



# **European Contract Law: The Italian Perspective**

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***An Italian Perspective on the EC  
Proposal for a Regulation on a  
Common European Sales Law***

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EC Proposal for a Regulation on a  
Common European Sales Law  
(CESL)

# Minimal solution

- Cross-border sales
- Optional instrument

# Directive on Consumer Rights

25 October 2011 (2011/83/EU)

- *Maximum harmonisation*
  - duties of disclosure and right of withdrawal in B2C distance contracts and off premises contracts.

CESL

*Towards a European Contract Law ?*

- **STARTING POINT**

→ **FRAGMENTATION**

- **GOAL**

→ **UNIFORMITY - ENFORCEMENT  
CROSS-BORDER TRANSACTIONS**

# Obstacles

- the linguistic problem
- the economic problem
- the technological problem
- the cultural problem
- general worries or suspicions
- legal fragmentation



# Is the CESL the best solution for a European common law?

- fragmentation of the contents
- uncertainty of many provisions
- opt-in solution

# **Innovations with regard to Italian legal system**

# **Pre-contractual information**



**Avoidance due to  
fraudulent non-disclosure**

# **New defect in consent**

**The case of unfair exploitation  
(art. 51, CESL)**

# A special protection to the weaker business

Art. 86

*Meaning of “unfair” in contracts between traders*

In a contract between traders, a contract term is unfair if it forms part of not individually negotiated terms and it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.

# Blacklist / greylist

The list of unfair contract terms is more strict  
in comparison with Directive 93/13/EC

# Art. 85, w), CESL.

- A contract term is presumed to be unfair if its object or effect is to make the initial contract period, or any renewal period, of a contract for the protracted provision of goods, digital content or related services longer than one year, unless the consumer may terminate the contract at any time with a termination period of no more than 30 days

# Problem: Killer rules

Why should a strong business agree for the adoption of this CESL, if it is supposed to give a higher level of protection to the other party?

Big companies could be dissuaded from adopting this instrument.



# Change of circumstances (art. 89)

- A party must perform its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished.
- Where performance becomes excessively onerous because of an exceptional change of circumstances, the parties have a duty to enter into negotiations with a view to adapting or terminating the contract.
- If the parties fail to reach an agreement within a reasonable time, then, upon request by either party a court may:
  - adapt the contract in order to bring it into accordance with what the parties would reasonably have agreed at the time of contracting if they had taken the change of circumstances into account; or
  - terminate the contract within the meaning of Article 8 at a date and on terms to be determined by the court.

# *Article 73*

## ***Determination of price***

Where the amount of the price payable under a contract cannot be otherwise determined, the price payable is, in the absence of any indication to the contrary, the price normally charged in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price.

# The parties' obligations and remedies

The buyer may:

- (a) require performance, which includes specific performance, repair or replacement of the goods.
- (b) withhold the buyer's own performance;
- (c) terminate the contract and claim the return of any price already paid;
- (d) reduce the price; and
- (e) claim damages.

# Right to cure

- If the buyer is a trader the buyer's rights to exercise any remedy are subject to the right of cure by the seller.
- A seller who has offered a performance which is not in conformity with the contract can offer to cure it at its own expense.

# ≠ Italian Law

- the reduction of the price and the termination of the contract are exceptional and subject to the seller's right to cure in B2C transactions (art. 3.3, Directive 1999/44 and art. 33 ss. cod. Cons.),
- and in cross-border B2B transactions according to Articles 37 and 48 CISG

# Three different *regimes*

- Civil code: general application
- Consumer code: b2c sales of goods
- Vienna convention: cross border b2b sales of goods

# **Controversial aspects of the CESL**

# Relevant lacks

- legal personality,
- the invalidity of a contract arising from lack of capacity,
- illegality or immorality,
- representation,
- plurality of debtors and creditors,
- property law including the transfer of ownership,
- intellectual property law,
- law of torts,
- concurrence,
- contractual and non-contractual liability claims,
- connected contracts: i.e., insurance, transport...



# Undefined and open-ended provisions

## Art. 48 *Mistake*

- A party may avoid a contract for mistake if (...) the other party (...) knew or could be expected to have known of the mistake and caused the contract to be concluded in mistake by not pointing out the **relevant information, provided that good faith and fair dealing** would have required a party aware of the mistake to point it out.

*Article 2*  
***Good faith and fair dealing***

- Each party has a duty to act in accordance with good faith and fair dealing.
- 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.
- The parties may not exclude the application of this Article or derogate from or vary its effects.

# Uniformity in case law

## *Article 14*

### ***Communication of judgments applying this Regulation***

Member States shall ensure that final judgments of their courts applying the rules of this Regulation are communicated without undue delay to the Commission.

The Commission shall set up a system which allows the information concerning the judgments referred to in paragraph 1 and relevant judgements of the Court of Justice of the European Union to be consulted. That system shall be accessible to the public.

# To keep away from the judgement

- avoidance due to defects of consent by notice to the other party (art. 52, CESL)
- termination due to breach of contract by notice to the seller (art. 118, CESL)
- right to cure (art. 109, CESL)

# The problem of translation and multilingualism

- Art. 2, lett. j): '*obligation*' means a duty to perform which one party to a legal relationship owes to another party