

CISG vs. Regional Sales Law Unification

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With a Focus on the
New Common European Sales Law

edited by
Ulrich Magnus

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Foreword

This book unites the papers presented at a conference that took place on 11 and 12 May 2012 at the Max-Planck-Institute in Hamburg. The publication of the Proposal for a Common European Sales Law (CESL) by the European Commission on 11 October 2011 gave reason to reconsider the relationship between the global unification of the law for international sales of goods and the different approaches and attempts to maintain or introduce regionalised uniform sales law. The global perspective is represented by the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG); the regional perspective focussed on the new CESL Draft and how it compares to the situation in the United States with its coexistence of CISG and Uniform Commercial Code, in Australia where the rivalry is between the CISG and the all-embracing Common Law as well as in the African OHADA (Organisation pour l'Harmonisation en Afrique du droit des Affaires) whose Member States enacted a CISG-light version as mandatory law.

It was a particular advantage of the conference that renowned experts, in particular from the United States and Australia, could authentically describe and assess in which way their countries and regions coordinate international and regional sales law unification. But also the audience assembled scholars not only from Germany but also from other European countries and even from Japan and Vietnam. The interest also of extra-European countries in CESL and how Europe organises its variant of a co-existence of global and regional sales law is remarkable.

The editor owes many thanks to many: first of all to the speakers who delivered the paper version of their contributions more than punctual and thus enabled the prompt publication. Thanks are also due to sellier european law publishers and there in particular to Andreas Pittrich for supporting the publication in the best possible way. Last but not least I want to thank the Max-Planck-Institute in Hamburg and its very supportive and effective staff for hosting the conference.

Hamburg in May 2012

Ulrich Magnus

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Introduction

Ulrich Magnus

On 11 October 2011 the EU Commission has released a Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011) 635 fin; abbreviated: CESL). It is an optional instrument, primarily for international sales. The parties of such a sale must opt for it. However, if chosen it provides for many mandatory rules though mainly but not exclusively for consumer sales. Yet, there is a rival already there: the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) which also regulates international sales of goods in principle between merchants. In many respects the CISG is the original root of the CESL, in particular for its provisions on international sales between businesses. Europe which actually was the birthplace of the CISG now starts to install an own competing sales law. This Common European Law is designed to enable uniform sales law in the EU but also for sales transactions beyond its borders.

Other regions of the world have their own experience with competing global and regional unification of sales law. This is particularly true for the United States with its Uniform Commercial Code (UCC), for Australia with its common law background and for the African OHADA states which adopted a modified CISG as their common sales law. The contributions to this book discuss the respective regional experience in order to give insights and infer conclusions how reasonable, useful, necessary or unnecessary such regional vs. global sales law unification is. This may influence the judgment on CESL which is still in the making.

The contributions do not focus so much on the details of differences between the CISG and the respective regional sales law but rather on the kind and eventual problems of coexistence between the two competitors.

Instead of an introduction to these problems I would like to address four points: the spirit of the place of this conference, the significance of the CISG, the movement of regional sales unification and lastly the questions which the development and in particular CESL pose.

First, the *genius loci*. There is very good reason that this conference took place in the Max Planck Institute in Hamburg. This is a particularly apt place to discuss the current state of relations between the global and the regional unification of sales law. For, the first director and founder of the Institute, Ernst Rabel, was also the initiator and mentor of the Uniform Sales Law. He is the father of all international sales unification. Much in the CISG goes back to him, in particular the structure and most major policy decisions. Even the formulation of many provisions differs not much from his first proposal. Thus, the global sales law has its roots in this Institute and almost all later directors of the Institute took an active interest in the subject.

Let me add a personal remembrance that leads us also to our second point, the CISG's impact and importance: When I came to the Institute in 1973 – now almost four decades ago – the Institute's director was Konrad Zweigert. In 1974 the Hague Uniform Sales Law had entered into force in Germany and two or three years later at one occasion Zweigert posed the question whether there was any experience with this law. I then made an empirical field study asking all German courts and chambers of commerce whether and to which extent they applied the new law. The conducting of this study came to the knowledge of a very influential German business association, actually *the* German business association. An official of that association contacted Zweigert and urged him to forbid me the conducting of the study. The reasons for this initiative never became quite clear. Evidently, business circles were not favourable towards the new law and might have feared that it could impede their practice regularly to agree on German internal law as applicable law. Zweigert ordered me to come to his office, informed me, wanted to hear what I had to say and then simply said, smiling: "Go on with your study. I do not care whatever their attitude is." By the way, the later published outcome of the study was typical: The German courts applied the new law only in one out of ten possible cases.¹ By that time, the new law was either excluded or overlooked. But since then, this initially defensive or even hostile attitude against the uniform sales law has now completely changed. In Germany the CISG is often applied and much less excluded than in its early years.

You find a similar reaction in many, if not all countries which have just ratified the CISG: initial reluctance or even hostility, but then steadily growing acceptance. It needs time to make the new law known, to get familiar with it, to discover its advantages, to change the preceding attitude and tradition and to accept and apply the new law. And in contrast to new mandatory law it needs even more time because the CISG can be excluded, its application can be avoided. Enterprises are not forced to change their habits in respect of the applicable law. In other words; the reception of the CISG is an on-going process that lasts a considerable time.

Like in Germany in most 'older' CISG countries the CISG has now grown up and has almost reached its adult age. Its practical relevance can hardly be doubted. Not only for Germany, it is a misdescription if it is said that the CISG still leads a "shadow existence",² that it is in most cases excluded or that its importance in practice is negligible. The contrary is true. The CISG's practical

¹ See *U. Magnus*, Das Haager Einheitskaufrecht und die gegenwärtige deutsche Praxis, *Neue Juristische Wochenschrift* 1977, 2000 ss.

² *H. Ch. Grigoleit*, Der Entwurf für ein Gemeinsames Europäisches Kaufrecht: Funktionsbedingungen, EU-Kompetenz und Perspektiven, in: *O. Remien/S. Herrler/P. Limmer* (eds.), *Gemeinsames Europäisches Kaufrecht für die EU? Analyse des Vorschlags der Europäischen Kommission für ein optionales Europäisches Vertragsrecht vom 11. Oktober 2011* (2012) 70.

significance is also underpinned by the fact that it is the law in now 78 States; the estimates are that three quarters or even more of world trade automatically fall within its scope. Each year an increasing number of court decisions on the CISG from all over the world is reported.

However, practical importance is only one aspect that matters for the CISG's general importance. The Convention has become a model for national and international legislation on sales law as well as on general contract law. The CESL Draft is only the most recent example. Further, the CISG is the fundament of international soft law, in particular of the PICC and the PECL, the UNIDROIT Principles of International Commercial Contracts as well as the Principles of European Contract Law. In addition, it influences teaching and teachers of law, at least of international commercial law. There is hardly any course on that subject worldwide that does not prominently mention the CISG.

The CISG, as Peter Schlechtriem expressed it, has become a legal "lingua franca" among the lawyers of the world.³ In a positive sense, the Convention is the legal face of globalisation where one uniform set of rules ideally suffices for international sales transactions. And as the essence of the most comprehensive and thorough study on the CISG's impact on national laws Franco Ferrari asked the rhetoric question: "In light of this, what is the CISG if not a success, at least in Europe, where it is not only applied more often than elsewhere but is also applied in ways that better conform to the mandate to promote uniformity in its application?"⁴

Why all this on the CISG, its applauded significance and success? This leads us to our third point: the regional unification of sales law, not only but most recently in Europe. Despite the evident appreciation of the CISG all over the globe we nevertheless face regional attempts and effective achievements to unify sales law even by contracting states of the CISG. I leave aside the old Nordic Sales Law of 1905 which started regional unification of sales law long before any global unification of that area of law. If it is allowed to regard the United States as a region – because the single US States enjoy vast legislative competences in civil law – the most successful and prominent example of regional sales law unification is certainly the American Uniform Commercial Code and its Chapter 2 which is on sales. One could argue that this is just a national codification of sales law. However, the UCC is a mere model law which in itself has no binding force at all. Such model laws may or may not be adopted by the legislation of the single US States and only after such adoption a model law becomes binding. With certain variations each of the 50 US States except Louisiana has accepted Chapter

³ P. Schlechtriem, 25 Years of the CISG: An International *Lingua Franca* for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts, in: H. M. Flechtner/R. A. Brand/M. S. Walter (eds.), *Drafting Contracts Under the CISG* (2007) 167 ss.

⁴ F. Ferrari, General Report, in: F. Ferrari (ed.), *The CISG and its Impact on National Legal Systems* (2008) 480.

2 of the UCC (although Louisiana adopted the rest of the UCC). Thus, the UCC in fact harmonised the law for a territory that in economic and social terms is widely comparable to the present EU. On the other hand, the US also ratified the CISG which applies to all single US States though not for sales among them.

A further example, where the CISG and regionally uniform law meet, is Australia. The whole continent has adopted the CISG; but all separate units of the Australian Federation which like the single US States enjoy broad competences in civil law are governed by the Common Law with specific sale of goods acts which are all modelled after the English Sale of Goods Act of 1893.

Quite another example of rivalry between the CISG and regional sales law is to be found in the OHADA which stands for Organisation pour l'Harmonisation en Afrique du droit des Affaires. This supranational organisation with own competences and an own central court was formed by an international treaty of 1993 between states of Africa's mid-west. Today, OHADA has 17 Member States. Only very few of them, namely Benin, Gabon and Guinea, have ratified the CISG. However, the OHADA itself has enacted uniform acts which become binding when ratified by the Member States. Among those acts the uniform act on general commercial law is the most important one. It is more or less a commercial code, which was first enacted in 1998 and has been revised in 2010. It also provides for rules on commercial sales which widely copy the CISG. Thus, a modified CISG has been made the sales law among and in the OHADA states.

The most recent approach to harmonise sales law on a regional level is the European CESL initiative. This optional instrument primarily addresses b2c sales and b2sme sales. The latter ones are commercial sales where at least one party is a sme, a small or medium-sized enterprise.⁵ However, the EU Member States may extend the applicability of CESL to huge enterprises – non-smes – as well.⁶ One wonders whether without this provision the parties themselves could not do this. Anyway, CESL applies only if the parties validly choose it. Only then even its mandatory provisions become binding law.

