Common European Sales Law (CESL)

– Commentary –

C.H. Beck · Hart
Nomos
Common European Sales Law (CESL)

- Commentary -

edited by

Reiner Schulze

C.H. Beck · Hart · Nomos
Preface

Alongside Dr. Maija Ernberga, special thanks is owed above all to the editorial assistant Dominika Bednarczyk, without whose assistance the Commentary could not have been produced.

Münster, June 2012

Reiner Schulze
# Table of Contents

Preface ................................................................. V
List of contributors .............................................. XVII
Abbreviations ..................................................... XIX
Bibliography ....................................................... XXVII
List of Cases ....................................................... XXXIII

Proposal for a
REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on a Common European Sales Law

<table>
<thead>
<tr>
<th>Article</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 1</td>
<td>Objective and subject matter</td>
<td>9</td>
</tr>
<tr>
<td>Article 2</td>
<td>Definitions</td>
<td>13</td>
</tr>
<tr>
<td>Article 3</td>
<td>Optional nature of the Common European Sales Law</td>
<td>30</td>
</tr>
<tr>
<td>Article 4</td>
<td>Cross-border contracts</td>
<td>34</td>
</tr>
<tr>
<td>Article 5</td>
<td>Contracts for which the Common European Sales Law can be used</td>
<td>40</td>
</tr>
<tr>
<td>Article 6</td>
<td>Exclusion of mixed-purpose contracts and contracts linked to a consumer credit</td>
<td>49</td>
</tr>
<tr>
<td>Article 7</td>
<td>Parties to the contract</td>
<td>53</td>
</tr>
<tr>
<td>Article 8</td>
<td>Agreement on the use of the Common European Sales Law</td>
<td>57</td>
</tr>
<tr>
<td>Article 9</td>
<td>Standard Information Notice in contracts between a trader and a consumer</td>
<td>62</td>
</tr>
<tr>
<td>Article 10</td>
<td>Penalties for breach of specific requirements</td>
<td>65</td>
</tr>
<tr>
<td>Article 11</td>
<td>Consequences of the use of the Common European Sales Law</td>
<td>68</td>
</tr>
<tr>
<td>Article 12</td>
<td>Information requirements resulting from the Services Directive</td>
<td>72</td>
</tr>
<tr>
<td>Article 13</td>
<td>Member States’ options</td>
<td>78</td>
</tr>
<tr>
<td>Article 14</td>
<td>Communication of judgments applying this Regulation</td>
<td>81</td>
</tr>
<tr>
<td>Article 15</td>
<td>Review</td>
<td>82</td>
</tr>
<tr>
<td>Article 16</td>
<td>Entry into force and application</td>
<td>83</td>
</tr>
</tbody>
</table>

ANNEX I
COMMON EUROPEAN SALES LAW

Part I
Introductory provisions

Chapter 1
General principles and application

Section 1
General principles

<table>
<thead>
<tr>
<th>Article</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 1</td>
<td>Freedom of contract</td>
<td>85</td>
</tr>
<tr>
<td>Article 2</td>
<td>Good faith and fair dealing</td>
<td>89</td>
</tr>
<tr>
<td>Article 3</td>
<td>Co-operation</td>
<td>91</td>
</tr>
</tbody>
</table>

Section 2
Application

<table>
<thead>
<tr>
<th>Article</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 4</td>
<td>Interpretation</td>
<td>94</td>
</tr>
<tr>
<td>Article 5</td>
<td>Reasonableness</td>
<td>97</td>
</tr>
<tr>
<td>Article 6</td>
<td>No form required</td>
<td>103</td>
</tr>
</tbody>
</table>
Table of Contents

<table>
<thead>
<tr>
<th>Article</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 7</td>
<td>Not individually negotiated contract terms</td>
<td>105</td>
</tr>
<tr>
<td>Article 8</td>
<td>Termination of a contract</td>
<td>108</td>
</tr>
<tr>
<td>Article 9</td>
<td>Mixed-purpose contracts</td>
<td>110</td>
</tr>
<tr>
<td>Article 10</td>
<td>Notice</td>
<td>114</td>
</tr>
<tr>
<td>Article 11</td>
<td>Computation of time</td>
<td>117</td>
</tr>
<tr>
<td>Article 12</td>
<td>Unilateral statements or conduct</td>
<td>120</td>
</tr>
</tbody>
</table>

