**MARGHERITA FELEPPA***

# EUROPEAN SALES LAW IN THE 21ST CENTURY
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In an era where 74% of European internet users shop online[1], sales law faces many new challenges. The SECOLA Conference on European Sales Law in the 21st Century has provided its audience with an all-encompassing view of the subject: from discussions on the shift from ownership to servitizations, goods with digital elements, sustainability and right to repair issues to perspectives on direct producer's liability, liability of online platforms and even the rise of a new lex mercatoria in the AI scene.

The first session of the conference, chaired by Pascal Pichonaz (University of Fribourg/European Law Institute, President), was dedicated to «Setting the Long-Term Scene» and hosted the key-note introductive speech of Hugh Beale (Warwick University) «Sales Law in the 21st Century – from Ownership to Servitization?». Servitization has been thoroughly studied by the Organization & Management literature, which traditionally presents it according to a 3-step evolution: (i) a first stage, based on the transfer of goods with 'product oriented' services (such as integrated, tailor made business packages); (ii) a second one, characterized by the retention of ownership and its provision to the customer limited to use-oriented functions; (iii) a final one, focused on 'result-oriented' services which completely disregard the material availability of goods. From a legal perspective, servitization represents a turning point in a number of sectors where digitization currently extends its relevance in the realm of the law: from the agreements evolved in the market sectors of the sharing economy to the provisions of contracts for smart products and for the settling of IoT environments. In all these

* Ph.D. Student, Law and Social Change, Roma Tre University, Department of Law.

[1] Eurostat 2021, *E-commerce statistics for individuals*, <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=E-commerce_statistics_for_individuals#General_overview>.

fields, servitization offers considerable advantages, both for suppliers (for instance, extra-sources of revenues, longer term relationships with customers) and for customers (for example, one-stop shops and tailored services). At the same time, it certainly raises new legal issues, highlighted by Beale through a comparison with the traditional model of the contract for the sale of goods, and the related set of remedies available in the western legal systems. Beale focused on the different standards which define the expected quality of goods, on the one hand, and of digital contents, on the other, and, as a corollary, on the heterogeneous sets of obligations pending upon the seller and the supplier. In terms of responsibility, the evolution of market-offers based on an inextricable interpenetration of goods and services, potentially provided by different professionals, leads to question to what extent the end-user is able to identify the liable subject: to Beale, pre-contractual information is a crucial element in addressing the point. Another focal element in the regulation of servitization is the promotion of a legal environment that fosters competition among providers, reducing the number of cases in which customers may find difficulties or relevant transaction costs in passing from one supplier to another. Among others, a formal barrier is the set of data available to the old provider, and that the new one might need in order to offer a qualitatively comparable service. Looking ahead, attention should be given to the debate surrounding the most recent proposals concerning a European Data Act, which could certainly represent an effective tool to regulate the matter.

The second session of the Conference, concerning «Goods with Digital Elements», was chaired by Jacobien Rutgers (VU Amsterdam), and opened by the intervention of Mirjam Eggen (University of Bern), dedicated to the topic «Sale of Goods vs. Supply of Digital Content». The analysis emphasized the pressing need to identify the exact boundary line between the concept of good and that of service. The traditional answer, already in the elaboration of Adam Smith, finds its roots in the prevalence of tangible components in the former notion, and of immaterial ones in the latter. Eggen's investigation departed from the relevant blackletter rules traceable in the EU sources (both of primary and secondary level) and applied their interpretation to solve the practical problems connected to the question of whether, and in which circumstances, the end-user may be entitled to a contractual claim towards the provider of digital contents. The analysis was centered on three major classes of cases: (i) the

purchase of connected devices; (ii) the purchase of digital content; (iii) the temporary supply of digital contents. In each of them a relevant hermeneutic criterion is to be found in a classification of contracts based on their primary function: the "transfer of assets" vs. the "provision of services".

Christian Heinze (Heidelberg University) illustrated the topic «Conformity Requirements of Goods with Digital Content». Building off the definitions provided by EU secondary sources, Heinze addressed two fundamental questions: (i) what characterizes goods with digital elements, and why their definition is of relevance; (ii) what is the rationale of having special rules for goods with digital elements in sales law. As to the first issue, he stressed the relevant divergences between the provisions of Directive 2019/770 (on certain aspects concerning contracts for the supply of digital content and digital services) and of Directive 2019/771 (on certain aspects concerning contracts for the sale of goods, also the Sale of Goods Directive or the Directive). These were considered as particularly relevant especially in the light of the possible joint application of both legal tools, and of the correlative set of remedies (in this regard, special attention was dedicated to the lack of harmonization in the rules concerning the case of termination of contract). As for the second issue, Heinze suggested the need of special rules for digital elements in consideration of their inner peculiarities, which cannot be coherently addressed by the traditional set of rules dictated by sales law. Indeed, digital elements cannot be used in isolation; they need constant updates; they are often provided by a third party, different from the seller of the goods; their fitness for purpose and correlative conformity-test represent an open-ended and highly problematic issue because of the developing context in which they operate.