My fourth and last point concerns the questions which the different ways to organise the coexistence of global and regional unification or harmonisation of sales law raise. How do the CISG and the competing sales regulation interact? How is their relationship structured? How reasonable, useful, necessary or unnecessary is such coexistence? Which are the experiences of those regions which practice a side by side existence of CISG and further sales regulations? How do they organise this situation? Do they face problems? Which are the eventual problems? Can we learn for CESL from them? Has CESL to be modified? If so, in which respect? The final question is: Is regional unification still an adequate answer in times of globalisation of trade and if so, under which conditions?

The contributions to this book intend to provide answers to these questions.

⁵ Art. 7 (1) CESL Regulation.

⁶ Art. 13 (b) CESL Regulation.

The U.S. Experience with the UCC and the CISG: Some Insights for the Proposed CESL?

Harry M. Flechtner

The U.S. has lengthy experience living with two bodies of law aimed at creating uniform substantive legal regimes for cross-border sales transactions. The two sets of uniform sales law in force in the U.S., of course, are Article 2 of the Uniform Commercial Code (“UCC”), a project motivated largely by a desire to foster uniformity in sales law for interstate transactions within the U.S. internal market (although it is not limited to those transactions), and the U.N. Convention on Contracts for the International Sale of Goods (the “CISG”), a treaty whose purpose is to create a global regime of uniform sales law for international sales. I will attempt to identify lessons that might be useful if Europe comes to face a similar situation, i.e., if the Member States also end up living with two uniform sales law regimes, one designed primarily with the internal EU market in mind (the proposed Common European Sales Law (“CESL”),¹ should it enter into force) and the CISG, to which most EU members are Contracting States. My thinking on this topic has been greatly influenced by a unique opportunity created for me by a Fulbright grant through the Austrian-American Educational Commission: from March through June 2012 I taught a course comparing the CESL and Article 2 of the UCC at the University of Salzburg.

I. The history, rationale, and “enactment architecture” of the UCC: Lessons for the CESL

In keeping with my usual practice, let me begin by stating the obvious – but something that is worth keeping in mind as I proceed: Article 2 of the UCC, the CISG, and the CESL all share the same fundamental goal, which is to reduce the transactions costs imposed on cross-border sales by non-uniform law in the jurisdictions whose law may potentially apply. These three bodies of sales law, furthermore, pursue this goal using the same fundamental strategy: promulgating uniform substantive sales rules, as opposed to, e.g., uniform or international rules of private international law for sales transactions.

¹ *Proposal for a regulation of the European Parliament and of the Council on a common European sales law*, Brussels, 11.10.2011 COM (2011) 635 final, 2011/0284 (COD) [hereinafter “Proposed CESL Regulation”], available on the Internet at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:EN:PDF>.

Let me amplify a bit on these obvious points with respect to Article 2 of the UCC. Since the founding of the country, contract law – indeed, much of commercial law – has been governed in the U.S. by state law: each state has its own system of contract law, derived (with the exception of the civil-law-based system of Louisiana) from the English common law of contracts and thus quite similar in general outline and approach, but often featuring specific doctrines and answers to particular issues that vary from state to state. The highest court of each state acts as the final authority on that state's contract law. Thus it is literally true that there is not a contract law of the United States; there are 50 contract laws (actually, several more if you count the law of the District of Columbia and of the various U.S. territories). The pre-eminence of state law in the U.S. for contract and many other important areas of law is why conflict of laws (choice of law) has been approached primarily as a domestic rather international legal topic in the U.S.: historically, the most pressing, sometimes outcome-determinative, choice of law questions in the U.S. were determining which state's law would govern in a dispute.

The difficulties that non-uniform state law created for interstate commerce – for interstate sales of goods in particular – were recognized relatively early in the U.S. Variations among the state laws meant that U.S. sellers who wanted to engage in interstate sales transaction would either have to ignore the risks attendant upon variations in the sales rules of the jurisdictions whose law potentially might apply to a transaction (and, of course, bear the consequences of such ignorance), or would have to incur the extra expenses of dealing with those risks. If they chose the latter route, such sellers would have to be familiar (or have access to professionals who were familiar) with a multiplicity of laws, would need legal advice from those qualified in a multiplicity of jurisdictions, would need a multiplicity of contract terms adapted to different legal systems, and might have to expect a multiplicity of legal outcomes from the same set of facts.

The resulting increased transactions costs for interstate commerce (as compared to purely intra-state commerce) were obvious, and were seen to discourage interstate commerce and thus the competitiveness of markets. Article 2 of the Uniform Commercial Code, of course, was a response to these problems, but it was not the first such response; before there was a Uniform Commercial Code there was the Uniform Sales Act, promulgated in 1906 and widely (some 36 states) but not universally adopted by the states in an attempt to reduce the non-uniformity of sales law across the U.S. Indeed, what became the U.C.C. – which of course covers many important topics besides sales of goods, including negotiable instruments, rules for bank/customer relationships, letters of credit, documents of title (e.g., bills of lading) and secured lending based on collateral other than real property – grew out of a project to revise and update the old Uniform Sales Act. In short, the U.S. has a long history of recognizing the importance of and attempting to create a uniform body of sales law, although through most of that history the focus has been on domestic U.S. interstate transactions.

To (again) state the obvious, the parallels between the problems addressed by Article 2 of the U.C.C. and those motivating the CESL proposal, as well as their general approaches to these problems, are quite strong. Both bodies of law attempt to promote a more vigorous internal market by reducing non-uniform sales law within a political entity. Both are motivated by concerns about, *inter alia*, competitiveness and the political impact of encouraging a common market among individual units of the larger political entity – units that historically exercised autonomous authority over their contract law and have to this point retained that autonomy to a substantial degree. Whatever your view about the wisdom and quality of the CESL proposal, the Explanatory Memorandum that accompanies the proposed CESL regulation contains a well-articulated statement of the theory behind uniform law proposals – one that could be just as well applied to Article 2 of the U.C.C., and that is worth quoting, in relevant part, here:

Differences in contract law between Member States hinder traders and consumers who want to engage in cross-border trade within the internal market. The obstacles which stem from these differences dissuade traders, small and medium-sized enterprises (SME) in particular, from entering cross border trade or expanding to new Member States’ markets. Consumers are hindered from accessing products offered by traders in other Member States (...)

(...) Surveys show that out of the range of obstacles to cross-border trade including tax regulations, administrative requirements, difficulties in delivery, language and culture, traders ranked contract-law-related obstacles among the top barriers to cross-border trade.

The need for traders to adapt to the different national contract laws that may apply in crossborder dealings makes cross-border trade more complex and costly compared to domestic trade, both for business-to-consumer and for business-to-business transactions.

Additional transaction costs compared to domestic trade usually occur for traders in crossborder situations. They include the difficulty in finding out about the provisions of an applicable foreign contract law, obtaining legal advice, negotiating the applicable law in business-to-business transactions and adapting contracts to the requirements of the consumer’s law in business-to-consumer transactions (...)

In cross-border transactions between traders, ... the economic impact of negotiating and applying a foreign law is also high. The costs resulting from dealings with various national laws are burdensome particularly for SME. In their relations with larger companies, SME generally have to agree to apply the law of their business partner and bear the costs of finding out about the content of the foreign law applicable to the contract and of complying with it. In contracts between SME, the need to negotiate the applicable law is a significant obstacle to cross-border trade. For both types of

contracts (business-to-business and business-to-consumer) for SME, these additional transaction costs may even be disproportionate to the value of the transaction.

These additional transaction costs grow proportionately to the number of Member States into which a trader exports. Indeed, the more countries they export to, the greater the importance traders attach to differences in contract law as a barrier to trade. SME are particularly disadvantaged: the smaller a company's turnover, the greater the share of transaction costs.

Dealing with foreign laws adds complexity to cross-border transactions. Traders ranked the difficulty in finding out the provisions of a foreign contract law first among the obstacles to business-to-consumer transactions and third for business-to-business transactions. Legal complexity is higher when trading with a country whose legal system is fundamentally different while it has been demonstrated empirically that bilateral trade between countries which have a legal system based on a common origin is much higher than trade between two countries without this commonality.

Thus, differences in contract law and the additional transaction costs and complexity that they generate in cross-border transactions dissuade a considerable number of traders, in particular SME, from expanding into markets of other Member States. These differences also have the effect of limiting competition in the internal market. The value of the trade foregone each year between Member States due to differences in contract law alone amounts to tens of billions of Euros.

The missed opportunities for cross-border trade also have a negative impact upon European consumers. Less cross-border trade, results in fewer imports and less competitiveness between traders. This can lead to a more limited choice of products at a higher price in the consumer's market.²

A colleague of mine at the University of Pittsburgh Katz School of Business, Professor Kenneth Lehn, has presented an economist's musings on the magnitude of the transaction costs savings that uniform sales law might engender, and they are (potentially) impressive indeed.³

The difficulty with the rationale advanced in the Explanatory Memorandum that accompanies the Proposed CESL Regulation (a rationale applicable to other uniform contract law proposals) is that, because this rationale is contained in an advocacy piece designed to support adoption of the proposed regulation, it articulates only the reasons favoring the CESL proposal and it neglects countervailing considerations. The general disadvantages of the proposal (not get-

² Explanatory Memorandum accompanying the Proposed CESL Regulation, *supra* note 1, at 2-3.

³ See Kenneth Lane, "The CISG: Perspectives from an Economist", in *Drafting Contracts Under the CISG* at 261-68 (Harry Flechtner, Ronald Brand & Mark Walter, eds.) (Oxford University Press, 2007) 261-268.

ting into the wisdom of its particular provisions) have mostly to do with the start-up costs of instituting a new law. I will argue later in this paper that these countervailing considerations are formidable, and may well prevent the CESL from having a major impact, at least in the short run.⁴

Although the parallels between the purposes, context and approaches of the CESL and of Article 2 of the UCC are indeed strong, there are also many differences that are important to bear in mind. Foremost among these, in my view, is the mode of enactment or implementation of the two laws. The text formally designated as the “UCC” is a model law, proposed for enactment by individual state and territories, sponsored and drafted by two groups without law-making authority – the National Conference of Commissioners on Uniform State Laws (“NCCUSL”),⁵ and the American Law Institute (the “ALI”, best known for producing the various “Restatements” of U.S. law, including the Restatements of Contracts).⁶ The UCC model law promulgated by these groups is under continuing supervision from another group without law-making authority – the Permanent Editorial Board for the UCC.⁷ The UCC model law has no legal authority unless and until enacted as legislation by individual states or territories, and not all have done so. Although it has adopted most articles of the UCC, Louisiana has never enacted Article 2,⁸ choosing instead to keep in place its civil-law-based code of obligations to govern sales of goods. Many states have adopted non-uniform versions of particular UCC provisions (although the changes are often, but by no means always, more stylistic than substantive). Thus the question of which state’s version of UCC Article 2 applies to an interstate domestic U.S. transaction can remain an important question in particular instances. Furthermore, for Article 2 of the UCC to become legally effective in any particular jurisdiction requires law-making action by the relevant authorities of the particular state or territory – generally (in the case of states) enactment by the state legislature of a bill containing the text of the UCC (or the version of that text desired by the state), followed by signature by the state’s governor.

