumers»: with this emphatic proclamation Viviane Reding, EU Commissioner for Justice, welcomed the adoption of the new directive on consumers rights by the Strasburg Parliament.

⁸ R. Pardolesi, *Contratti dei consumatori e armonizzazione: minimaz e commiato?*, *La direttiva sui diritti dei consumatori (direttiva 25 ottobre 2011, n. 2011/83/UE)*, in *Foro Italiano*, 5/2012, p. 178.

⁹ The harmonization principle aims to ensure an indefeasible *plafond* of protection leaving the member States free of implementing, at the receipt (which involves the integration in the domestic discipline with the appropriate adaptations), more forceful forms of protection.

¹⁰ Cfr. the considering n. 2 of the Proposal of directive.

¹¹ The Green Book on revision of the *acquis*, even discussing on possible alternative options, did not hide the preference for a solution based on the maximum harmonization.

The *full harmonization* technique had been experimented in the directive on distance sales of financial services to consumers, on unfair practice between companies and consumers and on latest version of timesharing, and it seems it became a keynote element of the European strategy on consumer's protection. To this purpose U. Pachal, *The future of EC consumer legislation*, in *Consumatori, diritti e mercato*, 2009, 14, p. 19 ss.

¹² Among the others, T. Wilhelmsson, *A complete harmonization of consumer law?*, in *Riv. crit. dir. priv.*, 2008, p. 605;

¹³ M. W. Hesselink, *The consumer rights directive and the CFR: Two worlds apart? (Briefing note for the European Parliament, February 2009, PE 410.674)*, published also in *European Review of Contract Law*, 2009, p. 290 ss.

¹⁴ Points 89 ss.

¹⁵ Decision of the Commission of 26th April 2010 (G.U.U.E.L. 105 dated 27th April 2010, p. 109).

¹⁶ It was discussed about *pointilist guidelines*.

¹⁷ Cfr. Art. 28 of the directive 2011/83/EU.

So far, only the following Countries adopted the directive in object: Belgium, Czech Republic, Denmark, Germany, Estonia, Greece, Lithuania, Malta, Portugal, Finland, Sweden and United Kingdom.

In Italy, in December 2013 the Scheme of legal decree with the actuation of the directive 2011/83/UE, according art. 1 of law of 6th August 2013, n. 96. The Scheme consists of two articles and an Annex.

¹⁸ A. Palmieri, *Quel che avanza dei diritti dei consumatori: una disciplina parziale e frammentaria (con qualche spunto interessante sul piano definitorio)*, in *La direttiva sui diritti dei consumatori*, in *Il Foro Italiano*, 5/2012, p. 182.

¹⁹ O. Lando, *Comments and questions relating to the European Commission's Proposal for a Regulation on a Common European Sales Law*, in *European Review of Private Law*, 6/2011, p. 721.

²⁰ This was recommended by G. Alpa, *Harmonisation of and Codification in European Contract Law*, in *The Harmonisation of European Contract Law*, Oxford, 2006, p. 149 ss.

²¹ Art. 5 of the Treaty on EU states that «In exercise of the attribution principle, the Union acts exclusively within the limits of competences given by the member States in the treaties so achieve the aims they fix. Any competence not assigned to the Union in the treaties belongs to the member States.»

²² This is more significant if considering that even if numerically limited, this position comes from at least two of the member States that have a major political stature and legal and economical influence in Europe.

²³ Par. 1 of art. 114 states that « [...]The European Parliament and Council deliberating according to the ordinary legal procedure and after having consulting the economical and social Committee, adopt the measures of drawing closer of the legal, statutory and administrative regulations of the member States having as an object the institution and the functioning of the internal market».

²⁴ Art. 114, par 3 states that «the Commission, in its proposals as per par. 1 concerning health, safety, environment and consumer protection, is based on a high level of protection considering in particular the new developments founded on scientific verification. Also the European Parliament and the Council, within the limit of their competences will try to achieve this objective»

²⁵ J. W. Rutgers, *European Competence and a European Civil Code, a Common Frame of Reference or an Optional Instrument*, in <http://ssrn.com/abstract=1542533>, 2010, p. 8.

²⁶ According to art. 352 par. 1 in fact: «If an action of the European Union appears as necessary, within the politics defined by the Treaties, to achieve one of the objectives even if the Treaties did not provide for required power of action, the Council deliberating unanimously on proposal of the Commission, prior to the Parliament approval, adopts the appropriate regulations. Adopting the above mentioned regulation according to a special legal procedure, the Council deliberate unanimously on proposal of the Commission and prior approval of the European Parliament».

²⁷ Decision CGCE case C- 217/04, United Kingdom/Parliament and Council

²⁸ On *CESL* in general, doctrinal contributions are a lot: M. Meli, *Proposta di regolamento – Diritto comune europeo della vendita (Proposta di regolamento del Parlamento europeo e del Consiglio relativo a un diritto comune europeo della vendita I-COM (2011) 635 def.*, in *Le nuove leggi civili comm.*, 2012, p. 183 ss; H. Eidenmüller, N. Jansen, E. –M. Kieninger, G. Wagner, R. Zimmermann, *Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht*, in *Juristenzeitung*, 2012, p. 269 ss; G. Low, *Unitas via Diversitas: Can the Common European Sales Law Harmonize Through Diversity?*, in *Maastricht Journal of European and Comparative Law*, 2012; N. Kornet, *The Common European Sales Law and the CISG – Complicating or Simplifying the Legal Environment?*, in *Maastricht European Private Law Institute*, 2012; H. Fleisher, S. Whittaker, *The Proposed Common European Sales Law: Legal Framework and the Agreement of the Parties*, *destinato alla Modern Law review*, 2012; J. Basedow, *The Optional Instrument of European Contract Law: Opting – in through Standard Terms – A Reply to Simon Whittaker*, in *European Review of Contract Law*, 2012, p. 82 ss.

