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## **The Proposed Common European Sales Law (CESL)**

### **Introduction: an optional instrument**

On 11 October 2011 the European Commission published its Proposal for a Regulation on a Common European Sales Law (Brussels, 11.10.2011, COM(2011) 635 final). The proposal is innovative in many ways. It takes the form of an 'optional instrument', meaning that it is a set of rules applying to sale of goods and supply of digital content contracts that the parties can choose to govern their particular transaction. At one level, there is nothing unusual about this: contracting parties are generally free to choose the law that will govern their contract, and they can if they wish choose the law of a jurisdiction with which they have no other connection and in which no aspect of the contract will be performed. If the parties make no explicit choice, then normally the rules of international private law will determine which law applies; and in the European Union those rules are now to be found in the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 4.7.2008, L 177/6. What the CESL provides is a choice additional to those that already exist amongst the world's laws. But this alternative has a rather different character. As a Regulation the proposed CESL will be directly applicable in Member States and becomes part of their domestic laws, operating alongside those laws insofar as it does not supplant them. If it comes into effect, therefore, it will do so as part of French, German, English or Scots law as the case may be. In a contract to which one of these laws would be applicable in the ordinary way, choosing the CESL as the governing law would not be to select a foreign law, but simply an alternative in the domestic one already applying. This, as we shall see in more detail later, has crucial effects for consumer sales in particular. Above all, it means that the consumer protection regime applying in such sales is that provided by the CESL, rather than that established by purely domestic legislation.

### **Scope**

The choice of the CESL is also restricted by the scope of the instrument itself. First, it limits the class of transactions for which it is available to cross-border contracts in which at least one of the countries involved is a Member State of the European Union. A transaction is cross-border when the parties are located in different countries at the time of contracting, but not if the parties are merely of different nationalities. So, for example, a shop in Edinburgh's Royal Mile may target tourists from the Continent by offering only foreign language guides and newspapers for sale, using these languages rather than English (or Scots) as appropriate in dealing with individual customers, and giving prices in euros rather than pounds; but any contract of sale resulting from all this will still be a domestic one for Scots law or some choice of law other than the CESL. Similarly for a Frenchman who, as still commonly happens, travels to Scotland in the summer to sell his onions or cheeses door-to-door or at a farmers' market there. The likeliest scenario for a consumer transaction to be governable by the CESL is therefore one of distance selling, most probably by way of electronic commerce on the Internet. But if a Scotswoman orders goods from an Internet trader based in England, the transaction is not cross-border for CESL purposes, since all the relevant actions take place inside one Member State. On the other hand, an Internet trader based in the United States targeting the European market with its website can do so under the CESL banner.

The next limitation of the CESL's scope is that the seller must be a trader; if the buyer is also a trader, one or other of the parties must be a small or medium-sized enterprise (SME).

Hence the CESL may be deployed in business-to-business (B2B) or business-to-consumer (B2C) sales; but it may not be used when neither party is a trader. Finally, while the CESL applies to sales of goods and service contracts related to these transactions, what the instrument calls ‘mixed-purpose’ contracts (i.e. that include any element beyond sale of goods or services related to either the sale or the supply) are excluded from its scope.

Some of these restrictions are, however, in their turn subject to choices that can be made by Member States. They can decide to have no requirement that at least one party is an SME in a B2B transaction governed by the CESL. They may also choose to make the CESL available for entirely domestic transactions without any cross-border element, which would not only enable the Royal Mile tourist shop to add further attractions for customers, or the French onion and cheese seller to tour Scotland contracting under what will be a law possibly more familiar at least to him, but also let the English Internet trader transact with all his fellow Britons, north and south of the Tweed-Solway border.

