

EUROPEAN CONTRACT LAW AND THE BUILDING  
INDUSTRY IN THE LIGHT OF THE 2011 PROPOSAL  
FOR A REGULATION ON A COMMON EUROPEAN  
SALES LAW

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ABSTRACT

On 11 October 2011, the European Commission published its "Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law". This proposal suggests adopting an optional instrument in European sales law. It constitutes a significant step in the process of harmonising contract law in the European Union. Now, the influence that European harmonisation of contract law will have on the real estate industry (and in particular the building industry) remains largely unknown. This contribution will analyse the advantages and the challenges of the principle itself of an harmonisation of national regulations in relation to contract law, as regards the specificities of the real estate industry. It will also examine several difficulties in connection with the indirect but specific application of the Proposal for a Regulation of 11 October 2011 to certain contracts of this industry.

INTRODUCTION

On 11 October 2011, the European Commission published a Proposal for a Regulation of the European Parliament and of the Council on a Common

\* The author is co-President of the European Society of Construction Law (ESCL). This paper is based on a presentation made at the ESCL's Conference in November 2011 at Frankfurt. It is a revised and updated version of the responses from the Property Law Working Group of the Trans Europe Experts network ([www.transeuropexperts.eu](http://www.transeuropexperts.eu)). (i) to the open consultation following the 1 July 2010 publication of the European Commission Green Paper, and (ii) to the open consultation following the 3 May 2011 publication of the Feasibility Study on European Contract Law. See also H Périnet-Marquet, B Kohl, B Mallet-Bricout and J Sénéchal, "Le secteur immobilier face au développement du droit européen des contrats (Position du pôle immobilier de Trans Europe Expert sur le Livre vert du 1er juillet 2010 relatif aux actions envisageables en vue de la création d'un droit européen des contrats)", in M Behar-Touchais and M Chagny (dir.), *Livre vert sur le droit européen des contrats—Réponses du réseau Trans Europe Experts*, coll. TEE, Vol I (Paris: ed. Société de législation comparée, 2011), p. 214 *et seq.*

Following the publication of the DCFR, the Commission created a group of experts "... to study the feasibility of a user-friendly instrument of European Contract Law, capable of benefiting consumers and businesses which, at the same time, would provide for legal certainty".<sup>7</sup> It subsequently published its Green Paper on 1 July 2010. This Green Paper identified seven options for consolidating the internal market by making progress in the area of European contract law:

- (1) the publication of the results of the Expert Group created by the Commission to study the feasibility of an instrument on European contract law;
- (2) an "official" toolbox for the European legislator;
- (3) a Commission recommendation addressed to the Member States;
- (4) a Regulation setting up an optional instrument of European contract law;
- (5) a Directive on European contract law (minimum common standards);
- (6) a Regulation establishing a European contract law; and
- (7) a Regulation establishing a European Civil Code.

The Expert Group published its findings on 3 May 2011. These took the form of a "Feasibility Study",<sup>8</sup> which already represented a true draft optional instrument (option 4 of the above-mentioned Green Paper of 1 July 2010).<sup>9</sup> Indeed, while this Feasibility Study does not take a clear position as regards the advocated method of harmonisation, the preference shown by many European Institutions for option 4 has already been demonstrated several times. The European Commission, in particular,

*European Contract Law, Part III* (The Hague: Kluwer Law International, 2003)). Some principles of the Common Frame of Reference were also inspired by the principles and model rules prepared by the Association Henri Capitant and the Société de législation comparée in *Terminologie contractuelle commune*, Coll. Droit privé comparé et européen, Vol. 6 (Paris: Société de législation comparée, 2008) also in, *Principes contractuels communs*, Coll. Droit privé comparé et européen, Vol. 7 (Paris: Société de législation comparée, 2008). The drafters of the Common Frame of Reference also benefited from the work of the "Acquis Group", which in 2007 published a comparative analysis on how eight European Directives on consumer protection in contract law were applied in the Member States (Research Group on the Existing EC Private Law (Acquis Group), *Principles of the Existing EC Contract Law (Aquas Principles)*, Existing EC Private Law (Acquis Group), *Conciliation of the Contract, Unfair Terms* (Munich, Sellier, 2007)).

<sup>7</sup> Green Paper of 1 July 2010, p. 4. See also the European Commission Communication of 19 May 2010: "A Digital Agenda for Europe" (COM (2010) 245). The group includes experts representing the various legal traditions of the Union and the interests of the stakeholders. Its members were selected from amongst the recognised specialists in civil law, in particular in contract law.

<sup>8</sup> European Commission, *Feasibility Study for a Future Instrument in European Contract Law* ([http://ec.europa.eu/justice/contract/files/feasibility-study\\_en.pdf](http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf)).

<sup>9</sup> This Feasibility Study is accompanied by an explanatory memorandum and several questions posed by the European Commission on the content.

European Sales Law.<sup>1</sup> This Proposal follows the 1 July 2010 Green Paper *On Policy Options for Progress towards a European Contract Law for Consumers and Businesses*<sup>2</sup> in which the European Commission identified seven policy options for consolidating the internal market through progress in the field of European contract law and launched a public consultation regarding these various options.

This Green Paper represents the extension of initiatives taken within the European Union since the beginning of the 2000s in the field of European contract law. Indeed, following its 2001 Communication on *European Contract Law*,<sup>3</sup> the European Commission opened a public consultation on the way in which problems resulting from the differences between national contract laws within the European Union should be handled at the European level. Based on the responses submitted, in 2003 the Commission published an action plan on contract law.<sup>4</sup> The action plan suggested, in particular, increasing the coherence of the Union *acquis* in the field of contract law, promoting the creation of EU-wide general contract terms and examining further whether the problems that result from European contract law are likely to require solutions that are not specifically sectoral, like an "optional instrument" in this field. To improve the quality and the consistency of European contract law, the Commission suggested establishing a "Common Frame of Reference" (CFR), which would contain the principles, terminology and common rules that would be applied by the Union legislator when adopting or amending legislation.<sup>5</sup>

At the same time as the European Institutions were taking their initiatives, several research groups were carrying out research on European contract law. This work led, in particular, to the publication in 2008 of a Draft Common Frame of Reference (DCFR) that included the principles, definitions and model rules of civil law, in particular, regarding contract law (general principles, special contracts and consumer law) and of tort law.<sup>6</sup>

<sup>1</sup> Proposal for a Regulation of the European Parliament and of the Council on Common European Sales of 11 October 2011 (COM (2011) 635 final).

