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Efforts in Harmonizing Contract Law: Some Considerations Regarding European Sale of Goods

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ABSTRACT: The European Union has taken great strides in harmonizing the sale of goods contracts, however the Common European Sales Law is yet to be approved. In 2019, the European Parliament and the Council adopted Directive (EU) 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods. Some of the main benefits of the directive are: a minimum warranty period of two years from the date on which the consumer receives the good in question and a period of one year for the burden of proof reversed in favor of the consumer, and the possibility for the countries to set longer deadlines than these to maintain their current level of consumer protection. This article is set out to present the steps made towards a unified theory of sales law and some issues that can appear when concepts from different legal systems are adopted into one legal framework.

KEYWORDS: contract, law, sale, goods, EU, Common European Sales Law, international

Introduction

The contract for sale of goods is without a doubt one of the most important contracts ever since we moved on from the predominance of barter-type agreements (Sayuma 2008, 1).

On the European level, there has been a lot of debate concerning the advantages of harmonizing the legislation for contract law due to the fact that each Member State comes with its own legal traditions (Gomes 2015, 1).

How does the Romanian framework for contracts harmonise with international rules?
The Romanian legislation relating to sale of goods needs to be analysed through the three main instruments relating to the harmonisation of contracts: 1. The 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG); 2. UNIDROIT principles of international commercial contracts (Principles); and, of course, 3. The European regulations relating to contracts.

1.1. The 1980 United Nations Vienna Convention on Contracts for the International Sale of Goods
The Vienna Convention is part of Romanian domestic law since the entry into force of Law no. 24/1991 for Romania's accession to the United Nations Convention on the Contracting Contract for the International Sale of Goods, published in the Official Gazette no 54 of March 19, 1991. The adoption of uniform rules governing contracts for the international sale of goods and the consideration of the various social, economic and legal systems contribute to the elimination of legal barriers to international trade and to the promotion of the development of international trade. In view of this, the signatory states of the convention wanted to promote the standardization and thus the overcoming of individual legal and socio-economic traditions regarding the international sale of goods (Radu 2018, 80).

As a rule, when a sale is international, the court called to try the case must first establish the substantial rules applicable using the rules of private international law. However, where there are substantial uniform rules, the applicability of those rules must be decided before the application of the rules of private international law. Thus, a convention such as the CISG has, in the first place, a special effect, more limited than the rules of private international law (Radu 2018, 80).

The 1980 United Nations Convention on Contracts for the International Sale of Goods specifically regulates the contract of sale, the international nature of which depends on the nationality of the headquarters of the contracting parties, as opposed to the rules of private international law that relate to all types of contracts, without any limitation. Moreover, the specificity of the uniform substantive rules is based on the mechanism it provides for solving the substantial problems in question. Material rules must be considered specific because they directly address these issues, avoiding the double step required for the application of private international law, consisting, on the one hand, in establishing the applicable law and then in applying it. In recognition of the rule that gives priority in applying the Convention and not the rules of private international law stand the court decisions given in Italy in the cases of *Mitias v. Solidea S.r.l* (See Tribunale di Forli 2008) and *Ostorznik Savo v. La Farrona* (See Tribunale di Padova, Italy 2005).

According to art. 1 para. 1, the Convention shall apply to contracts for the sale of goods between Parties which have their headquarters in different States: a) when those States are Contracting States; or b) where the rules of private international law lead to the application of the law of a Contracting State. Thus, the direct and autonomous application of the Convention takes place when both parties have their seat in States parties to the Convention, even if the rules of private international law designate the law of a third State as the applicable law in question. However, the parties are allowed by the provisions of art. 6 to derogate from the application of the convention by choosing another law.

Indirect application of the Convention takes place when the rules of private international law have designated as applicable law the law of a signatory State to the Convention, regardless of the nationality of the parties. An illustration of this situation can present itself if the forum's rules of private international law are based on the Rome I Convention (1980) or the Hague Convention (1955) on the law applicable to international sales (which recognize the autonomy of the parties in choosing the law applicable to the contract), the choice of law signatory of the Vienna Convention may lead to its application based on art. 1 para. 1 point b).

The nationality of the parties, their civil or commercial character or the contract shall not be taken in account in the application of the Convention.

It should be noted that not every international sale of goods falls under the Convention.

