

Matthias E. Storme^o

Some remarks on the material scope of an optional instrument for contract law¹

My contribution is limited to questions concerning the objective or material scope of an optional instrument. I will leave the question of the subjective scope (*ratione personae*) to others, and comment on two questions on the objective scope, namely, which (specific) contracts (2) and which matters (1).

1 Which matters?

I start from the presupposition that we want the optional instrument to be a success. An optional instrument will not fulfil its function of providing a uniform regime for contracts within its scope if a) it does not exclude to a large extent the application of otherwise applicable law, and b) it does not make it sufficiently clear which matters are covered - implying that there can be no external gap but at most an internal gap on those matters.

a) As generally known (and discussed elsewhere in this book), there are in principle two techniques to make an optional instrument applicable to a contract to the exclusion of the otherwise applicable national law on the matters regulated by the instrument: changing the conflict of law rule (introducing an optional legal system) or introducing a substantive option within the legal system of all the Member States.

Although I favour the second option, it is nevertheless useful to look at the existing conflict rule in order to determine the material scope of an optional instrument, especially, Articles 10 to 12 of the Rome-I Regulation. These rules provide that the law applicable to a contract shall govern apart from the interpretation of the contract and the performance, non-performance and extinction of contractual obligations, also the existence and validity of a contract, or of any term of a contract, and the consequences of nullity of the contract.

^o Professor at the K.U. Leuven and U. Antwerpen, member of the Brussels Bar. The author was active in the Lando-Commission, the Study Group on a European Civil Code and the Acquis Group and member of the CRT (Compilation and Redaction Team) for the Draft CFR.

¹ lecture at the Conference Recent Developments in European Private Law, Uniwersytet Slaski W Katowicach, Katowice 23 september 2010, in *Recent developments in European Private Law and the influence of European consumer law on national legal systems*, Beck München 2012.

It is especially important that the validity or nullity of the contract is also covered by the instrument, considering the experience with the CISG (the Vienna Sales Convention) (which does not deal with validity). Certain facts that under some legal systems only give rise to the application of the rules on non-performance; may constitute under other systems a ground for avoidance (annulment). Especially, the distinction between non-conformity and mistake is not evident. The Unidroit Principles and the DCFR differ as to the rule on cumulation of remedies (UPICC excludes it, DCFR allows it). Different outcomes are also caused, because CISG does not deal with the validity or nullity of exemption clauses and penalty clauses.

b) An optional instrument has to include not only the rules relevant to all contractual obligations, but also the rules relevant to the different specific obligations typical of the specific contracts to be covered, such as contracts of sale and contracts for services. Insofar as there are specific rules typical of an obligation to pay a price, or of an obligation to transfer property and deliver goods, or of an obligation to render services, they should be included in addition to the rules relevant to all types of obligations. One of the weaknesses of e.g. the PECL or the UPICC is that they do not include any rules on specific types of obligations, and will thus, in nearly every case, be supplemented by the rules on specific contracts under national law (unless uniform law relating to that specific type of contract applies, such as CISG or the Unidroit Leasing Convention, Ottawa 1988). It is true that the English common law of contract is essentially a law of contract and not of contracts, but even in English law there are many specific rules for specific contracts (most of the statutory rules). An optional instrument containing only general contract law would function autonomously only in very few cases (namely those where atypical obligations are contracted that are not regulated in most national laws), and it is not very useful to have an instrument which in practice would be superseded by national law, because the instrument misses more specific rules on typical obligations.

c) It is often advocated that an instrument on contract law should, in its structure, follow the “life cycle” of a contract. Although there is nothing against an order starting with pre-contractual duties, continuing with rules on formation and validity, then with rules on performance and non-performance and ending with rules on extinction of contractual obligations, we should not use the metaphor of a life cycle. This metaphor does namely mix up contracts as legal acts (and thus facts in a certain

sense), which take place at a given moment in time (the conclusion of the contract), and contractual relationships as legal relationships, which have been created by contract and can be extinguished by performance, by agreement, by prescription, etc. Once a contract has been concluded, performance or remedies for non-performance are not the only possible events.. There may be a plurality of parties, one or more parties to the relationship may be substituted or added, etc. The confusion between the parties to the contract as an act and the parties to a contractual relationship has led to many errors in a legal doctrine - a typical error is, e.g. that the relationship between a debtor and an assignee is not contractual, because there is no contract concluded between them.

