



The Multi-Level Realignment of European Sales Law

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Introduction

- In this paper we consider aspects of the **dynamic** relationship between EU and national consumer laws in the context of the proposed CESL;
- We will do this at both **microscopic** and **macroscopic** levels;
- At a **microscopic** level we will explore the **interface** between the proposed CESL and relevant national law;
- At the **macroscopic** level we will place the proposed CESL against **innovations** at national level which is particularly important given the optional nature of the proposed CESL...

An Optional Instrument

*“A Regulation could set up an optional instrument, which would be conceived as a ‘2nd Regime’ in each Member State, thus providing parties **with an option between two regimes of domestic contract law.** It would insert into the national laws of the 27 Member States a comprehensive...self-standing set of contract law rules which could be chosen by the parties...It would provide parties, primarily those wishing to operate in the internal market, with an alternative set of rules. The instrument could be applicable in cross-border contracts only, or in both cross-border and domestic contracts...”*

The Rebalancing of UK Consumer Law?

Consumer Law in the UK is in a state of **flux** with (for example):

- The Law Commission's 2005 work on **Unfair Terms in Contracts** (Law Com No 292);
- The Law Commission's 2009 work on **Consumer Remedies for Faulty Goods** (Law Com 317);
- The Law Commission's March 2012 report on **consumer redress for aggressive and misleading practices** (Law Com No 332);



The Rebalancing of UK Consumer Law?

- The Law Commission's 2012 Issues Paper **Unfair Terms in Consumer Contracts: a new approach?**

“We think the current law on which terms are exempt from review under the UTCCR is unacceptably uncertain. This advantages well resourced, large organisations which can pay for sophisticated legal advice. It disadvantages smaller traders and individual consumers.” (para 8.11)



The Rebalancing of UK Consumer Law?

- The development of a **Consumer Bill of Rights**.



The Continuing Europeanisation of National Law

In addition national law continues to be Europeanised, not only by measures such as the **Consumer Rights Directive (Directive 2011/83/EU)**, but also in more subtle ways. For example, see AG Trstenjak in Case C-137/08 *VB Penzügi*:



The Continuing Europeanisation of National Law

*“As long as there is no uniform European civil law, the [CJEU] continues to be dependent on the information provided by the national courts... for the purposes of interpreting the concept of unfairness under Art 3(1) of Dir 93/13 in relation to a specific term. **That said... the [CJEU] could... also draw... on codification models developed by European academics, such as the... DCFR... to find appropriate solutions to disputes...**”*



The Continuing Europeanisation of National Law

See also AG Trstenjak, in Case C-618/10 *Banco Espanol de Credito*:

“Consumer protection law in the EU is currently undergoing a series of legislative adjustments, which bear witness to the Commission’s efforts to consolidate and modernise the acquis...”



The Continuing Europeanisation of National Law

“by its Proposal... on a CESL, the Commission has initiated a... proposal which will make it possible in future to apply that legislation on a voluntary basis to cross-border sales contracts, upon an express agreement of the parties...**Even though these legal acts are not applicable *ratione temporis* to the main proceedings, they will undoubtedly have an important influence on further developments in the field of consumer protection law.**”



Reflections

One question for us is whether the proposed CESL is, **and will continue to be**, preferable to these **innovations at a national level...**



The Economic Case

Of course *some* would argue that **whatever the virtues of individual national systems**, differences in the contract laws of Member States **negatively impacts on the development of the internal market**. Thus the Green Paper *on policy options for progress towards a European Contract Law for consumers and businesses* (COM(2010) 348 final) stated:

The Economic Case

*“The internal market is built on a multitude of contracts governed by different national contract laws. **Yet, differences between national contract laws may entail additional transaction costs and legal uncertainty for businesses and lead to a lack of consumer confidence in the internal market.** Divergences in contract law rules may require businesses to adapt their contractual terms. Furthermore, national laws are rarely available in other European languages...” (p.2)*

The Economic Case

“Partly for these reasons, consumers and businesses, in particular small and medium enterprises (SMEs) having limited resources, may be reluctant to engage in cross-border transactions. This reluctance would in turn hinder cross-border competition to the detriment of societal welfare. Consumers and businesses from small Member States might be particularly disadvantaged.” (p.2)



The Economic Case

On the other hand, **not everyone is convinced by the economic case**: see, for example, the advice given to the UK Government by the UK Law Commissions:



The Economic Case

*“The CESL offers the parties a free choice – which we welcome. Even if the CESL is hardly ever used, no harm would be done. **On the other hand, we are not convinced that developing a CESL for commercial parties should be seen as a priority.** We think efforts would be better spent on developing a European code for consumer sales over the internet, where there is stronger evidence that the current variety of contract laws inhibits the single market.”*

