



Common European Sales Law – Issues for IT Lawyers

What is the CESL?

The Commission believes that

the existence of different commercial contract laws in all 27 EU Member States is an impediment to trade (as someone in one Member State might feel at a disadvantage using the law of another state).

The Commission intends to put in place a voluntary 28th contract law for the sale of goods and digital content, sitting alongside the existing 27 commercial laws of the various Member States. This will introduce a new 'European' contract law into the legal systems of each Member State.

However, the new CESL will be something of a hybrid in practice. As the law will not regulate every single aspect of a transaction, it will need to be supplemented by applicable domestic law (for example, on the question of whether a contract can be considered

illegal because of the nature of the goods being sold).

Enforcement of the law will also be based within domestic courts (but in interpreting the CESL domestic courts will be obliged to implement the jurisprudence of the ECJ).

Scope of the CESL

The new law will have limited scope. The CESL would be voluntary, and would apply only where both parties agree (in most consumer situations the supplier is likely to choose the applicable law).

It is intended that the CESL will be capable of applying only to certain types of contract (although this may change over time), namely contracts between a business (of any size) and a consumer, and contracts where are least one of the businesses involved is a small or medium-sized enterprise (SME). An SME is defined as a business employing fewer than 250 people *and* having an annual turnover of EUR 50m or less/a balance sheet of EUR 43m or less.

It is not intended that the CESL be used for purely domestic contracts (ie where the parties are all based in the same EU Member State) but this will be a possibility. Initially the CESL will not apply to contracts for the supply of services, except where a service is related to the sale of goods or digital content.

Once in place many believe (or fear) that use of the law will increase and that suppliers may come under pressure from customers (particularly enterprise customers), licensors,

the EU or national governments to adopt and use the CESL.

The CESL document itself specifies that the law must be adopted in full or not at all (ie suppliers cannot cherry-pick the provisions of the CESL they like, ignore the parts they dislike and still claim to use the law). However, certain provisions of the law could still become standardised contract terms in national law contracts particularly for cross-border trading in the same way that provisions or definitions within Incoterms are commonly adopted. The CESL is a development that commercial lawyers should be aware of.

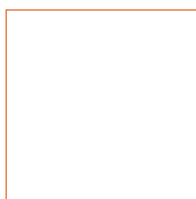
Timetable

Although the EU legislative procedure still has some way to run there is a clear determination within the EU for this to be implemented as soon as possible and in any event by the end of 2012, the 20th anniversary of the creation of the internal markets. This article is based on the draft proposal as at January 2012, which may be subject to change during the legislative process.

Will the CESL be relevant to IT lawyers?

Although the CESL is relevant for all commercial lawyers, there are a number of issues which are particularly relevant in the technology and IT law field, in particular:

- the scope of the law with respect to digital content and technology hardware



On 11 October 2011, the European Commission published a detailed proposal for a regulation on a Common European Sales Law (CESL).

Guy Wilmot and David Webster consider the Commission's proposals and explain what the CESL is before explaining some of the issues for technology and IT lawyers in particular

- the obligations of a supplier who opts to use the law when selling hardware or digital content
- how managed IT and telecoms suppliers and other service providers might be affected
- whether the new law will apply to software
- issues relating to copyright clearance for digital content.

Application to Technology Hardware and Digital Content

The CESL may apply to the sale of goods and digital content. The adoption of CESL instead of national contract law will almost certainly be a possibility for any business selling technology hardware or goods to consumers or SMEs and ultimately the law may have wider application than this.

The definition of 'digital content' includes 'data which are produced and supplied in digital form' so, with some limited specific exceptions, this will include media content like video, music, e-books etc and also downloadable software.

Services which are supplied with digital content or hardware may also be subject to the CESL if the parties so choose. For example, if a piece of hardware is sold under the CESL together with a maintenance contract, the parties can opt for the CESL to be the governing law of the maintenance element.

Content of the Law and Supplier Obligations

In terms of content the CESL deals with the main areas of contract law – what must be supplied by way of pre-contractual information, offer and acceptance, consumer rights (eg what constitutes an unfair contract term, the consumer's

cooling off right etc), contractual defects (mistake, fraud etc), termination and remedies.

It will mainly fall to suppliers of hardware and content to decide whether or not they wish to use the CESL. It is worth considering very briefly some of the main obligations and liabilities of a supplier:

General obligations: there are general obligations to act in good faith and to deal fairly. This is a controversial issue for lawyers in common-law jurisdictions, particularly the UK, where these concepts are not familiar in commercial sales law. It is particularly rare to see such obligations in IT contracts (especially end-user contracts).

Pre-contractual information: the supplier will need to provide detailed information to the customer about the customer's rights (including a right to withdraw), how the price is calculated and the specification of the goods or content. Furthermore, in the case of digital content, the supplier must inform the customer about the functionality of the content, any required technical specifications and any relevant information about the interoperability of digital content with hardware or software.

