

A COMMON EUROPEAN SALES LAW (CESL) FOR BUSINESS-TO-BUSINESS CONTRACTS: PROS AND CONS¹

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1. General Advantages of the CESL

There are some advantages that the Common European Sales Law (CESL)² would bring to both Business-to-Consumer (B2C) and Business-to-Business (B2B) contracts for sales of goods and the supply of digital content. The advantages are that for most disputes that are likely to arise the CESL would provide a “neutral”, non-national system of rules. The text of the rules would be available in all the EU languages. Hopefully it would be applied uniformly in all the different Member States. Thus it would enable businesses to sell across borders on the basis of a single law which would apply equally to all - and with which hopefully all will become equally familiar. It would allow a business to use a “single operating platform” for at least all cross-border sales.

In other respects, however, the case for a CESL for B2C contracts is different to the case for it with B2B contracts.

2. Advantages for B2C Contracts

Using a CESL for B2C contracts will be discussed by other contributors, so I will deal with the advantages for B2C contracts only briefly. The

¹ A version of this paper was also given at a conference on The Making of European Private Law: Why, How, What, Who at the Centro di eccellenza Altiero Spinelli per l'Europa dei popoli e la pace nel mondo, University of Rome III, in May 2012.

² Proposal for a Regulation on a Common European Sales Law, 11 October 2011 COM(2011) 635 final.

principal advantage is that the CESL would overcome the problem posed by Article 6 of the Rome I Regulation.³ Under article 6, if a consumer contracts with a business in another MS when the business has directed its activity towards the consumer in the latter's country of habitual residence, the consumer is entitled to the protection of the mandatory rules of the law of his country of residence. This means that a business advertising its goods across Europe, for instance via a website "e-shop", must be prepared to deal with the consumer protection rules of at least 28 different jurisdictions (28 because Scotland has a separate legal system from that of the rest of the UK). A business that used the CESL will no longer need to worry about this. The CESL will form part of the law of each Member State, so that if the parties have chosen to use the CESL – if the consumer has pressed the "Blue Button" on his or her computer screen, as envisaged by some proponents of the CESL⁴ – the consumer will be protected by the mandatory rules provided by the CESL. Technically the consumer will still be protected by the mandatory rules of his or her habitual residence, but by those rules which are in the CESL, which will be the same in each Member State. The "domestic law" (i.e. non-CESL law) which would otherwise apply - either because of the choice of the parties, as permitted by Art 6, or that which applies as the result of Art 4 of the Regulation – will be relevant only if the issue is one that is outside the scope of the CESL.

It is worth making two points about the CESL in relation to B2C contracts. The first is that the CESL as proposed provides a high level of consumer protection.⁵ It is of course true that the CESL does not contain every rule of consumer protection found anywhere in the EU Member States. I suspect that many Member States, let alone businesses, would object were the mandatory minimum on every issue to be set at the highest level found anywhere in the EU. What I would say is that, insofar as it is possible to calculate these things, the "average" or overall level of protection across all the issues which may affect consumers is about as

³ Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations.

⁴ See H. Schulte-Nölke, <http://www.eesc.europa.eu/resources/docs/schulte-nolke-budapest-march-2011.pdf>

⁵ A high-level of protection is an explicit aim of the CESL, see Recital 11.

high under the CESL as it is under any national law. This high level of protection cannot be avoided. If the parties choose to use the CESL for a B2C contract (in effect, if the business chooses to offer this possibility), they have to choose the whole thing. The business cannot “cherry pick”, for example, by choosing to apply only those articles of the CESL that give the consumer the same or less protection than the mandatory rules of the law of the consumer’s habitual residence, and omitting any articles of the CESL that give the consumer more protection. “Cherry-picking” is prevented by Art 8(3) of the proposed Regulation, which provides that:

(3) In relations between a trader and a consumer the Common European Sales Law may not be chosen partially, but only in its entirety.