Part II
Making a binding contract

Chapter 2
Pre-contractual information

Section 1
Pre-contractual information to be given by a trader dealing with a consumer

Introduction to arts 13–29 ................................................................................................ 125
Article 13 | Duty to provide information when concluding a distance or off-premises contract | 127  |
Article 14 | Information about price and additional charges and costs | 134  |
Article 15 | Information about the identity and address of the trader | 137  |
Article 16 | Information about the contract terms | 139  |
Article 17 | Information about rights of withdrawal when concluding a distance or off-premises contract | 142  |
Article 18 | Off-premises contracts: additional information requirements and confirmation | 145  |
Article 19 | Distance contracts: additional information and other requirements | 148  |
Article 20 | Duty to provide information when concluding contracts other than distance and off-premises contracts | 152  |
Article 21 | Burden of proof | 156  |
Article 22 | Mandatory nature | 157  |

Section 2
Pre-contractual information to be given by a trader dealing with another trader

Article 23 | Duty to disclose information about goods and related services | 158  |

Section 3
Contracts concluded by electronic means

Article 24 | Additional duties to provide information in distance contracts concluded by electronic means | 163  |
Article 25 | Additional requirements in distance contracts concluded by electronic means | 166  |
Article 26 | Burden of proof | 170  |
Article 27 | Mandatory nature | 171  |

Section 4
Duty to ensure that information supplied is correct

Article 28 | Duty to ensure that information supplied is correct | 172  |

Section 5
Remedies for breach of information duties

Article 29 | Remedies for breach of information duties | 175  |
Table of Contents

Chapter 3
Conclusion of contract

Introduction to arts 30–39 ........................................................................ 179
Article 30 Requirements for the conclusion of a contract ................................ 180
Article 31 Offer .................................................................................. 184
Article 32 Revocation of offer ................................................................. 188
Article 33 Rejection of offer ................................................................. 191
Article 34 Acceptance ......................................................................... 192
Article 35 Time of conclusion of the contract ............................................ 194
Article 36 Time limit for acceptance ........................................................ 196
Article 37 Late acceptance ..................................................................... 198
Article 38 Modified acceptance ............................................................... 200
Article 39 Conflicting standard contract terms ........................................ 204

Chapter 4
Right to withdraw in distance and off-premises contracts between traders and consumers

Introduction to arts 40–47 ........................................................................ 209
Article 40 Right to withdraw .................................................................... 210
Article 41 Exercise of right to withdraw .................................................... 223
Article 42 Withdrawal period .................................................................... 228
Article 43 Effects of withdrawal ................................................................. 232
Article 44 Obligations of the trader in the event of withdrawal .................... 236
Article 45 Obligations of the consumer in the event of withdrawal ................ 241
Article 46 Ancillary contracts .................................................................... 247
Article 47 Mandatory nature .................................................................... 251

Chapter 5
Defects in consent

Article 48 Mistake ................................................................................. 254
Article 49 Fraud .................................................................................... 264
Article 50 Threats .................................................................................. 272
Article 51 Unfair exploitation ................................................................... 276
Article 52 Notice of avoidance .................................................................. 284
Article 53 Confirmation ........................................................................... 287
Article 54 Effects of avoidance ................................................................. 290
Article 55 Damages for loss ..................................................................... 293
Article 56 Exclusion or restriction of remedies ........................................... 297
Article 57 Choice of remedy..................................................................... 300

