THE DRAFT COMMON EUROPEAN SALES LAW:
TOWARDS AN ALTERNATIVE SALES LAW?
THE DRAFT COMMON EUROPEAN SALES LAW: TOWARDS AN ALTERNATIVE SALES LAW?

A Belgian Perspective

Ignace CLAEYS
Régine FELTKAMP
(editors)
The Draft Common European Sales Law: Towards an Alternative Sales Law?
A Belgian Perspective
Ignace Claeys and Régine Feltkamp (eds.)

© 2013 Intersentia
Cambridge – Antwerp – Portland
www.intersentia.com | www.intersentia.co.uk

ISBN 978-1-78068-180-1
D/2013/7849/90
NUR 822


No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means, without written permission from the publisher.
FOREWORD

The EU Member States are on the verge of having their sales law (and beyond) supplemented with a vast new set of rules.

On 11 October 2011, the European Commission published a proposal for a regulation on an optional Common European Sales Law (the ‘REG CESL’). The main purpose of this proposal is to bring more uniformity throughout Europe among the laws of the EU Member States concerning the sale of goods, in an overall aim to break down remaining barriers to competition and to boost cross border trade.

According to the European Commission, the 27 sets of national rules lead to additional transaction costs, a lack of legal certainty for businesses and a lack of consumer confidence, thus hampering cross border trade throughout Europe.

To overcome this, the REG CESL provides a legal framework for cross border sales transactions (with a possibility for Member States to expand to domestic sales transactions) in an annex that concerns movable goods in a ‘business-to-business’ and ‘business-to-consumer’ context (the ‘CESL’).

The remit of the matters addressed by the CESL is broad. The proposed 186 articles govern the lifecycle of a sales contract, including the supply of digital content and services related to sales and the supply of digital content. They cover the contract’s coming into being (pre-contractual information duties, validity and making of a binding contract, content), performance during its life (rights and obligations of the parties), consequences of non-performance (remedies) and more general issues such as good faith performance, interpretation, change of circumstances, force majeure and prescription. When compared to Belgian law, the proposed provisions relate not only to matters that are specifically provided for sales contracts, but also to matters that are part of the law of obligations generally applicable to any type of contract.

The REG CESL also contains proposals for the elaboration of a database for the exchange of information on judgements, as well as the establishment of an expert group to develop model contract terms.
Although introduced by way of a directly applicable regulation, the framework provided by CESL is optional, implying that both parties to the sales contract have to explicitly opt for its application. Once opted for, certain provisions of the CESL are mandatory in ‘business-to-consumer’ relations.

To the extent Belgian law is to be supplemented with a set of rules governing sales transactions that will co-exist as an optional regime besides the already existing framework(s), the question arises whether these rules will be sufficiently ‘attractive’ to see them applied in practice. What changes do the new rules imply compared to the existing legal framework? How does it affect the legal position of the seller or the buyer? Will companies and consumers effectively be inclined to opt for this set of rules instead of the Belgian common sales law, the rules regarding sales to consumers or the rules contained in the Vienna convention? How do these rules integrate in and interact with the general Belgian law of obligations?

A response to these questions requires a careful examination of the different provisions contained in the CESL and a comparison to Belgian law. The Centre for Law of Obligations of the University of Ghent and the Research Unit Business & Contracts of the Free University of Brussels took up this challenge and organized on 14 September 2012 an academic conference where the content of the different provisions of the CESL were thoroughly and critically examined from particularly a Belgian law perspective. The in-depth analyses of the experts are bundled in this publication.

The work starts with a general explanation by M.W. Hesselink on the purpose, the scope of application and the functioning of the CESL. I. Claeys then assesses some key aspects of the structure, the underlying principles of the CESL and how the CESL would integrate in Belgian law. The subsequent contributions take, one by one, a closer look into the different matters addressed in the CESL. Thus this book contains an analysis of the provisions on pre-contractual information (J. Delvoie and S. Reniers), the valid conclusion of the sales contract (L. Cornelis), the right of withdrawal and unfair terms (R. Steennot), the rights and obligations of the seller and the buyer (R. De Wit), the remedies of the buyer and the seller (R. Feltkamp & F. Vanbossele), termination and restitution (J. Baeck), damages (J. Baeck), and prescription and change of circumstances (D. Philippe).

Within the general purpose of the conference and the boundaries of the matters attributed to each, the authors enjoyed their scientific freedom to determine the specific goal and method of their contribution. This explains some enriching differences of approach and interpretation.
While the dialogue and discussions on the text proposal are currently still on-going this set of analyses aims at providing a constructive contribution to the discussions.