### **CESL and CISG**

All this helps to differentiate the proposed CESL from the existing Vienna Convention on the International Sale of Goods (CISG), which is yet to be ratified by the UK but otherwise applies very widely in the European Union and, indeed, around the world. While it too applies to cross-border sales of goods, and may also be made applicable to domestic transactions by its Member States, the CISG is confined to B2B transactions, without, moreover, any requirement that one of the businesses be an SME. The CISG is thus wider in scope than the CESL in this regard; but on the other hand it has no application in B2C transactions. Again, a CISG Member State will have the Convention as its applicable law for cross-border B2B transactions, and does not have any option to provide a parallel system of its own devising. But where the proposed CESL is an ‘opt-in’ for the parties to a contract, the CISG allows parties in jurisdictions where it is the applicable law to ‘opt-out’, in whole or in part, and choose another law. In this rather different way, then, the CISG too is an optional instrument. The alternative to it could be the domestic sales law of the Member State with which the contract otherwise has its closest connections, or the law of some non-CISG jurisdiction, such as England. Opting out of the CISG is common in commercial practice across Europe, raising the question of whether business parties in Europe and their advisers are any more likely to ‘opt in’ to the proposed CESL.

The CISG is however by no means a dead letter, and the evidence about its use does not preclude the possibility that, over time, the CESL might also gain a degree of business credibility. Two aspects of the proposal may be helpful in this regard. One is that as part of a European Union Regulation, the CESL unlike the CISG will have a court – the Court of Justice of the European Union (CJEU) – in which issues about its interpretation can be authoritatively determined for all the jurisdictions in which it can be applied. The other potentially useful aspect is the slightly wider coverage of the CESL by comparison with the CISG. The latter does not cover ‘the validity of the contract or of any of its provisions or of any usage’ (Article 4(a) CISG). But in the proposed CESL, validity is the subject of a whole chapter (5), while two further chapters (7 and 8) provide rules on, respectively, the contents and effects of contracts and unfair contract terms (including in the latter rules on unfair terms in B2B contracts). There is very little overlap here with anything in the CISG. The proposed CESL also in effect elaborates upon some of the CISG rules: for example, with regard to some of the remedies for non-performance such as specific performance and the seller’s right to cure. On the other hand, the proposed CESL does not any more than the CISG have rules

on the transfer of ownership from seller to buyer, which might be thought a surprising omission of one of the defining characteristics of a sale.

### **A business perspective on the CESL?**

A businessman may think that some of the proposed CESL is too open-textured and uncertain, making litigation, possibly prolonged if it has to go all the way to the CJEU, the only possible way of resolving disputes on legal (as distinct from factual) issues. In general, litigation is an outcome devoutly to be avoided in the business world, reinforced in the case of the CESL if the text is seen, as it could be, as leaning too far towards enabling judicial intervention to go so far as to set aside what the parties have agreed. So, for example, Article 2 CESL affirms that each party has an un-excludable duty to act in accordance with good faith and fair dealing, breach of which not only may preclude a party from exercising or relying on a right, remedy or defence it would otherwise have, but also make that party liable for any loss caused by the breach of duty to the other party. Good faith and fair dealing pop up across the CESL provisions, and not only in connection with consumer protection: for example, in the duty in business-to-business (B2B) transactions of pre-contractual disclosure of information about the main characteristics of the goods to be supplied (Article 23 CESL); in what is to be regarded as a relevant matter in interpreting any contract (Article 59 CESL); in the implication of terms (Article 68 CESL); and in the regulation of unfair terms in B2B contracts (Article 86 CESL).