<sup>2</sup> COM (2010) 348/1.

<sup>3</sup> Communication responded to a request on this in 1989 made by the European Parliament (Resolution A2-157/89, OJ, C 158/400 of 26 June 1989).

<sup>4</sup> Communication from the Commission to the Council and the European Parliament. A More Coherent European Contract Law. An Action Plan (OJ, C 63/1 of 15 March 2003).

<sup>5</sup> The Commission also suggested reviewing the Union *acquis* regarding consumer contract law to remove incoherences and to fill regulatory gaps. This revision resulted in the adoption of the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Directive on Consumer Rights (OJ, L 304/64 of 22 November 2011).

<sup>6</sup> C. Von Bar, E. Clive and H. Schulte-Nölke (Eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)* (Munich, Sellier, 2009). This Common Frame of Reference was inspired by several previous research projects in contract law. In particular, it relied on the *Principles of European Contract Law* (PECL), published in 2000 by a research group under the direction of O. Lando and H. Beale (Eds), *Principles of European Contract Law, Parts I and II* (2nd ed., The Hague: Kluwer Law International, 2000); O. Lando, E. Clive, A. Prüm and R. Zimmermann, *Principles of*

received substantial support from the European Parliament, which on 8 June 2011 delivered its opinion, with a comfortable majority, in favour of the principle of an optional instrument of European contract law.<sup>10, 11</sup>

The Proposal for a Regulation published by the Commission on 11 October 2011 relies very heavily on the above-mentioned Feasibility Study. This Proposal for a Regulation initiates a Common European Sales Law that harmonises Member State contract laws, not by imposing the amendment of their national legislation in force in the area, but rather by creating within the latter a second regime of contractual law for contracts that fall within its field of application. This second regime should be identical throughout the Union territory and co-exist with current national contract laws. The Common European Sales Law should thus be applied to cross-border contracts on a voluntary basis, by agreement of the parties.

For 20 years, European harmonisation of contract law has been the subject of much research and, in particular, of numerous doctoral theses. European contract law is, moreover, now taught as such in many law faculties across Europe where it appears as a compulsory course in the educational programmes for students.

Nonetheless, the effect of European harmonisation of contract law on the real estate industry (and, in particular, on the building industry)

<sup>10</sup> European Parliament, *Resolution on Policy Options for Progress towards a European Contract Law for Consumers and Businesses*, Ref INI/2011/2013. The Parliament: "... (6) Believes that only by using the legal form of a Regulation can the necessary clarity and legal certainty be provided; (7) Stresses that a Regulation setting up an Optional Instrument of European Contract Law would improve the functioning of the internal market because of the direct effect, with benefits for businesses (reduction in costs as a result of obviating the need for conflict-of-law rules), consumers (legal certainty, confidence, high level of consumer protection) and Member States' judicial systems (no longer necessary to examine foreign laws) ..."

<sup>11</sup> Similarly, in an opinion rendered on 19 January 2011, the European Economic and Social Committee recommended retaining a "mixed option" in the form of: "(i) a 'toolbox' serving as a common frame of reference available to parties drawing up cross-border contracts, accompanied by (ii) an optional regulatory regime establishing an 'optional advanced new regime' which could be used by the parties as a more favourable basis when entering into cross-border contracts, as an alternative to national rules, provided that both the toolbox and the regulation are available in all EU languages and ensure legal certainty based on the most advanced forms of protection for individual citizens and companies. Such regulation shall not prevent any Member State from maintaining or introducing more stringent protective measures for consumers." (*Economic and Social Committee, Opinion on the Green Paper from the Commission on Policy Options for Progress towards a European Contract Law for Consumers and Businesses*, 19 January 2011, No INT/524-CESE 60-2011). In the same way, on the occasion of a talk given on 3 June 2011, the Vice-President of the European Commission, V. Reding, responsible for Justice, also expressed her intention to present to the European Parliament in the autumn of 2011 a draft European Regulation containing an optional instrument on contract law (See V Reding, "The Next Steps Towards a European Contract Law for Businesses and Consumers", Speech/11/411, *Key-Note Speech given by Commissioner Reding at the Conference "Towards a European Contract Law"*, Leuven, 3 June 2011, p. 9 (available on the europa.eu site: <http://europa.eu/rapid/pressReleasesAction.do?referencc=sPEECH/11/411&format=HTML&aged=0&language=EN&guiLanguage=en>).

remains largely unknown.<sup>12</sup> Therefore, this contribution is aimed, first, at analysing the advantages and challenges of the principle itself of an harmonisation of national regulations on contract law, as regards the specificities of the real estate industry (Section I). Secondly (Section II), the harmonisation method selected by the European Commission in its proposal for a Regulation of 11 October 2011 (that is, resorting to a Regulation instituting an optional instrument of European contract law) will be analysed in greater depth.

## I. ADVANTAGES AND CHALLENGES OF THE PRINCIPLE OF APPROXIMATION OF NATIONAL LAWS IN THE REAL ESTATE INDUSTRY

### 1. The advantages

#### *For the economic actors in real estate*

The value of a European Union action is that it will harmonise the national laws or create a common system that co-exists with or substitutes for national laws. Therefore, options 2 and 3 of the Green Paper of 1 July 2010 (that is, the creation of a "toolbox" for European and national legislators) is not immediately of much value to the economic actors even if they might constitute a first useful step in the creation of European contract law in the real estate industry. Nonetheless, *a priori*, an instrument that harmonises