The Economic Case

- Moreover it seems that the **success of the economic case is linked to a number of factors**, including the **drafting** of the proposed CESL and the **degree to which it would result in fragmentation**.
- Issues surrounding the drafting of the CESL were also identified in the advice given to the UK Government by the UK Law Commissions:

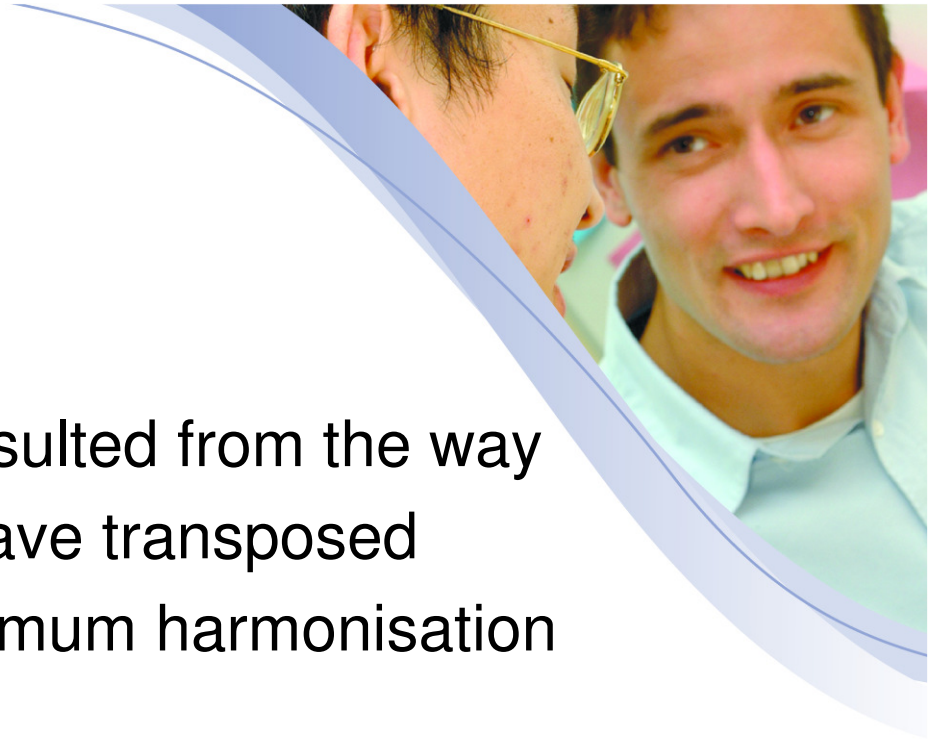
“The European Commission’s draft is a complex document, which is not always easy to understand.”

Fragmentation

- Of course, one of the drivers for further EU initiatives in this area has been **existing fragmentation** (see Devenney & Kenny (2012)).
- This has been, for example, the result of:
 - focusing on particular types of contract (e.g. consumer credit contracts or package travel contracts); or
 - focusing on discrete areas of contract law (e.g. unfair terms).

Fragmentation

- Fragmentation has also resulted from the way in which Member States have transposed directives, particularly minimum harmonisation directives:



Fragmentation

“The existing EU consumer protection rules are fragmented basically in two ways. Firstly, the current directives allow Member States to adopt more stringent rules in their national laws (minimum harmonisation) and many Member States have made use of this possibility in order to ensure a higher level of consumer protection.”

Green Paper on the Review of the Consumer
Acquis
(COM (2006) 744 final) p. 6



Fragmentation

“The impact of... harmonisation... has not been the creation of a single, consistent and coherent body of consumer law... instead there are now 27 national rules on doorstep selling, distance selling...” (C. Twigg-Flesner (2011))



Fragmentation

Yet will the proposed CESL also result in fragmentation as a result of:

- the **scope** of the proposed CESL (including calls for a wider or narrower CESL);
- the **challenges of interpretation**; and
- variations in **enforcement regimes**?



The Proposed CESL: Scope

Article 3 of the Proposal:

*“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.”*



The Proposed CESL: Scope

Article 7 of the Proposal:

“The Common European Sales Law may be used only if the seller of goods or the supplier of digital content is a trader. Where all the parties to a contract are traders, the Common European Sales Law may be used if at least one of those parties is a small or medium-sized enterprise ('SME').”

The Proposed CESL: Scope

- However on **matters outside of the optional instrument** see the Proposed Recital (27):

“All the matters...that are not addressed...are governed by the pre-existing rules of the national law...under Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict of law rule...”



