
PRE-CONTRACTUAL INFORMATION UNDER ART. 69 CESL – REMAKE OR REVOLUTION?

GCL WORKSHOP: „CONTENTS AND EFFECTS OF CONTRACTS“
RIJKSUNIVERSITEIT GRONINGEN – MAY 31, 2013

BERND SEIFERT

OLDENBURGISCHE INDUSTRIE- UND HANDELSKAMMER

SEIFERT@OLDENBURG.IHK.DE

INTRODUCTION

- „The principle of conformity with the contract may be considered as common to the different national legal traditions.“ (Recital 7 CSD)
- **But: CSD does not lay down rules regarding the creation of contract terms; it merely introduces a **rebuttable presumption** of conformity with the contract covering the most common situations (Art. 2 CSD)**
- **PECL and DCFR provide for an elaborate set of rules regarding the contents of a contract**
- **CRD does not take up the question of contract terms and conformity**

SELLER'S STATEMENTS

- **Art. 69 CESL** elevates practically every statement on the characteristics of the goods to a **term of the contract** (antetype: Art. II.-9:101 DCFR)
- **Art. 6:101 PECL**: statements can „give rise to contractual obligations“
- **Art. 2 (2) CSD**: Public statements are merely to be „**taken into account**“ when determining conformity of goods (which provides for a much more flexible interpretation of the statement in question!)
- **Sec. 434 BGB**: Public statements influence the quality that the buyer can expect in goods of the same type

SELLER'S STATEMENTS

- **Art. 69 (1) CESL comprises pre-contractual statements made by the seller which are**
 - addressed at the buyer or
 - made publicly
- **Statements by persons engaged in advertising/marketing for the trader are regarded as trader's own statements (Art. 69 [2] CESL), even if trader is not responsible for a specific statement**
- **Art. 69 applies to all statements regarding the sold goods; it does not apply to related service contracts (cf. art. 148 CESL)**

SELLER'S STATEMENTS

- What exactly is (and how do you make) a **„statement“** in terms of Art. 69 CESL?
 - No particular form required? (cf. Art. 6 CESL)
 - Explicit (written) information ? (cf. Art. 13 CESL)
 - Unilateral statement indicating intention ? (cf. Art. 12 CESL)
 - „Notice by any means appropriate to the situation“ (cf. Art. 10 CESL) ?
 - Implied statements?
 - „Conduct“ (cf. Art. 12 [5], 30 [3], 59 [b] CESL) ?

SELLER'S STATEMENTS

Application of Art. 69 (1) CESL is excluded by law:

- if the buyer is **aware** or **expected to be aware** that a statement is incorrect or could not be relied on
 - Burden of proof lies with the seller
 - When is a buyer „expected“ to be aware? (Out-dated commercials? Exaggerated slogans? Very general statements?)
 - Relevance of Art. 13 (2), 28 (2) CESL?
- if the statement could **not** have **influenced** the buyer's decision (burden of [practically impossible] proof lies with seller!)

SELLER'S STATEMENTS

Application of Art. 69 (1) CESL is excluded by law:

- if parties **agree otherwise**
 - only in B2B contracts; cf. Art. 69 (4) CESL
 - Art. 99 (3) CESL: agreement can derogate from the requirements of Art. 100 CESL if consumer knows of specific condition of goods and accepts it
- if parties of a B2B contract have agreed to a **merger clause** (Art. 72 CESL)
 - Note: prior statements may still be used to interpret the contract; cf. Art. 72 (2) CESL

THIRD PARTY STATEMENTS

Statements by **producer** or other persons within the **supply chain** become terms of a B2C contract (Art. 69 [3])

- **Problem 1: Product liability could be imposed on all traders!**
- **Problem 2: Third party statements directly create terms of a contract. Is this necessary and appropriate?**
- **Problem 3: Who are these „other persons“ in earlier links of the chain of transactions supposed to be?**

Owner? Director? Head of Sales Department? Other Representatives? Warehouseman? Janitor?

THIRD PARTY STATEMENTS

Exclusion of liability by law:

- Liability is only excluded by art. 69 (3) CESL if trader can prove that he **did not** and could **not** have been **expected to know** about the statement in question
- **Consequence:** The trader has a duty to know about the product's complete transaction history!
- **Problem 1:** How does a seller prove the **negative fact** that he *actually did not know* ?

THIRD PARTY STATEMENTS

Exclusion of liability by law:

- **Problem 2: Commercials issued via cross-border media (e.g. Internet, satellite TV, press)**
 - Does a trader have to monitor all of these sources (and to what extent)? Is there a limit ?
 - Does liability derive from ignorance, negligence, gross negligence?
- **Problem 3: Is the consumer himself obliged to monitor the media for potential correction of a statement?**

THIRD PARTY STATEMENTS

Does CESL allow for a **right of redress**?

- **Art. 4 CSD: Right of redress (determined by national law) if final seller is liable to consumer due to an act by producer or previous seller (cf. Sec. 478 BGB)**

- **CESL: No corresponding right!**

Consequence: Final seller may be liable to consumer due to third party statements without the possibility of obtaining compensation from the third party

CONCLUSION

Art. 69 CESL may prove to be a major obstacle for a trader when considering to choose CESL, mainly because

- scope of relevant statements is unclear**
- trader has a duty to keep an eye on all advertising campaigns in the whole supply chain**
- of extensive liability of the seller for third-party statements (compared to current legislation)**
- disadvantages are not compensated by CESL's other stipulations**



**Thank you for
your attention!**