Limitation of Liability for Damages in European Contract Law

Limitação da responsabilidade por danos no direito contratual europeu

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Resumo: Este artigo faz uma abordagem crítica, sob uma perspectiva histórica e comparativa, das regras contidas no capítulo sobre danos na proposta de *Common European Sales Law – CESL*. Chega-se às seguintes conclusões: (i) a regra de previsibilidade, contida em vários ordenamentos jurídicos, tem-se perpetuado no plano europeu, ainda que sem questionamento crítico, se é idealmente adequada para os propósitos segundo os quais foi projetada. (ii) O art. 161 do *CESL* não contém previsão específica para inadimplemento doloso ou realizado mediante culpa grave, o que se torna necessário. (iii) As normas relativas a "perda atribuível ao credor" e "redução de perda" são problemáticas em vários aspectos. Deve-se abandonar tal distinção e ser criado um dispositivo uniforme intitulado "perda atribuível ao credor". Podem ser incorporadas concepções do direito holandês, direito alemão, dos *Principles of International Commercial Contracts/Unidroit* e do Grupo Acquis.

Palavras-chave: Contrato – Danos – Danos hipotéticos – Direito comparado – Direito europeu.

Abstract: The present paper provides a critical assessment, in historical and comparative perspective, of the rules contained in the Chapter on Damages of the proposed Common European Sales Law. It arrives at the following conclusions: (i) The foreseeability rule, entrenched in a number of national legal systems, has been perpetuated on a European level without critical enquiry as to whether it is ideally suited for the purpose for which it was designed. (ii) That Article 161 CESL does not contain a special provision relating to intentional and grossly negligent non-performance is to be welcomed. (iii) The rules on "loss attributable to creditor" and "reduction of loss" are problematic in several respects. The distinction should be abandoned and one uniform rule be drafted under the heading "loss attributable to creditor". Inspiration can be gained, in particular, from Dutch law, German law, the PICC and the ACQP.

Keywords: Contract – Contract law – Damages – Remoteness of damages – Comparative law – European law.

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I. The Common European Sales Law in Perspective(*)

Over the past two decades a number of texts have appeared in quick succession which have attempted to consolidate, and eventually also to coordinate, the European *acquis commun* (ie the traditional private law as it can be found today in the national legal systems) and the *acquis communautaire* (ie the rules of European Community private law, particularly in the field of consumer contract law).[1] Apart from, and following upon, the PECL,[2] these are: Acquis Principles (ACQP),[3] Principles of European Law (PEL),[4] Draft Common Frame of Reference

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1. For an overview, see Reinhard Zimmermann, 'The Present State of European Private Law', (2009) 67 *American Journal of Comparative Law* 479 ff; idem, 'Europäisches Privatrecht – Irrungen, Wirrungen', in *Begegnungen im Recht, Ringvorlesung der Bucerius Law School zu Ehren von Karsten Schmidt* (2011) 321; idem, '"Wissenschaftliches Recht" am Beispiel (vor allem) des europäischen Vertragsrechts', in Christian Bumke and Anne Röthel (eds), *Privates Recht* (2012) 21 ff. For the distinction between *acquis commun* and *acquis communautaire*, see Nils Jansen, 'European Private Law', in Jürgen Basedow, Klaus J. Hopt, and Reinhard Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (2012) 637 ff.
2. Ole Lando and Hugh Beale, *Principles of European Contract Law*, Part I (1995); Ole Lando and Hugh Beale, *Principles of European Contract Law*, Parts I and II (2001); Ole Lando, Eric Clive, André Prüm, and Reinhard Zimmermann, Principles of European Contract Law, Part III (2003).
3. Research Group on the Existing EC Private Law (ed), *Principles of the Existing EC Contract Law (Acquis Principles), Contract I* (2007); *Contract II* (2009); see Hans Christoph Grigoleit and Lovro Tomasic, 'Acquis Principles', in Jürgen Basedow, Klaus J. Hopt, and Reinhard Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (2012) 10 ff.
4. Many volumes covering, *inter alia*, specific contracts, non-contractual obligations, trust and transfer of property with regard to movables; for present purposes, see Study Group on a European Civil Code/Ewoud Hondius, Viola Heutger, Christoph Jeloschek, Hanna Sivesand, and Aneta Wiewiorowska, *Sales* (2008); generally, see Martin Schmidt-Kessel, 'Study Group on a European Civil Code', in Jürgen Basedow, Klaus J. Hopt, and Reinhard Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law* (2012) 1611 ff.