²⁹ In the *discussion paper* dated 1st June 2012 (10611/12)

³⁰ Provisional edition, Strasburg, P7TA Prov (2014)0159, A7-0301/2013, in www.euoperl.europa.eu

³¹ This may happen only with contracts between companies considering that according to art. 2, lett. a) of the Convention, the latter is not applied to the purchases for personal, familiar or domestic use and therefore not to the sales to consumers that constitutes instead the most consistent application area of the *CESL*. *CVIM* would be the third regime of cross-border sales only for contract with small and medium enterprises and if the member State decides to extend the discipline according to art. 13 of the Proposal for Regulation, also for contracts between enterprises not small and medium.

³² C. Castronovo, *La Proposta per un Diritto comune europeo della vendita: alcuni quesiti fondamentali. Come dovrebbe funzionare all'interno del quadro giuridico attuale?* Relationship between the Proposal and the norms of private international law, Interaction between existing national laws and International and European instruments, European Parliament, 1st March 2012.

³³ O. Lando, *Comments and questions relating to the European Commission's Proposal for a Regulation on a Common European Sales Law*, cit., p. 723 highlights how the previous experiences of application of opt-in instruments such as *Principles of European Contract Law (PECL)* and *Principles of International Commercial Contracts (PICC)*, in *B2b contracts*, demonstrate the little use of similar models in the commercial transactions, so it is not difficult to imagine a different destiny also for *CESL* if it remains subject to the parties intention instead of an *opt-out* instrument on the model of *CISG*.

³⁴ In considering No. 27 it is specified that «Any subject of contractual or extra-contractual nature not included in the application area of the European common law on sale is regulated by pre-existing norms extraneous to the European common law of the national law applicable in accordance with the regulation (EC) n. 593/2008, regulation (EC) n. 864/2007 or any other conflict norm. These subjects include the legal personality, the contract invalidity deriving from legal incapacity, illegality or immorality, the determination of the language of contract, the non-discrimination, the representation, the plurality of debtors and creditors, the modification of parts such as conveyance, compensation and confusion, property law including the title transfer, the intellectual property and the extra-contractual responsibility. The problem if it is possible to push forward concurrent questions on the contractual and extra-contractual responsibility is also excluded from the application area of the European Common law on sales ».

³⁵ L. Valle, *Diritto privato di derivazione europea, diritto privato europeo e regolazione dei contratti transnazionali nel mercato interno europeo*, in <http://www.unisob.na.it/ateneo/d005/valle.pdf>

³⁶ Cfr. N. Kornet, *The Common European Sales Law and the CISG: complicating or simplifying the legal environment?*, in <http://ssrn.com/abstract=2012310>, 2012, p.13.

³⁷ On point M.W. Hesselink, *How to opt into the Common European Sales Law? Brief comments on the Commissions Proposal for a Regulation*, in *European Review of Private Law*, 1/2012, p. 201.

³⁸ The incompleteness of *CISG* is attested by art. 4 that limits the discipline to the creation of the sale contract and to the rights and duties arisen between the seller and the purchaser. It is not relevant to the contract validity, to its clauses, to its uses and to the effects that the contract may have on property of sold goods. The application area of the *CISG* does not include the discipline of consent vices, of pre-contractual information duties, of correctness and of validity of standard conditions.

³⁹ C. Castronovo, *L'utopia della codificazione europea e l'oscura Realpolitik di Bruxelles*, in *Eur. dir. priv.*, 2011, p. 837 ss.

⁴⁰ EC Regulation n. 593/2008 of the European Parliament and Council of 17th June 2008 on the law applicable to contractual obligations (Roma I).

⁴¹ EC Regulation n. 44/2001 of the Council of 22nd December 2000, regarding the legal competence, the acknowledgement and execution of decision on civil and commercial issues.

⁴² While art. 6 par. 1 of the Regulation of Rome I makes reference to the usual "place of residence" of the consumer, art. 15 par. 1 lett. c) of the Regulation of Bruxelles I makes instead reference to its "place of domicile". The Bruxelles I Regulation defines the place of domicile of legal persons but not the one of physical persons that remains disciplined by the National legal laws. To determine if the consumer is domiciled in the territory of the member State, the judge must apply the national law; if the consumer is not domiciled therein the judge must applied the law of the domicile State..

⁴³ United proceedings C-585/08 and c-144/09 Peter Pammer c. Reederei Karl Schlüter GmbH.

⁴⁴ In particular they are the following elements: 1) indication of itineraries starting from other member States to go to the place decided for the trade; 2) use of a language or of a currency in use in the member State where the trader lives with the possibility of booking and confirming the booking in that language; 3) indication of phone contacts with the international prefix, the al location of financial resources for the service of positioning in Internet in order to facilitate the access of consumers domiciled in other member States or of his/her intermediate person; 4) use of a domain of first level different from the one of the member State where the trader lives; 5) the indication of international customers domiciled in different member States.

⁴⁵ P. Sirena, *Diritto comune europeo della vendita vs. Regolamento di Roma I: quale futuro per il diritto europeo dei contratti?*, in *I contratti*, 7/2012, p. 637.

⁴⁶ A. Veneziano, *Un diritto europeo per le contrattazioni on-line (anche) tra imprese?*, in *Contratto e impresa/ Europa*, 2012, p. 455.