A contract may also be avoided by a party who made a mistake of fact or law existing at the time of formation and who would not have entered the contract, or would have done so only on fundamentally different terms if the other party knew this and knew or could be expected to have known of the mistake but who failed to point out the relevant information where good faith and fair dealing would have required a party aware of the mistake to point it out (Article 48 CESL). Although the same Article goes on to qualify this very widely stated requirement to look after the other party's interests during the negotiation process by saying that there is to be no avoidance if the mistaken party assumed the risk of mistake or should in the circumstances bear that risk, the issues raised are of a type that could probably only be resolved by going to court. Again, Article 89 CESL, requiring parties to re-negotiate their contract 'where performance becomes excessively onerous because of an exceptional change of circumstances' and enabling them to ask a court to adapt or terminate the contract should such negotiations fail, may also be seen from a business perspective as potentially undermining certainty in enabling any party thinking it has a losing bargain to escape the contract or have it adjusted to be more favourable. It is left unclear how the duty to re-negotiate might be enforced. Once more the spectre of ending up in court looms large over all aspects of the Article

Some of this at least can be avoided by using the freedom of contract proclaimed in the very first Article of the proposed CESL, which also allows parties to 'exclude the application of any of the provisions of the [CESL], or derogate from or vary their effects'. So it might be possible, for example, to exclude Article 89 CESL, or to provide explicitly that a party assumes the risk of a mistake so that there is no question of avoidance if a mistake is actually made. But there are limits to this. Article 1 CESL says that exclusion or variation of the provisions of the CESL is not allowed where the provisions themselves so state; as for example with the non-excludable duty of good faith in Article 2 CESL. Most of the other mandatory provisions in the proposed CESL are in fact in favour of consumers, and the B2B transaction is little affected by them. But the duty of good faith and fair dealing is a potentially far-reaching one; and one also wonders why business parties would choose to

have their contract governed by the CESL if they wanted also to exclude, vary or derogate from very many of its other provisions.

Overall, as the Law Commissions pointed out in their Joint Advice to the United Kingdom Government on the CESL proposal (published only online at <http://www.scotlawcom.gov.uk/news/advice-on-european-sales-law/> or <http://www.justice.gov.uk/lawcommission/publications/1698.htm>, 10 November 2011)), the most likely B2B setting in which the proposed CESL could prove attractive is where SMEs are dealing with each other. Such businesses lack the resources to negotiate the detailed contracts professionally drafted for each transaction that are characteristic of bigger businesses, and tend to rely instead on either pre-prepared standard forms or the default rules of whatever may be the governing law. If however standard forms are used on each side, there is the hazard of the ‘battle of the forms’, or the possibility that the other side’s form somehow comes to be the basis of the contract; if there is reliance on the governing law, it is crucial to have confidence about what that law is as well as its content. The proposed CESL contains a solution to the ‘battle of the forms’ as well as regulating B2B standard form terms ‘of such a nature that [their] use deviates from good commercial practice, contrary to good faith and fair dealing’ (Articles 39 and 86 CESL). On parties’ confidence about the governing law, the Law Commissions referred to a case brought to their attention in which the conclusion of an otherwise straightforward negotiation for a contract between a Scottish and a Polish company was held up for weeks as the parties debated what the governing law should be. The parties knew nothing of each other’s law, neither of which was accessible in any language that they knew well enough. Had the proposed CESL been in force, of course, it would have been available in all the languages of the European Union and, provided the parties were happy with what they read there, their problem could have been resolved without much delay and the consequent expenses.

### **CESL and consumer sales**

In consumer (B2C) transactions, freedom of contract is constrained, not only by the mandatory CESL provisions on consumer protection, but also by a provision in the Regulation that ‘in relations between a trader and a consumer the Common European Sales Law may not be chosen partially, but only in its entirety’ (Article 8(3) CESL). What this seems to prevent, however, is not the exercise of the freedom provided within the proposed CESL itself, to vary or replace the rules in particular Articles with other rules, but the alternative possibility, known as *depeçage* in the world of international private law, of changing non-mandatory CESL rules by a choice of some other system’s parallel but different rules. In the consumer context, in other words, the contract is to be governed by the CESL and those rules which the parties formulate for themselves when they are free to do so, rather than by a mixture of bits of the CESL and reference to bits of other laws. But the argument from the silence of the Regulation on this possibility in the B2B context seems to leave it open to business parties as between themselves.

