

Gap-filling in the CESL and the Role of National Law

Prof. Dr. Christoph Busch, Maître en Droit



Agenda

- I. Fragmentary scope of CESL**
- II. Internal gaps: Autonomous supplementation**
- III. External gaps: Recourse to national law**
- IV. Role of the CJEU: Control of ‘external clauses’**
- V. Conclusion**

I. Fragmentary scope of CESL

Matters governed by CESL (Recital 26)

- Pre-contractual information duties
- Conclusion of a contract including formal requirements
- Right of withdrawal
- Mistake, fraud, threats or unfair exploitation
- Interpretation, contents and effect of a contract
- Unfair terms
- Termination
- Restitution
- Prescription

I. Fragmentary scope of CESL

Matters not governed by CESL (Recital 27)

- Legal personality and capacity
- Illegality and immorality
- Language of the contract
- Non-discrimination
- Representation
- Plurality of debtors and creditors
- Change of parties and assignment
- Set-off and merger
- Property law and torts

II. Internal gaps: Autonomous supplementation

Internal gaps

Article 4(2) CESL

Issues within the scope of the Common European Sales Law but not expressly settled by it are to be settled in accordance with the **objectives** and the **principles** underlying it...

...**without recourse to the national law** that would be applicable in the absence of an agreement to use the the Common European Sales Law or to an other law.

II. Internal gaps: Autonomous supplementation

Internal gaps

Article 7(2) CISG

Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the **general principles** on which it is based...

~~...or, in the absence of such principles, in conformity with the law applicable by virtue of the **rules of private international law.**~~

II. Internal gaps: Autonomous supplementation

Article 4(2) CESL

Issues within the scope of the Common European Sales Law but not expressly settled by it are to be settled in accordance with the **objectives** and the **principles** underlying it [...]

- ➔ Art. 1-3 CESL: Freedom of contract, good faith, co-operation
- ➔ DCFR
- ➔ CISG, PICC
- ➔ Acquis communautaire

III. External gaps: Recourse to national law

Recital 27

All the matters of a contractual or non-contractual nature that are not addressed in the Common European Sales Law are governed by the pre-existing rules of **national law** that is applicable under Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant **conflict of law rule**.

III. External gaps: Recourse to national law

Example: Immorality and illegality

Source of legal uncertainty

Re-nationalisation of CESL through the backdoor

Legal uncertainty as a policy tool?

III. External gaps: Recourse to national law

Example: Unfair commercial practices law

Contract law remedies for a breach of unfair commercial practices law (e.g. Art. 41 Belgian Trade Practices Act)

‘CESL defence’ against claims for breach of unfair commercial practices law (e.g. Information duties under Directive 2005/29/EC)

→ Spill-overs into national laws and the *acquis*?

IV. Role of the CJEU: Control of ‘external clauses’

Directive 93/13/EC

Division of labour between CJEU and national courts
(C-237/02 - Freiburger Kommunalbauten)

Common European Sales Law

Monopoly of the CJEU on interpretation and supplementation

→ Does this also apply to the control of ‘external clauses’?

IV. Role of the CJEU: Control of ‘external clauses’

Agency	Art. 84 lit. c)
Arbitration clauses	Art. 84 lit. d)
Exclusive jurisdiction	Art. 84 lit. e)
Evidence restrictions	Art. 85 lit. a)
Exclusion or limitation of the right to set-off	Art. 85 lit. c)
Stipulated payment for non-performance	Art. 85 lit. e)
Transfer of rights and obligations	Art. 85 lit. m)

→ Retention of title clauses?

V. Conclusion

Distinction between internal and external gaps is a matter of greater importance than under CISG

External gaps create a risk of re-nationalisation of CESL but may also result in spill-overs from CESL into national law and the acquis

Division of labour between CJEU and national courts with regard to the control of unfair terms needs to be recalibrated

Gap-filling in the CESL and the Role of National Law

Prof. Dr. Christoph Busch, Maître en Droit

