

# Statute law and alternative solutions

## The European Contract Law project: the drafting challenges

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### Summary:

This presentation will explain the development of general “European” contact law from “soft law” restatements, through a proposed legislator’s guide or “toolbox”, to the proposal for a Regulation on a Common European Sales Law. It will consider how the purposes underlying the restatements influenced their form (articles, accompanied by a commentary and comparative notes), their substance (a workable body of rules, even if the rules are not common to even a majority of the MSs, aiming for complete coverage within their scope of application) and style of drafting (short and simple, to be understandable to lawyers from all jurisdictions and businesspeople).

The European Commission’s Action Plan on Contract law proposed a Common Frame of Reference, drawing on the Restatements, which might form a toolbox (to provide fundamental principles, definitions and model rules to help with revising and developing the consumer Acquis) and which might also be the basis for an Optional Instrument. This created some tension both over coverage and form. A toolbox would ideally be in a more discursive form than an optional instrument. It would also require a wider coverage and comparative notes. It would be aimed at lawyers not businesspeople.

The purposes of the proposed optional instrument (the CESL) will be outlined, and how it is intended to work. The aim of encouraging SMEs to make more cross-borders contracts, with both consumers and other traders, without having to worry about differences between the laws of the different MSs, has implications for both the substance and the style of the rules. Within its scope of application (which is not easy to define), the CESL needs to be complete, so it must have in-built ways of allowing it to be developed in the future. It needs to be short and fairly simple in style, so as to be understandable to businesspeople and consumers (or at least consumer advisers). To achieve this, there is significant reliance on open-textured norms and on a general clause that imposes a duty to act in accordance with good faith and fair dealing. This is to have only a subsidiary role, and will not necessarily produce results that are very different from what a court would decide under domestic English law, but it has a significant impact on the drafting style. The drafting style goes hand in hand with style of interpretation that may emphasise purpose and spirit as much as literal meaning.

The style of drafting and the need to apply open-textured norms and articles allowing for new developments, have a direct impact on the form of the legislation. The text needs to be accompanied by a commentary with examples. The aim is a code not a statute. The approach is not suitable for all fields of law or even all domestic contract law, but it is appropriate for cross-border contract with consumers and between SMEs. The CESL is also structured in a way that should make it easier for the non-lawyer, because it is presented topic by topic, so that the lawyer need deal only with what is relevant to the case in hand.

The legislative process of the EU presents obstacles to achieving well-drafted legislation, but the recent establishment of a European Law Institute offers some hope, especially if the ELI can gain and retain the confidence of the European legislative institutions. A critique of the CESL, by a group chaired by Sir John Thomas, has been an excellent start.

The presentation concludes by considering possible lessons for drafting English legislation. The Consumer Rights Bill 2013 makes some attempt to make the law clearer and more comprehensible, by bringing together what is presently fragmented. However, as the Bill stands, it fails to devise a clear and simple legislative style for consumer law - a missed opportunity.

## COMMON EUROPEAN SALES LAW

### Chapter 11 The buyer's remedies

#### SECTION 1 GENERAL PROVISIONS

##### *Article 106*

##### *Overview of buyer's remedies*

1. In the case of non-performance of an obligation by the seller, the buyer may do any of the following:
  - (a) require performance, which includes specific performance, repair or replacement of the goods or digital content, under Section 3 of this Chapter;
  - (b) withhold the buyer's own performance under Section 4 of this Chapter;
  - (c) terminate the contract under Section 5 of this Chapter and claim the return of any price already paid, under Chapter 17;
  - (d) reduce the price under Section 6 of this Chapter; and
  - (e) claim damages under Chapter 16.
2. If the buyer is a trader:
  - (a) the buyer's rights to exercise any remedy except withholding of performance are subject to cure by the seller as set out in Section 2 of this Chapter; and
  - (b) the buyer's rights to rely on lack of conformity are subject to the requirements of examination and notification set out in Section 7 of this Chapter.
3. If the buyer is a consumer:
  - (a) the buyer's rights are not subject to cure by the seller; and
  - (b) the requirements of examination and notification set out in Section 7 of this Chapter do not apply.
4. If the seller's non-performance is excused, the buyer may resort to any of the remedies referred to in paragraph 1 except requiring performance and damages.
5. The buyer may not resort to any of the remedies referred to in paragraph 1 to the extent that the buyer caused the seller's non-performance.
6. Remedies which are not incompatible may be cumulated.