Article 11 of the CESL Regulation provides that ‘where the parties have validly agreed to use the [CESL] for a contract, only the [CESL] shall govern the matters addressed in its rules’. This has the vital effect that only the CESL’s mandatory consumer protection provisions apply, while those parallel rules which might be found in the consumer’s normal domestic law do not. This will not matter if the CESL rules afford the same or a higher protection compared with those of the consumer’s normal domestic law, but it will be very important if the latter is in fact better. Then the effect of a choice of the CESL will strip from the cross-border consumer the benefits of the Rome I Regulation which says, simply put, that

a choice of law other than such a consumer should normally enjoy does not deprive that party of mandatory domestic consumer protection. For this reason above all, consumer groups in Europe are largely hostile to the CESL proposal. Even although as first published the proposal incorporates all the major relevant European Union consumer protection measures, there is a perhaps not wholly rational fear that this may be whittled down in the negotiating process before the CESL text is finalised; or, more intelligibly, that once the CESL is enacted Member States may either cut down their existing higher consumer protection levels or avoid any further measures of expansion in order to enable their domestic law to compete more effectively with the alternative for the hearts, minds and business dealings of suppliers. In other words, consumer protection in Europe could either become frozen at its present levels or begin to wither in a possible 'race to the bottom'.

Another key point here is that the choice of whether or not to use the CESL in consumer transactions will be primarily that of the supplier, not the consumer. It is unlikely in the extreme that a consumer wishing to buy under the CESL from a seller who does not will be able to make the latter agree to that choice. The most probable scenario is that a trader seeking to attract cross-border custom will do so by way of the Internet, declaring a choice of the CESL in advance – for example, by a notice or appropriate symbol on its website - and thereafter by trading under no other law unless dealing domestically. So the consumer will be in a 'take it or leave it' position with regard to the CESL, protected only by the Regulation's requirement that the choice must be notified by the trader to the consumer in advance of any contract by means of a Standard Information Notice and then, further, agreed by the parties separately from the contract of sale, with the trader supplying the consumer with a confirmation of that agreement on a durable medium. But consumers who want the trader's goods because this is the only source for them in the European Union, or because the price is likewise the best available, will effectively have no choice but to give up whatever advantages may be afforded them by their normally applicable domestic law.

The argument for Internet traders, on the other hand, is that the Rome I defence of a consumer's domestic protections inhibits them from offering their goods (and services) across the European Union as long as these protections remain variable around the multiplicity of jurisdictions and Member States. A particular cause of concern is information duties, the cost of meeting which in terms of the languages needing to be used as well as the variability of the requirements themselves is said to be prohibitively high. It is certainly a common experience to find it impossible to transact with an Internet trader located in another Member State because, quite apart from possible language, payment and delivery difficulties, its website will decline business from outside that country. Even a worldwide giant of an Internet business, such as Amazon, divides its websites along national lines in the European Union, with different sites for the United Kingdom ([amazon.co.uk](http://amazon.co.uk)), France ([amazon.fr](http://amazon.fr)), Germany ([amazon.de](http://amazon.de)), Italy ([amazon.it](http://amazon.it)) and the Netherlands ([amazon.nl](http://amazon.nl)), for example. In all these jurisdictions, it may be noted, Amazon currently trades under the law of Luxembourg; but in each of them Rome I ensures that nonetheless the Amazon customers at whom these sites are directed retain the benefit of the relevant local consumer protection laws.

A further point which might be made is that not all domestic consumer protection law will be displaced by the CESL, only that which applies directly in relation to the sale of goods. Thus, for example, there is no question in the United Kingdom of the consumer losing the protection provided by connected lender liability under section 75 of the Consumer Credit Act 1974. There is no direct equivalent to this elsewhere in the European Union, which does not require Member States to go so far. Its existence may at least partly explain the apparent relative confidence of British consumers in using their credit cards to pay for

Internet purchases (higher than elsewhere in Europe), because they know they can make the credit card supplier liable if the goods or services are faulty, even if the goods are purchased outside the United Kingdom (see *Office of Fair Trading v Lloyds TSB Bank* [2007] UKHL 48, [2008] 1 AC 316). Its continued operation would therefore probably be extremely important to the electronic marketplace and so to the use of the CESL to govern sale of goods transactions with payment, as will be the norm, by credit card. There may well be a further argument that the European Union could facilitate electronic commerce by making connected lender liability a Union-wide form of consumer protection.