<sup>12</sup> See, however, in building law: C.E.C. Jansen, *Towards a European Building Contract Law, Defining Liability: A Comparative Legal Analysis of English, German, French, Dutch and Belgian Law*, Coll. Schoordijk Instituut—Center for Liability Law (Deventer: W.E.J. Tjeenk Willink, 1998); B. Kohl, *Droit de la construction et de la promotion immobilière en Europe, Vers une harmonisation de la protection du consommateur en droit de la construction?* (Brussels, Paris: Bruylant, LGDJ, 2008); J. Senechal, *Le contrat d'entreprise au sens de la classification des contrats spécifiques, Recherche sur un double enjeu du mouvement de modification du droit des contrats* (Presses Universitaires d'Aix-Marseille, 2008), pp. 259-306 and pp. 417-421; H. Beale, "Harmonisation of Construction Law and Practice, Part II: European Principles of Contract Law and Construction Contracts" [1998] ICLR 85 *et seq.*; J. Heller, "Les responsabilités des constructeurs et les assurances construction dans les pays de la CEE et les perspectives d'harmonisation. Les systèmes français et étrangers "Assurance-Construction" et les perspectives communautaires", RDI, 1990, p. 50 *et seq.*; C.E.C. Jansen, "Unification of liabilities in the European Construction Industry" [1995] ICLR 440 *et seq.*; C.E.C. Jansen, "The Case for the European Lex Constructionis" [200] ICLR 598 *et seq.*; D. D. W. Helms, "Harmonisation of Construction Law and Practice, Part I, The Current Position" [1997] ICLR 525 *et seq.*; B. Kohl, "Towards a European Consumer Construction Law?" [2010] ICLR 211 *et seq.*; [2009] "European Construction Law and the Draft Common Frame of Reference: Selected Topics" [2009] REDP/EPLR 675 *et seq.*; B. Kohl, "Des opérations transfrontalières de construction à la construction européenne. Exposé de synthèse", in B. Tillemann and J. Senechal (Eds), *Les opérations transfrontalières de construction*, Coll. Contrats et Patrimoine, No 5 (Brussels: Larcier, 2007), p. 263 *et seq.*; H. Périmet-Marquet, "La responsabilité des constructeurs en droit communautaire: enjeux et débats", *Revue de droit immobilier* (RDI), 1992, 457 *et seq.*; H. Périmet-Marquet, "Les responsabilités des constructeurs et les assurances construction dans les pays de la CEE et les perspectives d'harmonisation", RDI, 1990, 39 *et seq.*; V. Van Houtte, "The Impact of Europe upon the Construction Industry" [1991] ICLR 209 *et seq.*

national laws could, by equalising conditions of competition, improve opening up the building and real estate markets in the European Union, which is a desirable objective. But it may be noted, on the one hand, that, as regards the specificities of the market under consideration, many construction firms have already opened subsidiaries in various EU countries and have thus adapted to the diversity of the applicable laws. On the other hand, for some contracts in real estate law, most of these transactions only involve nationals of a single Member State, except in the border areas.

#### *For the consumer*

As with what has been observed following the harmonisation carried out for contracts related to the supply of movable property and of services, the approximation of legislation in matters of contracts for immovable property, in so far as it affects consumers, would allow for strengthening the confidence of the latter and would simplify cross-border transactions.

#### *For the European Union*

Finally, the progress of the European ideal may doubtlessly not dispense with legislative progress in the area of contract law, the foundation of commercial transactions. The European Union action would nonetheless benefit from taking the time to reflect on the specificities, in each of the Member States, of the specific industry of construction. It seems, moreover, difficult to consider harmonisation of general contract law without taking into account its impact on special contracts; in addition, the visibility of the action will essentially be expressed through special contracts, more than through the general theory of contracts.

## 2. The challenges

### (a) Generalities

By way of a preliminary remark, the condition mentioned above may be repeated here: unlike other sectors of activity, the diversity of the applicable contractual rules does not appear to constitute a significant obstacle to cross-border trade in the building industry. At least, the various international organisations active in this sector (like the FIDIC or the FIEC) have not—yet?—revealed challenges in this area.

The main challenge lies in the fundamental observation that there is no *acquis* shared by the different Member States in the area under consideration, nor, for that matter, sufficient thought in the matter by the European authorities. Indeed, if a certain number of studies and reports have been

carried out by the Commission or in the field of academia,<sup>13</sup> these have demonstrated the difficulty of the task of harmonisation in the real estate industry. This sector is particularly significant in the European economy, as well as in the economy of each Member State, in which very different specific policies have developed in each Member State (regulating professions,<sup>14</sup> housing grants, impact of the property regime and of real rights, etc.).

Construction law, moreover, is at the crossroads of different issues, such that, when a dispute arises regarding a construction project, it usually involves rules belonging to both contract law and non-contractual liability or property law. Sometimes added to this are considerations of social legislation (in particular the health and safety of building sites), public procurement law, urban planning law and environmental law or even tax law. Considering the very strong connection between these issues, mostly touching on the area of national competences, it seems more difficult to bring contract law out of the Member States' field of intervention without looking at the impact of such a decision on the consistency of the legal regime, generally uniquely national, that applies to construction projects.

Determining the absence of a common *acquis* runs smoothly when studying the Draft Common Frame of Reference (DCFR), which was published in 2008<sup>15</sup> and which has served as working basis for the experts appointed by the Commission to complete the Feasibility Study then the Proposal for a Regulation published on 11 October 2011: a quick look at parts A and C of Book IV of the Draft, devoted to sales contracts (Part A) and service contracts (Part C), might give the (false) impression of great proximity, on certain points, between the provisions of the Draft Common Frame and those of certain national laws. However, with respect to property law, nothing is less certain, as demonstrated by a few examples below, drawn from French law.

<sup>13</sup> See in particular C.E.C. Jansen, *Towards a European Building Contract Law*, n. 12; B. Kohl, *Droit de la construction et de la promotion*, n. 12; see also, the report drafted in 2010 following the "ELIOS" study commissioned by the European Commission (ELIOS, *Liability and Insurance Regimes in the Construction Sector: National Schemes and Guidelines to Stimulate Innovation and Sustainability* (Paris, 2010) ([www.elios-ec.eu](http://www.elios-ec.eu))). See also the study carried out in 1989 by C. Mathurin, also at the request of the European Commission: *Etude des responsabilités, des garanties et des assurances dans la construction en vue d'une harmonisation au niveau communautaire, Rapport final* (Brussels: ed. Commissions of the European Communities, III/8326/89-FR, 1989).

<sup>14</sup> To take just one example, the field of architecture is far from presenting a united front across Europe. More specifically, two significant components connected to the exercise of this activity, that is, first, its monopoly and, second, its independence, have taken separate routes in different countries; it is enough here to note the profound differences that cross this profession. These are apparent, *inter alia*, in relation to the nature of the profound differences connecting the client to his/her architect, in relation to the monopoly available to this profession and in relation to the independence between it and the profession of works contractor (see on this issue B. Kohl, *Droit de la construction et de la promotion*, n. 12; S. van Guljik, *European Architect Law, Towards a New Design* (Antwerp: Maklu, 2009), pp. 30–43; S. van Guljik, "A New Design for European Architect Law" [2009] ICLR 16).