##### *Article 107*

##### *Limitation of remedies for digital content not supplied in exchange for a price*

Where digital content is not supplied in exchange for the payment of a price, the buyer may not resort to the remedies referred to in points (a) to (d) of Article 106(1). The buyer may only claim damages under point (e) of Article 106 (1) for loss or damage caused to the buyer's property, including hardware, software and data, by the lack of conformity of the supplied digital content, except for any gain of which the buyer has been deprived by that damage.

*Article 108*  
**Mandatory nature**

In a contract between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Chapter, or derogate from or vary its effect before the lack of conformity is brought to the trader's attention by the consumer.

**SECTION 2 CURE BY THE SELLER**

*Article 109*  
**Cure by the seller**

1. A seller who has tendered performance early and who has been notified that the performance is not in conformity with the contract may make a new and conforming tender if that can be done within the time allowed for performance.
2. In cases not covered by paragraph 1 a seller who has tendered a performance which is not in conformity with the contract may, without undue delay on being notified of the lack of conformity, offer to cure it at its own expense.
3. An offer to cure is not precluded by notice of termination.
4. The buyer may refuse an offer to cure only if:
  - (a) cure cannot be effected promptly and without significant inconvenience to the buyer;
  - (b) the buyer has reason to believe that the seller's future performance cannot be relied on; or
  - (c) delay in performance would amount to a fundamental non-performance.
5. The seller has a reasonable period of time to effect cure.
6. The buyer may withhold performance pending cure, but the rights of the buyer which are inconsistent with allowing the seller a period of time to effect cure are suspended until that period has expired.
7. Notwithstanding cure, the buyer retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.

**SECTION 3 REQUIRING PERFORMANCE**

*Article 110*  
**Requiring performance of seller's obligations**

1. The buyer is entitled to require performance of the seller's obligations.
2. The performance which may be required includes the remedying free of charge of a performance which is not in conformity with the contract.
3. Performance cannot be required where:
  - (a) performance would be impossible or has become unlawful; or
  - (b) the burden or expense of performance would be disproportionate to the benefit that the buyer would obtain.

*Article 111*

***Consumer's choice between repair and replacement***

1. Where, in a consumer sales contract, the trader is required to remedy a lack of conformity pursuant to Article 110(2) the consumer may choose between repair and replacement unless the option chosen would be unlawful or impossible or, compared to the other option available, would impose costs on the seller that would be disproportionate taking into account:
  - (a) the value the goods would have if there were no lack of conformity;
  - (b) the significance of the lack of conformity; and
  - (c) whether the alternative remedy could be completed without significant inconvenience to the consumer.
2. If the consumer has required the remedying of the lack of conformity by repair or replacement pursuant to paragraph 1, the consumer may resort to other remedies only if the trader has not completed repair or replacement within a reasonable time, not exceeding 30 days. However, the consumer may withhold performance during that time.

*Article 112*

***Return of replaced item***

1. Where the seller has remedied the lack of conformity by replacement, the seller has a right and an obligation to take back the replaced item at the seller's expense.
2. The buyer is not liable to pay for any use made of the replaced item in the period prior to the replacement.

**SECTION 4 WITHHOLDING PERFORMANCE OF BUYER'S OBLIGATIONS**

*Article 113*

***Right to withhold performance***

1. A buyer who is to perform at the same time as, or after, the seller performs has a right to withhold performance until the seller has tendered performance or has performed.
2. A buyer who is to perform before the seller performs and who reasonably believes that there will be non-performance by the seller when the seller's performance becomes due may withhold performance for as long as the reasonable belief continues.
3. The performance which may be withheld under this Article is the whole or part of the performance to the extent justified by the non-performance. Where the seller's obligations are to be performed in separate parts or are otherwise divisible, the buyer may withhold performance only in relation to that part which has not been performed, unless the seller's non-performance is such as to justify withholding the buyer's performance as a whole.

## SECTION 5      TERMINATION

### *Article 114*

#### ***Termination for non-performance***

1. A buyer may terminate the contract within the meaning of Article 8 if the seller's non-performance under the contract is fundamental within the meaning of Article 87 (2).
2. In a consumer sales contract and a contract for the supply of digital content between a trader and a consumer, where there is a non-performance because the goods do not conform to the contract, the consumer may terminate the contract unless the lack of conformity is insignificant.

### *Article 115*

#### ***Termination for delay in delivery after notice fixing additional time for performance***

1. A buyer may terminate the contract in a case of delay in delivery which is not in itself fundamental if the buyer gives notice fixing an additional period of time of reasonable length for performance and the seller does not perform within that period.
2. The additional period referred to in paragraph 1 is taken to be of reasonable length if the seller does not object to it without undue delay.
3. Where the notice provides for automatic termination if the seller does not perform within the period fixed by the notice, termination takes effect after that period without further notice.

