

ABSTRACT

According to Custom..? The Role of ‘Trade Usage’ in the Proposed Common European Sales Law (CESL)

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Article 67 of the proposed Common European Sales Law (CESL) stipulates that usage and practices are binding on traders. It follows that, if such customs can be referred to in the interpretation of contracts, they create flexibility in the understanding of contractual agreements and therefore introduce a factor of uncertainty in commercial dealings. One may wonder whether a flexible rule like this is appropriate for the context in which CESL is meant to operate – B2B contracts in which one of the parties is a small or medium-sized enterprise (SME). A particular concern for the European market, in which many businesses are SMEs, is that local usage is likely to be unknown or even unknowable to one or both of the parties. The appeal of the CESL as an alternative contract regime therefore may be diminished.

This paper addresses the question whether the CESL’s reference to trade usage in contract interpretation is indeed a weakness. A comparison is made with US literature in which two theories – the plain meaning rule and the incorporation theory – support different views on the role of usage in trade contracts. Applied to two existing uniform regimes for commercial contracts, the Uniform Commercial Code (UCC) and the Vienna Convention on Contracts for the International Sale of Goods (CISG), these theories reveal the strengths and shortcomings of the application of usage in specific market contexts. Distilling a number of parameters from earlier studies on these instruments, a comparison is made to test whether the CESL can safely make use of trade usage as a means of contract interpretation.