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# Common European Sales Law: A Practical View

NOTE

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POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

# Common European Sales Law: A Practical View

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**Abstract**

This paper provides a comment on the legislative history of the Common European Sales Law from the perspective of a former rapporteur. It dealings particularly with the importance of many of the practical surrounding and related measures such as the provision of standard terms and conditions of trade and ADR and ODR necessary to make the proposal a success.

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## AUTHOR

Diana Wallis
Solicitor and Accredited Mediator and the European Parliament previous rapporteur on the Commission Green Paper on policy options in Contract Law and until January 2012; the co-rapporteur on the CESL proposal.
dianawallis@rocketmail.com

The contents of this paper reflect my own personal views; they are not the views of any political group or party, nor of any professional or other body that I may be associated with.

## RESPONSIBLE ADMINISTRATOR

Danai PAPADOPOULOU
Policy Department C: Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: danai.papadopoulou@europarl.europa.eu

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## DISCLAIMER

# 1. A LITTLE BIT OF HISTORY

The idea of a European contract law in various forms has a long history in the European Parliament; it is not something of sudden or recent invention. Certainly it was a continuing and changing discussion during my whole twelve years in the Parliament, during which I was continuously a full member of the Legal Affairs Committee and its predecessor Committee the Internal Market and Legal Affairs Committee. Indeed the first positive parliamentary resolution on the subject dates back to 1989.

I entered Parliament in 1999 following twenty years of legal practice, mainly in London dealing with cross border European litigation, so I was no stranger to the practicalities of these issues. I was immediately made painfully aware of the problems of legislating in a balanced and progressive manner to encourage the then fairly new medium of e-commerce. At that moment I was the rapporteur on the Brussels 1 Regulation and at the same time our committee dealt with the E-commerce Directive. It was then that we were confronted with traders wanting keep disputes in their own national courts, where they could assert the use of their own national contract law, which would have deprived consumers of access to their local courts and potentially of the protections afforded by the mandatory and other rules of their own national law. This basic conundrum has dogged our exploitation of the full potential of the Internal Market. Whilst some might argue that full-scale harmonisation of consumer law would provide the answer; the political difficulties of further progress in this direction were clearly shown during the discussions on the Consumer Rights Directive. For the moment that route would appear exhausted and in any event does not address the issue of cross border B-to-B transactions.

My own time as a practicing lawyer demonstrated to me on an almost daily basis the shortcomings of European traders and consumers trying to relate to one another across the legal and linguistic barriers of each other' s national contract law. Supposing there were contract terms, there was often a so-called 'battle of the forms' as to whose terms applied, and if that could be ascertained there were then big surprises in 'foreign' law awaiting the uninformed. Litigation around such issues could be long, costly and often unsatisfactory; certainly in terms of encouraging intra-community trade. Sadly despite our best efforts as European legislators I am not convinced a lot has changed. I am sure most are now familiar with the 2007 report of the UK Federation of Small Businesses which estimated that compliance with the Rome 1 Regulation, that is adopting the consumer' s national law could entrain costs of € 15000 per jurisdiction (presumably mainly legal) in terms of compliance. Such transaction costs are clearly highly dissuasive for the average SME wanting to take advantage of the cross border potential of Internet based trade, meaning also that the offer and choice made to European consumers is greatly reduced.

Discussions on addressing European contract law differences have thus continued over the intervening years. There have been ideas of a so called tool box for legislators, backed by the Common Frame of Reference on Contract Law; a form of high class 'better legislation' tool, but whilst potentially helpful, it's direct practical effect could be limited. Then always hovering in the background of these discussions has been the persistent fear that any move towards a European contract law is in fact the first step on the road to a full-blown European Contract Code. Even the suspicion of such a political destination, however long term, has made the discussions surrounding any proposals in this area particularly fraught in jurisdictions like my own; there is huge mistrust about what this means for national legal systems.

However this is the appeal of the legislative proposal actually now on the table, being an optional choice as between the parties, the effect on national law is minimal to non-existent. The systems co-exist. This proposal is in many ways the right political proposal at the right political moment; it is limited, it is optional and in a time of economic difficulty it could help deliver a boost to trade.