The conclusive report of the session was presented by Katarzyna Kryla-Cudna (University of Bristol), and it was aimed at investigating the challenges posed by goods with digital elements from the point of view of the commercial seller. Two main issues were examined: (i) the advance payment (connected to the fact that the average sale price covers also digital services and content provided after the contract is concluded); (ii) the division of liability (inherent to the frequent involvement of different market actors, each providing tangibles and/or intangibles components of the complex digital-good architecture). These topics were analyzed by taking into account the interrelation between the contents of the EU Directives and the rules of the CISG (as in particular

to the issue of the right of redress and the passing of risk).

The third session, chaired by Pietro Sirena (Bocconi University) focused on sustainability. Yeşim Atamer (University of Zurich) opened the session with a presentation titled «Durability as a new requirement of conformity» where she sought to answer the question of whether sales law can contribute to green growth, in line with the EU Green Deal and UN Sustainable Development Goal n. 12. The starting point for the discussion was the concept of durability, defined by article 2(13) of Directive 2019/771 as «the ability of the goods to maintain their required functions and performance through normal use». Under this Directive, the non-durable nature of goods constitutes non-conformity, as it can fall under the subjective or objective requirements of conformity (articles 6 and 7). In addition, Atamer explored the connection between durability and the 2-year liability period, arguing in favor of the extension of the latter which might also benefit other related issues such as that of planned obsolescence (which, she argues, differs from the durability issue per se as it implies fraudulent intent on behalf of the producer). She concluded by suggesting the introduction of a broader definition of durability so as to include repairability and the availability of spare parts as well as the introduction of a rule allowing statements on durability to be interpreted, to the extent possible, as guarantees.

The second panelist of the session, Marco B.M. Loos (University of Amsterdam), delivered a presentation on the exceptions to the application of the Sale of Goods Directive, namely the one provided under article 3(5)(a) for second-hand goods sold at public auction (that Member States may exclude from the scope of the Directive) and the one envisaged by article 10(6) for second-hand goods (whereby Member States may provide that the seller and the consumer can agree to contractual terms or agreements with a shorter liability or limitation period), with the aim of understanding whether these exceptions are aligned with the sustainability imperative. To answer this question, he studied the laws of the Member States that have made use of the exceptions under articles 3(5)(a) and 10(6), as well as those of the Member States that have decided not to resort to them, finding that national legislators failed to expressly state a reason behind their choice. Having established that neither of the two exceptions in the Directive helps achieve sustainability goals, Loos concluded by pointing out the need to stimulate sustainable consumption.

Following the two presentations, the discussion with the audience showcased various perspectives on second-hand goods and unfair terms and on consumers' understanding of durability.

Carl Dalhammer (Lund University) opened the second part of the third session with a presentation on the right to repair. He explained that product repairability is a key aspect of the circular economy – along with other 'R' activities such as re-using, refurbishing, repurposing, remanufacturing, recycling and recovering. He then expanded on the policy perspective, arguing in favor of more «choice editing» from legislators (i.e. providing that all products comply with high environmental and quality standards); more policies aimed at educating consumers on lifetime, warranties, repairability and the need for legal coordination between the policies of the European Union and those of the Member States. After having explained the role of consumers and the importance of their understanding of durability as one of the top three factors influencing purchasing decisions, Dalhammer moved on to the contents of the right to repair. In his view, the right to repair should encompass: (i) the rights of individuals to repair their goods autonomously or by resorting to independent repairers; (ii) the right for consumers/independent repairers to access manuals, spare parts, and tools; (iii) the right to have a product that can be repaired with common tools; (iv) the right to reasonably priced spare parts; (v) the 'right to know' more about product lifetime and repairability and (vi) the right to legal guarantee on the repair work (and/or commercial warranty). The right to repair in the EU was also compared to repairability in the United States, where there seems to be a similar issue on the lack of harmonization between state and federal law. The presentation was concluded with a reference to the upcoming legal interventions on the right to repair in the European Union.