This publication was made possible by the appreciated effort of the authors and the precious support of the administrative staff of the Ghent University (in particular Gandaius Permanente Vorming), of the Brussels University and of the publisher. The editors warmly thank all concerned persons for their participation, support and assistance. Finally the editors especially thank Prof. L. Cornelis and Prof. R. Steennot for their precious input for and support during this project and to Michaël de Potter for elaborating the index.

Prof. dr. I. Claeys Prof. dr. R. Feltkamp
Centre for the Law of Obligations Research Unit Business & Contracts
Ghent University (UGent) University of Brussels (VUB)
CONTENTS

Foreword ................................................................. v
List of common abbreviations ........................................... xvii
List of contributors ................................................... xix

How to opt into the Common European Sales Law?
Brief comments on the Commission’s proposal for a regulation
Martijn W. Hesselink ................................................ 1

1. Introduction ........................................................... 1
2. A second national regime ............................................ 2
   2.1. Opting into the CESL ≠ a choice of law .................... 2
   2.2. Implications for B2C: Article 6 Rome I Regulation ....... 4
   2.3. Implications for B2B: the CISG ............................. 4
   2.4. Substantive scope and multi-level contract law ........... 6
   2.5. A hybrid: common European and second national sales law ... 7
   2.6. Common sales law, legal education and a common European legal space .................................................. 8
   2.7. To use the law ................................................... 9
3. Agreement ............................................................. 11
   3.1. Optional nature ............................................... 11
   3.2. B2B: implied and partial choice permitted ............... 11
   3.3. B2C: explicit choice required, no cherry picking ......... 11
   3.4. Time of agreement ............................................ 12
4. Standard Information Notice ........................................ 12
   4.1. Does information protect consumers? ...................... 12
   4.2. An ill-considered sanction .................................... 14
5. Conclusion ........................................................... 15

CESL tools: issues settled, matters addressed, rules, principles, objectives and all its provisions
Ignace Claes ......................................................... 17

1. Review of four basic drafting choices of the Commission .... 18
   1.1. The lifecycle of a contract as a structuring model ....... 19
   1.3. Not limited to sales contracts ............................... 21

Intersentia ix
Pre-contractual information in the proposal for a Common European Sales Law

Jeroen Delvoie and Stijn Reniers

1. Introduction ....................................................... 43
2. Pre-contractual information duties in Belgian law: some brief notes... 45
   2.1. Introduction .................................................. 45
   2.2. Pre-contractual information in the general law of obligations ..... 45
   2.3. Some specific regimes ......................................... 46
       2.3.1. The Market Practices and Consumer Protection Act ...... 46
       2.3.2. The E-Commerce Act ................................... 48
       2.3.3. Some other specific examples ............................ 49
3. Pre-contractual information duties in the CESL .......................... 49
   3.1. Introduction.................................................. 49
   3.2. Some rules applicable to all agreements relevant for pre-
       contractual information ....................................... 52
       3.2.1. Good faith and fair dealing(?) ........................... 52
       3.2.2. Duty to ensure that the information supplied is correct
               and not misleading ...................................... 54
       3.2.3. Duty to raise awareness of contract terms not
               individually negotiated ................................. 55
       3.2.4. Contract terms derived from pre-contractual statements . 55
   3.3. Pre-contractual information in B2C contracts ..................... 56
       3.3.1. General framework .................................... 56
       3.3.2. All B2C contracts: Standard Information Notice .......... 56
       3.3.3. All B2C contracts, other than distance and off-premises
               contracts................................................ 58
3.3.4. Distance contracts and off-premises contracts .......... 60
3.3.5. Specific rules regarding distance contracts ............ 62
3.3.6. Specific rules regarding off-premises contracts ......... 63
3.4. Pre-contractual information in B2B contracts ............ 64
3.5. Contracts concluded by electronic means ................... 66
3.6. Remedies ................................................. 68
4. The interaction between the CESL and national law in the pre-
contractual phase: vigilance required .......................... 70
5. Conclusion .................................................. 72

Unaware of any evil: breath-taking, simply breath-taking – Articles
30–39 and 48–57 of the CESL
Ludo CORNELIS ................................................. 75

1. Introduction ................................................. 75
2. Disappointing and misleading principles and objectives have been set.. 76
3. Everything is possible and nothing is required (Arts. 30–39 CESL) .... 84
4. How to come to an agreement ..................................... 87
5. “The battle of the forms” ........................................ 93
6. The mainstay of obligations: their content ...................... 96
7. Defective expressions of will .................................... 99
   7.1. Background ............................................... 99
   7.2. Mistake .................................................. 100
   7.3. Fraud ................................................... 103
   7.4. Loopholes in mistake and fraud .......................... 105
   7.5. Threats .................................................. 108
   7.6. Unfair exploitation ....................................... 110
8. Conclusion ..................................................... 111