d) Although this may seem strange at first sight, it does make sense to include the rules on pre-contractual information duties in an optional instrument. Firstly, these rules are relevant if a contract has been concluded. They are important to determine the validity or invalidity of the contract (especially when a mistake or a fraud are invoked), and relevant to determine the contents of the contract. Especially, the required conformity of performance will be determined taking into account what the parties stated or not disclosed in the pre-contractual stage.

Moreover, according to Article 12 Rome-II Regulation, the law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, is the law that applies to the contract, or that would have been applicable to it, had it been entered into.

e) The optional instrument should contain rules on the effect of the contractual relationship on the applicability of tort law to the same relationship. National laws clearly differ in this respect, as legal systems such as the French and Belgian, in principle, exclude any tort law remedy for damage that also constitutes contractual damage; whereas many other legal systems accept a cumulation of rules and choice of remedies in such a case. Also, Article 14 (1)(b) of the RomeII Regulation allows commercial parties to exclude the otherwise applicable tort law. With the perspective of an optional instrument, it would be appropriate to go a step further, and provide that the rules of the instrument cannot be frustrated by cumulatively applying national tort law in relation to such contractual damage. I thus plead for a negative reflex

effect of the instrument in relation to the national law of obligations. This does not mean that parties are, in principle, free to exclude the application of tort law; tort law would insofar be excluded by operation of law (law being the uniform instrument).

f) The optional instrument should contain rules on restitution, not only in case of withdrawal from a contract, or termination of the contractual relationship, but also in case of avoidance or nullity; although in the latter case the obligation is not a contractual one. This is again in line with Article 12 of the Rome-I Regulation.

2. Which specific contracts?

It does make sense to make an optional instrument in the first instance available only to one or more specific contracts, because it is practically impossible to draft it for many types of contracts in the short term. An optional instrument applicable to just a few contracts, but containing a full set of rules for such contracts, makes more sense than an instrument applicable to most or all contracts, but dealing only with a few topics. Nevertheless, one must take into account the fact that contracts for the sale of goods - being the most obvious candidate - are often coupled or linked with other contracts, such as associated services, credit contracts, contracts for personal security, etc. The borderline between sales and services is not very clear, and not uniformly interpreted in national laws. Many services are in economic terms “sold” as products, even if the contract is not a sale *sensu stricto*; in this wider sense the parties also sell and buy financial products, insurance contracts, digital rights, etc.

Also, the instrument should be structured in such a way that additional contracts can easily be added at a later stage. For this reason, the rules should be framed in general terms as far as possible, i.e. in a way which makes them fit for any type of specific contract.

3. Domestic contracts

Limiting the use of the optional instrument to cross-border relationships would lead to several undesirable effects. First of all, this raises a problem of equal treatment or discrimination under national constitutional law (*Inländerdiskriminierung*). Secondly, if the instrument is interesting enough (if not, it will not be successful at all), it will stimulate the artificial introduction of a foreign element into a relationship in order to make it a cross-border contract. Thirdly, there is a growing number of situations

where it becomes increasingly difficult to locate a contract, especially in the case of e-commerce. This problem can be avoided to a large extent by making the instrument available for on-line transactions in general, but in such a case it is even more difficult to justify why it would not be available to domestic off-line contracts too.

4. By way of conclusion

An optional instrument only makes sense if it is sufficiently self-standing. The best way not to reach its purpose is an instrument full of external gaps, like Emmental cheese, with more holes than cheese. For all questions not regulated, one would have to fall back on the otherwise applicable national law, which is precisely not uniform. An instrument that would regulate the matters only superficially, full of internal gaps, would be just as bad. The idea originally advanced by the European Commission of an instrument consisting of no more than 150 articles is therefore unworkable. Rather than the airiness of Emmental or Gruyère, the instrument should have the density of Stilton Cheese.