This safeguard is essential. Consumers will not know the details of the law – neither the law of their habitual residence nor that of the CESL - but they should know that by pressing the Blue Button they will get full, high-level protection.

The second point is that there are trade-offs. In many cases the consumer would be better protected under the CESL than they would be by the mandatory rules of the law of their habitual residence, but certainly consumers in some countries would have less protection in particular respects. However, there is this trade-off for consumers: consumers who agree to contract on the CESL may lose slight elements of consumer protection but, if the scheme works to encourage more businesses to sell across borders, all consumers should benefit from increased choice and competition, leading to lower prices. For businesses there is also a trade-off: while the business using the CESL may have to offer consumers in some Member States a higher level of consumer protection than is currently provided for those consumers by virtue of Art 6 of the Rome I Regulation, the business will only have to deal with a single set of mandatory rules, whichever Member State the consumer lives in.

3. Advantages for B2B Contracts

In contrast, the case for the CESL for B2B contracts rests more on the substance of the rules. In particular, the CESL contains many provisions that are aimed to provide the kind of legal protection needed by small and medium-sized enterprises (SMEs) – protection that is found in some laws but which in others is marked by its absence. The scope of application of the CESL in B2B contracts would be limited to contracts where at least one party is an SME,⁶ though Member States would be given the option to dis-apply this restriction.⁷

4. The Disincentives to Cross-border Trade for SMEs

Why the concern with SMEs? First, while it is clear that differences between the laws of contract across Europe do not prevent trade – the fact that for years we in England have been buying oats and whisky from our Scottish neighbours shows that this is not the case – it seems self-evident that having to deal with a variety of legal systems must add to the cost, or the risk, of anything except the simplest cross-border transaction. The business will want to know, what difference will it make to us if the other party insists on the contract being governed by their law (or indeed the law of some third country)? Will our standard contract “work” as well under that law as it does under our own law? Perhaps even more important is that for many business people, differences between legal systems create a psychological barrier. But whether we are speaking of B2B or B2C contracts, the barriers are likely to be much more significant for small and medium-sized enterprises (SMEs) than for larger businesses.

There are a number of reasons for this. First, larger businesses may actually not sell across borders: they may open a subsidiary in the buyers’ country. Secondly, larger businesses are more likely to have the expertise to deal with foreign laws. Thirdly, they are likely to be entering larger transactions with higher values – when the cost of obtaining legal advice about foreign

⁶ Proposed reg 7.

⁷ Proposed reg 13(b).

law will be relatively much lower than with a small transaction. SMEs are often not so sophisticated and will not think the cost of taking expert advice can be justified. So if they were to make cross-border contracts they would have to take the legal risk. And that brings us to another difference. I strongly suspect that smaller businesses are generally more risk averse than larger ones. Putting it simply, they can't afford to take the same risks. I suspect many are simply put off from trying cross-border selling. It is precisely these firms that we hope to encourage by providing the CESL.

5. Model Contracts and Adoption of Principles by Contract

Obviously there are fewer mandatory rules for B2B contracts than there are for B2C contracts in the CESL, just as in most national laws. In other words, in a B2B contract the parties are free to agree their own terms to a much greater extent than in a B2C contract. This suggests another way in which to solve the problem of different laws for B2B contracts: to provide model standard contracts that can be used for cross-border transactions. Bodies like the International Chamber of Commerce have done a great deal in this respect. But there are two serious limitations on this approach. The first is that very few model forms are anything like complete – they frequently leave out important matters that are covered only by the applicable general law. True, this objection can be met by incorporating into the contract sets of principles such as the *Principles of European Contract Law*⁸ or the *Unidroit Principles of International Commercial Contracts*.⁹ But that will not deal with a second problem with model forms. Very often one party will try to modify the model contract or any set of Principles which the parties may have agreed to incorporate. The modification may be hidden in the small print and be unknown to the other party. This is particularly likely when one party is a large, sophisticated business using its own standard form for a contract with a much smaller and less sophisticated business. In such a situation, the SME might assume that because the contract looks like the model form, or appears to incorporate the PECL or the UPICC, the SME will get

⁸ See *Principles of European Contract Law, Parts I and II* (ed O. Lando and H. Beale) (Kluwer, 2000); *Part III* (ed. O. Lando, E. Clive, A. Prüm and R. Zimmermann) (Kluwer 2003).