The Proposed CESL: Scope

*“These issues include legal personality, the invalidity of a contract arising from lack of capacity, illegality...the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties...set-off and merger, **property law** including the transfer of ownership, intellectual property law and the law of torts.”*

The Proposed CESL: Scope

*“More could be done to clarify when the contract is formed; the effect of a change of circumstances; and unfair terms protection. **Provisions on the transfer of property could also usefully be inserted.**”*

(An Optional Common European Sales Law: Advantages and Problems Advice to the UK Government (November 2012))

The Proposed CESL: Extensions

*“A Member State **may** decide to make the Common European Sales Law available for:
(a) contracts where the habitual residence of the traders or, in the case of a contract between a trader and a consumer, the habitual residence of the trader, the address indicated by the consumer, the delivery address for goods and the billing address, are located in that Member State...”*

The Proposed CESL: Extensions

“(b) contracts where all the parties are traders but none of them is an SME within the meaning of Article 7(2).”

(Proposed Article 13)

Fragmentation: Scope

- As the proposed CESL will not cover all of the sales relationship, this may lead to a **fragmentation** of Contract Law in this area and the problem of non-harmonised background rules (see below).
- In addition there is also the question of the **interaction between the ‘Contract Law’ in the OI and (non-harmonised) areas of law outside of the OI...**

Fragmentation: The Case of Sureties

- Reminded of work on protection of non-professional sureties (e.g. Kenny and Devenney (2011)).
- Surety transactions are polycontextual in nature; they span traditional legal boundaries.
- Thus surety transactions involve aspects of:



Fragmentation: The Case of Sureties

- specific suretyship law;
- contract law;
- consumer law;
- insolvency law;
- family law;
- constitutional law;
- property law.

...and are affected by the behavioural patterns of financial institutions in particular Member States.



Fragmentation: The Case of Sureties

- The key point for present purposes is that, whilst most Member States have attempted to increase surety protection, there is marked diversity in the means used;
- In particular surety protection in individual Member States involves different complex orchestrations of the various legal fields, concepts and mechanisms mentioned above;
- This may mean that tinkering with one of these elements may have very different consequences in different Member States (Kenny and Devenney (2011)).

Fragmentation and Consistency of Interpretation

One of the **advantages** of an OI advanced in the EU Commission's Green Paper *on policy options for progress towards a European Contract Law for consumers and businesses* (COM(2010)348 final) was that:



Fragmentation and Consistency of Interpretation

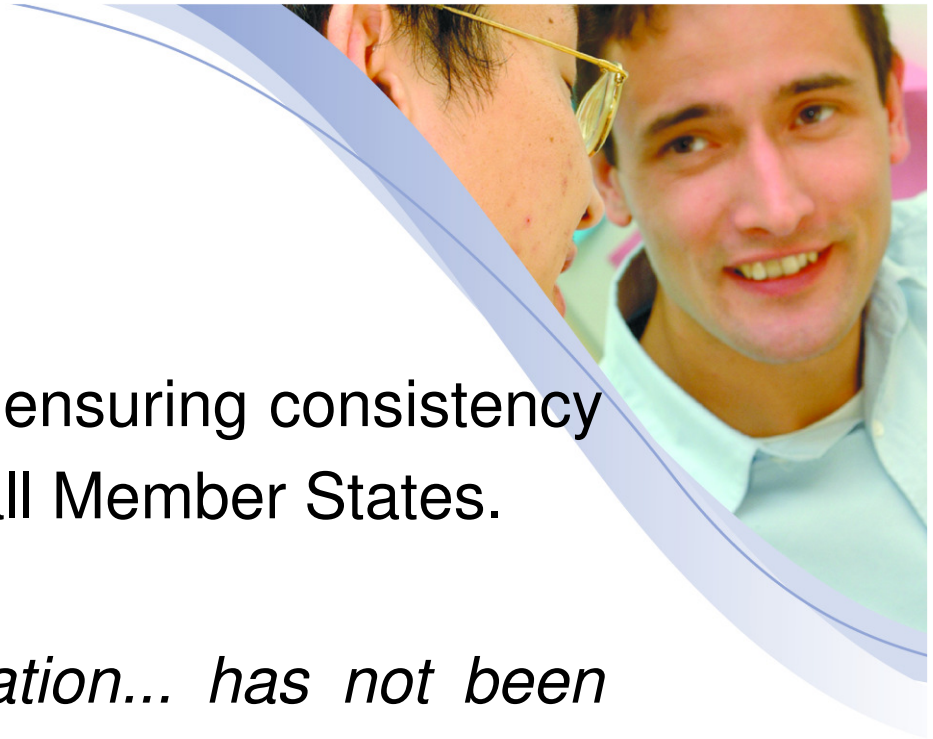
“Consistent reference to a single body of rules would remove the necessity for judges and legal practitioners to investigate in certain cases foreign laws, which is currently the case under conflict-of-law rules. This could not only reduce costs for businesses, but also alleviate the administrative load on the judicial system.”



