EU’s Proposed Sales Law Hits the Shelves

The Commission has, today, published its Proposal for a Regulation on a Common European Sales Law, as a consequence of its 2010 consultation on contract law in the EU and the work of the Commission’s (not uncontroversial) expert group. As expected, the proposed Common European Sales Law (CESL) takes the form of an optional instrument, which would apply only through the agreement of the parties to a contract falling within the scope of the instrument (which has contracts for the sales of goods at its core).

The Proposal marks the start of what seems likely to be a lively debate within and outside the institutions of the European Union. As a first reaction (and admittedly without having had sufficient time to explore the detail of the Proposal, which runs to 115 pages), it is suggested that two introductory points may be of particular interest to followers of this site.

First, the sole proposed legal basis of the measure is the internal market harmonisation power in TFEU, Art. 114. No reliance is placed on the civil justice power in TFEU, Art. 81.

Secondly, it is proposed that the Regulation should operate alongside (and not in lieu of) the choice of law regime established by the Rome I Regulation. According to Recital (10):

> *The agreement to use the Common European Sales Law should be a choice exercised within the scope of the respective national law which is applicable pursuant to Regulation (EC) No 593/2008 or, in relation to pre-contractual information duties, pursuant to Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Regulation (EC) No 864/2007), or any other relevant conflict of law rule. The agreement to use the Common European Sales Law should therefore not amount to, and not be confused with, a choice of the applicable law within the meaning of the conflict-of-law rules and should be without prejudice to them. This Regulation will therefore not affect any of the existing conflict of law rules.*

Recital (12) emphasises that, since the CESL contains a complete set of fully harmonised mandatory consumer protection rules, there will be no disparities between the laws of the Member States in this area where the parties have chosen to use the CESL. Consequently, Art. 6(2) of the Rome I Regulation, which guarantees to the consumer the protection of non-derogable provisions of the law of his country of habitual residence, is said to have "no practical importance for the issues covered by the Common European Sales Law". Recitals (27) and (28) emphasise that the national law applicable under the Rome I and Rome II Regulations (or other rules of private international law) will apply in any event to matters falling outside the CESL.

The exclusive character of the CESL, when chosen by the parties, is affirmed by the first sentence of Article 11 of the Regulation, which provides that, where the parties have validly agreed to use the CESL for a contract (see Art. 8), only the European Sales Law shall govern the matters addressed in its rules. The second sentence of Art. 11 addresses pre-contractual duties.

This seems all very well when the law applicable to the contract under Arts. 3, 4 or 6 the Rome I Regulation (as applicable) is the law of a Member State, but what if it is the law of a non-Member State? Can Art. 10 be taken at face value in preserving the integrity of the Rome I and Rome II Regulations, or must the CESL be understood as being superimposed on the law applicable under the Rome I Regulation and (if so) on what basis? Recital (14) touches on this issue. It states that the CESL should not be limited to cross-border situations involving only Member States, but should also be available to facilitate trade between Member States and third countries. It continues by suggesting that:

> *Where consumers from third countries are involved, the agreement to use the Common European Sales Law, which would imply the choice of a foreign law for them, should be subject to the applicable conflict-of-law rules.*

It appears, therefore, that the proposed Regulation may contemplate that the choice of the CESL would involve an implicit choice under the Rome I Regulation of a law other than that of the third country consumer's country of habitual residence. The question is "Which law?", as Art. 3(1) of the Rome I Regulation requires that the law chosen be the law of a country, and not a choice of non-national law such as the CESL? In a contract between a seller habitually resident

in an EU Member State and a consumer habitually resident in a non-Member State, one might argue that the choice of the law of the seller's State (including the CESL, as applicable in that State under the proposed CESL Regulation) may be demonstrated with sufficient clarity by the terms of the contract (Art. 3(1))? What, however, if the contract also (perversely) contains a choice of a third country's law? Does Art. 11 of the proposed Regulation then confer on the CESL rules the status of (party chosen) overriding mandatory provisions under Art. 9(2) of the Rome I Regulation, so as to trump the expressly chosen law, or does the CESL take effect as if incorporated by reference into the contract insofar as this is possible under the chosen law? Finally, even if a choice of a particular Member State's law can be clearly demonstrated, so as to give effect to the CESL, can the third country consumer still rely on more favourable protection under the law of his habitual residence, in line with Art. 6(2) of the Rome I Regulation (and in apparent contradiction of Recital (12))? These questions are likely to see more air time in the forthcoming legislative process. The point made here is that the proposed CESL and the Rome I Regulation do not, as Recital (10) and other parts of the Proposal appear to suggest, pass like ships in the night.