Consumer rights: the supplier must offer a consumer the right to terminate and withdraw from any distance contract up to 14 days following delivery (although this does not apply to downloaded digital content) and any 'unfair' terms will not be binding.

Exploitation: a more controversial proposal in the area of consumer rights is that a consumer may avoid a contract if the consumer is in a difficult situation that the supplier knows about and the supplier 'exploits' this situation. This is one of the

more contentious provisions and may be amended before the final law comes into force.

Performance: the seller must perform the contract 'without undue delay' in accordance with the contract terms and as set out in the pre-contractual information, the seller is liable for any of its contractors' failures.

Remedies: there are a number of remedies available to a buyer including specific performance, withholding payment, terminating the contract, reducing the price and claiming damages.

The CESL is clearly more onerous for a supplier than many national laws and one might wonder how many suppliers will actually choose to use the law. Suppliers might be prepared to adopt the new law if they believe that this will give comfort to customers in other Member States and that additional sales will be generated as a result (it will have to be seen whether or not this will be the case).

The CESL does not deal with enforcement but there is a separate EU proposal to harmonise rules on alternative dispute resolution in consumer contracts (including allowing for online dispute resolution).

Services – Managed IT and Telecoms

The law is not intended to apply to the provision of services, unless those services are 'related services' – ie services which relate to the supply of goods or digital content. However, in the current draft there is no materiality threshold at which a service supplied in connection with goods is to be treated as a 'related service', so any contract for services which relates to or includes any goods could be a 'related service',



a more controversial proposal in the area of consumer rights is that a consumer may avoid a contract if the consumer is in a difficult situation that the supplier knows about and the supplier 'exploits' this situation.



however small a part the goods are of the overall service.

It follows that, where a supplier offers a managed IT or telecoms service which includes the supply of telephony hardware, servers or PCs (or indeed digital content), the CESL could be used. The CESL could also apply to the provision of packages of hardware (eg servers or PCs) and software together with other maintenance services.

It is worth repeating that, as the adoption of the law is voluntary, the supplier cannot be compelled to use the CESL.

Having said that, a supplier of a managed service which includes goods or software should be aware of the risk that customers (especially those based in other Member States) might insist on using the CESL.

The supplier terms relating to 'associated services' include: a duty for the supplier to act with reasonable skill and care, a duty for the supplier to prevent damage, liability for the acts of the supplier's subcontractors and an obligation to warn about unexpected costs.

Applicability to Software

'Digital content' includes downloadable software or software supplied on disc, however as currently drafted the scope of the CESL will not apply to 'software' which is supplied as an Internet or web-based service. However, this distinction is not always easy to draw. Where a supplier offers a service which includes both a downloaded piece of 'client' software together with an Internet-based service then

the CESL could (if the parties agreed) apply to the whole service.

It is unlikely that the CESL will ever apply to native mobile applications offered through an 'app store' like iTunes or the Android Market (it is difficult to see circumstances in which they would choose to adopt the CESL). But the CESL could be used for applications which are provided outside of such markets.

Copyright Issues and Digital Content

One major issue for anyone supplying content under the CESL is that there is an obligation on the supplier to clear the content of all copyright claims and restrictions which apply in the buyer's home territory.

The drafting is currently ambiguous as to whether this applies only to those restrictions and rights the supplier knew about or ought to have known about. If the obligation applies to all local restrictions and rights irrespective of the supplier's

knowledge then this is going to be a very onerous imposition, if limited to those restrictions the supplier was aware of or should have been aware of then suppliers may be able to live with the rule.

The issue is that many suppliers selling third-party media content and software will not be provided with any assurance that they are free to sell the content anywhere other than a specific jurisdiction. This is often dealt with in the supplier's standard terms and conditions by providing that the buyer is accepting the content at his or her own risk and that the supplier offers no warranty that the content is free of intellectual property rights in the buyer's jurisdiction. If the CESL is adopted, this will not be an option.

This obligation might put a supplier in the position of needing to check the copyright status of content in each jurisdiction. Depending on the final drafting, using the CESL may not be a viable choice for

anyone selling content without appropriate assurances and indemnities from its suppliers.

Conclusion

Given the Commission's enthusiasm for adopting a common contract law framework it is very likely that some form of the CESL proposal will come into force.

We will have to see whether, once in force, the CESL will be used in a significant way by contract parties. It is possible that the CESL will be rarely used but the CESL may also form the basis of a new international contract law framework.

All commercial lawyers should be aware of the existence of the CESL and, as the law is intended to apply to the supply of digital content as well as to hardware and combined packages of hardware and services, definitely includes IT lawyers. ●

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