In Romanian legislation the institution of the contract in general constitutes the common law for every other special contracts prescribed; in the same manner, the specific rules of the sale contract constitutes the common law for the different types of sales, known as varieties of the contract of sale (Ciochină 2018, 96). This rule is not the same in regard to CISG, because certain varieties of sales contract don`t fall under its prescriptions.

The Convention does not govern sales:

a) Of goods purchased for personal, family or domestic use, unless the seller, at any time before the conclusion or on the occasion of the conclusion of the contract, did not know or did not consider that he knew that these goods were purchased for such use;

b) At auctions;

c) Of goods seized or otherwise carried out by the judicial authorities;

d) Of securities, bills of exchange and coins;

e) Of ships, ships, hovercraft and aircraft;

f) Of electricity.

The Convention governs exclusively the formation of the contract of sale and the rights and obligations under which such a contract gives rise between the seller and the buyer.

Regarding the *formation of the contract*, the Romanian legislator, when writing the new Civil Code (Law no. 287/2009), took in account the norms prescribed by the CISG.

In accordance to art. 14 of CISG, "*[a] proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price*". In the same manner, the Civil Code states, at art. 1182, that a contract is

considered concluded by negotiation by the parties or by the unreserved acceptance of an offer to contract. Moreover, it is sufficient for the parties to agree on the essential elements of the contract, even if they leave some secondary elements to be agreed later or entrust their determination to another person. If the parties do not reach an agreement on the secondary elements or the person entrusted with their determination does not take a decision, the court shall order, at the request of either party, the completion of the contract, taking into account its nature and by the intention of the parties.

1.2. UNIDROIT principles of international commercial contracts

According to the Principles' preamble, "*[t]hese Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like. They may be applied when the parties have not chosen any law to govern their contract. They may be used to interpret or supplement international uniform law instruments. They may be used to interpret or supplement domestic law. They may serve as a model for national and international legislators.*"

The Romanian Civil Code (RCC) treats with international private law rules in Book VII. For the purposes of this book, relations of private international law are civil, *commercial* and other relations of private law with an element of *foreignness*. The provisions of this book are applicable to the extent that the international conventions to which Romania is a party, European Union law or the provisions of special laws do not establish other regulations.

Even though the new RCC has been elaborated in accordance to the monistic theory, which basically reunites private law and abolishes the dichotomy of civil and commercial relations, art. 2557 (2) expressly recognises the existence, still, of the commercial relations (Ciochină a 2012, 180).

In this new Romanian civil law framework one can state that civil law lends its rules to other branches of law, when they do not have rules own for a case or aspect, or vice versa, other branches of law borrows civil law rules (Ciochină b 2012, 12).

Contrary to the applicability in cases where parties have not chosen any law, permitted by the Principles, RCC prescribes that in the absence of the choice of a law, the law of the state with which the contract has the closest links applies, and if this law cannot be identified, the law of the place where the contract was concluded shall apply. It is considered that there are such links with the law of the state in which the debtor or, as the case may be, the author of the act has, at the date of concluding the act, as the case may be, the habitual residence, goodwill or registered office (Art. 2638 of RCC).

This however is the case if the disputed contract is brought to court and not in front of an arbitral tribunal. If parties did not choose a governing law for the contract, the rules of private international law need to be used in order to determine it.

As the official commentary on the Principles' preamble state, usually in arbitral proceedings a certain domestic law will be applied, but in some cases, for example when domestic law application is excluded by both parties, arbitrators may resort to "the rules of law which they determine to be appropriate" (UNIDROIT 2016, 4). We can see such rules in article 21 (1) 2nd thesis of the 2017 Rules of Arbitration of the International Chamber of Commerce, or article 30 (2) of the Arbitration Rules of the Court of International Commercial Arbitration of the Chamber of Commerce and Industry of Romania adopted by the Board of the Court of International Commercial Arbitration in force as of January 1st 2018.