⁹ 3rd ed, Rome, 2010.

the full protection given by the model form or the relevant Principles when in fact the exclusions or alterations inserted by the other party take away that protection. This problem can be dealt with only by having mandatory rules such as controls over unfair terms. In other words, the risks to an SME can often not be solved by the parties using a model form or a set of internationally accepted principles as part of their contract.

6. The Need for Protective Rules for SMEs

In other words, the problems faced by SMEs are not just problems in finding out about and understanding foreign laws. They are also about the terms of the contract. Indeed, SMEs are also likely to have problems over the way in which the contract is made - for example, whether the SME has all the relevant facts - and the way in which the other party might behave during the course of the contract. When a party is relatively inexperienced or unsophisticated in negotiating contracts, and cannot afford legal advice, there are serious dangers. An SME, for example, may not know what is in the standard contract terms supplied by the other party, or it may not understand the implications of the terms. During the course of negotiations, it may not think to ask for information which would affect its decision whether or not to enter the contract – it may assume the other party will disclose such information. The SME may not anticipate that, during the course of performance, the other party might behave opportunistically - and so the SME will not seek to insert appropriate safeguards into the contract.

7. Different Approaches to Inexperienced Parties

There are marked differences in the way in which our various national laws deal with such issues. Some national laws of contract offer little protection to businesses which get themselves into trouble of the kinds I have just described. For example, the English law for B2B contracts can be described as highly individualistic – parties are expected to stand on their

own two feet and not to look to the court for assistance.¹⁰ There are very few controls over unfair terms - essentially only over clauses that limit or exclude liability;¹¹ there is generally no duty to disclose facts, however crucial,¹² and in effect no doctrine of mistake which can be used to escape the contract;¹³ and there is no general doctrine of good faith. English law's attitude is, broadly speaking: read the contract; ask questions before you agree; and, if you don't want the other party to behave in a certain way, insert a term in the contract to prevent it. If you didn't do so - well, that's tough luck. You will know better for next time. In contrast, other laws are much more protective or "communitarian" in spirit. German law, for example, allows a business to challenge the other party's standard terms,¹⁴ and it imposes a duty of disclosure if non-disclosure would be contrary to good faith.¹⁵ Some laws, for example Dutch law,¹⁶ give the court very wide powers to refuse enforcement to a party whose behaviour has been contrary to good faith.

Many English lawyers believe that English law is by-and-large appropriate for the kinds of cases that are normally heard by the English courts and especially the Commercial Court.¹⁷ I agree. The "typical litigant" in an

¹⁰ Some of these characteristics of English law are explored in more depth in H. BEALE, *Mistake and Non-Disclosure of Facts* (Oxford, Oxford University Press, 2012), ch. 3. Some possible reasons for them are canvassed in H. BEALE, *Characteristics of Contract Laws and the European Optional Instrument* (forthcoming).

¹¹ Under Unfair Contract Terms Act 1977.

¹² *Smith v Hughes* (1871) LR 6 QB 597 and, more recently, *Statoil ASA v Louis Dreyfus Energy Services LP (The Harriette N)* [2008] EWHC 2257 (Comm), [2008] 2 Lloyd's Rep. 685.

¹³ When the mistake is as to the substance or the surrounding facts (as opposed to a mistake as to the terms, which may give rise to relief: e.g. *Hartog v Colin and Shields* [1939] 3 All E.R. 566), it is legally relevant only if it is shared by both parties and renders the contract or the "contractual venture" impossible: *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679, at [76].