Challenges of Interpretation

- One difficulty is, of course, ensuring consistency of interpretation throughout all Member States.

“The impact of... harmonisation... has not been the creation of a single, consistent and coherent body of consumer law... instead there are now 27 national rules on doorstep selling, distance selling...” (C. Twigg-Flesner (2011))



Challenges of Interpretation

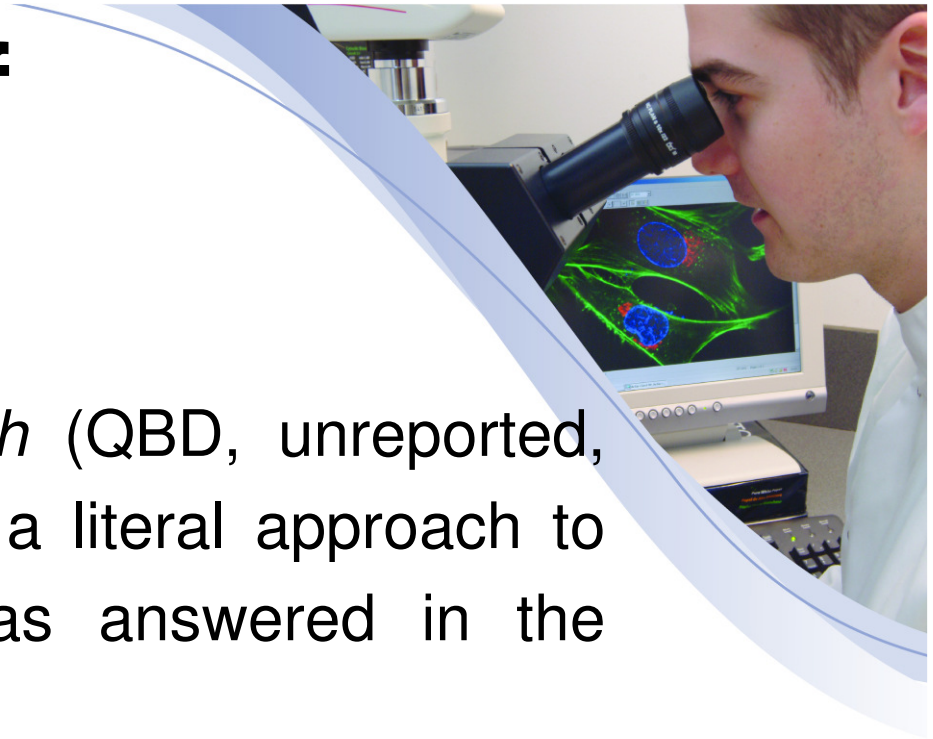
- A particular challenge is in ensuring a ‘European’ approach to the interpretation of the OI.
- By contrast, under existing Europeanised Private Law, there has been some unevenness in interpretation even within the same Member State:
e.g. on the question of whether or not the Unfair Terms Directive applies to contracts of surety...



Consistency of Interpretation

Compare:

- *Bank of Scotland v. Singh* (QBD, unreported, 17th June 2005) where on a literal approach to provisions the question was answered in the negative; with
- *Barclays Bank Plc v. Kufner* [2008] EWHC 2319 (Comm). where on a more 'European' approach to the provisions the question was affirmatively answered (expressly disagreeing with *Bank of Scotland v. Singh*).



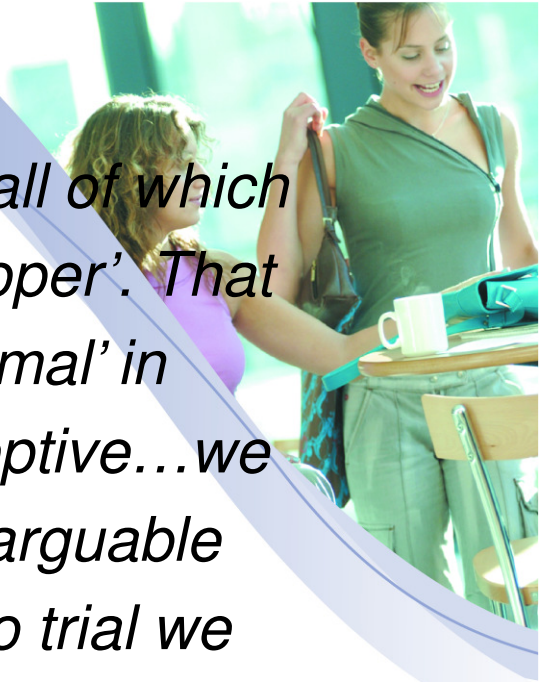
Role of CJEU

- Of course a robust and efficient reference process to the CJEU may act as **an interpretative compass**.
- Yet the reference procedure is not always perceived as having such qualities. Thus in *Page v. Combined Shipping and Trading Co Ltd* [1996] C.L.C. 1952 at 1956 Staughton LJ famously stated:



