



The World's Largest Open Access Agricultural & Applied Economics Digital Library

This document is discoverable and free to researchers across the globe due to the work of AgEcon Search.

Help ensure our sustainability.

Give to AgEcon Search

AgEcon Search

<http://ageconsearch.umn.edu>

aesearch@umn.edu

*Papers downloaded from **AgEcon Search** may be used for non-commercial purposes and personal study only. No other use, including posting to another Internet site, is permitted without permission from the copyright owner (not AgEcon Search), or as allowed under the provisions of Fair Use, U.S. Copyright Act, Title 17 U.S.C.*

No endorsement of AgEcon Search or its fundraising activities by the author(s) of the following work or their employer(s) is intended or implied.

THE HARMONIZATION OF THE EU CONTRACT LAW

GYURIS, ÁRPÁD

Key words: European Union, contract, harmonization.

CONCLUSIONS

Why would a common contract law be optimal for the member states of the European Union? The main reason is that it would be much cheaper to set up contractual relations. If somebody conducts economic activities in the European Union, and if the same regulations apply everywhere, this unity can help this corporate or private person (entrepreneur) to work under the same conditions. If somebody wants to sell a product in the EU he/she has to be well-prepared about the different legal systems in various countries. To know these regulations is very expensive. Apart from the costs, there is also the risk of accepting another country's legal norms, which are different than home rules. The essence of the EU is the common market. The steps that the EU has taken to deepen the level of the integration in the last decades lead to this direction. Many firms or private persons do not dare to step over the borders of their home countries, because of their ignorance of the legal systems of other countries. If the EU can create a unity in some fields of the legal systems, business transactions across the borders can be made much easier.

ABSTRACT

In this paper, I wish to provide an overview of the contract law of the European Union, which has an essential importance in regulating business life. Contract law belongs to the domain of private law. The legislature of the European Union first concentrated on issues of public law, regulations pertaining to private law issues are a later development. The creation of the common contract law began in the field of consumer policy, the reason being that all individuals of the society play the role of customer in several business interactions every day as unequal partners to firms having a much greater economic potential. The latter also profit from a common regulation of consumer policy,

however, since otherwise, in case of international transactions, they would have to obey different rules in different countries. The talk will examine further areas of contract law where the need for common legislation has been voiced, the possible advantages and disadvantages of this move. We will also look at the challenges that a common European contract law provides for Hungarian legislation.

INTRODUCTION

Hungary is a member of the European Union. If Hungary wants to keep its favourable situation in the harmonisation of EU norms, we have to be prepared for new challenges. We have to prepare and the business life too, that in a decade the

EU will introduce regulation on novel legal: the intellectual property, copyright, patent rights and civil process law can be the targets of such A regulation. In my paper I would like to predict the possible reactions to the EU law making on these field, and I would like to show the historical roots of the unity of the private law in the continent. Due to the fact that this conference focuses on issues related to the economy, I examine the influences of the EU law-making on economic life with particular reference to contracts. I concentrate on the demands of the EU against the legal persons who provide services for the consumers. One of the main characteristics of the EU contractual legislation is that this is a *consumer-centred legislation*. In the US during the 70's and 80's the consumers got to play a more and more important role, the EU wanted to follow this process, and examined the situation of consumers in the 80's. From this time on the EU have been looking closely at the practices of the service providers, and have been guaranteeing extra rights for the consumers. The EU regards the consumer as a weaker party of a business transaction, that's why it needs to receive extra legal help. We must not forget that perhaps this is the legal field, that is the closest to the everyday people. Importantly in the Hungarian private law, more precisely in the Civil Code, the consumers-centred regulation does not control only the consumer's contracts but because of these norms can be found among the general rules, they have general role also. The next question concerns the form of regulation. If the EU wants to put a new legislation in effect, it needs to choose the best legal way. Without mentioning the all legal instruments of the EU, I outline the two most general legal techniques. The first one is the regulation, and the second one is the

directive. The regulation is a very decisive law but the countries try to avoid it, because it refers to requires that one law of a particular form has to be taken over into the national legislation without modification. The other possible method to unify the legislation of the member states is the directive that has been the main tool of the EU legislation so far. Its success was based on the fact that this means of unifying national legislation involves incorporating a law with a common content, but possibly different form into the individual legal systems. Therefore the Member States have got the right to choose the best method to introduce these norms into their own legal systems. In the field of private law, the EU has used the directives because of the permissive way of the legislation. The member state also tries to use the most favorable way of putting the EU norms into practice. In the early period of the EU, many states refused to prepare an act to harmonize with a European Union norm. There are several reasons for this method, i.e. the state wants to express that the value of an EU norm not reach the act level, but a lower level. In the Netherlands, the new accepted Civil Code contains a lot of important rules about the consumer rights, but these norms were not absolutely in accordance with the EU regulation The EU let the Netherlands change. It does not seem likely that the EU will create a complete and compulsory Civil Code. The possible solution could be, for example, to compulsorily introduce a common part into the civil code of every EU member state.

