

BONA FIDEI IN THE PRE-TRIAL FACE FROM COMMON EUROPEAN SALES LAW

Alban Dokusha and Sara Hoxha

ABSTRACT: *Common European Sales Law represents the most recent "harmonization" attempt by the European Union in order to ensure a minimum common rules in the field of contracts in interstate trading transactions. The Act aims at facilitating transactions within the common market, in all cases where, due to different residences of the contracting parties, confusion and difficulties arise in relation to the law to be applied to their contract (the so-called cross-border trade).*

KEYWORDS: National Laws, Bona Fidei, Pre-Trial Face, European Sales Law

INTRODUCTION

CESL

The need for traders to adapt to different national laws, in interbank transactions, within a complex market, is bigger compared to domestic transactions. In order to avoid these costs and other difficulties of this nature and to ensure above all the interests of consumers involved in such contracts, the Commission and the European Parliament have issued a number of acts to establish a common legal framework for them. Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) provided that in distance contracts between traders and consumers, the trader shall apply the law of the consumer's residence. If the parties to the concluded contract between them provided for the implementation of another law, then this would only apply if the law of the consumer's residence did not provide for a higher level of protection. However, the harmonization achieved with the above act created uncertainty and vacuum in certain areas, giving a great deal of force to the national laws of states

The above act failed to cover all aspects of transactions of this nature, thus failing to meet the purpose of the above regulation. First, he could not guarantee the level of consumer protection required. Second, the difficulties created by the lack of knowledge of the domestic laws of the states, of the advantages and disadvantages that brought to their businesses the regulation of their activity by these laws, caused a certain hesitation of small and medium enterprises to expand their activity beyond the state their residency. This translates into the downturn of competitive market capacity and the drop in import-exports. The European Common Market function is threatened to be undermined. For this reason, the need for a more general act, which provides more comprehensive arrangements, was felt. The foregoing response came with the Common European Sales Law, whose purpose was to improve the functioning of the internal market by expanding interstate trade for traders and consumers. This objective can be achieved by establishing a uniform body of rules in the field of contracts, which operate in the form of a second legal regime within the legislation of the Member States. Traders should apply the rules provided by the Common European Sales Law in all intra-EU transactions within the European Union, unless the parties stipulate the implementation of an internal law which is more favorable to them.

Our analysis of the above regulation will be confined to only one aspect of the regulation that is made by the act of trust in the phase of pre-contract negotiations.

Article 2 (b) of the draft Regulation gives the definition of trust as a standard of conduct characterized by honesty, honesty and appreciation of the interests of the other party to the transaction or relationship. Also, Article 2 of Common European Sales Law (hereinafter referred to as CESL) provides that each party has the obligation to act in accordance with fair trade and fair trade. Failure to comply with this obligation may exonerate the party in violation of its right to seek redress, which the party may otherwise enjoy, or may oblige the party to reimburse the other party for the damages caused. Parties may not exclude the application of this provision or change its effects.

However, CESL presents a feature regarding this issue compared with the acts issued by the European Union so far. Unlike previous acts which highlighted the general obligation of negotiation in good faith, CESL emphasizes the duty of information, thus placing traders on a series of obligations to inform the customer with all the necessary information for them. Thus Article 20 of the CESL, which refers to contracts other than those concluded at a distance and contracts concluded outside trading centers, provides that the trader has the obligation to provide the consumer with the following information in a clean and comprehensible way forward that the contract is completed:

- (a) The main features of the goods or services subject to the contract, to an extent compatible with the means of communication and goods or services
- (b) Full price together with taxes and other charges, in accordance with Article 14 (1)
- (c) The identity of the trader, such as his trade name, his geographical address and telephone number
- (d) The terms of the contract in accordance with points (a) and (b) of Article 16
- (e) When necessary, conditions of post-sales services, trade warranties and customer complaints policy
- (f) Where applicable, technical safeguards applicable to digital content
- (g) Where appropriate, any appropriate interaction, with digital content of hardware and software for which the trader is aware or may not have been unaware.

This provision does not apply to contracts involving daily payments and are executed immediately at the time of termination of the contract.

So CELS emphasizes the provision of a number of specific information, rather than a general obligation of trust. The Act guides traders with regard to the type of information they need to provide by establishing another standard of good contractual behavior.

Such detailed forecasts may facilitate the provision of uniformity between different jurisdictions, yet this represents a different approach to trust, as a standard of contractual behavior. Such an approach is closer to that of the commonwealth countries, which are more inclined towards specific obligations that basically have the principle of good faith but without acknowledging the existence of a general rule of good conduct.

The burden of proof to prove the information falls on the dealer. Article 22 of the Act provides that the parties cannot, to the detriment of the consumer, exclude the application of these obligations or alter their effects. Article 29 also provides that in the event that the consumer incurs an economic loss because he reasonably believed in the information provided by the trader, then he has the right to compensation.

Article 23 of the CESL is considered a provision which in essence places emphasis on bona fide conduct. This provision provides:

1. Before the conclusion of a contract for the sale of goods or the supply of digital content or the performance of services related to the above transactions, from a trader to another trader, the supplier shall be obliged to disclose to the other party any appropriate means, any information relating to the main characteristics of the goods or data of a digital content or of the services related to the foregoing, information the failure of which would be considered contrary to the principle of trust and fair interoperability.

2. In order to determine the type of information the supplier is obliged to make known to the other party, account shall be taken of the entirety of the circumstances, including:

- (a) if the supplier has specific knowledge
- (b) the costs of providing the required information to the supplier
- (c) the ease with which the other party may have provided the necessary information in other ways
- (d) the nature of the information
- (e) the importance of information to the other party
- (f) Good trade practices that are followed in concrete situations

The obligation to provide information provided by this provision requires above all to act with the necessary care so that the information provided is accurate and not false. This is also reinforced by Article 48 of the act and its Article 49 (fraud), which together refer to defective wills resulting from inappropriate repatriation of the obligation to provide information. Article 48 (10) (b) (iii) refers in particular to the error in the case where one party was aware or should have been aware of the error and by not giving the other party the necessary information that the principles of trust and the right interaction required to be granted, the contract was linked to the error conditions.

The regulation offered by CESL has been among the most debated. The proponents of the approach adopted by the act emphasize that through such regulation a compromise is reached between the dear legal systems of the member states. Likewise, the act is distinguished for "structural workmanship" as it acts as a second legal regime for contracts within the legislation of member states, applicable through an express provision of the parties to the contract.

Skeptics of the act discern a variety of flaws in its structure. Firstly, the regulation provided by CESL in the case of non-disclosure of the obligation of information is considered problematic. Article 11 of the Draft-Regulation provides for the right to compensation for failure to provide relevant information, in the case of a contract being concluded. On this basis, when the negotiations did not result in the conclusion of a contract, the issue of liability would be

resolved under the national laws of states. Such an adjustment is not considered appropriate because it leaves the traders in a state of uncertainty during the negotiations regarding the law to be applied to the claim for reparation.

Secondly, the Commission's belief that the obligation to provide information is the appropriate means of protecting the weaker-consumer party is questioned. There is still no consensus about this point and moreover it can not be argued with the conviction that such an arrangement ensures a high degree of consumer protection.

CONCLUSIONS

According to European private law and European legislation, pre-contract responsibility is a highly regulated and harmonized institute. The European instruments clearly show the conditions that must exist to invoke pre-contractual liability and provide for all its features.