The approach taken by the UCC to creating uniform (or, more accurately, somewhat-more-uniform) sales law represents rejection of the idea of a national (federal) sales law in favor of retaining the traditional dominant role of state law in the area of sales and contract. And, of course, it is an extremely cumbersome process to obtain enactment by each state. Pennsylvania, my home state,

⁴ See the text accompanying notes 20-26 *infra*.

⁵ The official website of NCCUSL is at <http://www.nccusl.org>.

⁶ The official website of the ALI is at <http://www.ali.org>.

⁷ Descriptions of the Permanent Editorial Board for the UCC can be found on the websites for the ALI (see http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=4) and NCCUSL (see <http://www.nccusl.org/Committee.aspx?title=Permanent%20Editorial%20Board%20for%20Uniform%20Commercial%20Code>).

⁸ See <http://uniformcommercialcode.uslegal.com/states-adopting-the-ucc/louisiana>.

was the first to enact the UCC – the code was adopted there in 1953 – but the second state (Massachusetts) did not adopt the Code until 1957. It took more than a decade of effort (as well as multiple substantial revisions of the model law) before the UCC was widely adopted by the states. That time-line is actually surprisingly quick given the magnitude of the legal change represented by the UCC, as well as the number and diversity of jurisdictions whose legislators had to be convinced of the wisdom of adopting this new law. Indeed, the leading commentators on the UCC have asserted that, “[j]udged by its reception in the enacting [state] legislatures, the Code is the most spectacular success story in the history of American Law.”⁹ If experience with recent attempts to revise various parts of the UCC is any guide, the process of enacting the UCC would now take much longer, and might well not succeed at all: an intense 15-year effort by the sponsors of the model law resulted in 2003 in a proposed amended and updated versions of UCC Article 2, but not a single state has enacted the proposed revisions and the sponsoring organizations have now dropped efforts to have the amended version enacted.¹⁰

The mode of enactment envisioned for the CESL is markedly different than that used for the UCC. The current proposal is for the CESL to become legally effective through an EU regulation – not a directive, and certainly not through any process resembling the UCC approach of having each individual member-jurisdiction decide to enact (or not enact) the proposal at its discretion. Thus with (figuratively) a stroke of the European lawmaker’s pen, the CESL would achieve what took so much time and effort in the case of the UCC, and what in fact the UCC has never fully achieved – uniform enactment for the entire union. That is certainly, from many perspectives, an advantage for the CESL: if one wants uniform sales law, there is much to be said for actually having uniform sales law, rather than the ragged and imperfect version produced in the U.S. by the UCC approach. And, of course, the CESL approach saves all the time and effort that would be needed to procure legislation from each Member State.

On the other hand, the UCC has probably enjoyed political advantages from having the commitment, support and imprimatur of relatively local government – an advantage not available through the CESL enactment process. These days, we all know, being labeled a European initiative rather than a project of individual Members States may indeed produce some political resistance.

What is most interesting to me, as one accustomed to the UCC process, is the insistence in the proposed CESL regulation that, although it would not require enacting legislation by the Member States, the CESL would not be a “28th” (European) sales law regime, parallel to the national (domestic) sales laws of the Members States, but a “2nd national sales law regime” that is part of

⁹ JAMES J. WHITE & ROBERT S. SUMMERS, *UNIFORM COMMERCIAL CODE* 7 (5th ed., 2000).

¹⁰ As reported on the website for the ALI, “[t]he 2003 amendments to UCC Articles 2 and 2A were withdrawn in 2011.” See http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=4 (visited 23 April 2012).

each Member State’s legal structure, parallel to the Member State’s (existing) domestic sales law.¹¹ Relevant portions of the Proposed Regulation and the Explanatory Memorandum that accompanies it repeatedly make this assertion: The proposed CESL “is to be considered as a second contract law regime within the national law of each Member State.”¹²

The Common European Sales Law will be a second contract law regime within the national law of each member state. Where the parties have agreed to use the Common European Sales Law, its rules will be the only national rules applicable for matters falling within its scope. Where a matter falls within the scope of the Common European Sales Law, there is thus no scope for the application of any other national rules. This agreement to use the Common European Sales Law is a choice between two different sets of sales law within the same national law and does therefore not amount to, and must not be confused with, the previous choice of the applicable law within the meaning of private international law rules.¹³

* * * * *

The proposal provides for the establishment of a Common European Sales Law. It harmonizes the national contract laws of the member states not by requiring amendments to the pre-existing national contract law, but by creating within each Member State’s national law a second a second contract law regime for contracts covered by its scope that is identical throughout the European Union and will exist alongside the pre-existing rules of national contract law.¹⁴

* * * * *

The proposal provides for a single uniform set of fully harmonized contract law rules including consumer protection rules in the form of a Common European Sales Law which is to be considered as a second contract law regime within the national law of each Member State available in cross-border transactions upon a valid agreement by the parties. This agreement does not amount to, and must not be confused with, a choice of the applicable law within the meaning of private international law rules. Instead this choice

¹¹ For discussion of this aspect of the proposed CESL Regulation, see Martin W. Hesselink, “How to opt into the Common European Sales Law?” (Centre for the Study of European Contract Law Working Paper Series No. 2011-15 1-8 (2011) (available on SSRN through http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1950107).

¹² Explanatory Memorandum accompanying the Proposed CESL Regulation, *supra* note 1, at 4.

¹³ *Id.* at 6.

¹⁴ *Id.* at 8.

is made within a national law which is applicable according to the private international law rules.¹⁵

The reason for this insistence that the proposed CESL Regulation would create, not a 28th regime of European sales law, but a 2nd national regime of sales law for each Member State, is articulated in Recitals to the proposed Regulation:

(3) Contract law related transaction costs which have been shown to be of considerable proportions and legal obstacles stemming from the differences between national mandatory consumer protection rules have a direct effect on the functioning of the internal market in relation to business-to-consumer transactions. Pursuant to Article 6 of Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Regulation (EC) No 593/2008) [i.e., the Rome I Regulation], whenever a trader directs its activities to consumers in another Member State the consumer protection provisions of the Member State of the consumer's habitual residence that provide a higher level of protection and cannot be derogated from by agreement by virtue of that law will apply, even where another applicable law has been chosen by the parties. Therefore, traders need to find out in advance whether the consumer's law provides higher protection and ensure that their contract is in compliance with its requirements. In addition, in e-commerce, web-site adaptations which need to reflect mandatory requirements of applicable foreign consumer contract laws entail further costs. The existing harmonisation of consumer law at Union level has led to a certain approximation in some areas. However the differences between Member States' laws remain substantial; existing harmonisation leaves Member States a broad range of options on how to comply with the requirements of Union legislation and where to set the level of consumer protection.

* * * * *

(10) The agreement to use the Common European Sales Law should be a choice exercised within the scope of the respective national law which is applicable pursuant to Regulation (EC) No 593/2008 [i.e., the Rome I Regulation] or, in relation to pre-contractual information duties, pursuant to Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Regulation (EC) No 864/2007) [i.e., the Rome II Regulation] , or any other relevant conflict of law rule. The agreement to use the Common European Sales Law should therefore not amount to and not be confused with, a choice of the applicable law within the meaning of the conflict-of-

¹⁵ *Id.* at 9.

law rules and should be without prejudice to them. This Regulation will therefore not affect any of the existing conflict of law rules.

(11) The Common European Sales Law should comprise of a complete set of fully harmonised mandatory consumer protection rules. In line with Article 114(3) of the Treaty, those rules should guarantee a high level of consumer protection with a view to enhancing consumer confidence in the Common European Sales Law and thus provide consumers with an incentive to enter into cross-border contracts on that basis. The rules should maintain or improve the level of protection that consumers enjoy under Union consumer law.

(12) Since the Common European Sales Law contains a complete set of fully harmonized mandatory consumer protection rules, there will be no disparities between the laws of the Member States in this area, where the parties have chosen to use the Common European Sales Law. Consequently, Article 6(2) Regulation (EC) No 593/2008 [i.e., the Rome I Regulation], which is predicated on the existence of differing levels of consumer protection in the Member States, has no practical importance for the issues covered by the Common European Sales Law.¹⁶

In short, it is vital that the CESL be viewed as a second national regime within each Member State’s law so that choice of the CESL in B2C transactions does not technically constitute a choice of law that would trigger the protections of Article 6 (2) of the Rome I Regulation. That regulation provides that a choice of law cannot deprive an EU consumer of mandatory consumer protection provisions of the consumer’s home (national) law. Because the consumer protection provisions of the CESL (which, the proposed CESL Regulation argues, are strong and sufficient) would in fact become the level of mandatory consumer protection in each EU Member State, and would not be imposed as a matter of choice of law, Article 6 (2) of Rome I would not allow a consumer to invoke differing consumer protection rules of (non-CESL) national law. As a result of this (pardon the word, but it seems apt) circumvention of Article 6 (2) of Rome I, the proposed CESL can create EU-wide uniform sales law rules for B2C as well as B2B transactions.¹⁷

It is certainly interesting to this observer (but I am easily amused) that the UCC and the proposed CESL, for entirely different reasons, ended up using a conceptually similar legal “architecture” for their attempts to create uniform sales law within their respective larger political entities. Neither the UCC nor the proposed CESL Regulation adopts the straight-forward approach of creating uniformity simply by enacting a single sales law applicable throughout the larger political entity. The UCC rejects the idea of a U.S. national (federal) sales

¹⁶ Proposed CESL Regulation, *supra* note 1, at 15 & 17.

¹⁷ For an excellent discussion of this aspect of the proposed CESL Regulation, see Hesselink, *supra* note 11, at 3.

law, and the CESL rejects the idea of a European sales law that is an alternative (28th) regime to the various national sales laws of Member States. For the UCC, the motivation for this member-state-law architecture is preservation of state law's traditional primary role in the area of contract law. In the case of the CESL, the member-state-law architecture is designed to work around the non-uniformity of consumer protection law mandated by Article 6(2) of Rome I.