The right of withdrawal and unfair contract terms under the Proposal
for a Common European Sales Law
Reinhard STEENNOT ......................................... 115

1. Introduction .................................................. 115
2. Optional nature of the CESL .................................... 116
3. The scope of the CESL is limited to certain contracts ............ 117
4. Right of withdrawal ............................................. 118
   4.1. Scope of application of the right of withdrawal .......... 120
       4.1.1. Personal scope of application ....................... 120
       4.1.2. Material scope of application ....................... 122
       4.1.2.1. Distance contracts ............................. 122
       4.1.2.2. Off-Premises contracts ......................... 123

Intersentia
Contents

4.1.2.3. Justification of the existence of a right of withdrawal ........................................ 125
4.1.2.4. Contracts excluded from the right of withdrawal .................................................. 126
4.2. Withdrawal period ................................................................. 128
4.3. Information on the right of withdrawal ......................................................... 130
4.4. Exercise of the right of withdrawal ...................................................... 132
4.5. Effects of the exercise of the right of withdrawal ........................................... 133
  4.5.1. Obligations on the part of the trader ............................................... 133
  4.5.2. Obligations on the part of the consumer ........................................ 134
4.6. Ancillary contracts ......................................................................... 138
4.7. Conclusion as regards the right of withdrawal ........................................ 138
5. Unfair contract terms ......................................................................... 139
  5.1. Unfair contract terms in contracts between traders and consumers ................. 140
    5.1.1. The black and the grey list of unfair terms ........................................ 141
      5.1.1.1. Identical and similar prohibitions ........................................ 141
      5.1.1.2. Broader prohibitions ................................................................. 143
      5.1.1.3. New prohibitions .................................................................. 144
      5.1.1.4. Missing prohibition .................................................................. 145
    5.1.2. Other unfair contract terms ................................................................. 145
    5.1.3. Exclusions from the unfairness test ..................................................... 147
    5.1.4. Impact of the consumer’s choice to apply CESL on its protection ......... 147
      5.1.4.1. Private international law .......................................................... 148
      5.1.4.2. Role of private international law once the CESL has been chosen .... 149
    5.1.4.3. Evaluation ........................................................................... 150
  5.2. Unfair contract terms in contracts between traders .......................................... 151
5.3. Effects of unfair contract terms ................................................................. 152
6. Conclusion ........................................................................................................ 153

Duties of buyer and seller. Transfer of risk
Ralph De Wit ........................................................................................................ 155
  1. Introduction ............................................................................................. 155
  2. Brief overview of the parties’ duties in Belgian sales law ................................ 157
  3. The seller’s duties in the CESL ................................................................... 161
    3.1. Overview ............................................................................................. 161
    3.2. Place of delivery .................................................................................. 164
    3.3. Method of delivery ............................................................................... 166
    3.4. Time for delivery .................................................................................. 167
    3.5. Carriage of the goods .......................................................................... 168
    3.6. Buyer’s refusal to accept ...................................................................... 168
xii
Intersentia
4. Conformity of the goods and digital content ........................................ 169
  4.1. Principle .................................................................................. 169
  4.2. Specific rules on conformity with regard to consumers ................. 170
  4.3. Criteria for conformity ............................................................ 170
  4.4. Incorrect installation under a consumer sales contract .................. 171
  4.5. Third party rights or claims ....................................................... 171
  4.6. Time to test conformity ............................................................ 172

5. The buyer’s duties under the CESL .............................................. 173
  5.1. Overview ................................................................................. 173
  5.2. Method of payment ................................................................ 174
  5.3. Place of payment .................................................................... 174
  5.4. Time for payment ................................................................... 175
  5.5. Payment by third party .............................................................. 175
  5.6. Imputation of payment ............................................................... 176
  5.7. Reception of the goods ............................................................ 176

6. Transfer of risk ............................................................................. 178
  6.1. General .................................................................................... 178
  6.2. Consumer sales ....................................................................... 179
  6.3. Commercial sales .................................................................... 181

7. Conclusion ..................................................................................... 184

Remedies under the optional Common European Sales Law – a good alternative for Belgian sales law?