¹⁴ See §§ 305-307 BGB. The "grey" and "black" lists (§§ 308 and 309 BGB respectively) do not apply to B2C contracts but § 310(1) means the courts can and do reach similar results under the general provision of § 307, see, B. MARKESINIS, H. UNBERATH and A. JOHNSTON, *The German Law of Contract* (2nd ed, 2006), 177.

¹⁵ See *ibid*, 306-310.

¹⁶ Art 6:2 BW.

¹⁷ See H BEALE, The Impact of the decisions of the European courts on decisions made by the national courts in English law, in G MATHÉ and others (eds) *Panel Meeting of the 5th European Jurists' Forum* (Budapest, 2009) 209-225 (also published in a revised version "The Impact of the decisions of the European courts on English contract law: the limits of voluntary harmonisation" (2010) 18 *European Review of Private Law* 501-526.)

English contract case is a large company, which is either sophisticated (many of them are “repeat players” in the relevant market) or is represented by highly trained lawyers; a party which knows what is in the standard form document, if there is one; a party which knows what facts it should ask before entering the contract; a party which can anticipate at least most of the tricks that the other party can get up to. Moreover, such parties don’t mind risk; what they dislike is uncertainty about the legal effect of their agreement – uncertainty which is inevitable if the court has power to assess the validity of the contract terms or to assess, after the event, whether or not the parties’ behaviour was or was not in accordance with good faith and fair dealing. This is particularly the case when the contract is in a fluctuating market, where one or other party may have very strong incentive to find a legal ground on which to avoid the contract if the market has moved against it.¹⁸ But a “hard-edged” kind of law is not suitable for many SMEs, who do not have the same characteristics and who do not, by and large, make large contracts or contracts in fluctuating markets.

8. Why the CISG is not the Answer

This explains my answer to a question that I am frequently asked: why do we need a CESL when we already have the 1980 Vienna Convention on International Sale of Goods (CISG)? It is a good question. The CISG offers many of the same advantages as the CESL. It provides a neutral, internationally accepted law that is translated into many languages. Moreover, it is already part of the law of many countries and we have developed case law and wide experience of the CISG. But my answer is simple. It is that elements that are crucial for SMEs – validity and the control of unfair terms – are not covered by the CISG. They are to be determined by the otherwise-applicable law of the contract. And that brings us back to the problem of knowledge. Unless it is familiar with the otherwise-applicable law of the contract, an SME which is offered a contract to which the CISG will apply but which is on standard terms will not know whether it would be able to challenge one of those terms if it is

¹⁸ See the analysis by G PRIEST, *Breach and Remedy for the Tender of Non-conforming Goods* (1978) 91 *Harvard LR* 960.

unfair; it will not know whether the other party has a duty of disclosure; it will not know whether it might have a remedy if it finds that it has made a fundamental mistake; it may have enormous difficulty in knowing to what extent it will have protection if the other party behaves badly. All that will depend on what the law that governs these issues provides. And the position is made even more complex by the fact that in some laws, the protections that apply to domestic contracts do not apply to “international”, i.e. cross-border, contracts.¹⁹

9. Protection within the CESL

If I am right that many SMEs are risk averse, then I would expect many SMEs will want to have the kind of protection that the mandatory rules of the CESL provide for business-to-business contracts. They will want to have protection in case terms that were not negotiated are unfair. They will find it in the CESL. Art 86 provides:

Article 86

Meaning of “unfair” in contracts between traders

1. In a contract between traders, a contract term is unfair for the purposes of this Section only if:
 - a) it forms part of not individually negotiated terms within the meaning of Article 7; and
 - b) it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.

2. When assessing the unfairness of a contract term for the purposes of this Section, regard is to be had to:
 - a) the nature of what is to be provided under the contract;
 - b) the circumstances prevailing during the conclusion of the contract;

¹⁹ E.g. the UK’s Unfair Contract Terms Act 1977 does not apply to international supply contracts (s.26) nor to contracts to which English law applies only because the parties have chosen English law to govern the contract and which otherwise would be governed by some other law (s.27).