Part III
Assessing what is in the contract

Chapter 6
Interpretation

Article 58 General rules on interpretation of contracts ................................... 303
Article 59 Relevant matters ....................................................................... 307
Article 60 Reference to contract as a whole ............................................... 312
Article 61 Language discrepancies ............................................................. 313
Article 62 Preference for individually negotiated contract terms .................. 315
Article 63 Preference for interpretation which gives contract terms effect ........ 317
Article 64 Interpretation in favour of consumers .......................................... 320
Article 65 Interpretation against supplier of a contract term ....................... 323
## Chapter 7
### Contents and effects

- **Article 66** Contract terms ................................................................. 327
- **Article 67** Usages and practices in contracts between traders .................... 329
- **Article 68** Contract terms which may be implied .................................. 334
- **Article 69** Contract terms derived from certain pre-contractual statements 337
- **Article 70** Duty to raise awareness of not individually negotiated contract terms 343
- **Article 71** Additional payments in contracts between a trader and a consumer 348
- **Article 72** Merger clauses ................................................................. 351
- **Article 73** Determination of price ...................................................... 354
- **Article 74** Unilateral determination by a party ......................................... 358
- **Article 75** Determination by a third party ............................................ 362
- **Article 76** Language ........................................................................... 365
- **Article 77** Contracts of indeterminate duration ..................................... 367
- **Article 78** Contract terms in favour of third parties ................................. 371

## Chapter 8
### Unfair contract terms

#### Section 1
**General provisions**

- Introduction to arts 79–86 ........................................................................ 376
- **Article 79** Effects of unfair contract terms ............................................. 377
- **Article 80** Exclusions from unfairness test .............................................. 378
- **Article 81** Mandatory nature ................................................................. 380

#### Section 2
**Unfair contract terms in contracts between a trader and a consumer**

- **Article 82** Duty of transparency in contract terms not individually negotiated 381
- **Article 83** Meaning of ‘unfair’ in contracts between a trader and a consumer 382
- **Article 84** Contract terms which are always unfair .................................... 386
- **Article 85** Contract terms which are presumed to be unfair ....................... 389

#### Section 3
**Unfair contract terms in contracts between traders**

- **Article 86** Meaning of ‘unfair’ in contracts between traders ...................... 393

### Part IV
**Obligations and remedies of the parties to a sales contract or a contract for the supply of digital content**

#### Chapter 9
**General provisions**

- **Article 87** Non-performance and fundamental non-performance ............... 396
- **Article 88** Excused non-performance .................................................... 408
- **Article 89** Change of circumstances .................................................... 415
- **Article 90** Extended application of rules on payment and on goods or digital content not accepted ......................................................... 426
Table of Contents

Chapter 10
The seller’s obligations

Section 1
General provisions

<table>
<thead>
<tr>
<th>Article</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>91</td>
<td>Main obligations of the seller</td>
<td>432</td>
</tr>
<tr>
<td>92</td>
<td>Performance by a third party</td>
<td>436</td>
</tr>
</tbody>
</table>

Section 2
Delivery

<table>
<thead>
<tr>
<th>Article</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>93</td>
<td>Place of delivery</td>
<td>440</td>
</tr>
<tr>
<td>94</td>
<td>Method of delivery</td>
<td>445</td>
</tr>
<tr>
<td>95</td>
<td>Time of delivery</td>
<td>450</td>
</tr>
<tr>
<td>96</td>
<td>Seller’s obligations regarding carriage of the goods</td>
<td>453</td>
</tr>
<tr>
<td>97</td>
<td>Goods or digital content not accepted by the buyer</td>
<td>457</td>
</tr>
<tr>
<td>98</td>
<td>Effect on passing of risk</td>
<td>463</td>
</tr>
</tbody>
</table>

Section 3
Conformity of the goods and digital content

<table>
<thead>
<tr>
<th>Article</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>99</td>
<td>Conformity with the contract</td>
<td>463</td>
</tr>
<tr>
<td>100</td>
<td>Criteria for conformity of the goods and digital content</td>
<td>471</td>
</tr>
<tr>
<td>101</td>
<td>Incorrect installation under a consumer sales contract</td>
<td>476</td>
</tr>
<tr>
<td>102</td>
<td>Third party rights or claims</td>
<td>479</td>
</tr>
<tr>
<td>103</td>
<td>Limitation on conformity of digital content</td>
<td>486</td>
</tr>
<tr>
<td>104</td>
<td>Buyer’s knowledge of lack of conformity in a contract between traders</td>
<td>486</td>
</tr>
<tr>
<td>105</td>
<td>Relevant time for establishing conformity</td>
<td>487</td>
</tr>
</tbody>
</table>