THE WAY TOWARDS THE COMMON EUROPEAN CONTRACT LAW

I would like to present some processes that led to the idea of common contract law. The first initiatives came from

various teams of scholars. The aim of the so-called Pavia-group was to prepare a plan for a common law book for contract law. This book would have had to be accepted compulsory in every member state. The form of the book was modelled on the Italian civil law book, Codice Civile. The English McGregor – project tried to find some common legal points between the Scottish and English legal systems in the 60's. The legendary *Lando-Committee* has prepared the first possible model of a compulsory civil code of the EU. It didn't step into effect, but the scholars consider it as a good example of contract legal principles. The Lando-Committee was founded by the European Committee in the 80's, and the name came from its leader professor *Ole Lando*. The cause why this Committee was established was to collect and model a possible version of an integrated European Civil Code. The Committee consisted of leading scholars from the European member states. Finally this group managed to design a book, which is actually a Civil Code, it is called Principles of European Contract Law (PECL). The work of this group gave an impetus to the creation of another academic research group, the one called *Study Group on European Civil Code*.

Another project called the *Trento Common Core Project* does not only deal with questions of contract law but also with those of property law. It takes a completely different point of view from those of the previous projects, because the Trento scholars would like to prepare a legal map, which gathers the characteristics of the different legal institutions in the European countries. The *European Group on Tort Law* is a project Jaap Spier started in 1993 in Tilburg, the seat of which became Wien in 1999. This group deals mainly with torts law and delictual law. The *Ius Commune Case-*

book plan is a common project of two universities, Leuven and Maastricht, the leader of this initiative being *Walter van Gerven*. The purpose of this project is to put together various different fundamental cases of various legal disciplines, i.e. liability law, contract law, procedural law, company law. Beside the projects of the scholars, the EU has also taken important steps towards the civil code. I mention first the legislation items which brought some important particles into the *acquis communautaire*. The main method of the regulation is the directives, some of the most important ones, which I would like to deal with, are the following (all of them has integrated into the Hungarian legal system with the appropriate act):

1. *Council Directive 85/577/EEC* of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.

2. *A Council Directive 90/88/EEC* of 22 February 1990 amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit.

3. *Council Directive 93/13/EEC* of 5 April 1993 on Unfair Terms in Consumer Contracts.

4. *Directive 97/7/EC* of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in respect of Distance Contracts.

5. *Directive 99/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees.*

THE CONTRACT LAW OF THE EUROPEAN UNION

The EU's most important principle is the idea of the four main freedoms. The freedom of goods, services, capital and

people is the main idea of the common market. How these principles enable the forming of contractual relations in the EU. The constitutional authorisation of the consumer protection derives from the article (95 EC or 153 EC Treaty of European Union). Some experts consider that the Treaty (95 EC) article empowers to regulate on common contract law.

QUESTIONS OF THE HARMONISATION

During the compulsory harmonisation, the integration of the EU norms produced some problematical issues. I would like to present some of these here. According to the basic intention of the consumer's protecting regulation, the main challenge was to give legal help for private persons, who have bought something, and the seller abused its position. The first question is whether the legal persons (business corporations) are always the stronger partners in a business relationship. According to the Hungarian regulation these possibilities are regulated in every kind of transaction apart from the business transaction of the consumer. The relevant Hungarian act does not make a difference between the consumer status of a private person and a legal person. It is hard to decide on for example what means the consumer itself, or the business organizations. It is fundamentally true that the business organization is always a legal person or should be a legal person. And the consumers commonly are natural persons. If we follow the original idea of the EU law-makers, we will have to suppose that the general situation would be the situation where the consumer is the weaker and the service provider is stronger. The European Union consists of 25 member states. The legal systems of the countries are very different. The common European legislation brings some controver-

sies in the field of legal expressions. For instance, damage can be material and non-material damage also, but some countries appreciate only the material damage.