<sup>15</sup> C. von Bar, E. Clive and H. Schulte-Nölke (Eds.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)* (Munich: Sellier, 2009).

(b) Illustrations related to the Draft Common Frame of Reference

(i) The agreement of purchase and sale of immovable property in the face of the DCFR

Part A of Book IV of the DCFR, devoted to the sales contract, excludes as a matter of principle of its field of application the sale of land, buildings or other real property (Article IV.A-1:101(3)<sup>16</sup>). The object of the sales contracts is essentially the sale (and exchange) of "goods", a term to be understood in a broad sense, including more generally tangible and intangible property. However, if we accept the idea according to which it could be useful, in the future, to establish an optional Regulation for agreements of purchase and sale of immovable property, what then would be the content of such a Regulation? In the absence of an academic preliminary draft proposing a specific Regulation for purchase and sale of immovable property, Book IV.A of the DCFR may serve as a foundation for such reflection. However, on this point, also, a cursory reading of the provisions on sales contracts can give the appearance of proximity with French law. Some significant obstacles may nonetheless be identified.

Therefore, if the buyer's obligations (Articles IV.A-3:101 *et seq.*) do not present specific problems as regards French positive law, by contrast, the seller's obligations include the transfer of property. In the DCFR, therefore, this is considered an "obligation" on the part of the seller (Article IV.A-2:101<sup>17</sup>), not as an immediate effect of the sale, which runs counter to the principle of transfer of ownership *solo consensu* as applied in French positive law. Similarly (as in French law), the transfer of risks is not connected to the transfer of the property, but takes place at the time the buyer "takes over the goods or the documents representing them" (Article IV.A-5:102<sup>18</sup>). Furthermore, in the DCFR, the concepts of "guarantee of conformity" and of "hidden defects" are combined in a single concept of "conformity". If this presentation were to be maintained in an optional instrument that applies to the sale of immovable property, it would bring about a change of perspectives as regards managing, in internal law, defects and deficiencies that could affect the immovable property sold. In particular, the DCFR provides that the defect in conformity must exist at the time the risks are transferred to the buyer, even if this defect becomes apparent only after that time (Article IV.A-2:308<sup>19</sup>). Furthermore, the issue of enforceability of the sales contract against third parties is not specifically considered in the DCFR while it is certainly essential in matters of

<sup>16</sup> Art IV.A-1:101 (3): "It does not apply to contracts for the sale or barter of immovable property or rights in immovable property."

<sup>17</sup> Art IV.A-2:101: "The seller must: (a) transfer the ownership of the goods."

<sup>18</sup> Art IV.A-5:102 (1): "The risk passes when the buyer takes over the goods or the documents representing them."

<sup>19</sup> Art IV.A-2:308 (1): "The seller is liable for any lack of conformity which exists at the time when the risk passes to the buyer, even if the lack of conformity becomes apparent only after that time."

immovable property. Article IV.A-2:305 provides only: "The goods must be free from any right or reasonably well founded claim of a third party."<sup>20</sup>

Finally, since it has failed to deal specifically with sales of immovable property, the DCFR does not regulate the issue of compulsory diagnostics that have been implemented in French law. Articles L271-4 *et seq.* of the French construction and housing code (Code de la Construction et de l'Habitation (CCH)), therefore, have no equivalents in the academic preliminary draft. If an optional instrument were to be created to govern the purchase and sale of immovable property, it would be imperative to take into consideration the obligation to provide, at the time of the sale, a technical diagnostic file, which would fully inform the buyer of the risks presented by the property and of its energy performance.

These few examples highlight the need to reflect on an instrument that includes rules dealing specifically with the purchase and sale of immovable property. The provisions of the DCFR on the sale of goods may only serve very partially as a model for a Regulation that applies to the purchase and sale of immovable property.

(ii) Construction contracts in the face of the DCFR<sup>21</sup>

The content of Chapters 1 and 2 of Book IV.C of the DCFR, which includes a definition of service agreements in general, the rules applicable to these and provisions on the distinction between the rules applicable to service agreements in general and the rules that apply to certain special service agreements, is very close to that of the French law on service contracts. For example, the general rules devoted to service agreements (Chapter 2 of Book IV.C of the DCFR) may be divided into four main points:

- (i) lack of *ad validitatem* formalism;
- (ii) collaborative nature of the service agreement;
- (iii) ambiguous (they may at times target the means of implementation and at other times the result to be achieved) and evolutionary content of the main commitment of the company; and
- (iv) flexibility of the termination of the service agreement.

These rules differ only slightly from the solutions found in general contract law and in French services contract law.

By contrast, a careful reading of the subsequent chapters and in particular of Chapter 3 of the academic preliminary draft devoted to the special service agreement, which is the construction contract, demonstrates significant differences between the academic preliminary draft and national laws.

<sup>20</sup> Art IV.A-2:305: "The goods must be free from any right or reasonably well founded claim of a third party..."

<sup>21</sup> See also on this B Kohl, "European Construction Law and the Draft Common Frame of Reference: Selected Topics" [2009] REDP/EPLR 675 *et seq.*

prescription periods: on this, the DCFR provides for a prescription period of three years (Article III-7:201) which, when it involves a hidden defect, will start to run when the client becomes aware of the defect (or when he can reasonably have become aware of it);<sup>26</sup> the DCFR makes no distinction that depends on the nature of the defect found and, consequently, the practitioner of French (or Belgian) construction law, accustomed to the 10-year guarantee system, is faced with public policy.<sup>27</sup>

II. THE OPTIONAL INSTRUMENT IN EUROPEAN SALES LAW: ANALYSIS OF THE PROPOSAL FOR A REGULATION OF 11 OCTOBER 2011 IN THE REAL ESTATE INDUSTRY

1. Introduction

The fourth option put forward by the European Commission in its Green Paper of 1 July 2010 consisted in adopting a European Regulation that would create an optional instrument in European contract law, which would be designed as a "second regime" in each Member State, in this way offering the parties the opportunity to choose between two regimes of internal contract law. The institution of such an optional instrument would therefore appear, psychologically, to be a "soft" legislative instrument that seems to leave in place the national laws while accompanying these with an optional though attractive alternative. From this perspective, therefore, it could more easily garner the necessary membership from the Member States without scaring them off.

