

Contents & Effects: CESL

The sources of contract terms

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Arts 66 and 68; and...

- Art 66: Contract terms
- [Art 67: Usages and practices]
- Art 68: Implied terms
- [Art 69: Terms from pre-contractual statements]

And...

- Terms provided by CESL, e.g.
 - Art 13(2) Information in D/O-P contract
 - Chapters 10, 12, 15 sections 2 & 3
- Filling the gaps
 - Implied terms
 - Co-operation
 - Good faith and fair dealing
 - Otherwise applicable law
- Obligations de sécurité, Schutzpflichten

Art 66: Contract terms

The terms of the contract are derived from:

- (a) the agreement of the parties, subject to any mandatory rules of the CESL;
- (b) any usage or practice by which parties are bound by virtue of Article 67;
- (c) any rule of the CESL which applies in the absence of an agreement of the parties to the contrary; and
- (d) any contract term implied by virtue of Article 68.

Agreement of the parties

- Even B2C, conceptual starting point
 - Art 1: Freedom of contract
- (1) Parties are free to conclude a contract and to determine its contents, subject to any applicable mandatory rules
- Rules of the CESL
 - Mandatory rules of OAL within scope displaced
 - Outside scope, OAL applies not CESL

Agreements and documents

- Agreement not = document
 - No parol evidence rule, so may be oral / in separate email
 - E.g. promise to pack in certain way
 - Unless effective merger clause: Art 72

Unstated assumptions

A, who lives in Flanders, telephones B, a newsagent in Maastricht, and orders a single copy of a monthly Dutch-language magazine. Only the name of the magazine may be spoken but there will normally be a tacit agreement that the magazine to be supplied will be the current edition and not last month's.

Implied terms?

Art 68 (1) Where it is necessary to provide for a matter which is not explicitly regulated by the agreement of the parties, any usage or practice or any rule of the CESL, an additional contract term may be implied ...

- Obvious, but not necessary
 - Tacit agreement
 - Cf German Law, not “completive” interp
 - Officious bystander not business efficacy

“Tacit” agreement > Art 59

In interpreting a contract, regard may be had, in particular, to:

- (a) the circumstances in which it was concluded, including the preliminary negotiations;
- (b) the conduct of the parties, even subsequent to the conclusion of the contract;
- (c) the interpretation which has already been given by the parties to expressions which are identical to or similar to those used in the contract;
- (d) usages which would be considered generally applicable by parties in the same situation;
- (e) practices which the parties have established between themselves;
- (f) the meaning commonly given to expressions in the branch of activity concerned;
- (g) the nature and purpose of the contract; and
- (h) good faith and fair dealing.

Art 66: Contract terms

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- (d) any contract term implied by virtue of Article 68.

Default rules of the CESL

- Art 91 Obligations of seller
 - To deliver
 - Arts 93-95: place, method, time
 - To transfer ownership/ensure right to use DC
 - To ensure conformity
 - Arts 99-105 Non-conformity
 - (not mandatory B2B)
 - To deliver documents
- See also chapters 12 and 15

Pre-contractual information

- Derived from statements

- [Art 69]

- Art 13 Information duties in D/O-P

(2) The information provided, except for the addresses required by point (c) of paragraph 1, forms an integral part of the contract and shall not be altered unless the parties expressly agree otherwise.

- Mandatory (“unless” qualifies “altered” only)

Art 68: Implied terms

(1) Where it is necessary to provide for a matter which is not explicitly regulated by the agreement of the parties, any usage or practice or any rule of the CESL, an additional contract term may be implied, having regard in particular to:

- (a) the nature and purpose of the contract;
- (b) the circumstances in which the contract was concluded; and
- (c) good faith and fair dealing.

Scope for application?

- Matters which the parties did not foresee or provide for
- CESL rules fill most “usual” gaps
- “Unusual”

Art dealer A in Brussels agrees to sell a tapestry to Art dealer B in London. Neither party was aware that, because of the age and rarity of the tapestry, an export license would be required. When he discovers the position, A applies for a license but it is refused... It is an implied term of the contract that it is subject to an export license being granted, and when the licence is refused, the contract ceases to bind the parties.

“Necessary”

- “... because of the danger of giving courts and arbitrators too much power to rewrite contracts according to their own ideas of what the parties should have provided ... A term should not be implied merely to ‘improve’ the operation of the contract.”
- Different traditions?

Restrictions

(2) Any contract term implied under paragraph 1 is, as far as possible, to be such as to give effect to what the parties would probably have agreed, had they provided for the matter.

(3) Paragraph 1 does not apply if the parties have deliberately left a matter unregulated, accepting that one or other party would bear the risk.

General clauses

- Art 5: Co-operation

The parties are obliged to co-operate with each other to the extent that this can be expected for the performance of their contractual obligations.

S sells C kitchen units which S is to install in C's kitchen. S needs a power outlet for his electric drill. An unused socket is close by. C must permit S to use it.

Good faith and fair dealing

Art 2:

- (1) Each party has a duty to act in accordance with good faith and fair dealing.
 - Duty not obligation

GF not “expansion joint”

Art 4(2): 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 and all its provisions, without recourse to the national law that would be applicable in the absence of an agreement to use the Common European Sales Law or to any other law.

Limits on GF & FD

(2) Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other party.

- GF as an ‘excluder’ (R Summers)
- Damages ‘in lieu of exclusion’?

Recital 31

“... As some rules constitute specific manifestations of the general principle of good faith and fair dealing, they should take precedent over the general principle. The general principle should therefore not be used as a tool to amend the specific rights and obligations of parties as set out in the specific rules...”

Ancillary duties

- Schutzpflichten
 - Not to cause injury or damage to other property
- Between parties, seldom needed
 - If non-conformity > injury/damage
 - Remedies include damages
 - As now in German law
 - Damage caused during installation
 - Art 149 Obligation to use reasonable care to prevent injury or damage to goods or property
 - Pre-contractual injury? (JURI: include)

Contracts with protective effect

- Injury to family member/employee?
- French law: obligations de sécurité
 - Not to injure party
 - Obligation de résultat
 - For benefit of close relations
 - Garantie des vices cachées

Article 78: Contract terms in favour of third parties

(1) The contracting parties may, by the contract, confer a right on a third party. The third party need not be in existence or identified at the time the contract is concluded but needs to be identifiable.

(2) The nature and content of the third party's right are determined by the contract. The right may take the form of an exclusion or limitation of the third party's liability to one of the contracting parties.

“Protective effect”

- 3 may be given right to enforce only certain terms

Scope of application

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 the national law outside the Common European Sales Law that is applicable under Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict of law rule. These issues include ... the law of torts.

Furthermore, the issue of whether concurrent contractual and non-contractual liability claims can be pursued together falls outside the scope of the Common European Sales Law.

Contract or tort?

- Obligations de sécurité
 - Fr: contractual because strict
 - Recovery by dependents
 - Tortious in many systems
 - In scope or not?
- Garantie
 - Fr: contractual, clauses opposable
 - In or out?
- Pre-contractual injury?

Scope

- Rec 27 (and JURI amendment)
 - By legal category
- Interpret or draft by fact situation?