Role of CJEU

*“...the French, German and Italian versions all of which use the word ‘normal/normale’ instead of ‘proper’. That does not necessarily mean the same as ‘normal’ in English; similarities in language can be deceptive...we ought to conclude that Mr Page has a good arguable case...It may well be that when this comes to trial we shall have to refer the problem to the European court, and it will take another two years after that before a decision emerges as to what the regulation really means. **Maybe the parties will think there are better methods of spending their time and their money than disputing that for a long period of time.**”*



Application of Rules

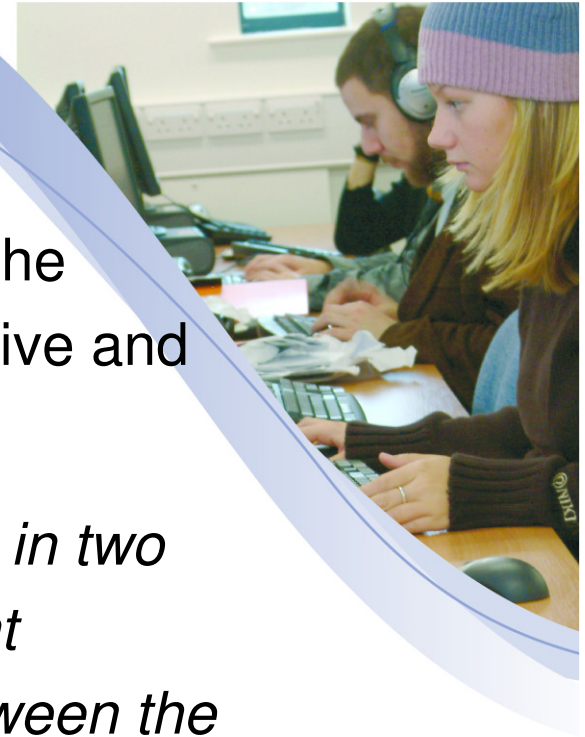
- A further difficulty is that *even if* a particular rule is being interpreted consistently throughout Member States, the **application may be different as a result of local considerations**.
- To some extent, this was recognised in *Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v. Ludger Hofstetter and Ulrike Hofstetter* [2004] ECR-I 3403 at [22] where the ECJ noted that it “*may interpret general criteria used by the Community legislation in order to define the concept of unfair terms. However, it should not rule on the application of these general criteria to a particular term*”.

Background Rules

- This can be illustrated by the interaction of the unfairness test under the Unfair Terms Directive and background rules:

“the application of the same general criterion in two Member States may give rise to very different decisions, as a result of the divergences between the rules of substantive law that apply to different contracts. Hence harmonisation under the Directive is more apparent than real.”

(Report on Directive 93/13/EEC on unfair terms in Consumer Contracts, [Com (2000) 248 final] at p.30.)



Background Rules

Thus in *UK Housing Alliance (North West) Ltd v Francis* [2010] EWCA Civ 117 the (non-harmonised) protection that could be offered by a Court in possession proceedings contributed to a finding that a term in a sale and leaseback arrangement was not unfair under the Regulations.

Social, Cultural and Economic Norms

- A related point is that the **social, cultural and economic norms in a particular Member State may affect the application of particular tests under any OI.**
- Again this may be illustrated by the Unfair Terms Directive, which is transposed in the UK by Regulation 5(1), Unfair Terms in Consumer Contracts Regulations 1999:

Social, Cultural and Economic Norms



*“A contractual term which has not been individually negotiated shall be regarded as unfair if, **contrary to the requirement of good faith**, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”*

- Meaning of **good faith**?