CONSUMER CONTRACTS

It is a general experience that the big firms that supply us with different services try to make contracts forward, which warrant them extra rights. The consumer has only two possibilities: to accept this sort of contract or not. The consumers' interests can be hurt in these general contracts, he/she can not change the terms of the contract or know his or her rights, he/she can decide whether to accept or refuse the contract. Sometimes even the consumer has no choice, and he/she must accept the contract (e.g., contracts with electricity, gas, water providers). The interests of consumers can be vulnerable in the general contracts. The factories and firms prepare a kind of contract which totally fits their own business needs. Because the EU wanted to guarantee exceptional rights to the consumers, there are some obligations that are only compulsory for the business organizations. These include the responsibility of providing the consumer with sufficient information, of taking back products, and the burden of evidence. The directive calls attention to those cases when the general contract is different from the regular practice. The right of information for the consumer is extremely important in this situation. The compulsory rules of the directives turn to be a part of every consumer contracts. The business organizations need to face with these prescriptions. They have to plan contracts in ways that are appropriate for the demands of the EU legislation also. They need to spent time money and energy to live up to these regulations. They need to create the institutions and

possibilities that are required of them by the law. Naturally, acting according to these regulations involves extra costs and requires extra time from the business organization, which could possibly make this product more expensive. However, the fact that the same regulations apply everywhere can lead to minimizing the costs on the long run, which can eventually make the product cheaper. These regulations present a serious challenge for business organization, since the state has integrated them into the legal system of Hungary. Unfortunately the regulation can bring only a *clausula* into the sort of contract, but the real question is how the consumer will fight for his /her right. So, I would like to examine some of the noticed directives.

UNFAIR TERMS IN CONSUMER CONTRACTS

The first important problem is the problem of the definition of the consumer. I have mentioned above, that the Hungarian translation of the English word consumer is not precise. According to the Hungarian version, every person can be a consumer (natural and legal persons alike). Another critical point of the harmonization, this regulation can be found in the Hungarian Civil Code (paragraph 209), is that the societies of the consumers can launch a lawsuit against the business organization that abuses its power, or precisely breach some of the conditions, which the Hungarian government integrated into a statutory order. I think these societies are a good way to protect the Consumers' right, but unfortunately they can not be active partakers by the conditions of the contract. Perhaps this legal authorization is convenient against general contracts of great firms, but not a proper way for dealing with small suppliers. It raises some doubt when we compare a private

person with a society of the consumers. In the case of a private person, when he/she attacks a contract, the court will only decide on his or her affair. But for the rest of the consumers, this part of the contract or the contract itself will be intact and valid. However, if a society which protects the consumers attacks the contract, and wins the case, the incriminated part will be invalid for everybody else. So the question arises, if this version the most optimal is. I suppose, this solution should be given to the consumers also. According to the preamble of the directive this law was created in order to help to establish the common market and to protect the consumer rights. This directive describes *clausula* that are absolutely forbidden in the consumer contracts. Note that although this directive intends to regulate the consumer contracts, it can be applied to some other fields of contractual relations. The Hungarian Parliament integrated this directive into the general contract rules of the Civil Code. So, it applies to many concords apart from the consumer contracts. The EU put some *clausula* into the directive that specify the types of terms that cannot be used by the service provider. The consumer should also have the right to refrain from making the contract. The next important demand is the consumer's right to information, which means that the contract has to be understandable, exact and clear for the consumers.

INERTIA CONTRACTS

The essence of this kind of marketing manner is that a firm sends a product to somebody, who has not even ordered it, in the hope that he/she will buy it. The Court of the EU dealt with this method and concluded that this way of selling can not put any obligations on the consumer, because of the lack of the pur-

chase intent from the consumer. So, nobody has to pay a parcel that a firm sent him/her without ordering.

DOORSTEP SELLING

A classical form of this process is the transaction between a consumer and a travel agent. Nowadays, this classical way of the direct selling has also transformed, and the EU directive tries to handle this situation. An agent can be a natural person, but a legal person also. The EU wanted to protect the consumers from dishonest advertisement, or bluffs. This happens when a seller presents a product with very advantageous conditions, but after buying it the consumer does not have a real chance to ask back his money or to change this product into another one. In real life this type of transaction can occur via media or directly. An agent's legal situation and the his/her connection to the product is a very interesting matter. The agent can have different relations to the firm whose products he/she is selling: he/she can be working for it on the basis of a contract for work, him/herself being a private entrepreneur, or an employee of the firm that sells the product. The Hungarian law tries to clarify the above difference, and, following the European directive, it emphasizes the firm's responsibility instead of that of the direct seller (agent). I give an example, which shows how the regulation related to direct selling can be applied to less classical cases. A German bank gave a loan to a local resident via an agent. The conditions of the loan were not so good, and the resident tried to cancel this contract alluding to this directive. Finally the court gave him justice. The Court of the European Union determined that it does not matter, what the situation of the contract partners is like or the substance. It means that the form of the selling is the main issue, but it is

not interesting what the product is. The other important assumption is that the purpose of this transaction can not be economical or professional from the side of the consumer. It is also a requirement that an agent has to present him/herself in the home of the consumer in a way that makes him (and the firm) easily identifiable.