- c) the other contract terms; and
- d) the terms of any other contract on which the contract depends.

It is true that the CESL does not offer quite the degree of protection that the European Commission's Expert Group included in the Feasibility Study²⁰ which preceded the proposal for the CESL. The Feasibility Study included an article on "surprising terms". Art 87 provided:

A term contained in standard terms supplied by one party which is of such a surprising nature that the other party could not have expected it is unfair for the purposes of this Section unless it was expressly accepted.

This was not included in the CESL, but in practice the court could reach much the same result by applying Art 86 CESL.

SMEs will also want the right to avoid the contract on the ground of mistake, at least when the other party knew or ought to have known of the mistake and to have said something. They will find this in Article 48 CESL:

Article 48

Mistake

1. A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:
 - a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different contract terms and the other party knew or could be expected to have known this; and
 - b) the other party:
 - i. caused the mistake;
 - ii. caused the contract to be concluded in mistake by failing to comply with any pre-contractual information duty under Chapter 2, Sections 1 to 4;

²⁰ See A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback (May 2011).

- iii. (iii) knew or could be expected to have known of the mistake and caused the contract to be concluded in mistake by not pointing out the relevant information, provided that good faith and fair dealing would have required a party aware of the mistake to point it out; or
- iv. made the same mistake.

SMEs will welcome the duty of disclosure in Art 23 CESL:

Article 23

Duty to disclose information about goods and related services

1. Before the conclusion of a contract for the sale of goods, supply of digital content or provision of related services by a trader to another trader, the supplier has a duty to disclose by any appropriate means to the other trader any information concerning the main characteristics of the goods, digital content or related services to be supplied which the supplier has or can be expected to have and which it would be contrary to good faith and fair dealing not to disclose to the other party.

In determining whether paragraph 1 requires the supplier to disclose any information, regard is to be had to all the circumstances, including:

- a) whether the supplier had special expertise;
- b) the cost to the supplier of acquiring the relevant information;
- c) the ease with which the other trader could have acquired the information by other means;
- d) the nature of the information;
- e) the likely importance of the information to the other trader; and
- f) good commercial practice in the situation concerned.

SMEs may even welcome the general duty of good faith and fair dealing contained in Art 2 CESL:

Article 2
Good faith and fair dealing

1. Each party has a duty to act in accordance with good faith and fair dealing.
2. Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other party.
3. The parties may not exclude the application of this Article or derogate from or vary its effects.

Article 2 is not supposed to have the major role that is played by good faith in some legal systems: it is to be subsidiary. Recital 31 states:

The principle of good faith and fair dealing should provide guidance on the way parties have to cooperate. As some rules constitute specific manifestations of the general principle of good faith and fair dealing, they should take precedent over the general principle. The general principle should therefore not be used as a tool to amend the specific rights and obligations of parties as set out in the specific rules. ...

So a court may not rely on Article 2 to invalidate a term of the contract that had been individually negotiated. Nonetheless, the article may prevent a party relying on a term if it would be unfair for it to do so, for example because its conduct had led the other party to believe that the term would not be enforced. Good faith and fair dealing is an important principle from which SMEs can expect significant protection.

10. Will SMEs Pay for Protection?

However, there is a very real question about whether the CESL will be adopted. Will the other party – a large business, say - ever agree to contract on the terms of the CESL? The CESL provides, as I have shown, “consumer-like” protection to the other party. That may mean that some

larger business will face increased costs if they agree to contract on the CESL. For example, a business which usually contracts on its own standard terms and insists on the contract being governed by English law will find that suddenly the other party may be able to challenge those terms on the grounds of unfairness – with the results, for example, that the large business may be unable to increase its prices suddenly or find that, if it breaks the contract, it may have to pay additional compensation. The business may have to disclose information that it has not had to disclose under English law. Its behaviour may be challenged in ways that were not possible with its earlier contracts. The challenge may or may not succeed, but in any event the larger business will face additional uncertainty. Even if the larger business can show that its terms are fair and its behaviour was impeccable, there may be delay while the issue is argued before a judge – most of these are not issues that can be dealt with quickly, they will need a full hearing. The large business may decide, therefore, that it will only contract on the CESL if it is paid enough extra, or if it obtains the goods or services that it wants at a sufficiently lower price, to compensate for the extra risk. In other words, use of the CESL may entail the SME paying a “premium” to the larger business for getting the contract on the CESL and therefore obtaining the legal protection that the SME wants.