Social, Cultural and Economic Norms

*“Good faith in this context is not an artificial or technical concept; nor, since Lord Mansfield was its champion, is it a concept wholly unfamiliar to British lawyers. **It looks to good standards of commercial morality and practice.**” (Director General of Fair Trading v. First National Bank plc [2002] UKHL 52 at [17] Lord Bingham)*

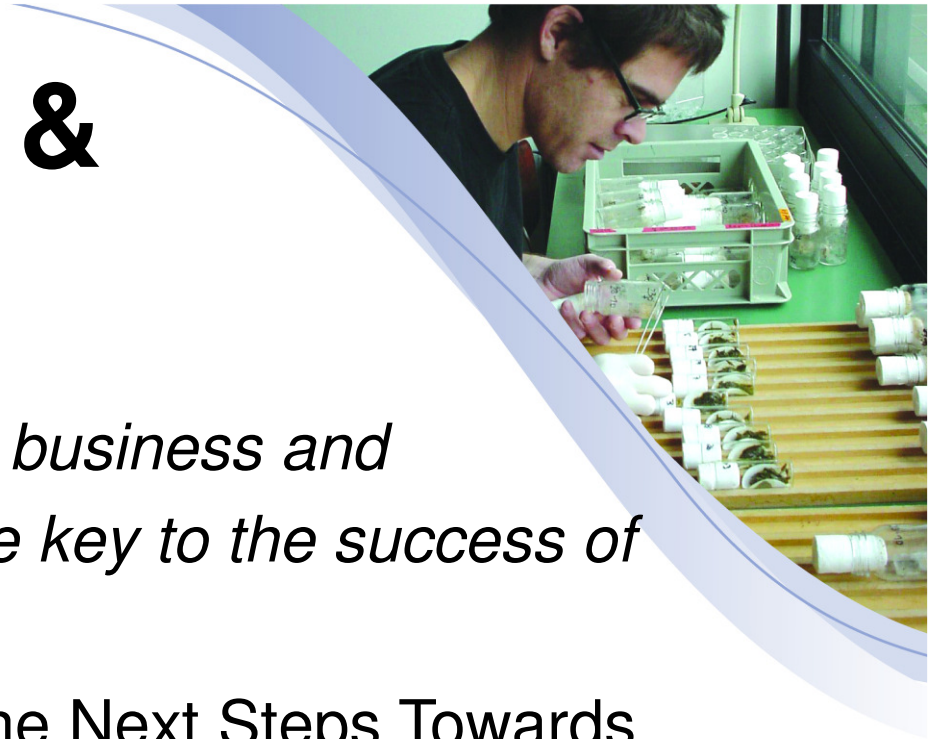
- Link between “good standards of commercial morality” and social, cultural and economic norms → differences in such norms throughout EU (see P. O’Callaghan (2007)).

Fragmentation & Enforcement

“The right balance between business and consumer interests is for me key to the success of the optional instrument.”

(Commissioner Reding, The Next Steps Towards a European Contract Law for Businesses and Consumers, June 2011)

By contrast, the Expert Group’s Feasibility Study stated (at p.6):



Level of Consumer Protection

As part of the feasibility study, the Commission tasked the Expert Group with drafting contract law rules which would afford consumers a high level of protection in business-to consumer contracts.”

- The reasoning seemingly being that in order to induce consumers to use the optional instrument, the level of consumer protection needs to be high.



Consumer Protection & Enforcement

- If so, careful thought needs to be given to the enforcement of consumer protection provisions in any OI.
- For example, the **role of collective proceedings** in the regulation of unfair terms, consumers often not having the information, resources and/or inclination to challenge 'unfair' standard terms in the courts (see Beale (1995)).

Disjointed regimes

Consumer Protection emerges from overlapping sets of provisions:

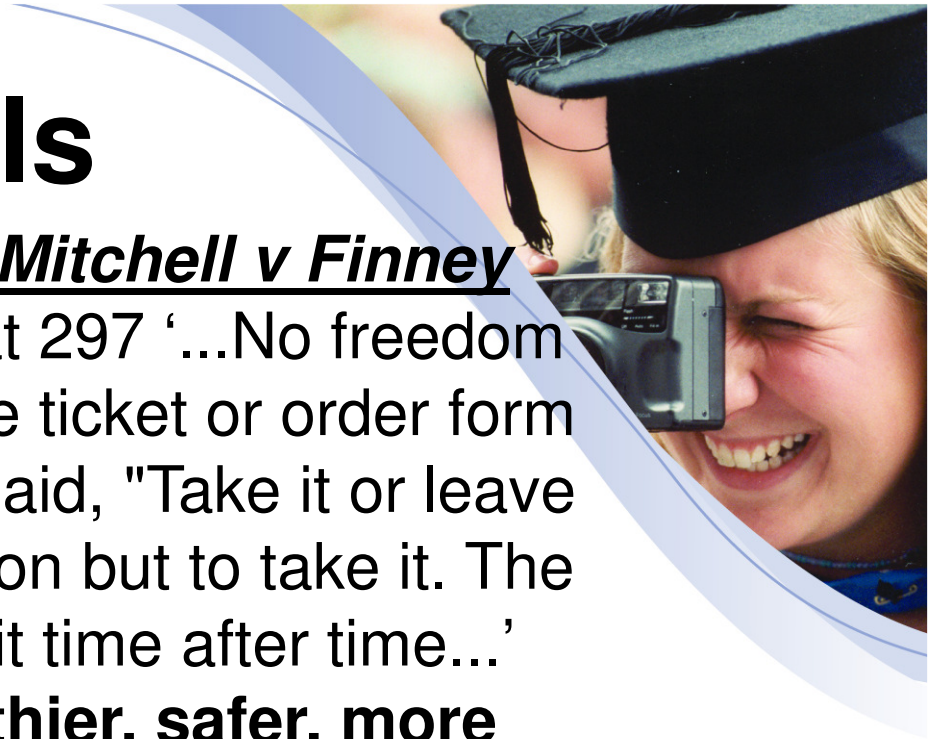
- a body of EU directives;
- and a body of national Statute, doctrine and regulations.