CONTRACTS NEGOTIATED AWAY FROM BUSINESS PREMISES

The directive does not apply to investment, insurance, financial service, pension insurance, selling products via vending machine, building contracts, estate buying or selling, auction, and to contracts at a pay station with service giver. That means also that in the business sphere a lot of transaction falls out from the domain of this directive. This method of regulation could be helpful for those service providers, who do not sell services directly. Examples would be the following, bank, insurance company, broker company, pension insurance company etc. This raises two issues. One issue is to help persons to establish contracts to each other directly. The EU wants to protect also the weaker party, that's why the service providers have obligations against the consumers (generally private person). Returning to the gist of this directive as in the case of doorstep selling the EU tries to favour the consumers because of the distance between the seller and the consumer. The distance can be problematical if the consumer not satisfied with the service. The Hungarian Government regulation (17/1999) expresses the main obligations of the business organizations. This legislative provision species the firms' responsibilities as far as providing information. This condition can be found in many directives which regulate on consumer matters. The regulation specifies

what information the customer should be supplied with: the name of the business organization, seat of the firm, registration number, tax number and telephone number. These data imply that the ser-

vice provider is business organization or entrepreneur. This provision is important because a real working firm can guarantee the necessary rights of the consumers.

REFERENCES

- (1) Bártfai-Bozzay-Kertész-Wallacher: Új szavatossági és jótállási szabályok. Hvgorac, Budapest, 2004 – (2) Benacchio, G.: Az Európai Közösség Magánjoga. Budapest, Osiris Kiadó, 2003. 199-238. old. – (3) Blair, W. – Brent, R.: A single European Law of Contract? BEG/COMBAR Joint Conference, Stockholm 3-4 May 2003 – (4) Bussani, M. - Mattei, U. (ed.): The Common Core of European Private Law. The Hague/London/New York, Kluwer, 2002.1-225.o. – (5) Frivaldszky, J. (szerk.): Egy európai alkotmány felé. Budapest, JTMR Faludi Akadémia – OCIFE Magyarország 2003. 8-97.o. – (6) Hesselink, M.: The New European Private Law. Kluwer 2003 – (7) Kecskés L.: A polgári jog fejlődése a kontinentális Európa nagy jogrendszereiben. Budapest-Pécs, Dialóg Kiadó 2004 – (8) Lando, O: Some Features of the Law of Contract in the Third Millennium http://frontpage.cbs.dk/law/ commission_on_european_contract_law/literature/ 345-402.o. – (9) Lando, O: Principles of European Contract Law – (10) <http://www.kclcl.or.jp/english/sympo/EUDialogue/lando.htm> – (11) Lukács-Sándor-Szücs: Új típusú szerződések és azok gyakorlata a gazdasági életben. Hvgorac, Budapest, 2003 – (12) Dr. Nagy Éva: A fogyasztói hitelszerződés és a házaló kereskedelem viszonyának értelmezése – A Heininger-ügy Európai Jog 2003/2 – (13) Nagy, K.- Kende, T.: A szavatosság és a jótállás intézményeinek újraszabályozása az EU jogharmonizáció jegyében. Európai Jog, Budapest, HVG-ORAC, 2004/5. szám 22-26. o. – (14) Dr. Sándor István: A magyar fogyasztóvédelmi jog. Unió, Budapest, 2003 – (15) John Toulmin: Actual contract cases – (16) <http://www.kclcl.or.jp/english/sympo/ EUDialogue/toul.htm> – (17) Vékás, L.: A PTK. 209. §-ának megmérettetése az Európai Közösségek Bírósága előtt. Európai Jog, Budapest, HVG-ORAC, 2004/6. szám 8-11. old. – (18) Vékás, L.: Polgári jogunk európai jogi háttéréről. Európai jog, Budapest, HVG-ORAC, 2003/6. szám 3-15.o. – (19) Vékás, L. (szerk.): Európai Közösségi jogi elemek a magyar magán- és kereskedelmi jogban. Budapest, KJK-Kerszöv, 2001. 27-99. old. – (20) Vékás, L.: Polgári jogunk európai jogi háttéréről. Európai jog, Budapest, HVG-ORAC, 2003/6. szám 3-15. o. – (21) Vékás L.: Az új polgári törvénykönyv elméleti előkérdései. Hvgorac, Budapest, 2001