Will the SME be prepared to pay? I think the answer is yes: SMEs, or at least some SMEs, will think that it is worthwhile to pay the premium. The increased cost is likely to be relatively low and I think the SMEs will view it as a kind of insurance – pay a small premium and get protection against a range of “contractual accidents.” And basic law and economics tells us that if the SME is prepared to “pay” the premium (or, as the case may be, to accept slightly lower prices for its products), the larger firm will find it worthwhile offering the CESL as a way of attracting those SMEs who otherwise would not contract. There is room, in other words, for an efficiency gain that will leave both parties better off; it is a win-win situation. Of course, not every SME will want to pay the premium. Some SMEs may prefer keener prices over increased protection. Let them opt for a law which doesn’t offer them protection, like English law. That is their choice. The great advantage of the CESL, and in particular its advantage over further harmonisation of general contract law, is precisely that the CESL is optional. No business needs to use it if it doesn’t want to.

The position where an SME is dealing with another SME is perhaps less clear. Will the SMEs then still wish to use the CESL, when it might result in their own terms being challenged, or their own behaviour being claimed to be contrary to good faith and fair dealing, or the other party being able to escape because of a mistake? Of course in many legal systems this can happen already. But even with SMEs that are used to dealing with each other on the basis of an “unprotective” law like English law, I believe that many of them will still prefer to adopt the CESL. By and large, they can ensure that their terms are fair and that their own behaviour is proper. They cannot be so sure about the other party’s terms and behaviour. I think they may be more concerned about losing because of what the other party gets up to than because of what they do themselves. They too, then will prefer the CESL. In addition, it may well be that they will view their own willingness to adopt the CESL as sign that “we are a good company; our terms are fair so challenges to them do not concern us; our behaviour is impeccable.”

11. The CESL as a Signal of Reliability

In other words, willingness to use the CESL may become a signal of a business’s reliability. I think there is a good chance that this will come about if the proposed CESL becomes legislation. I do not think we can expect companies, particularly SMEs, ever to become familiar with the niceties of the law. But if the CESL is adopted, I think that the trade associations and federations of small businesses will be able to get a simple message across to their members. The message will be: look for the CESL. If you contract on the CESL, you will have a good degree of protection against nasty surprises in the other party’s terms or their behaviour. The CESL is an indicator of quality that is worth paying for.

If this happens, I think it will bring advantages to SMEs and also encourage a general improvement in contractual behaviour. And it will be apparent that the logic of my argument applies equally to contracts that are not cross-border. Many laws do not provide the kind of protection that I think SMEs want; I think that they should be allowed to choose to have that protection. There is a strong case for Member States to exercise the

option they are given by Art. 13 of the proposed Regulation to allow use of the CESL for domestic as well as for cross-border contracts. At least in England and Wales, I think the law contained in the CESL is more appropriate for SMEs than the “domestic” English law. It would be as good for SMEs as, say, German Law – but with the advantage that the CESL would be available in English!

