

European Parliament Committee on Legal Affairs

Draft Report on the proposal for a CESL (18.2.2013)

Presentation by Professor Hugh Beale

Introduction

I am very grateful for this opportunity to give evidence to the Legal Affairs Committee, and in particular to comment on the Draft report of the Rapporteurs. I applaud and welcome the Draft Report, and in particular its support for a proposal that I believe is, in general terms, a very good one.

I believe that the CESL has the potential to benefit consumers significantly by encouraging more cross-border sales, particularly by SMEs, without significantly disadvantaging consumers, even those who are habitually resident in a Member State that on some issues has higher level of consumer protection than would be provided by the CESL. Even for those consumers, the overall level of protection offered by the CESL is very high – and it would remain so even if some of the changes discussed by the Rapporteurs, such as some restrictions on the consumer's right to terminate in cases of non-conformity – were to be adopted.

I believe that the CESL also offers significant advantages for SMEs in B2B contracts. Not only would it provide a uniform and readily-understandable set of contract rules; also it would provide a level of protection (for example, against unfair standard terms, non-disclosure where good faith and fair dealing required disclosure, and other forms of unacceptable contractual behaviour) which is not provided by the CISG nor by many national laws of contract, including my own.

Nonetheless, there are quite a number of difficulties with the current proposal. I have found the Rapporteurs' proposals to be generally very helpful in this

respect. However, in some cases I see difficulties with the draft amendments; and in others I believe the amendment would be a mistake.

I have submitted to the Rapporteurs a General Note, in which I deal with the points made by the Rapporteurs in their Explanatory Statement, and also an annotated version of the Draft Report, in which I have made comments on other amendments. I would be happy to discuss any of the points with the Rapporteurs or members of the Committee at any time.

I note that the Rapporteurs have taken into account the Statement on the CESL prepared by the ELI. In the documents that I have prepared, I have not repeated points made by the ELI. I would ask the Rapporteurs to note that I agree with all the conclusions in Part A of the ELI Statement. I only wish that it had been possible to involve the ELI at an earlier stage in the process, so that we could have benefitted from its expertise before the Commission's proposal was finalized.

In my presentation, I will concentrate on a small number of points where I have concerns over the Rapporteurs' provisional proposals.

Scope

I agree that the CESL should be targeted primarily at distance contracts. However, I do not see that it needs to be limited to them. If parties wish to use the CESL for contracts that are made by other means, they should be free to do so.

Good faith and fair dealing

For reasons I explain in my written Note, I support the "shield only" approach.

However, I would caution strongly against the proposed new definition of good faith, and particularly the reference to abuse of rights. There is a very serious danger that this will be interpreted to mean that there is only a lack of good faith

if the party acted with the intention of harming the other party, or at least with reckless disregard for the other's interests. That is much narrower than the meaning of good faith, as I understand it, in most legal systems. A party is not expected to put the other party's interests first – the definition of good faith and fair dealing in the CESL clearly does not require that - but a party is expected to pay reasonable regard to the other's interests.

This can be illustrated by the question on when a non-individually negotiated term should be considered to be unfair – which in many countries (though not all) is thought to be a matter of good faith. Harsh clauses, even in consumer contracts, are seldom inserted with the intention of causing a loss to the consumer, nor even in conscious disregard of the consumer's interests. They may be treated as unfair if the trader has merely drafted the term in its own interests without taking reasonable account of the consumer's interests also.

If time permitted, I could give many other examples of Articles in which good faith and fair dealing has the same, broader meaning.

So I would plead for Amendment number 35 to maintain the CESL definition of good faith and fair dealing.

Duty to raise awareness of terms

I have explained in the document I have submitted that it is essential that Article 70 is NOT limited to consumer contracts, as the Rapporteurs have provisionally proposed. Even in a B2B contract, transparency is essential. Each party should be given a reasonable opportunity to find out what terms are being offered.