This option was ultimately retained by the experts of the Commission in their "Feasibility Study" published on 3 May 2011. This is also the option retained in the Proposal for a Regulation of 11 October 2011.

This Proposal for a Regulation includes, in its Annex I, the rules that apply to the "Common European Sales Law", which are divided into eight parts:

- (i) Introduction provisions;
- (ii) Making a binding contract;
- (iii) Assessing what is in the contract;
- (iv) Obligations and remedies of the parties to a sale contract or a contract for the supply of digital content;
- (v) Obligations and remedies of the parties to a related services contract;

*contrats spéciaux, Actes du colloque du 17 juin 2011, Coll. Code économique européen (Brussels: Larcier, 2012), pp. 157-158.*

<sup>26</sup> See Art III-7:301: "The running of the period of prescription is suspended as long as the creditor does not know of, and could not reasonably be expected to know of: (a) the identity of the debtor; or (b) the facts giving rise to the right including, in the case of a right to damages, the type of damage."

<sup>27</sup> On these various issues, see also B Kohl, *op. cit.* n. 21.

Article IV-C-3:106 of the DCFR<sup>22</sup> thus appears to be very similar to Article 1792-6 of the French Civil Code as regards reception. Nevertheless, it seems, on reading the comments, that the view developed is not that of the French method of reception. Indeed, it is more a matter of determination of the moment of transfer of control, of custody and the risks than it is one of completion of contractual performance. Similarly, contrary to French law, absence of remarks at the time of reception is not important since the client is not obligated to examine the work. It is rather for the constructor to draw attention to certain defects.

The same remarks may be made regarding the repair of non-conformities in general. The Chapter on the construction contract provides no specific rules. Article III-3:302,<sup>23</sup> in the section of the DCFR on contract law in general, should therefore, *a priori*, apply. Nevertheless, compared to the French system of the completion guarantee ("*garantie de parfait achèvement*"), some clear differences are evident. Thus, the deadline is not set precisely and, unlike the system under French law, a possibility is given to the constructor not to undertake repairs if these appear to be too expensive for him. The cost/benefit analysis that the judge is asked to perform is, from this perspective, foreign to French law. Likewise, the reduction in the price provided under Article III-3:601<sup>24</sup> reiterates certain provisions of French law, except that it involves those related to the right to reduce the price ("*action estimatoire*") and not to the service contract.

Other differences are also observed, specifically, as regards the "standard of care", which is borne by the construction contractors,<sup>25</sup> or as regards the

<sup>22</sup> Art IV-C-3:106: "(1) If the constructor regards the structure, or any part of it, which is fit for independent use, as sufficiently completed and wishes to transfer control over it to the client, the client must accept such control within a reasonable time after being notified. The client may refuse to accept the control when the structure, or the relevant part of it, does not conform to the contract and such non-conformity makes it unfit for use. (2) Acceptance by the client of the control over the structure does not relieve the constructor wholly or partially from liability. This rule also applies when the client is under a contractual obligation to inspect, supervise or accept the structure or the construction of it. (3) This Article does not apply if, under the contract, control is not to be transferred to the client."

<sup>23</sup> Art III-3:302 of DCFR determines the regime of *specific performance* in case of non-performance of the debtor's obligations. The principle is established in Art III-3:302 (1) and (2): "The creditor is entitled to enforce specific performance of an obligation other than one to pay money. (2) Specific performance includes the remedying free of charge of a performance which is not in conformity with the terms regulating the obligation . . ."

<sup>24</sup> Art III-3:601: "(1) A creditor who accepts a performance not conforming to the terms regulating the obligation may reduce the price. The reduction is to be proportionate to the decrease in the value of what was received by virtue of the performance at the time it was made compared to the value of what would have been received by virtue of a conforming performance . . ."

<sup>25</sup> For service contracts, the DCFR has maintained the principle of the obligation of result (except for medical contracts). In each of the special contracts contemplated, the obligation of "skill and care" is specified, along with, very often, the obligation to provide information. Similarly, the obligation to co-operate is taken up in processing (maintenance) and construction contracts, and the possibility for the client to intervene is peculiar to construction contracts. These differences are perfectly normal but they singularly weaken the scope of the general rules presented as applicable to all service contracts. The general theory of services contracts (Chapter 2 of Book IV-C) therefore appears to be unnecessary. It weighs down an already fairly complicated text and (at least to a French mind) cluttered with obligations with no real interest like that of "skill and care" (see on this H Périnet-Marquet, "Vers un droit européen des contrats spéciaux de service", in D Voynet and J Sénéchal (dir.), *Vers un droit européen des*

- (vi) Damages and interest;
- (vii) Restitutions; and
- (viii) Prescription.

Before moving on to an analysis of the content of the Proposal for a Regulation in the Real Estate Industry, there are some concerns that have captured attention regarding its field of application and regarding the principle itself, of recourse to an optional instrument.<sup>28</sup>

First, the text does not create a clear choice between “B to B” and “B to C” contractual relationships. In real estate law, the observation is far from anecdotal, to the extent that, next to the “common” law that applies in real estate industry and in construction, specific regimes have progressively been set up, in many countries, to ensure specific protection of the purchaser facing the real estate professional when the property to be sold or built is intended principally to be used as housing for the former.<sup>29</sup>

Secondly, the text would only apply to cross-border transactions dealing with the sale of goods, the provision of digital content and the performance of related services. It therefore does not govern contracts “generally” (the “general theory of obligations”) and therefore is *a priori* not in a position possibly to apply to other contracts. Therefore, in its current state and compared with the DCFR, the text does not include more general rules on the non-performance of the obligations: the consequences of contractual non-performance are dealt with separately for each type of contract (sales or service) and, within each of these, for each of the parties (seller or buyer; service provider or client). For example, the contract may only be rescinded as a sanction for certain breaches (see Arts 114–119 and 134–139 of Annex I), but may not be rescinded generally.<sup>30</sup>

Thirdly, the *distinction between sales contract and service contract* raises a question.<sup>31</sup> In the definition under Article 2 (k), the sale is understood to mean the transfer of ownership of goods against payment of a price and includes the case according to which the seller manufactures or produces the good in question. Moreover, Article 3 (1) specifies that the sales contract should also mean services related with the sale of the good. The “related service” contract in turn is understood as being

“installation, maintenance, repair or any other processing, provided by the seller of the goods or the supplier of the digital content under the sales contract, the contract for the

<sup>28</sup> For a detailed study of these issues, see the contributions collected in D Voïnot and J Sénéchal (dir.), *Vers un droit européen des contrats spatiaux*, Coll. Code économique européen (Brussels: Larcier, 2012).