My belief has always been that this is how the proposal should be viewed as a trade or business facilitating instrument; this is about putting contracting parties together on the same page at the beginning of their relationship. This proposal is not about a detailed law book for litigation, this should be in the best sense 'preventative' law, law that is litigation adverse.

This does not mean that there is not much work to be done to ensure that CESL is a success; indeed many of the issues have been pointed out by other experts and the joint-rapporteurs. I intend to limit my observations to a number of practical issues that seem important to me.

# 2. THE DRAFT REGULATION ON A CESL: SELECTED ISSUES

## 2.1 Scope

I have always believed that the optional instrument (exactly because it is *optional* ) should be as widely available as possible, in my initial report on the Green Paper a number of limitations were suggested, partly as it were to calm nerves. With hindsight that may not have been such a good idea; any boundaries or cut off points have the potential to raise problems of interpretation; in the sense of what is cross border or what is a SME? It is clear if limitations are to remain they will have to clarified beyond doubt, and particularly the limitation to SMEs; indeed the definition of such would seem to be an artificial barrier, unduly and unnecessarily curtailing and complicating the free choice of the parties to use the instrument.

In terms of scope there has also been a developing narrative that the best way forward would be to use the instrument first in relation to Internet trade only. This is clearly a justifiable political choice but would perhaps unfairly discriminate against other forms of distance and cross border trade conducted either by telephone or mail order.

## 2.2 Language

One on the potential big advantages of CESL has to be the fact that for the first time we would have a basic contract law available in all the community languages, the impact of this should not be underestimated. Nor the task of getting all the language versions to the best standard possible, and this is not an adverse remark as to the abilities of the Union's lawyers linguists, this could make or break the success of the instrument. My own legal education (unusually for a Brit) began in Switzerland and I was always much impressed by the simple resonant language of the Swiss Civil Code in both French and German. Whether such linguistic clarity and agility can be achieved across all the community languages remains to be seen but the attempt will need to be made and perhaps a specific working method developed to facilitate this.

## 2.3 Standard Terms

Very much linked to the issue of language and understanding is the availability of off the shelf standard contract terms, or full terms and conditions of trade written in conformity with CESL. This was something I brought into my initial report. It came from practical experience. Firstly my own experience as a young lawyer, seeing the difficulties of parties not clearly agreeing and understanding terms in cross border transactions, and secondly re-enforced by discussions with SMEs in my own region as an MEP.

I was hugely disappointed to see this aspect relegated to the later flanking measures in the Commission proposal. In my view such terms need to be developed in tandem with the work on the legislative text itself, indeed there is an argument that working on such terms and conditions which will have to be used by parties would help flush out any practical difficulties. One process would inform and improve the other. This is not to say that the Commission is necessarily the appropriate draughtsman for this exercise but perhaps rather various professional, trade and consumer bodies on behalf of their members, with final standard forms being approved by the Commission as being in conformity with CESL.

The availability of such approved off the shelf standard terms is in my view central to the utility of CESL, it will only be used if it represents a saving and an advantage; for every SME to have to re-invent the wheel would arguably be no great improvement on the current position. However this should in no way restrict the freedom of the parties to make their own arrangements against the backdrop of CESL should they so wish.

The advantage of approved terms could also be a guarantee of quality and protection in consumer contracts giving confidence that an approved formula is being used. Also as stated above, with the complimentary advantage, if the idea is followed through, of being available in the consumers own language in a reliable form.

Clearly the methodology and economics of developing, translating and approving such terms will have to be decided upon, but should not be impossible.

## 2.4 ADR / ODR

The other discussion which followed me through my parliamentary career was that surrounding ADR and ODR. It dates back to the original conundrum I described above which became clear on dealing with the Brussels 1 Regulation and the E-Commerce Directive. As a direct result of the difficulties over jurisdiction versus country of origin principle provisions were including in Parliament' s final report on Brussels 1 asking for work on ADR and indeed ODR. There has been progress in the intervening years which is about to reach fruition with the Directive on ADR and Regulation on ODR in consumer cases, but there is a need to adopt a holistic approach ensuring that these instruments are integrated into CESL and vice versa. This should not be jeopardised in any way just because these instruments are dealt with by different Commission DGs, and different parliamentary committees.

