

Common European Sales Law, Third States and Consumers

This is the second post of a series discussing conflict issues raised by the European Commission's Proposal for a Regulation on a Common European Sales Law.

From a choice of law perspective, two important features of the Proposal are that the Common European Sales Law (CESL) would be optional, and that it would not be a 28th regime, but rather a second regime in the substantive law of each Member State. As a consequence, the CESL would only apply if the parties agree on its application, and if the law of a Member state is otherwise applicable. The CESL will, as such, never govern a contract; the law of a Member state will and, as the case may be, within this law, the CESL.

In the first post, I discussed the issues that the Proposal would raise for B2B contracts. Specifically, I argued that it was unrealistic to expect small and medium businesses to appreciate the difference between choosing CESL and choosing the law governing their contract, and that many contracts providing for CESL might thus fail to provide for the applicable law. I thus concluded that CESL should provide a rule ensuring that the law of a member state would govern in such cases.

In this post, I focus on B2C contracts.

The Impact of CESL on the Operation of Article 6, Rome I Regulation

The Proposal claims that the CESL does not affect applicable choice of law rules. For B2C contracts, this means that the applicable law should be determined by application of either Article 6 of the Rome I Regulation for contracts falling within its scope, or else by Articles 3 and 4.

Recital 14 of the Preamble to the Draft Regulation states:

The use of the Common European Sales Law 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. 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.

Despite the claim that the operation of the Rome I Regulation is unaffected, however, the European lawmaker does not want to apply article 6(2) of the Regulation. The Preamble further states that there is no need to compare the protection afforded to the consumer by the law chosen by the parties with CESL, because this law will not, it is argued, afford a higher protection than CESL.

Situation one: Article 6 does not apply

Some B2C contracts do not fall within the scope of Article 6 of the Rome I Regulation, for instance because the consumer was active rather than passive (see also Article 6(4)). In such cases, Article 4 will determine the applicable law absent a choice by the parties, and the law of the habitual residence of the seller will typically govern.

The analysis for B2B contracts is thus valid.

Situation two: Article 6 applies

For B2C contracts falling within the scope of Article 6, the law of the habitual residence of the consumer will govern the contract absent a choice by the parties.

If the parties choose CESL, but fail to choose the applicable law, a problem will arise when the consumer will be based outside of the European Union. The law of a third state will govern the contract, and it will thus be impossible to elect CESL within a legal system which does not include it.

As argued in my previous post, one way out of this would be to include a rule of interpretation in the CESL Regulation providing that the choice of CESL is an implicit presumption that the parties chose the law of a Member state. In contracts falling within the scope of Article 6, the problem will arise when the consumer will have his residence outside of the EU. As CESL is only available when one of the parties has its habitual residence in the EU, this would mean that the seller would have its habitual residence there. The rule should thus provide a presumption that the parties wanted this law to govern.

Conclusion

There is a need for opposite presumptions for B2B contracts and for B2C contracts falling within the scope of Article 6. Alternatively, a single presumption providing for the application of the law of the most closely connected Member state could be envisaged.

Possible New Provision

Article 11 of the Draft CESL Regulation could be amended to address these issues in several possible ways.

Single Presumption

Article 11

Consequences of the use of the Common European Sales Law

(1) Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules. Provided that the contract was actually concluded, the Common European Sales Law shall also govern the compliance with and remedies for failure to comply with the pre-contractual information duties.

(2) Where the parties have validly agreed to use the Common European Sales Law for a contract, but have not chosen the applicable law, they are presumed to have chosen the law of a Member state.

(a) This law shall be the law designated by Article 4 or Article 6 of the Rome I Regulation, or any other applicable choice of law rule.

(b) If the law referred to in (a) is not the law of a Member state, this law shall be the law of the Member state which is the most closely connected with the contract.

Several Presumptions

Article 11

Consequences of the use of the Common European Sales Law

(1) Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules. Provided that the contract was actually concluded, the Common European Sales Law shall also govern the compliance with and remedies for failure to comply with the pre-contractual information duties.

(2) Where the parties have validly agreed to use the Common European Sales Law for a contract, but have not chosen the applicable law, they are presumed to have chosen the law of a Member state.

(a) This law shall be the law designated by Article 4 or Article 6 of the Rome I Regulation, or any other applicable choice of law rule.

(b) If the law referred to in (a) is not the law of a Member state, this law shall be the law of the habitual residence of the buyer, or the law of the habitual residence of the seller for contracts falling within the scope of Article 6 of the Rome I Regulation.