The “signalling” argument leads me to a crucial point. If we are to encourage SMEs to look for and use the CESL as a sign of quality and protection, it must be a reliable sign. Parties who have opted for the CESL must have confidence that they are going to get what they expected. Unfortunately, in the current draft there seems to be a mistake which could undermine this completely. I referred earlier to Article 8(3) of the proposed Regulation, which prevents the business in a B2C contract from “cherry-picking” just parts of the CESL and ignoring the rest. The obvious implication of Art 8(3) is that in a B2B contract the parties - or more realistically, the party whose standard terms are used – are allowed to cherry-pick. Thus the contract might purport to be on the CESL but the “small print” might go on to exclude vital provisions such as the chapter on unfair terms or the chapter on validity. That would deprive the other party – typically the SME - of the protection that it was seeking to get by asking to contract on the CESL. I believe this is a drafting error. During the discussion of this paper in the conference, a Commission Official said that they think Art 8(3) does not allow a business, even in a B2B contract, to exclude the rules which CESL states are mandatory. The officials rely on Art 1(2), which provides that

(2) Parties may exclude the application of any of the provisions of the Common European Sales Law, or derogate from or vary their effects, unless otherwise stated in those provisions.

Unfortunately, this interpretation seems to be incorrect. Article 1 bites only where there is a provision elsewhere in the CESL making a particular article mandatory. Article 81, which provides that the rules on unfair terms are mandatory, is contained in the chapter on unfair terms. So if the CESL were adopted without the unfair terms chapter, there would be nothing to

make the rules on unfair terms mandatory and they would be excluded. This is a drafting mistake which must be corrected.

12. Risks and Remaining Problems

It is true that there are some risks in using the CESL. It may take some years before we have an established jurisprudence. The Commission's proposal for a database,²¹ like the ones available for the CISG, will be useful here. The CESL will also have the advantage over the CISG that ultimately there is a court – the Court of Justice of the EU - with ultimate authority to rule on the correct interpretation of the instrument. Perhaps we can avoid some of the costs and delay in obtaining rulings from the CJ by creating a special division of the General Court to deal with CESL cases.

The CESL will not, by any stretch of the imagination, solve all the problems associated with cross-border trading. There will still be major language problems – sales literature will have to be translated and staff who handle complaints and warranty claims will need to be fluent in more than their mother tongue. In some countries there still may be problems over ensuring delivery and in obtaining payment. And if there is a dispute, problems of dispute resolution and of enforcement are far more important than those of the substantive law, which is the only issue that the CESL tackles. But the CESL is a step in the right direction. I hope that readers of this paper will support it.

²¹ Proposal for a Regulation on a Common European Sales Law, 11 October 2011 COM(2011) 635 final, p.10.

SUMMARY

A Common European Sales Law (CESL) for Business-to-Business Contracts: Pros and Cons

HUGH BEALE

This paper explains the advantages that the adoption of the CESL will have for cross-border contracts between businesses (B2B), particularly for SMEs. Some of the advantages are the same as for B2C contracts – the CESL will provide a “neutral” set of rules that will be available in many languages, which can be applied uniformly and which a business can use for any cross-border sales contract. However, whereas with B2C contracts the aim is to eliminate the problem of the seller having to be familiar with the mandatory rules of each Member State to which it directs its activities, fewer mandatory rules apply to B2B contracts. Thus in principle the parties have greater freedom to agree on the rules they want; and in theory it is possible for them to adopt a model form contract designed for international use or even to incorporate “soft law” principles such as the PECL into their contract.

However, this approach is risky for an SME. SMEs are generally not “legally sophisticated”, and they tend to make low-value transactions on which it would be disproportionately costly to take legal advice. They may therefore not realise that the terms put forward by the other party are one-sided; they may trustingly assume that the other party will give them full information; they may not think of the ways in which the other party might behave opportunistically.

In other words, SMEs need a law that controls unfair terms, which provides adequate remedies for mistake and non-disclosure and which requires good faith. The CISG does not fulfil that function; it leaves these questions to national laws. Some national laws provide protection but others do not. The mandatory rules for B2B contracts in the CESL will provide what is needed for those who want this kind of protection and opt

for the CESL. However, the draft of the CESL must be clarified to make it absolutely clear that even in a B2B contract, if the parties choose the CESL, they cannot contract out of the mandatory rules.