The EU has taken a welcome leadership role in promoting one form of ADR through the Mediation Directive, it has the chance to encourage a different more citizen friendly form of dispute resolution through linking ADR, ODR and CESL. Of course some parties will resort to traditional litigation but this should be the limited exception. The approach of CESL should be to prevent disputes in the first instance, but where they do occur to provide linkage to a simple resolution system that again both parties will have clearly and knowingly agreed upon.

## 2.5 Consumers, equality of bargaining power.

If I had ever been in any doubt, it was absolutely clear to me whilst acting as Parliament's rapporteur on the Green Paper that this initiative would (and indeed should) only progress if it had a very high level of consumer protection. That cannot be a matter of lip service, it has to be a demonstrable reality. There seems to be some consensus that CESL does achieve such a high level but valid concerns remain around complexity and equality of bargaining power, does the consumer have any choice if they prefer their national law for whatever reason?

As consumers we are all constantly confronted with on-line tick boxes, which ask for our assent otherwise we cannot proceed. What the EU needs to assure is that the consumer knows when they are being asked to accept CESL and that in doing so they can have confidence: indeed greater confidence than when currently being forced into another unknown national law.

# 3. PROMOTING THE INSTRUMENT

Of course I hope that CESL will be good and attractive to potential users in terms of content, but being good will not be enough, it will need to be promoted. I fear, if as in other EU instruments, promotion is left to Member States to 'encourage' the use of CESL we may not see the take up we hope for. We are all familiar with blue flag beaches, and EU passenger rights posters at airports, it will take something like this to promote CESL - perhaps the famous 'blue button'.

I have made no comment about the long running discussions about subsidiarity or legal base. If the proposal gathers enough momentum these issues will surely recede in importance. However the irony I encountered as rapporteur was the interest from outside the EU; from UNICITRAL and from China! The sadness would be if the EU does not have the political courage to proceed with an optional contract law instrument, others can see the potential of what is suggested, it should and be could be one of the missing pieces in helping deliver the untapped potential of the Internal Market, particularly but not only in its on-line form.

It maybe appropriate to finish with a quote from Commercial Law by Professor Roy Goode first published in 1982 that is thirty years ago and before the advent of the Internet. Whilst he was writing in the context of B-to-B transactions, the Internet also gives a new relevance to his words in relation to B-to-C transactions within the Internal Market. We could think of CESL as the optional *lex mercatoria* of the Internal Market.

The ever increasing volume and complexity of international trade have led to the resurgence of interest in a new *lex mercatoria*. This process will be accelerated by the steadily mounting volume of European Community law, and by an increasing awareness that with the globalisation of markets and transactions a move from domestic laws of international trade towards a more harmonising transnational commercial law is essential."

Such a law as an optional instrument is now within our grasp, it contains aspects of and is informed by all our legal traditions, its use will be entirely at the option of the parties which must surely be the ultimate in terms of subsidiarity.

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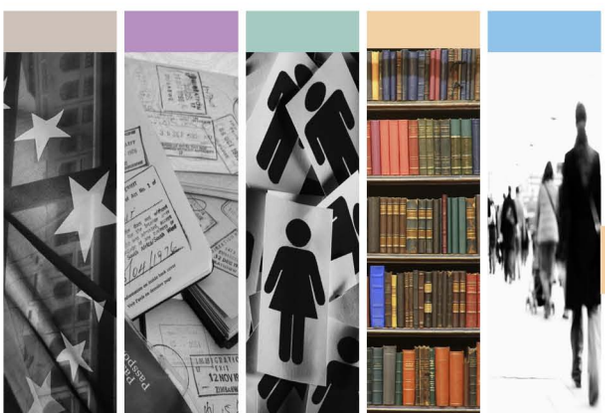

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