Luigi Russi, *Cooperation before Contract: The Law and Policy of Expenses Incurred During Negotiations in Comparative Perspective*, Vandeplas Publishing 2009

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A.

Luigi Russi's first book, "Cooperation before Contract: The Law and Policy Expenses Incurred During Negotiation in Comparative Perspective",[1] is a very readable functional comparative law and economic study based on English and Italian private law. Besides the comparison of the two national legal systems, the author presents and critically reviews several non-legislative codifications, namely the rules contained in the Draft Common Frame of Reference (DCFR),[2] its predecessor, the Principles of European Contract Law (PECL),[3] the UNIDROIT Principles of International Commercial Contracts 2nd edition of 2004 (UNIDROT Principles 2004)[4] and the European Contract Code drafted by the Academy of European Private Lawyers (AEPL Code)[5]. The book focuses on pre-contractual liability for frustrated expenses when contract negotiations for complex transactions fail and payment of profit is expected for the performance of already agreed duties (e.g. ancillary contracts) in cases in which the main contract never enters into force.

The book contains, furthermore, a foreword by Prof. Ugo Mattei,[6] with some interesting remarks on the development of functional comparative private law and its merger with U.S.-style law and economics within the last twenty years as well as on the contributions of Russi's book in that context.

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[1] Russi, Luigi, *Cooperation before Contract: The Law and Policy of Expenses Incurred During Negotiations in Comparative Perspective (With Foreword by Ugo Mattei)* (Vandeplas Publishing, Lake Mary, FL, 2009).

[2] Cf. von Bar, Christian; Clive, Eric and Schulte-Nölke Hans (ed.), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR) – Outline Edition* (Sellier, Munich, 2009). The DCFR has been mainly prepared by the Study Group on a European Civil Code (SGECC, more information available at http://www.sgecc.net/) chaired by Christian von Bar and the Research Group on EC Private Law (Acquis Group, more information available at http://www.acquis-group.org/) chaired by Hans Schulte-Nölke.

[3] The full text of the PECL is available at http://frontpage.cbs.dk/law/commission_on_european_contract_law/. The text has been drafted by the Commission on European Contract Law led by Ole Lando and published in three parts between 1995 and 2003.

[4] UNIDROIT International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts 2004* (UNIDROIT, Rome, 2004). Online available at: http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf. Since the 3rd edition of 2010 had not been published when Russi wrote his book, they could not been taken into consideration. However, major changes in respect to the subjects studied are not evident. The UNIDROIT Principles 2010 are online available at: http://www.unidroit.org/english/principles/contracts/principles2010/blackletter2010-english.pdf.

[5] Giuseppe Gandolfi (ed.), *European Contract Code – Preliminary Draft* (Giuffré, Milan, 2007).

[6] Russi (Fn. 1), xv-xvi.

B.

Russi makes the methodology of his book very explicit.[7] He attempts to merge a (mainly descriptive) functional comparative law study, based on Rudolf Schlesinger's "common core approach", with (a normative) law and economics evaluations.[8] Thereby, the traditional "fact-pattern-based" approach, used by the most advanced research group based on Schlesinger's methodology "The Common Core of European Private Law"[9], where the law is analyzed through questionnaire reports, is, however, rejected. Even though this approach would also be usable in Russi's study and would make it easier to utilize as a basis for other comparative law studies on this topic, the chosen methodology focuses the book on the law and economic evaluation of the different legal orders. Moreover, the shortcomings of a merely doctrinal comparative law study are sufficiently overcome by using the fact-based analysis "considering the relevance of more general factual variables derived from"[10] the economic model developed by Russi.

In his economic model, the author draws a distinction between the process of mere tendering, where it is investigated whether a profitable exchange is possible, and the process of negotiating profit-building and profit-sharing between the parties after a general agreement on the profitability of the transaction has been reached. Expenses incurred during the first part of this process should, according to the author, not be recoverable. In particular, he provides two reasons for his position: first of all, making a party liable for showing strong interest in a transaction could reduce the party's willingness to provide meaningful statements on the likelihood to enter into a contract, which, at the same time, would restrict an indirect disclosure of the anticipated costs or value placed on the transaction in question and, secondly, the provided information on the possible transaction to the contractual partner could, through personal networks, be passed to other possible customers increasing the probability of future contracts such that the expenses are not entirely wasted.[11]