### *Article 116*

#### ***Termination for anticipated non-performance***

A buyer may terminate the contract before performance is due if the seller has declared, or it is otherwise clear, that there will be a non-performance, and if the non-performance would be such as to justify termination.

### *Article 117*

#### ***Scope of right to terminate***

1. Where the seller's obligations under the contract are to be performed in separate parts or are otherwise divisible, then if there is a ground for termination under this Section of a part to which a part of the price can be apportioned, the buyer may terminate only in relation to that part.
2. Paragraph 1 does not apply if the buyer cannot be expected to accept performance of the other parts or the non-performance is such as to justify termination of the contract as a whole.
3. Where the seller's obligations under the contract are not divisible or a part of the price cannot be apportioned, the buyer may terminate only if the non-performance is such as to justify termination of the contract as a whole.

*Article 118*  
***Notice of termination***

A right to terminate under this Section is exercised by notice to the seller.

*Article 119*  
***Loss of right to terminate***

1. The buyer loses the right to terminate under this Section if notice of termination is not given within a reasonable time from when the right arose or the buyer became, or could be expected to have become, aware of the non-performance, whichever is later.
2. Paragraph 1 does not apply:
  - (a) where the buyer is a consumer; or
  - (b) where no performance at all has been tendered.

**SECTION 6      PRICE REDUCTION**

*Article 120*  
***Right to reduce price***

1. A buyer who accepts a performance not conforming to the contract may reduce the price. The reduction is to be proportionate to the decrease in the value of what was received in performance at the time performance was made compared to the value of what would have been received by a conforming performance.
2. A buyer who is entitled to reduce the price under paragraph 1 and who has already paid a sum exceeding the reduced price may recover the excess from the seller.
3. A buyer who reduces the price cannot also recover damages for the loss thereby compensated but remains entitled to damages for any further loss suffered.

## Consumer Rights Bill

### **18 Consumer's rights to enforce terms about goods**

(1) In this section and sections 23 to 25 references to goods conforming to a contract are references to:

- (a) the goods conforming to the terms described in sections 8, 9, 10, 12 and 13,
- (b) the goods not failing to conform to the contract under section 14 or 15, and
- (c) the goods conforming to requirements that are stated in the contract.

(2) If the goods do not conform to the contract because of a breach of any of the terms described in sections 8, 9, 10, 12 and 13, or if they do not conform to the contract under section 15, the consumer's rights (and the provisions about them and when they are available) are:

- (a) the early right to reject (sections 19 to 22);
- (b) the right to repair or replacement (section 23); and
- (c) the right to a price reduction or the final right to reject (sections 19 and 24).

(3) If the goods do not conform to the contract under section 14 or because of a breach of requirements that are stated in the contract, the consumer's rights (and the provisions about them and when they are available) are:

- (a) the right to repair or replacement (section 23); and
- (b) the right to a price reduction or the final right to reject (sections 19 and 24).

(4) If the trader is in breach of a term that section 11 requires to be treated as included in the contract, but it is not a breach by which the goods do not conform to the contract, the consumer has the right to a price reduction (see section 24 for provisions about that right and when it is available).

(5) If the trader is in breach of the term that section 16(1) (right to supply etc) requires to be treated as included in the contract, the consumer has a right to reject (see section 19 for provisions about that right and when it is available).

(6) Subsections (2) to (5) are subject to sections 26 and 27.

(7) This Chapter does not prevent the consumer seeking other remedies for a breach, whether of a term that this Chapter requires to be treated as included in a contract or of a requirement that is stated in a contract, including (where it is open to the consumer to do so).

- (a) claiming damages (see section 61 for the measure of damages),
  - (b) claiming interest or special damages,
  - (c) seeking specific performance (see section 62),
  - (d) seeking an order for specific implement, or
  - (e) relying on the breach against a claim by the trader for the price;
- but the consumer may not recover twice for the same loss.

(8) For the purposes of subsections (2)(b) and (c) and (3), goods which do not conform to the contract at any time within the period of six months beginning with the day on which the goods were delivered to the consumer must be taken not to have conformed to it on that day.

(9) Subsection (8) does not apply if.

- (a) it is established that the goods did conform to the contract on that day, or
- (b) its application is incompatible with the nature of the goods or with how they fail to conform to the contract.

### **19 Right to reject**

(1) A right to reject gives the consumer.

- (a) the right to reject the goods,
- (b) the right to treat the contract as at an end, and
- (c) the right to receive a refund from the trader (subject to subsections (7) to (12)).

(2) The early right to reject is a right to reject which is subject to sections 20 to 22.

(3) The final right to reject is a right to reject which is subject to section 24.

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