Of course in the case of the CESL this member-state-law architecture is purely a conceptual (fictional) matter, since the proposed regulation that would enact the CESL would in fact be EU law and would require no action by the law-making authorities of the Member States. Incidentally, I believe our state governments would have objected strongly if, instead of pursuing adoption of the UCC by legislation enacted in each state, the sponsors of the UCC had tried to have the U.S. Congress enact it as national (federal) law, based on the argument that the primacy of state law in the contract law area would be preserved because, under the Supremacy Clause of the U.S. Constitution, federal law becomes part of state law. That strategy, of course, is the equivalent of what the proposed CESL regulation tries to do. The proponents of the CESL apparently thought that a UCC approach – attempting to get each Member State to enact the same (or similar) regimes as their national sales law – would not achieve the uniformity of law that was sought; based on the U.S. experience, they are almost certainly right. At any rate, in discussing the proposal's compliance with the Subsidiarity Principle, the Explanatory Memorandum that accompanies the Proposed CESL Regulation clearly rejected an approach that would have required legislative action by the individual Member States:

The objective of the proposal – i.e. to contribute to the proper functioning of the internal market by making available a voluntary uniform set of contract law rules – has a clear crossborder dimension and cannot be sufficiently achieved by the Member States in the framework of their national systems ... The objective of the proposal could therefore be better achieved by action at Union level, in accordance with the principle of subsidiarity. The Union is best placed to address the problems of legal fragmentation by a measure taken in the field of contract law which approximates the rules applicable to cross-border transactions.¹⁸

Elsewhere, the Explanatory Memorandum asserts that “a Directive setting up minimum standards of a non-optional European Contract Law would not be appropriate since it would not achieve the level of legal certainty and the necessary degree of uniformity to decrease the transaction costs.”¹⁹

¹⁸ Explanatory Memorandum accompanying the Proposed CESL Regulation, *supra* note 1, at 9.

¹⁹ *Id.* at 10.

To summarize, the mode of enactment chosen for the CESL – an EU regulation, but one insisting that the resulting law is incorporated into the national law of each of the Member States – will almost certainly be less time-consuming and produce greater uniformity than has the UCC mode of enactment. The decision not to pursue actual enacting legislation by each Member State, however, means that the CESL will probably not enjoy all the political legitimacy the UCC obtained through the arduous process of obtaining the commitment and support of local governmental units.

II. The optional nature of the CESL: More insights from experiences with the UCC and the CISG

The fact that the CESL would be optional law, requiring an affirmative agreement of the parties in order to govern a transaction,²⁰ constitutes another significant difference between the enactment strategies of the proposed CESL Regulation and the UCC. The UCC replaced the sales law of the individual states; it does not require an affirmative agreement in order to apply; and, unlike the proposed CESL,²¹ it is not confined to cross-border transactions, but instead applies to any sales transaction for which the domestic law of an enacting state is the applicable law. This may be the most telling difference in approach between the proposed CESL and the UCC. Because the UCC replaced the pre-existing state sales law, U.S. parties are faced, at most, with the choice between two possible “home” legal regimes – the UCC (as enacted by a particular jurisdiction) or, for international sales, the CISG. European parties located in Contracting States to the CISG, in contrast, will (if the CESL proposal is enacted) face in some

²⁰ See Article 8 of the Proposed CESL Regulation, *supra* note 1, at 26-27. According to a statement in Recital 9 to the Proposed CESL Regulation, use of the CESL would be the result of “an express agreement of the parties”, Proposed CESL Regulation, *supra* note 1, at 16 (emphasis added). But see Hesselink, *supra* note 11, at 8-9 (arguing that, under the contract interpretation rules of the proposed CESL, in B2B transactions the parties may implicitly choose the CESL).

²¹ See Article 4 of the Proposed CESL Regulation, *supra* note 1, at 25. But see Article 13 (a) of the Proposed CESL Regulation, *supra* note 1, at 28, which gives Member States the option to extend the CESL to domestic sales transactions. In B2B transactions the proposed CESL can be used only if at least one of the parties is a “small or medium-sized enterprise” (“SME”) as defined in Article 7 (2) of the Proposed CESL Regulation. See Article 7 of the Proposed CESL Regulation, *supra* note 1, at 26. But see Article 13 (b) of the Proposed CESL Regulation, which gives Member States the option to extend the CESL to non-consumer sales transactions that do not involve an SME. Discussion of this limitation on the scope of the proposed CESL is beyond the scope of this paper.

circumstances a choice among three potential “home” legal regimes – the CISG, the CESL, or the current (traditional) national sales law.

Furthermore, the fact that the CESL requires an affirmative opt-in by the parties, along with the fact that the CESL would replace neither existing national sales law nor the CISG as the “default” applicable sales law, will no doubt have a significant impact on the “learning curve” for the new law. I have spoken with some who were in law school at the time the UCC was being enacted, and they described the resulting upheaval to the commercial law curriculum and the great efforts necessary to adapt large, basic courses like Contracts and Secured Transactions to the new law. Surely there was also high demand for continuing legal education offerings to educate the practicing bar regarding the new regime of commercial law. This academic upheaval and effort no doubt resulted in relatively rapid spread of knowledge about the new law. Knowledge of the new law was forced on the legal community, no doubt, by the lack of an alternative: when the UCC was in the process of being enacted by the various U.S. states it was (or was rapidly becoming) the law governing sales of goods and other significant commercial law topics; the old familiar commercial law was going or gone, displaced, and it was impossible to avoid learning about the new one.

Given the optional character of the proposed CESL, as well as uncertainty over the extent to which it will be utilized and the fact that the existing laws governing sales will remain in place even if the CESL is enacted, I wonder how quickly and extensively the curriculum of European law schools will incorporate study of the CESL.²² And will the practicing bar in Europe be willing to invest scarce time and financial resources learning about the new sales regime?²³

The rationale for making the proposed CESL an optional instrument that would not replace existing national sales law is interesting. The Explanatory Memorandum that accompanies the Proposed CESL Regulation articulates that rationale in two passages:

[Although] a full harmonization Directive and a Regulation establishing a mandatory uniform contract law regime ... would considerably reduce transaction costs for traders and offer a less complex legal environment for those wishing to trade cross-border, these options would however also create a considerable burden for traders as those who only traded domestically would also need to adapt to a new legislative framework. The costs attached to familiarise themselves with such a new mandatory law would be particularly significant when compared to an optional uniform contract law

²² For a more hopeful discussion of the likely incorporation of the CESL into the curriculum of European Law Faculties, see Hesselink, *supra* note 11, at 7.

²³ For a moderately pessimistic assessment of how likely business firms are to make use of an optional European sales law instrument, see Gary Low, *Will firms consider a European optional instrument in contract law?* (2011) (available on SSRN through <http://ssrn.com/abstract=1951944>).

regime, because they would impact upon all traders. An optional uniform contract law regime would on the other hand only create one-off costs for those traders wishing to use it for their cross-border trade. The establishment of an optional uniform contract law regime was therefore reasoned to be the most proportionate action as it would reduce transaction costs experienced by traders exporting to several Member States and give consumers more product choice at a lower price.²⁴

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The fact that the Common European Sales Law represents an optional set of rules applying only in cross-border cases means also that it can lower barriers to cross-border trade without interfering with deeply embedded national legal systems and traditions ... A Directive or a regulation replacing national laws with a non-optional European contract law would go too far as it would require domestic traders who do not want to sell across border to bear costs which are not outweighed by the cost savings that only occur when cross-border transactions take place.²⁵

These passages justifying the choice to make the proposed CESL an optional instrument that would not replace existing national sales law evidence real understanding of and appreciation for the start-up costs that society incurs when it enacts a new law. And certainly it makes some sense to argue that those start-up costs should, if possible, be confined to those who would benefit from the reduction in choice-of-law transactions costs created by the proposed uniform law regime – i.e., those engaged in cross border sales. But a broader sense of the impact of start-up costs associated with the proposed new law is absent from the Proposed CESL Regulation. Indeed, the final line of the second passage quoted above appears simply to assume that the choice-of-law transactions costs savings produced by the new law will “outweigh” the start-up costs that cross-border traders will experience with the new law. The experience with the CISG in the U.S. suggests that, at least to practicing lawyers and traders engaged in cross-border sales transactions, the benefits of the new proposed uniform regime may not clearly appear to outweigh the costs required to achieve those benefits.

The start-up costs associated with the CISG – the investment required to learn about an unfamiliar law, to redraft form documents, to absorb a different set of research skills, to deal with the uncertainty that accompanies any law not yet extensively tested in practice – have proven to be quite formidable obstacles to broad acceptance and use of the CISG in the U.S. (and elsewhere, I dare say). Furthermore, when considering whether parties will consciously

²⁴ Explanatory Memorandum accompanying the Proposed CESL Regulation, *supra* note 1, at 8.

²⁵ *Id.* at 10.

choose to incur the start-up costs associated with a new law, the CISG is, de facto, an alternative legal regime because, while it does not require parties to affirmatively opt-in, it makes it very easy, under Article 6 CISG, to opt-out. This means that the start-up costs associated with the CISG can easily be avoided – at least by those aware of the potentially-applicable new legal regime – by designating familiar domestic sales law as the applicable law.²⁶ And, of course, this is exactly what the vast majority of lawyers and their clients (quite rationally, I suspect) have been doing in the U.S. The UCC had the advantage, when it was enacted, of being the only sales law game in town – it drove competing sales law regimes from the legal landscape, and the legal community was **forced** to incur the costs of learning about the new law. This proved a distinct advantage for acceptance and understanding of the then-new law. The CISG has not enjoyed this advantage, and the result has been real resistance to using the CISG. The CESL may well face the same fate for the same reasons.

The Proposed CESL Regulation shows little appreciation that the combination of the opt-in nature of the CESL and the availability (in many cases) of **several** already-familiar sales regimes – existing national sales law as well as the CISG – raises very substantial questions about whether traders engaged in cross-border transactions will find it worthwhile to make the start-up investment that the new law will require. It seems sensible to preserve existing non-uniform national sales law for domestic transactions in order to insulate those engaged in purely domestic transactions from the start-up costs associated with a regime of uniform law that aims to benefit those engaged in cross border transactions. The experience in the U.S. with the CISG, however, suggests that the choice to make the CESL an optional law may well make it an unused law.