Freedom of contract in B2B contracts

I quite agree with the Rapporteurs' concern that as between traders, there should be as little interference as possible with freedom of contract. Between traders, either party should be free "to drive a hard bargain". However, we need

to draw a clear distinction between fairness in substance and “procedural fairness” (or transparency).

A trader who knows what the terms offered by the other party are and what they mean, yet who nonetheless agrees to those terms, is taking a conscious risk should be given relief only in extreme circumstances.

But the CESL should insist on transparency. A party should be held to a hard bargain only if it was given a reasonable opportunity to find out what the terms on offer were. As an English judge put it, the other party should “lay its cards face-up on the table”.

In other words, we should allow freedom of contract as between traders but at the same time, we should require a high degree of transparency – particularly in an instrument designed for use by SMEs.

The Expert Group discussed these issues at some length, and agreed on a two-track approach. Relief against non-negotiated “unfair” terms on the grounds of unfairness in substance would be limited to really outrageous cases. The test in what became Article 86 of the CESL (“grossly deviates from good commercial practice, contrary to good faith and fair dealing”) was intended to reflect this. But in the Feasibility Study, a high degree of transparency was to be assured by a separate article on *Surprising terms included in standard terms*:

A term contained in standard terms supplied by one party which is of such a surprising nature that the other party could not have expected it is unfair for the purposes of this Section unless it was expressly accepted.
(FS Art 87.)

(The article is very similar to §305c BGB.)

For some reason that I do not know, the Commission decided to omit this article from the CESL. Instead, any unfairness because of lack of transparency would

have to be dealt with under Article 86 CESL, the general provision on unfair terms. A reference was added to “the circumstances prevailing during the conclusion of the contract”, presumably to encourage the court to look at issues of procedural fairness. However, the basic test of unfairness in a B2B contract - “gross deviation from good commercial practice” - was left unchanged. To my mind this test is not the correct test to apply to questions of transparency. As I have already explained, between businesses, parties must be free to drive a hard bargain – but they should have to do it in a transparent way. I very much hope that the Committee can see its way to proposing an amendment that will restore the balance that the Expert Group intended.

This could be done in one of two ways:

- (1) by re-inserting a “surprising term” provision or
- (2) by amending Art 86 to require that in a B2B contract, a term may be unfair:

EITHER because it is not reasonably transparent,

OR because, in substance, it grossly deviates from good commercial practice,

In either case, contrary to good faith and fair dealing.

Remedies of the buyer

I agree that the buyer’s remedies in the case of non-conformity go very far. I fully support giving the consumer an immediate right to terminate the agreement without having first to ask the trader for repair or replacement, which may take some time or cause some inconvenience to the consumer even if neither the delay or nor the inconvenience is “unreasonable” in the circumstances. But I think it would be better to apply a short time limit such as the 30 days recommended by the English and Scottish Law Commissions. After that period, the consumer should be entitled to terminate (or reduce the price) only if the trader has been asked to repair or replace the goods and either repair or

replacement is not feasible or the trader has failed to repair or replace within a reasonable time, etc.

Even with this change, the consumer would be significantly better placed than under the minimum requirements of the Consumer Sales Directive – and the overall level of consumer protection offered by the CESL would remain very high.

Restitution

I welcome the attempt to reformulate the provisions of this Chapter. I also welcome the attempt to give it a broader scope of application. I have reservations about the wording proposed by the Rapporteurs; these are explained in my Note.

Digital content

I have a concern over digital content which I would like to put before the Committee. It is that the consumer's rights to receive digital content that conforms to the contract are not made mandatory. For contracts for the sale of goods, Article 99(3) provides that any agreement derogating from articles 100, 102 and 103 to the detriment of the consumer is valid only in very limited circumstances. I am sure that the Commission intended the consumer who buys digital content to be similarly protected, but art 99(3) applies only to "consumer sales contracts" and the definition of this and of "sales contract" sale in Arts 2(k) and 2(l) do not include contracts for the sale of digital content which is not "goods", i.e. is not supplied on a tangible medium. I hope this can be put right.