Régine Feltkamp and Frédéric Vanbossele ............................................. 185

1. Introduction .................................................................................. 185
2. General characteristics of the CESL’s remedies regime ...................... 188
  2.1. One legal framework for remedies ........................................ 188
  2.2. Autonomous and self-standing instrument ................................ 195
3. Construction of the remedies regime .............................................. 198
  3.1. General .................................................................................... 198
  3.2. Non-performance as a key triggering event for remedies .......... 199
    3.2.1. Notion .............................................................................. 199
    3.2.2. Limitations on non-performance as a triggering event ....... 206
4. Remedies of the buyer / customer .................................................. 215
  4.1. General .................................................................................... 215
  4.2. Suspension or loss of buyer’s remedies ................................... 222
    4.2.1. Seller’s right to cure ......................................................... 222
    4.2.2. Limitation in the event of non-conformity ......................... 225
    4.2.3. Remedies under CESL ................................................... 230
      4.2.3.1. Requiring performance ............................................ 230
      4.2.3.2. Withholding performance of the buyer’s obligation ....... 233
Contents

4.2.3.3. Termination for non-performance ............. 234
4.2.3.4. Price reduction ................................ 239
4.2.3.5. Compensation for damage .................. 240

5. Remedies of the seller / service provider ............. 244
   5.1. General ............................................. 244
   5.2. Remedies ........................................... 246
      5.2.1. Requiring performance of the buyer’s obligations .... 246
      5.2.2. Right to withhold performance ................. 247
      5.2.3. Termination ................................. 247
      5.2.4. Interest and damages .......................... 250

6. Conclusion ........................................... 250

Damages and interest under the CESL proposal: not too different from Belgian law

Joke Baeck ............................................. 255

1. Scope of Chapter 16 CESL ................................ 255
2. Requirements for damages .............................. 256
   2.1. Non-performance ..................................... 256
   2.2. Loss ................................................ 257
   2.3. Causation ......................................... 258
   2.4. Excused non-performance .......................... 260
   2.5. Not required: notice of the non-performance ....... 261
3. Measuring damages ...................................... 262
   3.1. General measure .................................... 262
   3.2 Specific guidelines (when the creditor has terminated the contract) .................. 263
      3.2.1. Substitute transaction .......................... 263
      3.2.2. No substitute transaction ....................... 264
   3.3. No provisions on penalty clauses .................... 265
4. Contributory negligence .................................. 265
5. Mitigation of loss ...................................... 267
6. Late payments ......................................... 268
   5.1. Late payments by consumers ........................ 269
   5.2. Late payments by traders ........................... 272
      5.2.1. Late payment of the contract price ............ 272
      5.2.2. Late payment of a sum of money other than the contract price ........ 277
7. Conclusions and recommendations ........................ 278
Restitution under the CESL proposal: to be revised...
  Joke BAECK .......................................................... 281

1.  The basic principles of the restitution regime ......................... 282
2.  The restitution rules in detail ................................. 283
  2.1.  Restitution of goods .................................. 283
    2.1.1.  Restitution in kind is possible .................. 284
    2.1.2.  Restitution in kind is no longer possible .......... 284
    2.1.3.  Restitution of fruits .................................. 287
    2.1.4.  Payment for use ........................................ 287
    2.1.5.  Compensation for expenditure .................... 288
  2.2.  Restitution of money ..................................... 289
  2.3.  Restitution of digital content .................................. 290
  2.4.  Restitution of related services .......................... 292
  2.5.  Exception for contracts to be performed in instalments or parts 293
  2.6.  Flexibility clause ........................................ 295
  2.7.  Mandatory nature ....................................... 296
3.  Conclusions and recommendations .................................. 297

CESL: change of circumstances and prescription
  Denis PHILIPPE ................................................... 299

1.  Change of circumstances ........................................ 299
  1.1.  Belgian law: an overview .................................. 299
    1.1.1.  Definition ........................................... 299
    1.1.2.  Recognition in Belgian law .......................... 300
  1.2.  Hardship in the CESL ..................................... 303
    1.2.1.  Scope of application .................................. 303
    1.2.2.  Conditions of application .......................... 304
      1.2.2.1.  ‘After conclusion’ condition .................. 304
      1.2.2.2.  ‘Excessively onerous’ condition ............... 304
      1.2.2.3.  Force majeure and hardship .................. 305
      1.2.2.4.  Risk ............................................. 305
    1.2.3.  Burden of proof ....................................... 305
    1.2.4.  Effects ............................................... 306
      1.2.4.1.  Negotiations .................................. 306
      1.2.4.2.  The judge ....................................... 307
      1.2.4.3.  Revision criteria .............................. 307
  2.  Prescription ..................................................... 308
    2.1.  Scope of application .................................. 308
    2.2.  Nature ................................................... 309
    2.3.  Duration .................................................. 309
Contents