RESÜMEE

Die Rolle der EU-Verordnung über ein Gemeinsames Europäisches Kaufrecht für Kaufverträge zwischen Unternehmen (B2B): Argumente und Gegenargumente

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Die Studie stellt die Vorteile der Verabschiedung der Verordnung über ein Gemeinsames Europäisches Kaufrecht (Regulation on Common European Sales Law, CESL) vor, die auf dem Gebiet der grenzüberschreitenden Kaufverträge zwischen Unternehmen (B2B), insbesondere aber für die kleinen und mittleren Unternehmen (KMU) spürbar sein werden. Einige Vorteile sind dieselben wie die Vorteile für Kaufverträge zwischen Unternehmen und Verbraucher (B2C): das CESL wird ein „neutrales“ Regelwerk darstellen, das in mehreren Sprachen verfügbar sein wird, das einheitlich angewendet werden kann und welche die Unternehmen für jeden grenzüberschreitenden Kaufvertrag anwenden können. Während im Falle der B2C-Verträge das Ziel darin besteht, diejenige Erwartung zu eliminieren, dass der Verkäufer die einschlägigen Regelungen aller EU-Länder kennen muss, in die seine Handelstätigkeit gerichtet ist, gelten für die B2B-Verträge bereits von vornherein weniger obligatorische Vorschriften. Im Falle der B2B-Verträge werden somit die Parteien theoretisch ein größeres Maß an Freiheit genießen, um über die anzuwendenden Vorschriften selber entscheiden zu können. Zudem haben sie theoretisch die Möglichkeit, einen Mustervertrag für internationale Verwendung zusammenzustellen und in ihre Verträge sogar die Prinzipien des „weichen Rechts“ einzubauen, wie sie zum Beispiel unter den Grundregeln des Europäischen Vertragsrechts (Principles of European Contract Law, PECL) zu finden sind.

Für die KMU ist dieser Ansatz jedoch mit Risiken behaftet. Die Betreiber der KMU sind im Allgemeinen in den Irrgärten des Rechts nicht genügend bewandert, und ihre Transaktionen haben – in Geld ausgedrückt – im Allgemeinen einen niedrigeren Wert. Deshalb würde es für sie eine unverhältnismäßige Ausgabe bedeuten, wenn sie einen Rechtsbeistandsdienst in Anspruch nehmen würden. Auf diese Weise kann es vorkommen, dass sie nicht merken: die von der anderen Partei angebotenen Vertragsbedingungen sind einseitig. Häufig kommt es vor, dass sie gutgläubig voraussetzen, die andere Partei versehe sie mit allen zur Verfügung stehenden Informationen. Vielleicht denken sie gar nicht daran, wie die andere Partei lediglich ihre eigenen Interessen vor Augen halten kann.

Es kann also festgestellt werden, dass ein Instrument notwendig ist, welche verhindert, dass auch unfaire Bestimmungen in die Verträge aufgenommen werden. Ein Instrument, das für den Fall des Irrtums, oder für den Fall des Verschweigens von Informationen einen entsprechenden Rechtsbehelf gewährleistet und ein gutgläubiges Vorgehen verlangt. Diese Funktion wird vom Übereinkommen der Vereinten Nationen über Verträge über den internationalen Warenkauf (CISG) nicht gesehen, da sie diese Fragen der eigenen internen rechtlichen Regelung der einzelnen Länder überlässt. Es gibt Länder, deren Rechtssystem einen entsprechenden Rechtsschutz bietet, aber im Falle von anderen ist dies nicht der Fall. In Zukunft werden die im CESL zu findenden, verbindlichen Vorschriften im Falle von B2B-Verträgen denjenigen den notwendigen Schutz gewährleisten können, die sich für das Befolgen dieser entscheiden. Der Text des CESL-Entwurfes muss aber dahingehend geklärt werden, dass im Falle einer Entscheidung der Parteien für die Anwendung des CESL, auch bei B2B-Verträgen, die Parteien nicht von der Anwendung der verbindlichen Vorschriften Abstand nehmen können.