To summarize, in the U.S., regional uniform sales law (Article 2 of the UCC) replaced (except in Louisiana) state non-uniform sales law. Thus since the CISG came into force U.S. lawyers have faced only two possible choices for U.S. sales

²⁶ As was correctly pointed out to me during the 11-12 May 2012 conference at the Hamburg Max Planck Institute (which was the origin of this paper), there is a significant difference between the start-up costs associated with an opt-in law (like the CESL) and an opt-out law like the CISG. An “opt-out” law will, clearly, end up applying to more transactions, and thus knowledge of an opt-out regime will likely be forced on practicing lawyers more quickly than is the case with an opt-in regime. That is certainly true. The additional transactions that will be subject to an opt-out regime (as compared to an opt-in regime), however, will be (at least for the most part) transactions where the parties have not consciously addressed the choice of law issue; that is why those additional transactions end up being “unintentionally” governed by an opt-out regime. The phenomenon of sales transactions being subject inadvertently or unconsciously to a particular legal regime is not directly germane to the conscious-choice situation that I am discussing. For purposes of a conscious choice between two possible legal regimes, a regime from which it is easy to opt out is little different than a regime that requires an opt-in.

law, both of which aim at uniform law: one choice, Article 2 of the UCC, is domestic sales law that is relatively uniform through the country; the other possibility, the CISG, constitutes international sales law that is (subject to declarations and non-uniform interpretations) uniform throughout the community of Contracting States. If the CESL is enacted, in Europe (at least in those states that have ratified the CISG) there will be three “layers” of “home” law from which parties can choose – the “traditional” non-uniform sales law of a party’s Member State, the optional CESL, and the CISG. That is a much more complicated relationship and a more difficult choice than we face in the U.S. The optional nature of the CESL, furthermore, will likely make overcoming resistance to the start-up costs associated with a new law – the same kind of start-up costs that have to this point blocked widespread acceptance of the CISG in the U.S. – much more difficult compared to the U.S. experience with the UCC.

III. More on the U.S. experience with the UCC and the CISG, and more lessons for the CESL

Because the proposed CESL would be confined to cross-border sales,²⁷ the default law that will often be displaced if the parties choose the CESL will be the CISG. But the CISG certainly will not always be the ousted legal regime. The proposed CESL could be chosen for transactions not governed by the CISG. For example, cross-border consumer sales are within the scope of the proposed CESL – indeed, that is a major focus of the proposed law, which devotes many provisions to the topic – whereas consumer sales are excluded from the CISG by Article 2 (a).²⁸ The proposed CESL, furthermore, could be chosen for contracts (whether B2B or B2C) for the supply of “digital content”²⁹ – e.g., music, films or computer software;³⁰ whether such “digital content” contracts are “sales of

²⁷ As was noted earlier (see note 21 *supra*), Article 13 (a) of the Proposed CESL Regulation, *supra* note 1, at 28, gives Member States the option to extend the CESL to domestic sales transactions.

²⁸ The definition of “consumer sales contract” in the CESL (see Article 2 (l) and (f) in the Proposed CESL Regulation, *supra* note 1, at 22 and 23) is not identical to the definition of sales “of goods bought for personal, family or household use” which are excluded from the CISG by Article 2 (a). Thus it is possible that some transactions that constitute “consumer sales contracts” under the CESL would be within the scope of the CISG.

²⁹ See Article 5 (b) of the Proposed CESL Regulation, *supra* note 1, at 25. The term “digital content” is defined in Article 2 (j) of the Proposed CESL Regulation, *id.* at 22.

³⁰ See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Common European Sales Law to Facilitate Cross-Border Transaction in the Single Market*, Brussels, 11.10.2011 COM (2011) 636 final, at 7-8 (“In order to take into account the increasing importance of the digital economy, and to ensure that the new regime is ‘fu-

goods” within the scope of the CISG is not clear.³¹ And some B2B cross-border sales of good for which the proposed CESL could be chosen would not have been governed by the CISG because several EU Member States – Ireland, Malta, Portugal and the UK – are not Contracting States to the CISG.³²

Indeed, it is argued that the proposed CESL is needed for B2B transactions because of the limited scope and sphere of application of the CISG – the failure of the sales Convention to cover some kinds of transactions altogether, and its failure to address certain issues (such as aspects of the validity of contracts) even in transactions to which it does apply. This fact, along with the lack of a final interpretative authority on the meaning of the CISG, is cited in the Explanatory Memorandum that accompanies the Proposed CESL Regulation to justify the proposal: “The Vienna Convention regulates certain aspects in contracts of sales of goods but leaves important matters outside its scope, such as defects in consent, unfair contract terms and prescription. Further limitations to its applicability arise as not all Member States have signed the Vienna Convention and there is no mechanism which could ensure its uniform interpretation.”³³ The European Commission’s communication to other European governing bodies in support of the proposed CESL states:

At the international level, a set of rules of a broader scope for B2B transactions was introduced by the 1980 UN Convention on the International Sales of Goods (the Vienna Convention). However, the Vienna Convention was not ratified by all Member States and is not applicable in the UK, Ireland, Portugal and Malta. It does not cover the whole life-cycle of a contract comprehensively and (in the absence of a compulsory jurisdiction within the UN system comparable to the one offered by the European Court of Justice for the EU’s single market) contains no mechanism ensuring its uniform

ture proof”, digital content contracts will also fall within the scope of the new rules. This means that the Common European Sales Law could also be used, for example, when buying music, films, software or applications that are downloaded from the internet. These products would be covered irrespective of whether they are stored on a tangible medium such as a CD or a DVD.”).

³¹ See the discussion and the decisions cited in Article 1, 29 of the UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sales of Goods (2012 ed.), available online at <http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf>.

³² The CISG applies to international sales of goods if both parties are located in Contracting States to the Convention (Article 1 (1)(a) CISG) or (subject to a state’s declaration under Article 95 CISG) if the relevant rules of private international law lead to application of the law of a Contracting State (Article 1 (1)(b) CISG).

³³ Explanatory Memorandum accompanying the Proposed CESL Regulation, *supra* note 1, at 5.

application as different national courts may interpret it differently. Only a relatively small number of traders use the Vienna Convention.³⁴

Thus the proposed CESL is, in the B2B area, basically a vote of no-confidence in the CISG. As one whose professional life has for many years focused largely on the CISG, and who believes it is a vitally-important experiment in creating a vigorous and functional global system of commercial law, I naturally find this unfortunate. But I also, frankly, find it at least somewhat realistic. The limited scope and sphere of the CISG is undeniable, and the threat to the CISG posed by non-uniform interpretation – a threat for which there is no clear, authoritative counter-mechanism (although a variety of innovative strategies for this purpose have been developed) – is clear.³⁵ The CISG cannot offer the broader, deeper and more reliable form of uniform sales law sought by those who support the proposed CESL.

The reasons for the limitations on the uniform sales law regime possible under the CISG are largely political: reaching a global consensus on sales law doctrine that would allow all (or most) States to ratify the Convention was an extraordinary challenge, and it proved (or at least was assumed to be) impossible in controversial areas like consumer sales and mandatory rules governing validity-of-contract questions. The level of consensus and of shared legal tradition within the EU is presumably much stronger than it is globally, and this allows the proposed CESL to have a far broader and more ambitious reach.

Of course the foregoing is merely a reflection of an obvious fact: efforts to create regional uniform law, particularly within an emerged or emerging federal governmental entity like the EU, are likely to be easier to bring off than are attempts to create global uniform law. This is true simply because regional efforts are likely to have to overcome less diversity of legal doctrine and methodology. As a result (and this is reflected in both the UCC and the proposed CESL), regional efforts can be more ambitious in scope. Of course such regional efforts, even if successful, accomplish considerably less than would the success of a global effort; regional uniform law may reduce that costs and difficulties associated with choice of law in some cases, but as long as the world is divided

³⁴ *Communication from the Commission on a Common European Sales Law*, *supra* note 30, at 5.

³⁵ I, among many others, have commented several times on this threat. See, e.g., Harry M. Flechtner, *The Globalization of Law as Documented in the Law on International Sales of Goods*, in NIEUW INTERNATIONAAL PRIVAATRECHT: MEER EUROPEES, MEER GLOBAAL 541 (XXXVe Postuniversitaire Cyclus Willy Delva 2008-09) (J. Erauw & P. Taelman, eds.) (2009), available at SSRN: <http://ssrn.com/abstract=1572917>; Harry M. Flechtner, *Excluding CISG Article 35(2) Quality Obligations: The “Default Rule” View vs. the “Cumulation” View*, in INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION (LIBER AMICORUM IN HONOR OF PROFESSOR ERIC BERGSTEN) 571-84 (2011).

into more than one non-uniform system, those costs and difficulties cannot be completely eliminated. Thus the CISG is, ultimately, far more ambitious than is the proposed CESL; if the CESL proposal undermines the success of the CISG, Europe (as well as the rest of the world) may be the loser.

On the other hand, I remain radically uncertain whether regional efforts to create uniform commercial law are necessary stepping stones or counter-productive stumbling blocks to the process of creating a true global system of commercial law.³⁶ One day it may be clear that projects like the proposed CESL are what evolved into a genuine international legal system, and projects like the CISG were premature (perhaps even harmful) efforts to create such a system before the world was ready. Alternatively, it may become clear some day in the future that the CISG was the seed (or one of the seeds) that flowered into a genuine international legal system – or that the CISG was delayed or even prevented from doing so by short-sighted efforts at more parochial regional uniformity. Which (if any) of those scenarios will prove true will be revealed, most likely, long after I have left such issues to future generations.

IV. Conclusion

The general lessons to be drawn from the U.S. experience of living with two sales law regimes aimed at creating uniformity – one intended (primarily) to create uniform sales law within the internal U.S. market (the UCC) and the other focusing on a global uniform sales law – is that the level of uniform commercial law that is actually achievable depends very much on two factors: 1) the will of the business and legal communities to incur the start-up costs associated with a new (uniform) law initiative, and 2) the extent to which the political ground has been prepared for acceptance of the new initiative. In the U.S., the original UCC initiative was strong on both points: the business, legal and academic communities were aware of the advantages of uniformity, and the sponsors of the UCC were willing to undertake the hard work³⁷ (and the damage to complete uniformity) of pursuing an approach of state-by-state enactment. This strategy reduced opposition to the UCC by honoring the traditional state law pre-eminence in the field of contract law. By promulgating a law that (where enacted) would replace pre-existing state sales law, the UCC ensured that, if it

³⁶ Cf. Harry M. Flechtner, *Another CISG Case in the U.S. Courts: Pitfalls for the Practitioner and the Potential for Regionalized Interpretations*, 15 J.L. & COM. 127 (1995) (positing that “regionalized” interpretations of the CISG that reflected the division of the world into trading blocs might ultimately either advance or retard the project to create globally uniform sales rules).