2.3.1. General trend toward shorter terms of prescription ...... 309
2.3.2. Sales to the consumer .................................. 310
2.3.3. Short prescriptions of Belgian law ...................... 311
2.4. Commencement ............................................. 311
2.4.1. How to apprehend the concept of knowledge of the fact
       in the short time bar period ............................ 312
2.4.2. Commencement of the long period ........................ 312
2.4.3. Continuing obligation ................................ 313
2.5. Extension ................................................... 313
2.5.1. Suspension ............................................ 314
2.5.1.1. Procedure ..................................... 314
2.5.1.2. Effects of the suspension ......................... 316
2.5.1.3. Negotiations .................................. 316
2.5.1.4. Other grounds for suspension ..................... 317
   a) Can fraud suspend the long term
      prescription? ......................................... 318
   b) Contra non valentem non currit praescriptio ......... 318
   c) Prescription between spouses ....................... 318
2.5.1.5. Effects of the suspension ........................ 319
2.5.2. Prolongation of prescription ............................ 319
2.5.2.1. Judicial procedure .............................. 320
2.5.2.2. Postponement of expiry in case of incapacity .... 320
2.6. Effects of prescription ........................................ 320
2.7. Agreements concerning prescription .......................... 321
3. Conclusions ...................................................... 322

Index ................................................................. 323
LIST OF COMMON ABBREVIATIONS

B2B  business to business
B2C  business to consumer
C2C  consumer to consumer
CC   Belgian Civil Code
CESL Common European Sales law, Annex I of the REG
CJEU Court of Justice of the European Union
E-Commerce Act Act of 11 March 2003 on certain legal aspects of information society services (‘Wet betreffende bepaalde juridische aspecten van de diensten van de informatie-maatschappij’ / ‘Loi sur certains aspects juridiques des services de la société de l’information’), Belgian State Gazette 17 March 2003
ELI Statement Statement of the European Law institute on the Proposal for a Regulation on a Common European Sales Law available at: http://www.europen-
List of common abbreviations

lawinstitute.eu/fileadmin/user_upload/p_eli/
Publications/S-2-2012_Statement_on_the_Proposal_
for_a_Regulation_on__a_Common_European_Sales_
Law.pdf

EC  European Commission
EU  European Union
MPCPA  Market Practices and Consumer Protection ACT of
6 April 2010 (‘Wet betreffende marktpraktijken en
consumentenbescherming’ / ‘Loi relative aux pratiques
du marché et à la protection du consommateur’),
Belgian State Gazette 12 April 2010

PECL  Principles of European Contract Law, H. Baele and
O. Lando (eds.), Principles of European Contract
l-Law, Parts I and II, prepared by the Commission
on European Contract Law, The Hague, Kluwer Law

REG CESL  Proposal of 11 October 2011 for a regulation of the
European Parliament and of the Council on a common
European sales law, 2011/0284 (COD), SEC (2011) 165
files/common_sales_law/regulation_sales_law_en.pdf

Rome I Regulation  Regulation (EC) N° 593/2008 of 17 June 2008 on the
law applicable to contractual obligations, OJ L 4 July
2008, 177/6

Rome II Regulation  Regulation (EC) N° 864/2007 of the European
Parliament and of the Council of 11 July 2007 on the
law applicable to non-contractual obligations
(Rome II), OJ L 199, 31 July 2007

TFEU  Treaty on the Functioning of the European Union

UCTD  Directive 93/13/ECC of the Council of 5 April 1993
on unfair terms in consumer contracts, OJ L 95,
21 April 1993
LIST OF CONTRIBUTORS

Prof. Dr. Joke Baeck, Ghent University (UGent)

Prof. Dr. Ignace Claeys, Ghent University (UGent), attorney at the Brussels bar

Prof. Dr. Ludo Cornelis, University of Brussels (VUB), attorney at the Brussels bar

Prof. Dr. Jeroen Delvoie, University of Brussels (VUB), attorney at the Brussels bar

Prof. Dr. Ralph De Wit, University of Brussels (VUB) and University of Antwerp (UA), attorney at the Antwerp bar

Prof. Dr. Régine Feltkamp, University of Brussels (VUB), attorney at Brussels bar

Prof. Dr. Martijn Hesselink, University of Amsterdam

Prof. Dr. Denis Philippe, University of Louvain (UCL), attorney at the Brussels and Luxembourg bar

Mr Stijn Reniers, attorney at the Brussels bar

Prof. Dr. Reinhard Steennot, Ghent University (UGent)

Mr Frédéric Vanbossele, Commercial Contract Manager Hewlett-Packard, Geneva