

ABSTRACT

Art. 76 – Language

Prof.Dr. Peter Rott

University of Copenhagen

1. The scope of application of Art. 76 CESL is very limited. The CESL does not regulate language requirements, which remain in the competence of the Member States. Insofar, the Rome I and Rome II Regulations apply, with some uncertainty as to the classification of language requirements under private international law.

2. Art. 76 CESL does not apply to pre-contractual information or to the language of the contract either but seems to presuppose an existing contract, as the interpretation rule only makes sense where the language ‘used for the conclusion of the contract’ can be determined. Thus, it only applies to post-contractual communication.

3. Examples for consumers’ post-contractual declarations are the withdrawal from the contract or claims related to remedies for non-conformity of goods or digital content with the contract. An example for a trader’s post-contractual declaration is a reminder to pay the agreed price. Communication ‘related to the contract’ is, however, also all communication around potential non-conformity up to the preparation of litigation; whereas it may be assumed that when it comes to litigation itself, the laws of the Member States will determine the language of judicial proceedings.

4. Art. 76 CESL does not specify the consequences of the use of the ‘correct’ or ‘incorrect’ language. The general rules on good faith and fair dealing of Article 2(1) might play a role here.

a) Article 76 seems to imply that no party of the contract can object to communication that is made in the language that was used for the conclusion of the contract. This could have serious and unforeseen consequences for the consumer. The consumer might have to take care to obtain (costly) translations of all communications that the trader sends after the conclusion of the contract, and possibly in legal or technical language, in order to avoid negative consequences. Surely, most consumers would not have foreseen this kind of consequence.

b) What are the legal consequences if the consumer or trader does not use the language of the contract for a contractual communication? Does Article 76 mean that such communication is invalid? Would that even apply if the trader actually understands the language that the consumer used but that is not the language of the contract? Surely, such an approach would be hard to bring

in line with general rules on good faith and fair dealing of Article 2(1), which applies in all stages of the contractual relationship.

5. German law does not know an explicit rule in the line of Article 76 CESL. Rather, courts apply that rule as a sub-rule to the general rule that a declaration of will is received when it is understood. Where the message was actually understood by the recipient, there seems to be no room for a reference to any 'incorrect' language.

6. In conclusion, Article 76 CESL leaves a good amount of uncertainty; which usually works against the consumer, as the trader will be able to point, in his post-contractual communication, to the interpretation rule of Article 76.