On the contrary, the author argues, some compensation should be paid for expenses incurred after general agreement has been reached. In his view, complex transaction consists of several nested tasks and each of them can be regarded as a separate economic transaction. As soon as some agreement has been reached that one of the nested tasks should be performed before the contract has been concluded, expectation interests exist, which should be compensated.[12] For his comparative analysis the author concludes that two factual features are important to evaluate a legal system based on his model: "(i) the function of any expenses incurred, since the expectation interest for performance of a nested task may accrue only if a profit is envisaged, and not in the presence of mere efforts to discover the profitability of a transaction, and (ii) the presence of 'indications of consent' on the recipient, with respect to the undertaking of a particular task by the other party."[13]

[7] See Russi (Fn. 1), Chapter 1 "Laying the Foundations: Choice of Laws and Methodology" (pp. 1-13), which lays down the basic methodological assumptions and Chapter 2 "An Understanding of Expenses Incurred with a View to Contract" (pp. 15-21), in which the author's economic understanding on pre-contractual expenses is discussed.
[8] Cf. Russi (Fn. 1), 6 et seq.
[9] The research group "The Common Core of European Private Law" is led by Ugo Mattei and Mauro Bussani. For more detailed information cf. the research group's website at http://www.common-core.org/.
[10] Cf. Russi (Fn. 1), 12.
[11] Cf. loc. cit., 16 et seq.
[12] Cf. loc. cit. 18 et seq.
[13] Loc. cit. 20.

Based on those assumptions, Luigi Russi discusses Italian[14] and English law[15] as well as the above mentioned non-legislative codifications[16]. Thereby he concludes that in both, Italian law and in all discussed non-legislative codifications, there appears to be a general rule that the frustration of an expected contract leads to liability based on the breach of the duty to negotiate according to the principles of good faith and fair dealing. That liability is, however, restricted to the reliance interests, i.e., to the expenses incurred in the contract negotiations.[17] Both, the possibility to recover expenses incurred in the mere tendering period and the limitation to reliance interests is clearly not in line with the economic model presented by Russi. English law, in contrast, seems to protect "reliance only to the extent that it can somehow be taken to consolidate a profit under the proposed transaction"[18] and provides for the compensation of expected profit, since English law has, in contrast to other common law jurisdictions, such as Australia and the USA, kept promissory estoppel limited to cases where a contract already exists "as a shield" against claims otherwise existing. Therefore, in English law the doctrine of ancillary contracts and restitution play the most important role in pre-contractual liability claims.[19] By and large, English law is, therefore, closer to the presented economic model than the continental tradition, the examined non-legislative codifications and the modern developments in US or Australian common law.

C.

Overall, the book is a very interesting piece of academic work to deferent readers. First of all, it can be of interest to everyone engaged in comparative law methodology as the book is an example of an innovative and advanced comparative law and economics study which's methodology can be used for further developments in this area. Secondly, the book can be suggested to those interested in studying the concepts of pre-contractual liability as it provides a readable overview of the state of the art and some innovative ideas in evaluating it – in particular in respect to the English tradition. Lastly, students of comparative law are provided with a comparative law study, which clearly discloses the methods used and could be regarded as a (long) teaching book example.

D.

The draft of a Common European Sales Law (CESL)[20] recently presented by the European Commission increases the importance of the quest to find "best solutions" in European Private Law. As in the DCFR, the most important rules relating to the recovery of expenses incurred in contract negotiations is the duty "to act in accordance with good faith and fair dealing" (Art. 2 (1) CESL[21]). It must be noted, however, that no specific rule on a duty to

[14] Loc. cit. 23-49.
[15] Loc. cit. 51-105.
[16] Loc. cit. 107-119.
[17] For the non-legislative codifications cf. loc. cit. 118 et seq., for Italian law cf. loc. cit. 122.
[18] Loc. cit. 124.
[19] Cf. loc. cit. 122 et seq.
[20] Cf. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law of 11.10.2011, COM(2011) 635 final.
[21] Articles, which are referred to as CESL, are those of Annex I (Common European Sales Law) of the Proposal for a Regulation on a Common European Sales Law, COM(2011) 635 final.

negotiate in accordance with good faith and fair dealing (II. – 3:301(2) DCFR) and no specific liability provision (Art. II. – 3:301(3) DCFR) exist in the CESL. But the effect of the general rule on good faith can – by and large – be the same, which states in Art. 2(2) CESL that any "[b]reach of this duty […] may make the party liable for any loss thereby caused to the other party".

The criticism on the rules relating to damages in cases of frustrated contract negotiations in the DCFR put forward by Luigi Russi[22] can, therefore, provide a good starting point for the discussion on the further development of CESL and the interpretation of Art. 2(2) CESL in the context of pre-contractual liability if the CESL is to become positive law.

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[22] Cf. Russi (Fn. 1), in particular 118-119 and 125.