Preface

The Proposal for a Common European Sales Law (CESL), published by the European Commission in 2011, has the aim of introducing an optional regime for cross-border sale of goods for the European Union.

The publication of this Proposal has given rise to a lot of interest not only in the academic community, but also in the world of the practitioner. The aim of this Commentary is to present a coherent view of the subject from the perspective of a number of scholars from different European countries, of whom will compare the text of the CESL with their own national law and other European legal texts. This Commentary offers a serious comparative study of the CESL alongside other instruments, such as the CISG, and also pre-existing instruments including the Draft Common Frame of Reference (DCFR) and the Principles of European Contract Law (PECL).

In the future application of the CESL it is anticipated that problems will arise in relation to the uniformity that is intended by such a European legal text requiring homogeneous application by the different national courts. The drafters of the CESL have sought uniformity in order to avoid the complexity of a European sales law resulting from the application of the different sales laws of each Member State. This Commentary, coordinated by legal scholars, whom of which are members of the Valencian Study Group for the Study of European Private Law (GEVDPE)[1], will contribute towards the achievement of this desired uniformity.

Firstly, the process of the enactment of the CESL will be analysed, in conjunction with its scope of application, covering areas such as sale of goods, supplying (licensing) of digital content, supply of trade-related services, and consumer protection. International aspects concerned with the application of the CESL will also be analysed in this Commentary, particularly as one of the main features of the CESL—unlike other international instruments—is its optional nature, i.e. the parties must agree upon its application in order for this instrument to govern the particular contract.

[1] This Book has been prepared within the framework of the Research Project DER2013-42526-R ("New legal challenges of the digital society: property, contracts, data and electronic registers"), funded by the Spanish Ministry of Science and Innovation and Prometeo Program 2011, PROMETEO 2011/23, ("Technological model of the Valencian Community").

The structure of the CESL determines the structure of this Commentary. The subjects that are regulated by the CESL may be divided into three groups: (i) aspects related to the conclusion of the contract and its content; (ii) aspects related to the performance of obligations by both parties; and (iii) aspects related to remedies in case of non-performance, including the issue of prescription of claims and other rights. The CESL adopts a simpler structure (compared to the Draft Common Frame of Reference) that is more accessible to traders and consumers. This Commentary focuses on the main aspects of the Common Sales Law proposal in more detail. In particular, the regulation of the CESL with regards to issues such as: pre-contractual information duties, unfair contract terms, the notion of conformity with the contract and the remedies in case of non-performance of obligations.

[1] Issues concerning the conclusion of contract.

Firstly, the CESL regulates matters relating to the conclusion of a contract. The provisions cover the pre-contractual information requirements. This includes the pre-contractual information required in the contract between the involved traders, the contract concluded by electronic means, the provisions that regulate conclusion of contract by the offer and its acceptance, and the provisions concerning the right to withdraw in distance provisions on the content of the contract and on unfair contract terms.

One of the questions related to the pre-contractual phase is the integration of advertising into contracts in Article 69 of the CESL where the necessary requirements of the professional supplier's pre-contractual statements are fixed, or the statements of a third party about the characteristics of the product to be incorporated into the content of the contract.

Another significant issue to take into consideration is that conclusion of contract regulated in the CESL is based on a combination of concepts derived from various legal systems. The textual part of the CESL combines some elements of common law and some elements taken from the European system. For that reason, future application of the rules will provide interesting insights into the mechanism of the reception of law into different legal cultures.

In relation to unfair contractual terms, there is a long-standing European tradition of law demanding good faith and fair dealing in contractual relationships. Therefore, this Commentary will analyse how to deal with contract terms that are considered unfair.

In addition to this, a chapter is also dedicated to the right of withdrawal that appears in the context of contractual obligations as a more modern development of the principle “pacta sunt servanda”. Nowadays the right of withdrawal is considered as an exceptional facility of only one of the parties of the contract, the consumer, enabling him or her to terminate “ad nutum”, meaning with no reason, and with retroactive contractual effect.

[2] Issues concerning performance.

Parts IV and V of the CESL are based on the approach of the CISG, containing the obligations and remedies of the parties to a sales contract, and related services contracts. In both cases, the respective provisions are preceded by a set of provisions that apply to both parties alike (Chaps. 9 and 15).

The subject of performance of the obligations is regulated in Chap. 10, which addresses the seller's obligations. Chapter 12 (Articles 123–130 of the CESL) relates to a buyer's obligations, and Chap. 14 addresses the passing of risk. Chapter 15 regulates the obligations of the parties in a service contract.