<sup>29</sup> For an overview of some of these, see B Kohl, “Towards a European Consumer Construction Law?”, [2010] ICLR 211 et seq.; B Kohl, *Droit de la construction et de la promotion immobilière en Europe*, n. 12, above, pp. 73–260.

<sup>30</sup> On this, see also M Storme, “Europees contractenrecht dichterbij?”, *Juristenbulleten*, 2011, No 230, p. 16.

<sup>31</sup> On this issue, see among other works J Sénéchal, *Le contrat d'entreprise au sein de la classification des contrats spatiaux. Recherche sur un double enjeu du mouvement de recodification du droit des contrats*, pref. M Defossez (Presses Universitaires d'Aix-Marseille, 2008), pp. 131–143.

supply of digital content or a separate related service contract which was concluded at the same time as the sales contract or the contract for the supply of digital content” (Article 2 (m)).

without reference to the possible product brought about by the company when providing this service. These definitions lead to a significant difficulty: the absence of clear criteria for distinguishing these two contracts, which results in a risk of manipulating qualifications. So the contractual qualification maintains a certain significance in the determination, not only as regards internal law, but also as regards the proposed text, of certain rights and obligations of the contracting parties.

Finally, and more generally, resorting to an optional instrument will necessarily raise the legal players’ expected level of knowledge in contract law. Indeed, unlike the creation of a codified text, imposed on every Member State and as an alternative to the national law, the system of the optional instrument compels all legal players, in every Member State, to know not just one body of rules but two, so that they are able to make an informed choice. This would discriminate between the players who are in a position to know the two regimes, because of their structural means, and those who are not, in particular, private individuals and SMEs. For the latter, the system would be an indisputable source of complexity and would involve resorting to legal counsel and thereby incurring additional cost. This criticism, however, does not apply in cross-border relationships, since, in that case, the “second regime” would in fact be a tool to simplify the legal relationships compared to current difficulties. This requirement to know two systems would be especially formidable as it could be viewed, *a priori*, as redundant.

## 2. Applicability of the Proposal for a Regulation in the real estate industry

A first reading of Article 2 of the Proposal for a Regulation seems to suggest that the real estate industry falls outside the field of application of this draft instrument. This provision (“Definitions”) sets out in fact what is understood by:

- “... (h) ‘goods’: any tangible movable items... .
- (k) ‘sales contract’: means any contract under which the trader (‘the seller’) transfers or undertakes to transfer the ownership of the goods to another person (‘the buyer’), and the buyer pays or undertakes to pay the price thereof; it includes a contract for the supply of goods to be manufactured or produced.”

However, on closer reading of the draft text, it clearly allows for the consideration that the real estate industry, and more particularly the activities of SMEs in the real estate industry, may be affected by this text. In fact, the sale of building materials may certainly be included in the field of

application of the Proposal for a Regulation since it involves goods within the meaning of Article 2 of this text. Moreover, Part 5 of Annex I, providing the rights and obligations of the parties to a contract of "related services", could be rendered entirely applicable to contracts dealing with the installation of goods into a pre-existing building. Consequently, certain activities in the real estate industry, in particular, certain activities related to renovation, installation, improvement of a pre-existing building, like plumbing, roofing, grouting, and so on, could be included in the scope of the draft instrument since they involve both the sale of materials, the building elements and the installation of these into a pre-existing building. As the text stands, the possibility that these activities of the real estate industry may be governed by an optional instrument may also prove problematic in several respects, so much so that it would be preferable to exclude clearly and explicitly from the field of application of the future instrument cases of incorporation of movable property in pre-existing immovable property.

### 3. Difficulties for an optional instrument in European contract law as regards the real estate industry

#### (a) Absence of shared *acquis* and reconsideration of the imperative nature of several national law regulations

It is important to state clearly that there is no shared *acquis* among the Member States in the real estate industry, nor, moreover, is there sufficient reflection by the European authorities in the field. Indeed, it is recalled that harmonisation is difficult in the real estate industry.<sup>32</sup> This sector is particularly important in the European economy as well as that of each Member State, where specific policies have been developed (regulation of professions, housing grants, impact of the regime of property and real rights, mandatory or connected rules in matters relating to contracts, liability or insurance, etc.). Many public policy provisions exist in this way within the various Member States regarding the real estate and construction industries.

Would the possibility of opting for a "second regime" permit evading public policy rules in national law if the instrument presented a lower level of limitation? Article 11 of the Proposal for a Regulation appears to support this concern since it provides: "Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules..."

This principle creates the risk of harm to the protection afforded by national laws as well as certain categories of professionals (companies and subcontractors) and real estate consumers. Thus, as regards building contracts, would the application of principles established in the draft optional instrument not lead to, on behalf of the freedom of the parties,

<sup>32</sup> See above, Section 1.2 (a).

calling into question a large part of the public policy provisions in the law of French construction which, unlike others, is founded on the successive addition of mandatory regimes that protect both the clients or the buyers and the builders themselves? An example from French law constitutes the system of guarantee owed by the client (Article 1799-1 of the French Civil Code<sup>33</sup>) and the "retention money" that the client may allocate (Law No 71-584 of 16 July 1971<sup>34</sup>). For service contracts, Article 153 (2) of Annex I ("Payment of Price") identifies as the moment of payment for construction the moment when the object of the service is made available: the system does not allow for retention money. However, it is specified that this text is not mandatory and that it is perfectly possible for the parties to include a contractual clause for this.<sup>35</sup> On this issue, as regards Law No 71-584 of 16 July 1971 on retention money, the parties are thus offered the choice between a national text of public policy and a voluntary suppletive European text. A possibility is therefore established to include a direct and open exclusion of an imperative national rule that can be replaced by contractual rules. The protective provisions of the law would be at risk, if the text were adopted, of being very easily circumvented.<sup>36</sup> Similarly, would the French system of subcontracting and of subcontractor payment protection not risk being undermined by the European principles? This could also be the case for the 10-year warranty,<sup>37</sup> which would lose its public policy character. In addition, would construction insurance, the pillar of the French system, not lose its compulsory nature if people opted for the European Regulation? In other words, if it were designed, even indirectly, to