³⁷ The difficulty of this approach is clearly demonstrated by the failure of the attempts to enact the proposed 2003 revisions to UCC Article 2. See the text accompanying note 10 *supra*.

were enacted, the incentives to incur the start-up costs associated with a new law would be virtually irresistible, and knowledge about the new law would spread quickly through both the academic and professional legal communities.

The CISG, in contrast, has not enjoyed the same advantages in the U.S. In particular, the ease with which parties can opt out of the CISG in favor of familiar pre-existing domestic sales law (in the U.S., ironically, that familiar domestic sales law is another uniform law initiative – Article 2 of the UCC) has significantly undercut the incentives to invest the time and money necessary to understand and learn to use the new law. The attitude this produced – “Don’t bother me about the CISG; I don’t need it because I have the UCC and I’m too busy” – may be reflected in the following peevish statement in an early U.S. court decision: “the Uniform Commercial Code, as previously noted does not apply to this case, because the State Department undertook to fix something that was not broken by helping to create the Sale of Goods Convention which varies from the Uniform Commercial Code in many significant ways.”³⁸ There is also some evidence that the enactment strategy employed for the CISG (enactment by national (federal) action in the form of a treaty) – although it immediately created a greater level of uniformity of law than was ever achieved by the UCC – has produced some resistance because it by-passed the traditional role of state law in the contract law area.³⁹

On the positive side, it seems to me that knowledge and appreciation for the advantages of the CISG as a global uniform sales law is increasing in the U.S. If this is true, I suspect it is due largely to the fact that a new generation of lawyers who were exposed to the Convention in law school has entered practice.⁴⁰ This generational-change method of increasing familiarity with and use of the CISG, however, is a very drawn-out process: it has been almost 25 years since the CISG went into force in the U.S., and my confident guess is that U.S. lawyers advising clients on international sales transaction still generally counsel opting out of the CISG if possible.

Against the background of U.S. experience, the proposed CESL, if enacted, looks far more likely to experience the U.S. fate of the CISG rather than the

³⁸ Federal District Court for the Southern District of New York, United States, 14 April 1992 (*Filanto, S.p.A. v Chilewich Int’l Corp.*, 789 F. Supp. 1229, *appeal dismissed* 984 F.2d 58 (2d Cir. 1993)), available on the Internet at <http://cisgw3.law.pace.edu/cases/920414u1.html>.

³⁹ See, e.g., Curtis R. Reitz, *Globalization, International Legal Developments, and Uniform State Laws*, 51 LOY. L. REV. 301, *passim* (2005) (with particular comments on the CISG at 315).

⁴⁰ See Ingeborg Schwenzer & Pascal Hachem, *The CISG – Successes and Pitfalls*, 57 AM. J. COMP. L. 457, 477 (2009). See also Harry M. Flechtner, *The Future of the Sales Convention: In Defense of Diversity (Some Non-uniformity) in Interpreting the CISG*, in PRIVATE LAW: NATIONAL – GLOBAL – COMPARATIVE: Festschrift für Ingeborg Schwenzer zum 60. Geburtstag 1, 3-4 (Andrea Böhler & Markus Müller-Chen, eds., 2011).

U.C.C.: it is likely to remain more an academic legal curiosity than a vital part of the practical world of European commerce, at least until a new generation of lawyers appears who were forced during their legal training to incur the costs of becoming familiar with the CESL. Indeed, the opt-in nature of the proposed CESL gives the business and legal communities even less incentive than does the CISG to incur the start-up costs associated with the new law. Of course the broader reach and more comprehensive nature of the uniform rules of the CESL, as compared to those of the CISG, may make the ultimate rewards for using the CESL high enough to overcome the start-up costs problem; that, however, will depend, *inter alia*, on whether the substantive rules of the CESL are good, sound, workable ones – and that is a topic beyond the scope of this paper.

The Curious Case of Transborder Sales Law: A Comparative Analysis of CESL, CISG, and the UCC

Larry A. DiMatteo

Introduction

The proposed Common European Sales Law (CESL) invites a historical, theoretical, and practical analysis of regional contract and sales laws – past, present and future. Whether it is enacted, whether it will be modified during the process of enactments, and whether private parties will opt into CESL are questions only the future can answer. But, CESL represents a major advancement of the idea of a European contact law. It is the first significant move towards a general contract law harmonization by the European Union (EU) as opposed to the piecemeal approach of narrowly focused Directives. This Chapter will begin by using the creation and adoption of the American Uniform Commercial Code (UCC) analogically to understand the pitfalls facing the implementation of CESL. The fact that CESL would be enacted as a Regulation of the EU does not detract from the view that it is still an international, as well as a regional law regime. The second part will examine the history of the implementation process of the United Nations Convention on Contracts for the International Sale of Goods (CISG) and its coexistence with Article 2 (sale of goods) of the UCC in American law. This is an especially relevant analysis given that CESL and the CISG scopes of coverage focus primarily on the trans-border sale of goods.

Part 3 provides a comparative analysis of CESL and the UCC, and focuses on the concept of incremental harmonization. Part 4 offers a qualitative assessment of CESL, including whether it is “built for the future”. It also undertakes a comparative analysis of the structure and substance of CESL, CISG, and the UCC. Included in this analysis is the novel protections offered by CESL to small-to-medium sized companies (SMEs), CESL’s interpretive methodology, the role of immutable or mandatory rules in CESL, the role of the duty of good faith in all three instruments, and an analysis of CESL’s general rules of contract. Part 5 ask the question of whether CESL does what the CISG fails to do. This Part also elaborates on the “known weaknesses” of CESL. Part 6 assesses the role of CESL in the future harmonization of contract law. The final part will offer some suggestions and prognostications on the future use of CESL.

A caveat here is in order – before beginning the analysis it is important to note that I have written extensively on the CISG, therefore, this Chapter might reflect some subconscious bias in favor of the CISG and against CESL. That said, the goal of this Chapter is not to analyze CESL from either the CISG or UCC perspectives; it is to analyze CESL from the overall perspective of a reasonable sales

law. The CISG and UCC are used as examples of successful sales law harmonization. They are used from the perspective of the process of their development and substantive content in order to provide context and gain insights into CESL – its substance, the process leading to its drafting, and possible enactment and use.

1. Multi-jurisdictional legal regimes

The common thread that binds these three codes – CESL, UCC, and CISG – is their multi-jurisdictional applications. Like most multi-jurisdictional laws their central purpose is to harmonize laws across jurisdictions whether it be the fifty American states, the twenty-seven EU countries, or the seventy-eight, and growing, CISG countries. Ancillary purposes of such instruments include simplification and modernization of existing law. In the case of the UCC, the Uniform Sales Act of 1904 was woefully out of date – still equating the shifting of the risk of loss to title transfer, as well as clinging on to the vestiges of the doctrine of *caveat emptor*. Karl Llewellyn wrote a scathing critique of the rule that risk of loss passes only on the transfer of title. Instead, he argued that such linkages had to be “de-lumped” given the realities of modern transactions.¹ A modern manifestation of this basic idea is the universally accepted INCOTERMS that provide trade terms that often disconnect title from risk of loss.

Llewellyn was called upon to write a new sales law to bring the law in line with real world practice. The new sales of goods law was primarily aimed at the modernization of the law. It was his hope that state legislatures would replace the old sales law with the new uniform sales law leading to greater harmonization among at least a majority of US states. Eventually, the sales law project expanded to become a commercial law code.² The next section examines the harmonization of commercial law through the UCC project. From this review, insights will be mined for purposes of the CESL project.

1.1 Harmonization movement: United States

The history of the development of the common law in the US is one interspersed with major codification movements.³ The first wave was the famous Field Codes of the mid to late-nineteenth century that resulted in the merging of the law

¹ See Karl N. Llewellyn, “Through Title to Contract and a Bit Beyond”, *New York University Law Quarterly* 15 (1938), 159.

² Karl Nickerson Llewellyn was the Chief Reporter for the Uniform Commercial Code, as well as being the principal drafter of Article I (General Provisions) and Article II (Sale of Good).

³ See Gunther A. Weiss, “The Enchantment of Codification in the Common-Law World”, *Yale Journal of International Law* 25 (2000), 435.

and equity courts.⁴ The result was a unified court system in which courts were able to grant both legal damages and equitable remedies under a single code of civil procedure. The second wave focused on the harmonization and modernization of substantive law. The greatest success in this area was the enactment of the UCC that started as an idea in the 1940s and resulted in its adoption by all American states by the mid-1960s.⁵

1.1.2 American Law Institute and NCUSL

At the time that the American Law Institute (ALI)⁶ was recruiting Llewellyn to draft a new sales law, there was a growing recognition that the general common law of contracts had become a chaotic mess in other specialized areas commercial law. The ALI was founded in 1923 at the beginning of this second wave of the American codification movement. The founding Committee noted that the two chief defects in American law were high degrees of uncertainty and complexity. It rationalized that “part of the law’s uncertainty stemmed from the lack of agreement on fundamental principles of the common law, while the law’s complexity was attributed to the numerous variations within different jurisdictions of the United States.”⁷ It is important to note that the ALI obtained almost instant credibility because its original founders and leaders were the reigning giants of the legal establishment and included Chief Justice and former President William Howard Taft, future Chief Justice Charles Evans Hughes, and former Secretary of State Elihu Root. Judges Benjamin N. Cardozo and Learned Hand were also among its early leaders. In the end, the ALI became the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. The Institute’s members presently include 4000 lawyers, judges, and law professors of the highest qualifications, who draft, discuss, revise, and publish Restatements of the Law, model statutes, and principles of law.

The ALI joined with the quasi-governmental National Conference of Commissioners on Uniform State Laws (NCCUSL)⁸ NCCUSL was established in 1892 to provide states with “non-partisan, well-conceived and well-drafted

⁴ David Dudley Field II (1805-1894) was an American law reformer whose major contribution was in the field of civil procedure. He was instrumental in changing civil procedure from old common law pleading to code-based pleading. His efforts resulted in the enactment by New York State of the Field Code in 1850. It soon became the model for the rest of the American states.

⁵ See William A. Schnader, “A Short History of the Preparation and Enactment of the Uniform Commercial Code”, *University of Miami Law Review* 22 (1967), 1.

⁶ See <http://www.ali.org>.

⁷ See <http://www.ali.org/index.cfm?fuseaction=about.creation>.