Next, Ofer Tur-Sinai (Ono Academic College) analyzed intellectual property as a barrier to repairability[2]. He introduced the right to repair by highlighting its global and interdisciplinary nature, as the subject gains momentum in many jurisdictions and brings up environmental, competition and property law considerations. A comparison

[2] See L.C. Grinvald, O. Tur-Sinai, *Intellectual Property Law and the Right to Repair*, in «Fordham Law Review», 88, 2019, p. 63 and Id., *The Right to Repair: Perspectives from the United States*, in «Australian Intellectual Property Journal», 31, 2020, p. 98.

was then made between the right to repair in the US and in the EU: while repairability pertains to the property rationale in the United States, the EU seems to address the matter from an environmental perspective. Moving on to the interplay between IP and repairability, Tur-Sinai showed that IP rights are often used by producers as an argument against repairability claims. For instance by claiming that repair information qualifies as trade secrets and they use design and logos to secure exclusivity. Looking at IP theory, he contended that the very rationale for IP law, namely that of incentivizing innovation, may justify the establishment of the right to repair because users can drive innovation and progress. He concluded that developing the right to repair requires acting on four circles. The first one pertains to the right to engage in repair that must be granted to individuals. The second one concerns repair shops which should be allowed advertising their repair activities and benefit from the diffusion of repair information. The third one has to do with replacement parts: competition in the market for spare parts must be enabled. The last one is addressed to manufacturers placing affirmative duties on original manufacturers to supply parts and repair information in order to ensure the implementation of an effective right to repair.

Overall, the panel contributed ideas toward enhanced models for the circular economy. The panelists engaged in a discussion with the audience concerning additional factors influencing consumers' decisions to resort to repair, such as the price and value perception of the good as well as consumers' distrust of non-authorized repair shops.

The first day was concluded with a session on «Disclosure Duties and Withdrawal Rights», chaired by Fernando Gomez (Pompeu Fabra University). Here, Antonio Davola (LUISS Guido Carli University/University of Amsterdam) presented on «Relational Disclosure as a Tool to Mitigate the Threats of Profiling Techniques in Online Sales». The Majority of B2C interaction is based on consumer profiling, a technique that gives rise to both opportunities – like reducing transaction costs through matching – and risks – such as discrimination and behavioral manipulation – and hence needs regulation. Under Directive 2019/2161, price personalization is subject to disclosure: a pre-contractual obligation, applying to every trader, to inform consumers in case of price personalization. Nevertheless, while such disclosure obligation is designed for non-relational decision makers, Davola maintained that consumers are relational entities, and their decisions are affected by the relationship with others. He

concluded by sharing the results of his empirical study on consumers and streaming services, which showed that consumers have a better understanding of profiling when information is presented in a relational format[3].

The next speaker, Nikola Ilic (University of Belgrade) talked about a different aspect of online sales: the right of withdrawal. The basis for his presentation was Antonios Karampatzos' proposal that the right of withdrawal pursuant to Directive 2011/83 (which Karampatzos classifies as «mandatory law protection») should allow for waivers thus taking the form of a mandated-choice model whereby the law obligatorily provides the consumer with the possibility to choose between a contract without a withdrawal right and a contract with a withdrawal right and a higher price[4]. Ilic raised the question of whether it is possible to alter the right of withdrawal right to increase sellers' and consumers' efficiency. His analysis was built upon extensive literature review, constructing and testing the hypothesis and deriving conclusions while relying on different methods such as historical-legal, dogmatic or normative, comparative-legal, law and economics. He concluded that the allocation of risk in distance sales contracts should be taken into account when (re)defining the right of withdrawal and special attention should be given to fairness and economic efficiency (i.e. information asymmetry and transaction costs). In addition, a new, and waivable, right of withdrawal should be observed in a broader context because, as he noted it, «it is a powerful tool and a sharp sword, but only when properly managed and used with care».

The day ended with a discussion on the platforms that employ multiple option schemes offering different prices which vary based on the inclusion or exclusion of cancellation options. The audience also talked about the harmful environmental consequences of the frequent exercise of the right of withdrawal.

On June 18th 2022, it was time for the last session of the conference: «Network Perspectives Beyond Sales Contracts», which was divided into two sub sessions.

[3] A. Davola, I. Querci, S. Romani, *No Consumer is an Island - Relational Disclosure as a Regulatory Strategy to Advance Consumers Protection Against Microtargeting* (February 8, 2022). SSRN: <https://ssrn.com/abstract=4068548> or <http://dx.doi.org/10.2139/ssrn.4068548>.

[4] A. Karampatzos, *The withdrawal right pursuant to Directive 2011/83/EU and the application of the mandated-choice model*, in *Private Law, Nudging and Behavioural Economic Analysis*, Routledge, London, 2020.