Chapter 11
The buyer’s remedies

Section 1
General provisions

<table>
<thead>
<tr>
<th>Article</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>106</td>
<td>Overview of buyer’s remedies</td>
<td>490</td>
</tr>
<tr>
<td>107</td>
<td>Limitation of remedies for digital content not supplied in exchange for a price</td>
<td>492</td>
</tr>
<tr>
<td>108</td>
<td>Mandatory nature</td>
<td>494</td>
</tr>
</tbody>
</table>

Section 2
Cure by the seller

<table>
<thead>
<tr>
<th>Article</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>109</td>
<td>Cure by the seller</td>
<td>495</td>
</tr>
</tbody>
</table>

Section 3
Requiring performance

<table>
<thead>
<tr>
<th>Article</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>110</td>
<td>Requiring performance of seller’s obligations</td>
<td>503</td>
</tr>
<tr>
<td>111</td>
<td>Consumer’s choice between repair and replacement</td>
<td>507</td>
</tr>
<tr>
<td>112</td>
<td>Return of replaced item</td>
<td>511</td>
</tr>
</tbody>
</table>

Section 4
Withholding performance of buyer’s obligations

<table>
<thead>
<tr>
<th>Article</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>113</td>
<td>Right to withhold performance</td>
<td>514</td>
</tr>
</tbody>
</table>
Section 5  
Termination  
Article 114  Termination for non-performance ................................................... 516  
Article 115  Termination for delay in delivery after notice fixing additional time for performance ................................................ 518  
Article 116  Termination for anticipated non-performance .................................... 520  
Article 117  Scope of right to terminate ............................................................. 522  
Article 118  Notice of termination ................................................................... 523  
Article 119  Loss of right to terminate ............................................................... 524  

Section 6  
Price reduction  
Article 120  Right to reduce price ................................................................. 526  

Section 7  
Requirements of examination and notification in a contract between traders  
Article 121  Examination of the goods in contracts between traders .................... 528  
Article 122  Requirement of notification of lack of conformity in sales contracts between traders ......................................................... 529  

Chapter 12  
The buyer’s obligations  
Section 1  
General provisions  
Article 123  Main obligations of the buyer ....................................................... 533  

Section 2  
Payment of the price  
Article 124  Means of payment ...................................................................... 537  
Article 125  Place of payment .......................................................................... 543  
Article 126  Time of payment .......................................................................... 547  
Article 127  Payment by a third party ............................................................... 552  
Article 128  Imputation of payment .................................................................. 558  

Section 3  
Taking delivery  
Article 129  Taking delivery ............................................................................ 565  
Article 130  Early delivery and delivery of wrong quantity .................................. 568  

Chapter 13  
The seller’s remedies  
Section 1  
General provisions  
Article 131  Overview of seller’s remedies ....................................................... 574  

Section 2  
Requiring performance  
Article 132  Requiring performance of buyer’s obligations ............................... 577  

XII
# Table of Contents

## Section 3
Withholding performance of seller’s obligations

- Article 133  Right to withhold performance ................................. 582

## Section 4
Termination

- Article 134  Termination for fundamental non-performance ................ 586
- Article 135  Termination for delay after notice fixing additional time for performance .... 588
- Article 136  Termination for anticipated non-performance .................. 591
- Article 137  Scope of right to terminate ........................................ 593
- Article 138  Notice of termination ................................................ 596
- Article 139  Loss of right to terminate .......................................... 598

## Chapter 14
Passing of risk

### Section 1
General provisions

- Article 140  Effect of passing of risk ............................................. 602
- Article 141  Identification of goods or digital content to contract ............ 603