What are the prospects for the proposed CESL? The proposal was published at an unpropitious moment for the European ideal as Member States struggled desperately to prevent the collapse of one of its vital symbols, the common currency. The chances of the CESL's making its way successfully through even the qualified majority voting process was no more clear at the time of writing (February 2012) than those of the Herculean labours to save the euro. The European Commission associated the proposal with the slogan 'Justice for Growth', arguing that in particular it would free up a hitherto latent online market worth an extra 26 billion euros to the European economy. The proposal survived a rather absurd challenge to its compliance with the subsidiarity principle of the European Union (under which the Union will only act in areas beyond its exclusive competence if objectives cannot be achieved by the Member States themselves). It had received support, not only from the European Parliament, but also from representatives of Internet traders and SMEs, including those in the UK. Some of the pre-conditions for a successful outcome to the reform process are thus in place. On the other hand there is significant opposition from consumer and legal professional groups, and it is highly uncertain whether enough Member States can be persuaded to vote for what some undoubtedly see as a challenge to domestic law, even if the latter is neither harmonised nor displaced.

As already noted, the UK Government asked the English and the Scottish Law Commissions to advise it on the subject. That advice accepted the view that the European single market was indeed potentially divided in the online consumer context, and that a common European sales law might help overcome that, but was critical of aspects of the CESL proposal as a means of tackling the difficulties. Were the proposal to be focused more clearly or exclusively on the problems of Internet trading its chances of success might be improved. The Commissions were also doubtful about whether as it stood the proposal sufficiently met the needs of SMEs in contracting across borders. On the other hand, the Commissions argued, if the CESL, or some revised version of it, was adopted, the United Kingdom should use the option of making it available for domestic as well as cross-border online consumer transactions, since Internet traders would find problematic the need to trade under different laws according to where the consumer came from. Likewise, if the CESL were to be adopted for B2B transactions, the United Kingdom should make it available in the purely domestic marketplace and not exclude non-SMEs from using it. In essence, the market should be allowed to decide the fate of the CESL, rather than governmental or vested interests such as those of the legal professions. Should it fail, then no-one would be damaged; success might on the other hand contribute to recovery in Europe, whether or not at the levels rather optimistically forecast by the European Commission. A consultation paper agreed by the UK Government, the Scottish Government and the Northern Ireland Executive was published at the end of February 2012.

This article nevertheless ends on an uncertain note, with awareness that there is sufficiently weighty opposition to the CESL proposal as to make its successful passage through the European legislative process a matter of some doubt. Such a failure would be a

matter for regret. The optional nature of the instrument if it comes into effect would be an interesting experiment with which to test the claim that the variety of domestic laws in the European Union is a barrier to the achievement of a single market. The beauty of it would be that no-one is harmed if the experiment fails to attract takers, other perhaps than those who have wasted time, intellect and energy on what has always been a risky project. But the benefits if Internet traders and SMEs in sufficient numbers did use it as a means to expand their markets more widely in Europe could be significant, and might well outweigh what in the great majority of cases would surely be a merely theoretical loss of consumer protection. There is much for which to play.

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\*The authors formed the Scottish Law Commission team in the preparation of the Law Commissions' Joint Advice referred to in this article. Save where the article summarises the Joint Advice, however, the views expressed should not be attributed to the Scottish Law Commission. The authors gratefully acknowledge the contribution of Emma Boffey, who was a member of the team until 31 August 2011.