The first one, chaired by Lucinda Miller (University College London), was opened by Jean-Sébastian Borghetti (Paris 2 Panthéon-Assas University) who gave a speech titled «Is There a Need for Direct Producer Liability in case of non-Conformity?». Borghetti began by illustrating French law on direct producer liability which provides for *action directe* allowing end-buyers to bring a direct contractual claim for any breach of a warranty attached to the contract of sale against any seller up the chain of sales, including the producer[5]. He also shared critical remarks on direct producer liability, asserting that producers are often located outside of the European Union and that they have no possibility of knowing whether the end-buyer is a consumer or a company as they stand at the very beginning of the sales chain. Therefore, he advocated for the introduction of direct producer liability as a voluntary guarantee.

Cristina Poncibò (University of Turin) approached the AI scene with her presentation on «*Lex Mercatoria Ex Machina*», devoted to exploring the law of merchants in the age of blockchain. Underlying this presentation was the idea that much like the growth of international trade gave rise to the lex mercatoria, the unprecedented technological evolution may give rise to a 'lex cryptographia'[6]. In this context, Poncibò showed that technology driven contracts evidence a different understanding of core principles like customs and communities, the principle of justice, the relationship with the law and with the state as well as the process of codification of technical rules. She added that, in essence, the blockchain community denies the importance of the role of the state and relies heavily on arbitration as the preferred dispute resolution method. She also pointed to the difficulty in regulating this phenomenon: technology experts should be included in the legal discussions and reforms while fragmentation should be avoided. She concluded by noting the centrality of this new development in the everlasting concept of *lex mercatoria*, where technology will become the architecture of sale contracts.

[5] For an overview of direct producer's liability in Europe see M. Ebers, O. Meyer, A. Janssen, *European Perspectives on Producers' Liability: Direct Producers' Liability for Non-conformity and the Sellers' Right of Redress*, Sellier European Law Publishers, Munich, 2009.

[6] See P. De Filippi, A. Wright, *Decentralized Blockchain Technology and the Rise of Lex Cryptographia* (March 10, 2015). SSRN: <https://ssrn.com/abstract=2580664> or <http://dx.doi.org/10.2139/ssrn.2580664>.

Following the first part of the session, the audience asked questions about the nature of the *action directe* as a contractual claim, consensus in technology driven contracts and the role of the state in blockchain technology.

The last part of the session was chaired by Ulrich Schroeter (University of Basel) and it was opened by Carlotta De Menech's discussion on «Online Platform Economy and Product Liability Law: A Review of the Theory of Enterprise Liability» (University of Pavia). Online platforms can have different legal qualifications (such as hosting service provider pursuant to art. 14 e-commerce Directive or art. 5 Digital Services Act; or producer, quasi-producer, importer, supplier under art. 3 of the Product Liability Directive) as well as different degrees of involvement in the supply chain (pure or hybrid online marketplaces). Legal and policy reasons support holding online marketplaces liable for losses caused to the consumers by dangerous products purchased from their websites, for example the fact that providers have the possibility to perform precautionary tasks, like detection software notice and takedown systems, to ensure product safety[7]. According to De Menech, it would be difficult to apply the strict liability approach to this scenario as online marketplaces might be seen as pure intermediaries hence the Directive on Liability for Defective Products might not apply. Instead, she suggested resorting to a negligence-based system where the standard of care should not be completely defined by the judges, as a case-by-case approach would involve very high administrative costs, and the liability regime should be complemented with an *ex-ante* and co-regulation of diligence duties that digital providers should comply with. She concluded by referring to the amendments adopted by the EU Parliament to the DSA, such as article 43(a), which pave the way for such a regime.

The last presentation of the SECOLA Conference 2022 was that of Ricardo Pazos (The Autonomous University of Madrid) concerning conformity in the Artificial Intelligence world. Pazos began by asserting that the notion of conformity can be used to solve or mitigate some of the issues in the AI world. To this end, he put forward three suggestions: (i) generalizing the principle of conformity; (ii) reconsidering the

[7] For a study on the matter see European Parliamentary Research Service, *Liability of online platforms*, Brussels, 2021, <https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656318/EPRS_STU(2021)656318_ EN.pdf >.

interaction between subjective and objective requirements for non-conformity and (iii) drawing a parallel between data protection rights by default and by design (article 25 of the GDPR) and conformity, which could also be classified as conformity by default and by design under the Sale of Goods Directive. To conclude, he emphasized the significance of flexibility in the AI scene and the need to rethink the ultimate goal of consumer protection as one of a high – and not of the highest – standard.

The SECOLA leading scholars and practitioners showcased various perspectives on the present of sales law while encouraging thought-provoking discussions on its future. By combining presentations on the challenges faced by modern consumers with those of sellers, producers and online marketplaces, this conference has captured the evolution of sales law, shedding light on the most relevant issues posed by technology.