Towards a unified European sales law

The European normative framework aims to produce a strong internal market where barriers in trade are eliminated, thus encouraging cross-border sales in the European Union. There are many instruments that were designed to do just that:

- Rome I regulation on the law applicable to contractual obligations (Regulation (EC) No 593/2008)
- Rome II regulation on the law applicable to non-contractual obligations (Regulation (EC) No 864/2007)
- Brussels I regulation - jurisdictional perspective (Regulation (EU) No 1215/2012)
- Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC
- Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees

One of the most important European efforts towards the unification of sales law that is worth mentioning is the *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law - CESL* (COM 2011). According to its explanatory memorandum: "*There are significant differences between the contract laws in the Member States. The Union initially started to regulate in the field of contract law by means of minimum harmonisation Directives adopted in the field of consumer protection law. The minimum harmonisation approach meant that Member States had the possibility to maintain or introduce stricter mandatory requirements than those provided for in the acquis. In practice, this approach has led to divergent solutions in the Member States even in areas which were harmonised at Union level. In contrast, the recently adopted Consumer Rights Directive fully harmonises the areas of pre-contractual information to be given to consumers, the consumer's right of withdrawal in distance and off-premises contracts, as well as certain aspects of delivery of goods and passing of risk*" (European Commission 2011, 5).

In Turrini and Van Ypersele (Turrini and Van Ypersele 2010, 82) it has been observed that what bears weight on international trade amongst OECD countries are factors like distance, a common border, a common language, and also *similarity of legal systems*. These circumstances can positively influence trade by 40%.

The main goal of CESL is to institute an optional[1] regime of special substantive rules (Mankowski 2012, 97-105) for cross-border contracts. Not every aspect of contract law is addressed by CESL, though. These are governed by the applicable domestic law rules of conflict of law.

Some of the issues that do not fall under CESL regulation are: legal personality, the invalidity of a contract arising from lack of capacity, illegality or immorality, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law and the law of torts.

If an issue arises from one party`s contestation of the other's good faith in executing its duties (Ciochină 2013), another regarding the validity of consent (Ciochină 2014), and another from the lack of legal capacity needed for the conclusion of the contract, the court must analyse the first two claims through CESL norms, but for the third one, it is imperative to establish applicable law by the rules of private international law.

There are some who express their concern regarding the fact that being an optional regulation, consumers may not receive the benefits they were hoping for and propose that "standardised European contracts for consumer e-commerce transactions (jointly agreed by business and consumer representatives) would be a better, less intrusive, less costly and much more swiftly applicable solution" (BEUC 2012, 5).

It is of great importance to underline the contracts that fall under the scope of this envisioned regulation because it outlines the relation between it and other rules of Private

[1] Art. 3 CESL: "The parties may agree that the Common European Sales Law governs their cross-border contracts for the sale of goods, for the supply of digital content and for the provision of related services within the territorial, material and personal scope as set out in Articles 4 to 7".

International Law (Moreno 2015, 21). It was, however, made clear that the CESL would qualify as second regime within the legal order of each Member State (Report of the Committee on Legal Affairs 2013, 42).

In essence, CESL would apply to: sales contracts; contracts for the supply of digital content whether or not supplied on a tangible medium which can be stored, processed or accessed, and re-used by the user, irrespective of whether the digital content is supplied in exchange for the payment of a price; related service contracts, irrespective of whether a separate price was agreed for the related service (Art. 5 (1), CESL).

Furthermore, the CESL may not be used for mixed-purpose contracts including any elements other than the sale of goods, the supply of digital content and the provision of related services within the meaning of article 5 (Art. 5 (1), CESL).

Moreover, the Common European Sales Law may not be used for contracts between a trader and a consumer where the trader grants or promises to grant to the consumer credit in the form of a deferred payment, loan or other similar financial accommodation. The CESL may be used for contracts between a trader and a consumer where goods, digital content or related services of the same kind are supplied on a continuing basis and the consumer pays for such goods, digital content or related services for the duration of the supply by means of instalments (Art. 6 (2), CESL).

Also, a key role in determining the types of contracts covered by this European instrument plays the preambles 16-20 and art. 2 (definitions).

Conclusions

A universal contract law is far from sight or even impossible if we take into account the different legal systems in existence and the fact that even the instruments that have most impact deal with only certain aspects of international contract law.

Efforts have been made by the EU member states but there are certain poignant topics that need to be addressed: the relationship between CESL with Rome I and II Regulations, or with the CISG; as well as the applicability of the European instrument when a cross-border transaction would be governed by the law of a third country that is not a Member of the EU.

In order for the European Union to grow intro what it was meant to be, a true Federation of European States, it is, with great certainty, necessary for it to act as one nation in dealing with foreign trade – ergo harmonized contract law.

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