<sup>33</sup> In the terms of Art 1799-1 of the French Civil Code, "... le maître de l'ouvrage qui conclut un marché de travaux privé... doit garantir à l'entrepreneur le paiement des sommes dues" (free translation: the client who concludes a private works contract... should guarantee the company payment of the amounts due); this guarantee includes a bank security, unless the client takes a loan to finance the works and asks the credit institution that consented to commitment not to transfer the amount to anyone but the contractor specified, as long as the latter has not been paid in full.

<sup>34</sup> Art 1 of this Law specifies that: "les paiements des acomptes sur la valeur définitive des marchés de travaux privés... peuvent être amputés d'une retenue égale au plus à 5% de leur montant et garantissant contractuellement l'exécution des travaux, pour satisfaire, le cas échéant, aux réserves faites à la réception par le maître de l'ouvrage... Toutefois, la retenue de garantie stipulée contractuellement n'est pas pratiquée si l'entrepreneur fournit, pour un montant égal, une caution personnelle et solidaire émanant d'un établissement financier..." (free translation: payment of the deposits on the final value of the private works contracts... may be taken from an amount withheld that is equal to no more than 5% of their amount and guaranteeing contractually the performance of the works, to satisfy, as necessary, the reservations made on receipt by the client... Nevertheless, the retention money stipulated contractually is not available if the company provides, for an equal amount, a joint and several personal guarantee from a financial institution...)

<sup>35</sup> See Art 1 (2) of Annex I: "Parties may exclude the application of any of the provisions of the Common European Sales Law, or derogate from or vary their effects, unless otherwise stated in those provisions."

<sup>36</sup> In the commentary on Art IV.C-3:107 of the academic preliminary draft of the Common Frame of Reference (DCFR), dedicated to payment of the price in the construction contract and providing a rule similar to that under Art 153 (2) in Annex I, the possibility is offered of providing in a contract retention money set at 10% while in French law it is limited to 5%.

<sup>37</sup> E.g., installing solar panels on an existing immovable property could be included in the field of application of the text, which, in French law, could then result, if the parties have chosen the optional instrument, in the exclusion of two- and 10-year guarantees.



apply to the real estate industry (see above), the proposed Regulation should at the very least comment on the question of maintaining national measures of protection, when, under Article 11, these provisions enter the field of application of the said instrument without being expressly regulated by it.

Moreover, Article 1 of Annex I specifies that the parties are free to conclude a contract and determine its content by excluding or derogating from the rules provided, unless otherwise stated.<sup>38</sup> However, these latter statements only apply, in essence, to "B to C" contracts.<sup>39</sup> Contractual freedom, therefore, appears complete in "B to B" relationships. Consequently, is it not possible in these relationships to distance oneself not only from the rules of public policy found in national law but also from the rules of the optional instrument since these are only suppletive? If this is truly what the drafters set out to do, the choice is no longer between national public policy and optional instrument but between national public policy and contractual freedom authorised by the optional instrument. European public policy therefore leads to absolute contractual freedom.

This kind of alternative could be considered food for thought. Some professionals wish to release themselves from service contracts they consider cumbersome. They may thus be tempted to propose an optional instrument designed to allow them to achieve their desire. Nevertheless, they will have to weigh all the risks they will run when they are no longer in a strong position. They will, in effect, be at the mercy of the fox that has been left in charge of a henhouse. The ideal situation would certainly be being able to choose the optional instrument when in a strong position but to take refuge behind the barriers of the national law when such is not the case. Clearly, however, it is contrary to the philosophy that underpins such an instrument.

#### (b) Creation of differentiated treatment of the activities subject to real estate law

The field of application of the Proposal for a Regulation, as defined in recital 22, potentially relates to only one part of the activity of construction companies:

"With a view to maximising the added value of the Common European Sales Law its material scope should also include certain services provided by the seller that are directly and closely related to specific goods or digital content supplied on the basis of the Common European Sales Law, and in practice often combined in the same or a linked contract at the same time, most notably repair, maintenance or installation of the goods or the digital content."

<sup>38</sup> Art 1 of Annex I of the Proposal for a Regulation provides: "(1) Parties are free to conclude a contract and to determine its contents, subject to any applicable mandatory rules. (2) Parties may exclude the application of any of the provisions of the Common European Sales Law, or derogate from or vary their effects, unless otherwise stated in those provisions."

<sup>39</sup> See Arts 22, 27, 47.

Therefore, the activities that could be principally concerned are those of renovation, installation, improvement with supply of materials and related to pre-existing immovable property.

In other words, activities like the construction of immovable property and the sale of a building to be constructed, in both the housing sector and the private sector, are excluded from the field of application of the proposed Regulation. The differentiated treatment of construction activities, some potentially falling under the optional instrument and others being excluded, adds an undesirable complexity.

#### (c) Difficulties related to applying the system in a "chain" of service contracts

A "chain" of service contracts is common in real estate law. The immovable property or the materials are often the object of successive sales. Subcontracting with its successive service contracts, if in French law it is not a "chain" of contracts in the legal sense of the term, is nevertheless the object of legislative relationships between the contracts, Law No 75-1334 of 31 December 1975 taking a global view of the prime contracts and the subcontracts.

What would happen, then, if the contracts at issue were subject to different instruments, the one European and the other national? Concretely, opting for the optional instrument for one of the contracts would render it very difficult for the other contract which is subject to national law, or eliminate much of the scope of application (and the case may be further complicated if there are more than two contracts). In fact, choosing the optional instrument for one of the contracts would greatly reduce the interest in choosing national law for the other, when it does not lead to excluding it. The parties to a contract could, therefore, reduce considerably the freedom of parties to another contract to choose. A certain kind of reconsideration of the principle of the relative effect of the agreements could therefore arise.