⁸ See <http://www.uniformlaws.org>.

legislation that brings clarity and stability to critical areas of state statutory law.” It is a non-profit unincorporated association, comprised of state commissioners on uniform laws from each state, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. It is a state-supported organization whose members are appointed by state governments. These two organizations – ALI and NCCUSL – joined forces to co-sponsor the UCC project. It is the involvement of these two organizations that helped produce the amalgamation of academics and practitioners that provided the intellectual and practical brain power used to craft a wide reaching commercial law code. These organizations also played essential roles in promoting and advancing the UCC through fifty plus legislatures. These types of organizations would be beneficial in the promotion of private law harmonization in the EU. The new European Law Institute should be supported and developed to play the role that the ALI has played in the U.S.

1.1.3 Llewellyn’s civilian perspective and law harmonization

Karl Llewellyn is a unique and important character in the development of American commercial law during the twentieth century.⁹ His eclectic interests extended to jurisprudence,¹⁰ law and anthropology,¹¹ legal education,¹² contract law,¹³ and sales law.¹⁴ He is of especial interest for the current Article not because of his importance in American legal development, but due to his ideas on the harmonization of commercial law. However, to understand his contributions in this area it is necessary to understand Llewellyn’s intellectual development and the incorporation of his ideas – stemming from that development – that he eventually incorporated into the UCC.

⁹ Karl N. Llewellyn (1893-1962), after a few years at Yale, joined the faculty at Columbia in 1925 and remained until 1951, when he joined the faculty at Chicago until his death.

¹⁰ Karl N. Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Chicago: The University of Chicago Press 1962); Karl N. Llewellyn, “A Realistic Jurisprudence--The Next Step”, *Columbia Law Review* 30 (1930), 431.

¹¹ Karl N. Llewellyn & E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman, OK: University of Oklahoma Press 1941).

¹² Karl N. Llewellyn, *The Bramble Bush* (Dobbs Ferry, New York: Oceana Publications 1960).

¹³ See e.g. Karl N. Llewellyn, “Our Case Law of Contract-Offer and Acceptance (Part 2)”, *Yale Law Journal* 48 (1939), 779; Karl N. Llewellyn, “What Price Contract – An Essay in Perspective”, *Yale Law Journal* 40 (1931), 704.

¹⁴ See e.g. Karl N. Llewellyn, “C.I.F. Contracts in American Law”, *Yale Law Journal* 32 (1923), 711; Karl N. Llewellyn, “Across Sales on Horseback”, *Harvard Law Review* 52 (1939), 725.

Llewellyn was a noted jurisprude during the early 1930s; he was a founding member of the American Legal Realist Movement¹⁵ that criticized the notion that law was an internally rational system that provided the right answers even to the most novel of cases. Instead, the Realists asserted that rules did not decide cases, but factors external to the legal system – public policy interests, equities, judicial biases – played major roles in explaining judicial decisions.¹⁶ In short, law was indeterminate and the legal formalism of the time masked the real factors behind judicial decision-making. Thus the selection of Llewellyn to be the Reporter of the Code (UCC) project was at first sight an amazingly bizarre choice.

What explains his selection to lead the most important code project in US history? First, Llewellyn was in the moderate camp of the Legal Realists. His critique of the law evolved from his critical harangue that for every rule there is a counter rule (that could justify any predetermined decision of a court) to the belief that rules could be made to work. That is, the problem with the law at the time was that the rules were bad in that they had become antiquated and the reasons behind the rules had been detached from the rules as applied.

Llewellyn's continued belief in the strengths of the common law system was premised upon the use of outside commercial practice to continually refresh the formal, but open-textured rules through the use of a reasonableness standard.¹⁷ Llewellyn's approach to how the common law system of judicial decision-making and law creation operated, at its best, was detailed in his book, *The Common Law Tradition*.¹⁸ He believed that existing institutional restrictions, such as is found in CISG interpretive methodology, limited or guided judicial discretion.¹⁹ It was these limits on judicial discretion – use of contextual evidence and institutional norms – that made the law more certain and predictable.²⁰ It is this part of the Llewellyn legal canon that the legal literature refers to as the “later Llewellyn.” The importance for the current undertaking is that these same beliefs are found embedded in the CISG and the CESL. Did Llewellynian thought

¹⁵ See William Twining, *Karl Llewellyn and the Realist Movement* (Norman, Oklahoma: University of Oklahoma Press, 1973).

¹⁶ See Joseph C. Hutcheson, Jr., “The Judgment Intuitive: The Function of the ‘Hunch’ in Judicial Decisions”, *Cornell Law Quarterly* 14 (1929), 274.

¹⁷ See E. Allan Farnsworth, “Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code”, *University of Chicago Law Review* 30 (1966), 666.

¹⁸ Karl N. Llewellyn, *The Common Law Tradition-Deciding Appeals* (Boston: Little, Brown and Company 1960).

¹⁹ CISG, Articles 7 & 8. See generally, Larry A. DiMatteo & André Janssen, “Interpretive uncertainty: methodological solutions for interpreting the CISG”, *Nederlands Tijdschrift voor Handelsrecht (Dutch Journal of Commercial Law)* 2 (2012), 52.

²⁰ See Larry A. DiMatteo, “Reason and Context: A Dual-Track Theory of Interpretation”, *Penn State Law Review* 109 (2004), 397.

have a direct influence on the drafting of the CISG and the CESL? No, Llewellyn's ideas were not wholly original for he borrowed much from his knowledge of the civil law, especially the German BGB, as well as Continental legal philosophers such as Rudolf von Jhering, Eugen Ehrlich, and Francois Gényn.²¹ Llewellyn is especially important because he had the opportunity to use his legal philosophy and ideas in constructing the UCC; he was also unique in that he possessed a solid knowledge-base of actual commercial practice that he was able to draw upon for the UCC project.²² Llewellyn's UCC will be briefly compared to the CISG in the next section.

2. UCC and CISG: an evolving coexistence

The fact that the U.S. has two laws for sales of goods – UCC and CISG – provides an opportunity to see if that structure can be analogized to the possible future relationship between the CESL and the CISG. The American UCC Article 2 is an optional but very successful internal sales law. It is mostly an “opt out” instrument. Its success is marked by the fact that contracting parties almost never opt out. In fact, many standard forms are premised on the UCC being the governing law. Express derogations are also rare. Since the UCC is almost entirely made up of default rules or gap-fillers, the parties express terms control and the UCC only becomes relevant when the parties fail to provide an express term.

The UCC coexists with the CISG. There are positive and negative aspects of this coexistence. The CISG provides the benefit of having a uniform Federal sales law that is also the law of America's largest trading partners. As such, it offers the basis for common understanding and lower transaction costs in international sales transactions. The other benefit of the CISG is that it offers a number of updated rules that better reflect modern commercial reality. For example, in adopting the CISG the U.S. failed to opt out of the “no writing” requirement of CISG Article 11 despite the fact that the UCC requires a written instrument (on sales of five hundred dollars or more). The writing requirement is seen as a relic and not a reflection of modern business contracting characterized by informality and the use of mass communications. The initial draft Revised

²¹ See James Whitman, “Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code”, *Yale Law Journal* 97 (1987), 156; Michael Ansaldi, “The German Llewellyn”, *Brooklyn Law Review* 58 (1992), 705; Shael Herman, “Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code”, *Tulane Law Review* 56 (1982), 1130.

²² See generally, Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960); Allen R. Kamp, “Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code”, *Albany Law Review* 59 (1995), 325; Larry A. DiMatteo, “A Theory of Interpretation in the Realm of Idealism”, *DePaul Business & Commercial Law Journal* 5 (2006), 17.

Article 2 incorporated a number of CISG-like provisions like the elimination of the writing formality; but, for political reasons the writing requirement was re-instituted with the modification that a writing is only required for transactions of \$5,000. Revised Article 2 also improved Section 2-207 and its handling of the battle of forms scenario by replacing “additional terms” with the more comprehensive “varying terms”, and by adopting the knock-out rule. But, in the end, a number of industry groups helped defeat the updating of Article 2.

In actuality, the UCC and the CISG have had an uneasy coexistence. American exporters and importers, and their attorneys, were ignorant of the CISG’s existence for an unreasonable amount of time after its adoption. Therefore, for at least the first decade of its existence, American businesses were subject to unintended legal liability. Even though the CISG possesses a great deal of commonality with the UCC, there are a dozen or so major differences. The UCC diverges from the CISG in a number of important areas – statute of frauds (UCC)²³ versus no writing requirement (CISG);²⁴ common law parol evidence rule²⁵ versus all forms of evidence including witness testimony allowed;²⁶ perfect tender²⁷ versus fundamental breach rule;²⁸ strict enforcement of timely delivery versus nachfrist notice (time extensions);²⁹ generalized notice of non-conformity is sufficient³⁰ versus requirement of particularized notice;³¹ additional terms almost never materially change an offer³² versus most terms are considered to materially alter the offer;³³ and so forth. The CESL does not present the problem of divergent rules for a number of reasons. First, the CESL, especially in the area of contract formation, borrows extensively from the CISG. Second, the extended scope of CESL’s coverage is mostly in areas not covered by the CISG. Third, parties cannot through ignorance come within the jurisdiction of the CESL because of its opt-in nature. Strategically, the drafters of the CISG understood that the opt-out nature of the CISG would best promote its use. The opt-in nature of the CESL prevents the occurrence of unexpected legal liability that the opt-out nature of the CISG has produced.

²³ UCC, Section 2-201.

²⁴ CISG, Article 11.

²⁵ UCC, Section 2-202.

²⁶ CISG, Article 11.

²⁷ UCC, Section 2-601.

²⁸ CISG, Article 49(1).

²⁹ CISG, Articles 47, 48 and 63.

³⁰ UCC, Section 2-607 (3)(a).

³¹ CISG, Article 39(1).

³² UCC, Section 2-207 (no definition of “material”).

³³ CISG, Article 19(3) (broad definition of materiality).

3. Comparative analysis of UCC and CESL: incremental harmonization

The UCC is a prominent example of a multi-jurisdictional commercial code – heralded in America as the greatest harmonization of private law in the country's history. Its nine plus Articles – some Articles have fully independent sub-articles, such as Article 2 (sale of goods) and Article 2A (lease of goods); Article 4 (bank deposits and collections) and Article 4A (funds transfers) – cover vast areas of commercial law including the above-mentioned sale and lease of goods and bank and wire transfers, along with negotiable instruments (previously, commercial paper), documents of title (bills of lading), bulk transfers, and secured transactions. The UCC's scope is much broader than the CESL except for the latter's coverage of the supply of digital content and related services. The proposed UCC Article 2B dealing with the licensing of goods was rejected. Therefore, licensing and services remain in the domain of the common law of contracts. Nonetheless, UCC Article 2 provides a case study in the application of a multi-jurisdictional sale of goods law to compare with the proposed CESL.