Disjointed Goals

Lord Denning MR, *George Mitchell v Finney Lock seeds* (1983) QB 284 at 297 ‘...No freedom for the little man who took the ticket or order form or invoice. The big concern said, "Take it or leave it." The little man had no option but to take it. The big concern... got away with it time after time...’

2005 communication: healthier, safer, more confident consumers: “... Market integration results in economic benefits for consumers (greater choice of goods and services, competition on merit; lower prices; higher standards of living). Internal Market policies must ensure that these benefits are realised...”



Tensions between regimes: unfair terms

Privately enforced, exemption clause focus of the **Unfair Contract Terms Act (UCTA), 1977**;

Part-publicly enforced, pre-formulated consumer contract terms' focus of the 1993 **Unfair Terms Directive (UTD)**, (UK implementation: **Unfair Terms in Consumer Contract Regulations (UTCCR), 1999**.)



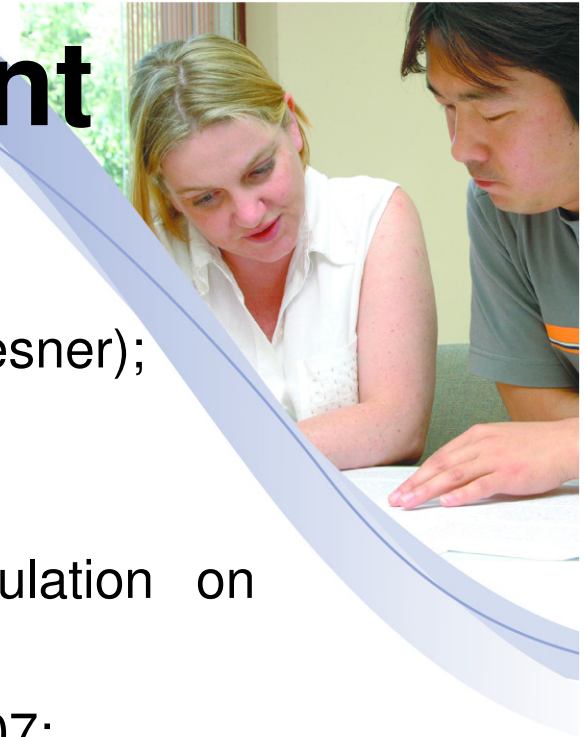
Aggravating factors:

- **'Minimum harmonisation'** (Art.169 TFEU; Art. 8 UTD),
- **Art. 267 TFEU:** CJEU/ interpretation; nat'l courts/ application of EU law: Case C-364/92 *SAT Fluggesellschaft* [1994] ECR I-43, para. 9;
- **National procedural autonomy;**
- **State Liability** (relation of 267 & compliance; Broberg/Fenger (2010)).



Multi-level realignment

- Maximum Harmonisation;
- Consumer Rights Directive 2011/83/EU;
- Consumer Protection Regulation (Twigg-Flesner);
- EU Civil Code (von Bar et al);
- Unified EU Collective Redress;
- Directive on Consumer ADR and Regulation on Consumer ODR;
- European Small Claims Regulation 861/2007;
- **CESL.**
- Law Commission's 2012 Issues Paper 292 'correcting the reach of the UTCCR';
- Law Commission's 2012 recommendation on a Private Right of Redress;
- 2013 Consumer Rights Bill.



Contradictions, tensions & dangers

- Law Commissions unfairness/
Consumer Rights Directive 2012;
- Public and private: ADR/ODR and the
need for diversity;
- EU Grand design/ national
perceptions of elective provisions.



Disjointed CESL

Regulation: covering “general EU law matters” objectives, legal base, definitions, scope of application, agreement/enforcement of opt-in procedure in B2C transactions, MS obligations and residual nat’l powers.

