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Domestic Contract Law as an Obstacle to the European Internal Market

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Summary

1. Two kinds of civil law rules must be distinguished: First, contract law rules from which derogation by agreement or choice of law is possible. Second, mandatory rules (especially for consumer and insurance contracts) from which no derogation is possible because they shall protect a certain minimum standard. Some of them are even internationally applicable, should the law of another country be chosen.

2. Whether domestic contract law rules fall within the scope of Art.28 and 49 EC-Treaty is to be scrutinized under the effect-based test of *Dassonville*. Especially mandatory rules which cannot be avoided by choice of law are liable to hinder intra-Community trade. In contrast, restrictive effects are generally unlikely for default rules or cases when choice of law is given.

3. The *Keck*-rationale, according to which certain selling arrangements may fall outside the scope under the three conditions that they are indistinctly applicable, that they have the same factual impact on imports and domestic products and that they do not prevent market access, is applicable within the scrutiny of all contract law rules whether they affect the free movement of goods or services.

4. Whether a contract law rule falls under the *Keck*-exemption and therefore outside the scope of the fundamental freedoms depends on its impact on market access, in particular, its influence on the content of the contract. The following categories may give some guidance:

- Domestic mandatory rules concerning the conclusion and transaction of a contract are indistinctly applicable and do not impede market access for imported goods and services and fall therefore outside the scope of freedoms.
- Rules shaping the subject of the contract, the “product”, may hinder market access and do not fall within the *Keck*-exemption. They have to be justified by the written reasons of the EC-Treaty or by mandatory requirements as consumer protection thereby also considering the conditions already fulfilled in the country of origin.
- For rules determining the subject matter the impediment of market access must be analysed for every special case. Rules concerning liability or limiting exemption clauses fall mostly under the *Keck*-exemption.

5. A rule hindering intra-community trade cannot be justified by consumer protection if the consumer is sufficiently protected by the binding consumer protection rules of the Member State of origin of the product.

6. The appropriate solution for the current obstacles in intra-Community trade due to diverging contract laws is mutual recognition according to *Cassis*. It should be based on an information concept to enable both parties to come to rational decisions. As far as this protection is not sufficient it should be supplemented by minimum harmonisation in the relevant areas. This approach considers the principle of subsidiarity and the federal structure of the EU and is preferable to a European Contract Code.

Further information:

Körper, Grundfreiheiten und Privatrecht, 2004;

Remien, Zwingendes Vertragsrecht und Grundfreiheiten, 2003

EC-Treaty

Article 28

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 49

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended. [...]

European Court of Justice

Case 8-74 *Dassonville* par. 5

5 All trading rules enacted by member states which are *capable of hindering, directly or indirectly, actually or potentially, intra-community trade* are to be considered as measures having an effect equivalent to quantitative restrictions.

Case 120/78 *Cassis de Dijon* par. 8

Obstacles to movement within the community resulting from disparities between the national laws relating to the *marketing of the products* in question must be accepted in so far as those provisions may be recognized as being *necessary in order to satisfy mandatory requirements* relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer.

Joined cases C-267/91 and C-268/91 *Keck and Mithouard* par. 16-17

15 It is established by the case-law beginning with "Cassis de Dijon" [...] that, in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down *requirements to be met by such goods* (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 30. This is so *even if those rules apply without distinction to all products* unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.

16 By contrast, contrary to what has previously been decided, the application to products from other Member States of national *provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade* between Member States within the meaning of the Dassonville judgment (Case 8/74 [1974] ECR 837), so long as those provisions *apply to all relevant traders* operating within the national territory and so long as they *affect in the same manner*, in law and in fact, the marketing of domestic products and of those from other Member States.

17 Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is *not by nature such as to prevent their access to the market or to impede access any more than it impedes the access of domestic products*. Such rules therefore *fall outside the scope* of Article 30 of the Treaty.

C-93/92 *CMC Motorradcenter* par.12 (concerning pre-contractual information duties and liability)

[...] The restrictive effects which the said obligation to provide information might have on the free movement of goods are *too uncertain and too indirect* to warrant the conclusion that it is liable to hinder trade between Member States [...]