

CESL - the Austrian viewpoint

Although there was wide-spread skepticism among Austrian Lawyers in the beginning, today, the Austrian Bar fully supports the idea of a Common European Sales Law as optional instrument; the Austrian Bar is convinced that a coherent, comprehensive, balanced and diligently drafted Common European Sales Law will be a decisive factor in enhancing the viability of the European market, facilitating cross-border trade and increasing the competitiveness of the European economy, But at the same time, this instrument must give comfort to both consumers and traders that it provides legal certainty and that it is more or less not less advantageous for them as the current legal regime – otherwise the CESL will not be accepted and thus be a failure, which would not only be a major setback to the CESL itself but also to any further harmonisation of European Contract Law.

The Proposal for a Regulation on a Common European Sales Law does not yet fulfill the requirements necessary to become a success; let me single out some points:

- 1) The CESL will only be accepted if it actually **covers all relevant aspects of contract law** – otherwise its main advantage for traders not to be forced any longer to deal with 27 or even more different national laws cannot be achieved; in this context it must be guaranteed that consumers are not entitled to invoke their respective national law via art 6 (1) Rome-I-Convention (a question which still has to be carefully investigated); but furthermore the existing gaps must be reduced, at least provisions on representation, illegality of contracts and concurring tort claims have to be incorporated: the assumption that representation issues are less likely to become litigious is simply wrong: the lack of rules on representation, illegality of contracts and tort claims concurrent with contractual damage claims is an open gateway for national law aspects which considerably reduces the attractiveness of the instrument.
- 2) The **scope** of the CESL has to be adapted in various directions:
 - this concerns on the one hand the **territorial scope**: as an optional instrument it should be chooseable for any contracts, even if there is no EU-link: why should the CESL not be eligible in contracts concluded by

and between third-country residents - and if they choose the jurisdiction or place of arbitration in a EU Member State, even the better !

- the restriction in B2B-contracts that at least one party must be a SME is neither justifiable nor feasible at all: the criteria for qualifying as SME are complex and pose particular difficulties for businesses with more than one branch or establishment: do we actually want to force sellers to ask its customers to provide information as to the turn-over, balance sheet and number of employees before entering into a contract? do you actually believe that such need for investigations will enhance the attractiveness of the CESL?
 - the focus on sales contracts as first step is acceptable; the exclusion of mixed-purpose contracts and contracts linked to a consumer credit is highly questionable as is the exclusion of contracts for the delivery of goods other than in exchange for a price, such as, for example, welcome gifts given as an incentive for long term contracts.
- 3) **Choice of the CESL**: the Austrian Bar strongly supports the CESL as instrument to opt-in and to give this choice both sides; we firmly oppose any change to this optional character. However, the mandatory Standard Information Notice, as proposed, is less a reasonable information and invitation to choose the CESL than a warning (*„before submitting to the CESL ask your attorney of your trust“*); furthermore, the complicated and hardly workable opt-in-mechanism in B2C contracts has to be facilitated.
- 4) The CESL will only be a success, if – compared to the national laws - it is **sufficiently simple, clear, unambiguous, user friendly and coherent**; the proposed wording of the CESL does not yet comply with these requirements. A careful redrafting word by word, section by section, is indispensable; this can only be done in cooperation with experienced legislators and practitioners. In this context I refer to the detailed proposals of the European Law Institute which provide some guidance for the necessary amendments.
- However, also conceptual issues need to be discussed and carefully reviewed.

For example, the sweeping clause of art. 2 „*Good Faith and Fair Dealing*“ is the source of legal uncertainty and a massive gateway for national law influence - and thus must be considered as obstacle for the uniform application of the CESL and the envisaged harmonisation of sales law: who actually believes that a judge in Plovdiv and a judge in Plymouth, a judge in Lisbon or a judge in Kirkenes do have the same understanding of good faith and fair dealing, without the faintest guidance as to the interpretation of this clause in the CESL? Moreover, this provision is completely unsuited as instrument to limit excessive rights granted under the CESL, for example with respect to the buyer's remedies; especially, we are convinced that the CESL has not yet found the proper balance of consumer rights. The proposal grants far reaching consumer rights, such as that the consumer can exercise the remedies at any time within the limitation period, they are not subject to a notice of non-conformity within reasonable time, the trader is excluded from its right to cure and the consumer is entitled to use the product free of costs before terminating the contract. These far reaching, some say excessive, consumer rights, however, are limited by several rather vague general clauses, among them the mentioned „*good faith clause*“: this concept leads to excessive legal uncertainty which will not only discourage traders to opt-into the CESL but might even deter consumers from exercising their rights at all.

Furthermore, the rules on termination and restitution need to be fundamentally revised to increase their coherence and to remove significant inconsistencies leading to unacceptable results, as has been demonstrated by various experts, f.e. recently by the ELI.

To summarize: despite all critical comments - excellent preparatory work has already been done on the way to a European Uniform Sales Law: but this must not hide the fact that much further work with respect to some policy decisions as well as to the details has to be done. This will require sufficient time, the involvement of all stakeholders, of legal scholars, especially those which were not involved in the preparatory works as well as specialists experienced in drafting laws. We are convinced – it does not matter whether the CESL will be available in 2014 or 2015 or even later; but what matters – is the quality of the CESL. Therefore allow sufficient time to improve the quality and coherence of the CESL!

Thank you

