

Reiner Schulze\*

**What Scholars say: A Commentary on CESL  
– Brussels, 17<sup>th</sup> December 2012 –**

Ladies and gentlemen,

What scholars say on the CESL is something that I cannot summarise in full here today. There is a broad discussion and, as is usually the case for such discussions, three scholars and four different opinions. However, there is no doubt that the CESL is a crucial task for academia across Europe – for research and for teaching – because it is the first European set of rules that offers the advantages of a codification in the area of contract law. This presents important advantages with regard to legal clarity and certainty when compared with the present situation of the *acquis communautaire*, which is often criticised as being confusing and with inconsistent terminology.

As to a commentary, what scholars say can be read in an article by article review in the recently published “Commentary on a Common European Sales Law”<sup>1</sup>. 15 scholars from all over Europe have not only explained every article and every clause of this future European sales law, but have also evaluated its possible impact on contracting in legal practice as well as its strengths, problems and weaknesses.

I cannot repeat all the results of this extensive review now. Thus I want to limit myself to underline just one aspect: the innovative features of the CESL that are explained in the commentary. This aspect concerns the “fitness” of the CESL in relation to the demands of modern international legal practice. In this respect it is helpful to compare the CESL with the Vienna Convention on the International Sale of Goods (CISG) in order to highlight three new elements of the CESL: *Consumer law – standardised contracts – digital transactions*.

## 1. Consumer Law

Firstly, and above all, the CESL is innovative through the discovery of the consumer as a main actor in international contracting. The CISG (Vienna Convention) excludes contracts with consumers from its scope of application. In contrast, the CESL now presents a new approach: on the whole the CESL is business contract law – though not in the traditional sense that it only covers B–B contracts. It considers rather at least the other side to business contract law: the contractual relationships between businesses and consumers. From the European perspective this is an equally important task. With its roughly 500 million consumers the

---

\* Professor of German and European Civil Law, Westfälische Wilhelms-Universität Münster, Germany.

E-Mail: [reiner.schulze@uni-muenster.de](mailto:reiner.schulze@uni-muenster.de)

<sup>1</sup> Reiner Schulze (ed.), *Common European Sales Law (CESL) – Commentary*, (Nomos: Baden Baden, 2012).

internal market rather offers a considerable potential for B–C contracts that cross the borders of the individual Member States.

From this perspective the CESL does not exclude the consumer (as the CISG does); it does not only protect the consumer against such internationalization (as the Rome I Regulation does); it rather wants to ease the consumer’s participation in the international trade of goods and to allow him to experience, as far as possible, the benefits of a uniform law and to protect him within *this* scope. Therefore the commentary on the CESL has to explain more than 100 clauses that are specifically concerned with consumer contracts and that will establish the future legal framework of this increasing area of contracting (and of legal disputes).

## 2. Standardised Contracts

The commentary also focuses on the particular attention given to standardised contracts. The CESL considers in a number of different respects the importance of standardised contracts. It contains, for example, a catalogue of standardised information duties, mainly for distance contracts, and standard forms that the parties can use for legal acts such as the right of withdrawal. In addition, the CESL contains detailed rules on unfair contract terms in non-negotiated B–C and B–B contracts (the latter B–B with a lesser level than B–C; a highly controversial compromise between the strict judicial fairness control of standard terms in B–B contracts under German law and the more liberal tradition of other Member States). The commentary may also help to meet the challenge of defining common European interpretation of these disputed compromises.

## 3. Digital Transactions

Linked to this, the CESL, and its commentary, considers, *thirdly*, the significance of the “digital world” for cross-border contracting. *One the one hand*, this concerns contracts concluded electronically. In contrast to the traditional contract laws of many states, the CESL is not primarily designed with respect to the face-to-face conclusion of contract or conclusion via letter. Rather it considers that due to modern technology many contracts are concluded electronically, via telephone or via other distance means (often with standardised and automatic forms of communication). In light of such distance contracts the CESL therefore contains some detailed provisions, for example on the pre-contractual information duties, the conclusion of contract itself etc. *On the other hand*, the CESL provides numerous specific provisions for the supply of digital content which supplement the provisions on the sale of goods – and as one of the first contract laws worldwide to do so. This requires interpretation in many respects. Furthermore, there are good reasons to criticise that some more instruments – developed in the commercial practice – should be included into this set of rules. In the commentary one will see many critical remarks and suggestions to these issues and to others, too. Hopefully, some of them will inspire the final version of the CESL.

Thus, the commentary on the CESL would like to promote both: some improvements in this final and crucial stage of the legislative procedure as well as a common understanding and interpretation of this common European law as a basis of beginning now with teaching and learning in order to prepare lawyers for the future legal practice and to assure legal certainty in this future practice.

Allow me to conclude with three sentences:

- 1) The CESL offers a number of approaches that, in principle, better correspond to the requirements in modern-day legal practice in the internal market than most traditional national laws and the CISG.
- 2) However, these approaches need and deserve improvements in order to guarantee the success of the CESL in practice – and accordingly the legislative procedure needs and deserves comments from academics, such as in the commentary, and those to be given by practitioners and stakeholders over the coming months, which is certainly a decisive time.
- 3) If this time is used well, the Common European Sales Law could not just develop the internal market, but rather it could also go beyond Europe and stimulate future developments in international sales law – with respect to its practice and doctrine and maybe even with respect to a modernisation of the CISG and other international sets of rules.

Ladies and gentlemen, I thank you for your attention.