Annex I: detailed CESL provisions (186 Articles)

Annex II: information notice on consumer opt-in.



‘Asymmetry’ of CESL:

CESL internal market measure Art 114 TFEU (explanatory memorandum p.9);

Limited scope? B2SME (SME defined in Art 7(2) CESL) & B2C (narrow definition)(cf Recital 17, CRD 2011/83/EU);

Availability in cross-border settings, MSS may make available in purely internal settings (Art 13(a));



CESL Article 4(3): a journey into the unknown...

- Beyond distance sales and e-commerce;
- Consumer and Trader in same country may select CESL in addition to normally applicable nat'l law where delivery is outside home State(!)



Hybrid-structure of CESL

- **B2SME:** default; eg micro-protection of SMEs [grossly unfair terms: Art 86 CESL]
- **B2C:** mandatory provisions [mistake 56(2), contra proferentem 64, pre-contractual statements 69, indeterminate contracts 77(2), delay in payment 167, restitution 177]



Contested scope of CESL:

- Wider, consolidate Regulation and Annex 1, extend scope: European Law Institute [Statement S-2-2012]
- Narrower, limit to distance contracts: European Parliament [08/10/12];



Reality of opt-in & legal base review

Active/stronger partner in B2SME & B2C proposes the regime;

CJEU rarely monitors legal base Case C-376/98 *Tobacco Advertising*; Case C-491/01 *BAT* judicial review available:

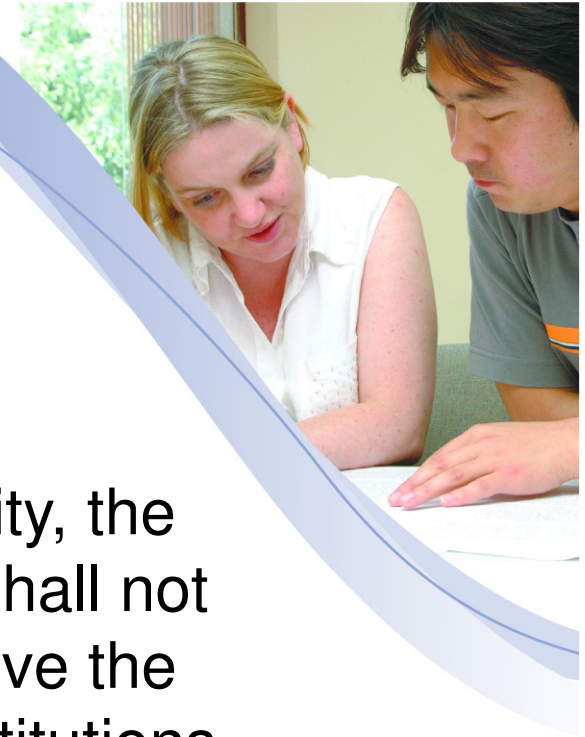
123...the... legislature must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that sphere can be affected *only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue* (...).



Designed to fail necessity review?

Article 5(4) TEU:

Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the *Treaties*. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.



CESL Susceptibility to Art 5(4) Review

B2SME:

Default rules altered by party agreement;
B2SME freedom of choice Art 3 Rome I
593/2008;

Availability of CISG (CISG opt-out/opt-in).

B2C:

Own-motion review of unfairness...

CRD 2011/83/EU fully harmonising the
provisions of off-premises and distance
contracts;

**“higher” CESL protection (ie remedies:
rights of rejection) in business interests**
(repair/replacement more costly);



CESL: *Ornithorhynchus paradoxus*



Future of CESL

- As 'Source of Inspiration'? (AG Trstenjak);
- As a paradoxical instrument cementing fragmentation?;
- As instrument of Soft-law (part of von Bar's tool kit);
- Place in a multi-dimensional system of iterative Europeanised Private law?

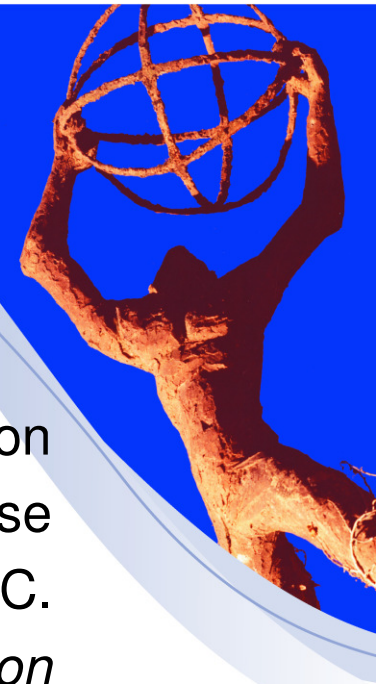


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