#### (d) Possibility of pressure to choose the optional instrument which would then become compulsory

According to the Green Paper, option 4

"would have to affect the application of the mandatory provisions, including those on consumer protection. Indeed, this would constitute the added value compared with the existing optional regimes, such as the Vienna Convention, which cannot restrict the application of national mandatory rules. The optional instrument would need to offer a manifestly high level of consumer protection."<sup>40</sup>

<sup>40</sup> Green Paper of 1 July 2010, *op. cit.* n. 2, p. 10.

This consideration is reproduced almost word for word in recital 11 of the Proposal for a Regulation of 11 October 2011.<sup>41</sup>

Indeed, the provisions of the Proposal for a Regulation related to contracts concluded between professionals and consumers should not underestimate the current protection of the consumer.<sup>42</sup> It would, however, be different if the Regulation, *quod non*, also required governing construction or sales contracts for real estate as such: under French law, in the real estate industry, many legal and regulatory provisions specifically protect the real estate consumer.<sup>43</sup>

Nevertheless, beyond consumer law, many national laws provide, in the real estate industry, mandatory provisions protecting in some cases the client, and in others, the real estate professional.<sup>44</sup> Consequently, as regards the one who benefits from the option, the question of knowing who will choose between national law and the optional instrument, when the interests of the parties encourage them to make competing choices, has a particular resonance in service contracts in the real estate industry. The weaker consumer or professional will generally be interested in applying the national law of public policy that offers greater protection while the stronger professional will push for the optional instrument. A survey of companies carried out for the European Commission by the European Business Test Panel on the impact of a European contract law demonstrates in effect a strong expectation in favour of an optional instrument.<sup>45</sup>

The enthusiasm of the panel of companies could therefore be explained by the perception they have that the European Law could reduce their contractual obligations. As nothing appears to be provided to settle this inevitable conflict between contracting parties, this will, to be sure, be to the

<sup>41</sup> "The Common European Sales Law should comprise of a complete set of fully harmonised mandatory consumer protection rules. In line with Article 114 (3) of the Treaty, those rules should guarantee a high level of consumer protection with a view to enhancing consumer confidence in the Common European Sales Law and thus provide consumers with an incentive to enter into cross-border contracts on that basis. The rules should maintain or improve the level of protection that consumers enjoy under Union consumer law."

<sup>42</sup> See the assessment made by M Storme, *op. cit.* n. 30, p. 16.

<sup>43</sup> If the Regulation should apply not only to "related" service contracts, but also to construction contracts or contracts for the sale of real estate, the question also arises as to the maintenance of, along with the harmonisation regime, national consumer law provisions specific to the real estate industry. So can Art. L291-3 of the French Code de la Construction et de l'habitation (CCH), which deems as unwritten six specific clauses in the contract for construction of individual houses with provision of plans, not be removed where the full harmonisation of the Proposal for a Regulation as an optional instrument is recognised and where this applies to construction contracts? Similarly, the Proposal for a Regulation includes a general regulation of the right of withdrawal (see Arts 18 and 40-47). In real estate law, Art L271-1 of the French CCH provides real estate consumers with a seven-day right of withdrawal, with no requirement that it be connected to the manner in which the contract is concluded. In other words, in the real estate industry, the choice made by the parties to opt for the optional instrument coupled with the principle of full harmonisation would also effectively reduce consumer protection here.

<sup>44</sup> See Section II.3 (a).

<sup>45</sup> Survey carried out by the European Business Test Panel from 26 November to 23 December 2010 (see: [http://ec.europa.eu/yourvoice/ebtp/consultations/2010/european\\_contract\\_law/report\\_en.pdf](http://ec.europa.eu/yourvoice/ebtp/consultations/2010/european_contract_law/report_en.pdf)).

advantage of the party who can threaten not to sign the contract if it does not refer to the optional European Law. Logically, the applicable law will be chosen by the party who, economically the stronger, can impose its options with all the imaginable disadvantages brought about by omitting the most protective laws. Thus, in the construction industry, the situation cannot be excluded where a certain number of insurers or guarantors will not make their guarantee conditional on the choice of an instrument that will likely suit them. The overall risk is therefore that the option offered is not truly left to the choice of the parties but that it depends on constraints imposed by a third-party guarantor or insurer of the operation.

## CONCLUSION

In light of the elements described above (and in particular in light of the absence of an *acquis* shared by the Member States in the sector under consideration), it would appear timely to exclude expressly from the field of application of the future optional instrument cases in which the service provided in relation to the provision of merchandise is analysed in the incorporation of this merchandise in a pre-existing immovable property.

This exclusion would allow the creation of a coherent regulation in the law of real estate contracts at the European level<sup>46</sup> which could take the form, first, of a "toolbox", for both European legislators and national legislators (as recommended in options 2 and 3 of the Green Paper of 1 July 2010). In the long term, adopting shared principles or a code applicable to real estate contracts across Europe may be an ideal to be achieved.

As a first step, to the extent that consumer protection is one of the main motivations for the Proposal for a Regulation, an investigation could quickly take shape in relation to the opportunity and the feasibility of European harmonisation of the national systems of consumer protection in the real estate industry. Previously, we demonstrated that such harmonisation, limited to methods of consumer protection in the construction industry, could be contemplated with much less difficulty than large-scale harmonisation of the law of construction, or of contract law in general.<sup>47</sup>

Finally, even if the Proposal for a Regulation of 11 October 2011, which takes the form of an optional instrument,<sup>48</sup> should be considered as not applicable in any way to the real estate and construction sectors (using a limited interpretation of the notion of "services"), some principles on which it rests, and especially the possibility offered to the parties to set aside

<sup>46</sup> As the construction industry represents a substantial economic weight in all Member States, it appears difficult to envisage being directed towards an approximation of laws without taking into account the point of view of professionals from each of the Member States and without them being linked to the development process.

<sup>47</sup> See on this B Kohl [2010] ICLR 211 *et seq.*, n. 29, above; B Kohl, *op.cit.* n. 12, above.

<sup>48</sup> See the Introduction, p. 253, above.

both the existing law and the optional regime (which would constitute a threat to the consistency of the applicable contractual regime, and raises serious questions about the fate of the mandatory provisions of internal law), are harmful for the future, to the extent that they could serve as (poor) models for other more sectoral regulations, including construction.