In Article 87 of the CESL the general definitions about the notions of "non-performance" and "fundamental non-performance" are recorded. This regime constitutes a unitary concept of breach of contract and, therefore, closely follows the European standard based on CISG, PECL and DCFR. In the corresponding chapter of this Commentary this question has to be analysed as the result of a development of uniform law starting with the CISG and ending so far with the notion of breach of contract in the DCFR. Similarly, the solution proposed by the CESL has to be compared to the diverging approaches of the national legal orders and the history of emergence of what will become a common European notion of breach of contract in a legal sense.

Along these lines the concept of conformity is one of the most important topics in modern Contract Law, especially concerning sales contracts, and other types of contracts for goods and services. This is particularly concerning for the CESL, where the lack of conformity constitutes a case of non-performance and in this situation makes the recourse to the panoply of remedies typical for non-performance possible.

Likewise, another issue to consider is that of the passing of risk, which is one of the most problematic topics regarding contract sales law. National laws usually link the passing of risk to abstract and general concepts, such as the conclusion of the contract, the transfer of ownership, or the transfer of the physical possession of the goods. However, these concepts are rigid and unsuited to international commercial practice. For these reasons, the CESL has opted to follow the "analytical approach" set out in the CISG. In this way Chap. 14 of CESL regulates the passing of risk in sales involving carriage of goods, when the goods are sold in transit or when the goods are placed at buyer's disposal. The CESL also expressly distinguishes between B2B and B2C contracts, ensuring a high level of consumer protection in this field.

The legal doctrine of the change of circumstances is also analysed in this Commentary. In accordance with Article 89 of the CESL, when the exact fulfilment of a contract becomes disproportionate due to an unexpected change of circumstances, the consequence is the duty to renegotiate. If, within a reasonable period of time, the parties do not reach an agreement, they may request the assistance of the court or an arbitrator. The judge may decide to adapt the contract taking into account the hypothetical will of the parties, or declare the termination of the contract and lay down the conditions for doing so. In the corresponding chapter it will be concluded that the application of Article 89 of the CESL should not be problematic in different European countries, as there are a lot of similarities between the various European legal systems in this field.

With regard to service contracts, however, the CESL only regulates those service contracts whose existence is justified by their direct link to sales contracts. This is different to the regulated under the DCFR where it provided a more exhaustive

coverage. The aim of this regulation in the CESL is to maximise the added value of the common European sales law, which justifies the inclusion in its material scope of certain services provided by the seller that are directly and closely related to the specific goods or digital content supplied on the basis of the said rules.

There is also a chapter concerned with the topic of the contract for the supply of digital content and its main aspects. This can be seen as the most novel part of the CESL and also a very important part.

[3]. Final part. General contract law issues.

The final three parts of the CESL are concerned again with general contract law issues, certain remedies (damages and restitution) and prescription.

Concretely, Part VI "Damages and interest" contains supplementary common rules on damages for loss and on interest to be paid for late payment. Part VII "Restitution" explains the rules that apply on what must be returned when a contract is avoided or terminated. Part VIII "Prescription" regulates the effects of the lapse of time on the exercise of rights under a contract.

The CESL contains, in Chapter 17 (arts. 172-177) rules relating to the scope and manner of exercising a restitution claim of whatever was supplied under a contract that has been subsequently avoided or terminated. The CESL regulates jointly restitution arising from avoidance and termination. The aim of the corresponding chapter of this Commentary is to analyse the most relevant aspects of this proposal, highlighting certain gaps in the text that could cause problems of interpretation and application.

The next chapter is dedicated to the issue of whether a remedy of compensation of damages as the right to rescind the contract and to withhold or reduce the price does not fully compensate the creditor for his loss in every case.

Finally the Commentary deals with the prescription regulated in a very complete way in the CESL, although this proposal is limited in its application to the sale of goods. This regulation takes into account several new tendencies that have emerged from a number of national legal systems. Prescription is undoubtedly a necessary doctrine; not only for obligations derived from contracts but for all types of obligations, and so its regulation in the Common European Sales Law could go on to form the basis of its regulation in a future European Civil Code.

To conclude, this Book seeks to offer a commentary on the main aspects of the CESL from the perspectives of scholars of different European countries, so that the intended impact of the CESL may be achieved in practice.

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http://www.springer.com/978-3-319-10496-6

European Perspectives on the Common European Sales Law

Plaza Penades, J.; Martinez Velencoso, L.M. (Eds.)
2015, XI, 311 p. 1 illus., Hardcover
ISBN: 978-3-319-10496-6