### Section 2
Passing of risk in consumer sales contracts

- Article 142  Passing of risk in a consumer sales contract ..................... 605

### Section 3
Passing of risk in contracts between traders

- Article 143  Time when risk passes .............................................. 608
- Article 144  Goods placed at buyer’s disposal ................................... 609
- Article 145  Carriage of the goods ............................................... 611
- Article 146  Goods sold in transit ................................................ 613

## Part V
Obligations and remedies of the parties to a related service contract

### Chapter 15
Obligations and remedies of the parties

#### Section 1
Application of certain general rules on sales contracts

- Article 147  Application of certain general rules on sales contracts .......... 616

#### Section 2
Obligations of the service provider

- Article 148  Obligation to achieve result and obligation of care and skill .......... 618
- Article 149  Obligation to prevent damage ..................................... 620
- Article 150  Performance by a third party ...................................... 622
- Article 151  Obligation to provide invoice ...................................... 622
- Article 152  Obligation to warn of unexpected or uneconomic cost ............ 624
Section 3
Obligations of the customer

Article 153 Payment of the price ................................................................. 627
Article 154 Provision of access ................................................................. 628

Section 4
Remedies

Article 155 Remedies of the customer ................................................................. 629
Article 156 Requirement of notification of lack of conformity in related service contracts between traders ................................................................. 631
Article 157 Remedies of the service provider ................................................................. 632
Article 158 Customer’s right to decline performance ................................................................. 633

Part VI
Damages and interest

Chapter 16
Damages and interest

Section 1
Damages

Article 159 Right to damages ................................................................. 635
Article 160 General measure of damages ................................................................. 639
Article 161 Foreseeability of loss ................................................................. 643
Article 162 Loss attributable to creditor ................................................................. 647
Article 163 Reduction of loss ................................................................. 649
Article 164 Substitute transaction ................................................................. 651
Article 165 Current price ................................................................. 654

Section 2
Interest on late payments: general provisions

Article 166 Interest on late payments ................................................................. 655
Article 167 Interest when the debtor is a consumer ................................................................. 661

Section 3
Late payments by traders

Article 168 Rate of interest and accrual ................................................................. 667
Article 169 Compensation for recovery costs ................................................................. 671
Article 170 Unfair contract terms relating to interest for late payment ................................................................. 674
Article 171 Mandatory nature ................................................................. 678

Part VII
Restitution

Chapter 17
Restitution

Article 172 Restitution on avoidance or termination ................................................................. 679
Article 173 Payment for monetary value ................................................................. 691
Article 174 Payment for use and interest on money received ................................................................. 704
Article 175 Compensation for expenditure ................................................................. 710
Article 176 Equitable modification ................................................................. 714
Article 177 Mandatory nature ................................................................. 719

XIV
Table of Contents

Part VIII
Prescription

Chapter 18
Prescription

Section 1
General provisions
Article 178 Rights subject to prescription ................................................................. 722

Section 2
Periods of prescription and their commencement
Article 179 Periods of prescription ........................................................................... 725
Article 180 Commencement ...................................................................................... 727

Section 3
Extension of periods of prescription
Article 181 Suspension in case of judicial and other proceedings ......................... 730
Article 182 Postponement of expiry in the case of negotiations .............................. 734
Article 183 Postponement of expiry in case of incapacity ....................................... 735

Section 4
Renewal of periods of prescription
Article 184 Renewal by acknowledgement ............................................................... 736

Section 5
Effects of prescription
Article 185 Effects of prescription ............................................................................. 738

Section 6
Modification by agreement
Article 186 Agreements concerning prescription ....................................................... 740

Appendix 1
Model instructions on withdrawal ............................................................................ 743

Appendix 2
Model withdrawal form ............................................................................................. 747

ANNEX II
STANDARD INFORMATION NOTICE
Standard Information Notice ..................................................................................... 749

EXPLANATORY MEMORANDUM
Explanatory Memorandum ...................................................................................... 751
Index ......................................................................................................................... 765