Much like the enactment of EU Directives in the area of private law and consumer protection, the U.S. codification movement in the early twentieth century was an effort in the drafting of narrowly focused model laws and partial enactments. The first substantial effort was the Sales of Goods Act in the first decade of the century. Numerous model laws and uniform acts followed, such as a relatively successful uniform law on commercial paper. That said, these attempts at harmonizing laws were mostly failures. Some, of the acts, such as the sales acts, almost immediately became obsolete at the time of their publications. These failures, however, paved the way for the UCC – first framed as a demand for an updated sales law and then expanded into the UCC project.

You may ask, what does this have to do with the CESL? First, it shows failures in the enactment and application of harmonizing private laws can lead to greater successes in future reincarnations. The hopelessly antiquated 1904 Sale of Goods Act produced a groundswell of academic, and eventually, support from the business communities for a more realistic, modern, and rational approach to commercial law. It is also an example of the cliché of having all the planets come into alignment: a very chaotic and uneven common law across the fifty states; an outdated uniform law enacted by a small majority of the states, the coming together of two think-tanks (ALI and NCCUSL), the enlistment of a uniquely gifted commercial law scholar and legal philosopher (Karl Llewellyn); and a savvy and persistent lobbying effort by the sponsoring associations, trade groups and academics. Still, it took over thirty years to draft and to be adopted by all fifty states. NCCUSL and ALI began drafting the UCC in 1942 and after a decade of work the UCC was published in 1952. It was not until the mid-1960s that it became the law of all the U.S. states.

Second, the UCC project provides a model of an incremental, gradualist evolution of uniform commercial law codification in a common law system. It

also represents the underappreciated role of codification in the common law, just as the role of precedent and judicial creationism is downplayed in the civil law. The somewhat analogous instrumentalism is found in the EU *acquis*, especially in the series of Directives in the areas of consumer protection and contract *acquis* leading up to the CESL. The CESL, like the UCC, is an attempt at harmonizing an increasing chaotic set of Directives, much as the UCC supplanted a chaotic body of commercial case law. The CESL can be seen, to a lesser degree, as a modernization of trans-border law in the area of Internet trading and the supply (sale-license) of digital content.

Looking into the future of the harmonization of European private law, it is unclear whether the CESL is a watermark moment in the evolution of a trans-European law or a termination point in which national sovereignty will permit no further transgressions. The diversity of opinions on the legal appropriateness of the CESL range from those who believe that it is an affront to the sovereignty of national law, especially in the area of consumer protection, to those who believe that EU competency supports the adoption of a broad EU Civil Code. Given the experience in the U.S. with the UCC, the planets would once again have to come into alignment for there to be a serious push in the harmonization of private law beyond the CESL.

Two anecdotal points – one substantive and the other political can be made at this point. First, the political-contextual factor is the more difficult obstacle to overcome in such harmonization efforts. The current state of the EU is still strong, but the Euro and sovereign debt crisis at least in the short-term is likely to distract and damper the momentum for more expansive private law harmonization. In addition, the savvy structuring of the CESL to target Internet trading, digital content, related services, as well its harmonization-simplification of consumer protection law has allowed the EU authorities to obtain the tentative support of most EU countries. A broader contract or civil code would be difficult to obtain, especially since it would be viewed by a host of EU countries as an incursion into the general law of contracts that would be viewed as an unacceptable pre-emption of national sovereignty. This begs the question of whether the EU possesses the legal competency to advance an EU contract or civil code. At least, in the area of general contract law the answer that can be best argued is in the affirmative. A harmonized sales, services, and general contract law advances the idea of a common internal market. However, as one moves from specialized areas of law, such as sales, agency, or insurance law, the internal market rationale becomes more tenuous. And as one moves from the idea of an EU Contract Code to an EU Civil Code, the argument becomes difficult to sustain, especially at this stage of EU integration.

Maybe, in future decades a “grand” civil code could be politically possible. For now, the differences in the legal traditions, especially the differences in legal culture between Western Europe and Southeastern Europe, make it difficult to believe that such an undertaking would be possible in the near future. Even if the political will were present, the EU and national legal apparatuses would not

be in a position to adequately receive and implement such a code. That said, a continuation of the incremental approach may allow for the harmonization of major areas of contract and commercial law. Once again, the UCC project provides a historical illustration. It took some sixty years to move from the legal formalism of the 1904 Uniform Sale of Goods law to the widespread adoption of the UCC in the mid-1960s.

So, with the idea of a European Civil Code somewhat in the distant future, the best that can be offered is piecemeal harmonization. Piecemeal harmonization sometimes conjures up a derogatory implication of patchwork remedies and incompleteness, and in the area of ever-growing consumer Directives a bit of chaos. The CESL may serve as a vehicle to further piecemeal harmonization on the road to a greater unification of European law. However, even if viewed as an evolutionary benchmark, the CESL must meet the dual standards of need and quality. In the area of need, the feasibility study and preliminary statements of the CESL provide a variety of rationales for the Regulation. The next section offers a qualitative assessment of the CESL.

4. Qualitative assessment of CESL

The assessment of quality is a bit of an amorphous and unreachable quest. Like any such code, the CESL is written with a modest degree of abstractness that provides the flexibility for its application to the variety and complexity of the real world's transaction-types (sales, digital content, related services) and fact scenarios, including the novelty of future, unknown types of transactions and new fact scenarios. However, quality can be measured in the present by examining the rationality of the CESL's structure or organization of subject areas and rules; the clarity of its exposition; the incorporation of mechanisms to deal with future real world developments, that is, its ability to self-adjust; and the minimization of undefined terms.

4.1 Built for the future: guarding against obsolescence

Two of the parameters of quality previously noted are whether the CESL incorporates mechanisms to deal with future real world developments and whether it possesses the ability to self-adjust. Again, the American UCC will be used as a case study. The UCC ranks high on the scale of flexibility and its ability to be applied to novel fact scenarios. The draft of Article 2 (sale of goods) was finalized in the early 1950s and is still the law to the present. This is mostly due to its generous use of open textured rules and its embrace of a contextual interpretive methodology. Karl Llewellyn, who personally drafted Article 2, used the reasonableness standard in many of the Article's gap-filling (default rules) provisions directing the judge to the real world of commercial practice.

Thus, reasonableness eliminates the possibility of a conceptual-driven determination of reasonableness or a judicial determination of reasonableness within the internal legal order. This approach provides a high degree of flexibility in applying the UCC because reasonableness has a chameleon-like definitional quality – reasonableness of a given term varies from case to case, business type to business type, and between existing transaction-types and transaction-types of the future.

Given its longevity and the use of open-textured terms can one assume that Article 2 has shown few signs of obsolescence and little need for revision? The answer is clear that a number of its rules now fail to reflect commercial reality and changing business practices. This is shown by the fact that all the other Articles of the UCC have been revised and the revisions adopted by the states. The most recent revisions of the UCC include a broadly revised Article 9 (secured transactions) and Article 1 (general provisions), which has now been adopted by the majority of American states. In 1989, NCCUSL recommended that Article 6 of the UCC, dealing with bulk sales, be repealed for obsolescence. Approximately 45 states have done so. Two others have followed the alternative recommendation of revising Article 6. The major exception to this remarkable history of unanimity among the fifty American states is Revised Article 2, which was published in 2003 and has been soundly rejected by the states. The only other exception was the rejection of Article 2B (licensing of goods). These rejections have a direct bearing on the future enactment of the CESL. The main reason for the rejection of Revised Article 2 was a lobbying effort by a few industry groups, which provided enough pressure to persuade state legislatures not to adopt the Revision. The rejection of Article 2B was primarily due to the fact that one of the two major sponsoring organizations, NCCUSL, withdrew its support before the publication of the Revision. The same potential dangers lie ahead for CESL – the possibility of organized opposition at the national level by consumer groups, the practicing bar, and business or industry associations. The importance of building wide consensus for the passage of a multi-jurisdictional law cannot be understated.

CESL does possess a “review clause”, which is somewhat foreign to American legislation. Article 15 mandates that after four years EU Member States are to report on the frequency of its use, the degree of litigation over the meaning of its Articles, and divergences between CESL and national laws in the area of consumer protection.³⁴ It then looks to future possibilities for greater harmonization: the EU Commission is to report to the Parliament, Council, and Economic and Social Committee to take account of “the need to extend the scope in relation to business-to-business contracts, market and technological developments in respect of digital content and future developments of the Union *acquis*.”³⁵ The

³⁴ CESL, Article 15.1.

³⁵ CESL, Article 15.2.

first part of the review clause – national informational reports – sets in motion the review process.

The information-gathering and review provisions are a logical and important feature of the CESL. However, it is important to have this information easily accessible throughout the course of the interpretation and application of the Regulation, such as is provided by the Institute of International Commercial Law's database relating to the CISG. Given the number of articles, difference areas of coverage, and area specific rules it would be helpful, especially to Southeastern European countries to have a resource to turn for guidance in applying the CESL. In comparison, the excellent case reporting systems in the U.S. has resulted in states using cases from other states as persuasive precedent in interpreting the UCC. Courts interpreting the UCC generally seek to harmonize their interpretations with those of other states that have adopted the same or similar provisions.

The second part of the review clause is more telling. First, it acknowledges that like any other law that revision is a necessity to keep the law relevant to business practices and novel developments in those practices, especially when considering the rapidity of technological change in areas such as digital content. Second, it indicates that the CESL is a stepping-stone for future harmonization when it states that the Commission shall report on the need to extend its scope. It also implies that the expansion of the EU *acquis* may lead to the need for a more expansive contract code. The review clause indicates that the four-year national informational reports and the five-year Commission report are one-shot affairs. It would have been prudent to make the review process a permanent part of the structure of the CESL. It should state that “every” so many years the review process must be performed.

Something that should have been considered is the establishment of a permanent body to provide guidance regarding the meaning of CESL provisions. In the case of the UCC, ALI and NCCUSL established a Permanent Editorial Board to provide commentary on UCC provisions. This board has issued a number of official comments and other published papers. Although these commentaries do not have the force of law, courts interpreting the UCC often cite them as persuasive authority in determining the effect of its provisions. This function could have been allocated to the newly established European Law Institute or an expert committee within the Institute.

4.2 Structural and substantive comparison of CESL, UCC, and CISG

The next few sections will examine the structure and substance of CESL, CISG and the UCC. It begins with an analysis of the importance of generalized and specialized rules. It will also look at some of the substantive differences between CESL, UCC, and the CISG such as the special status of SMEs in CESL, CESL's interpretive methodology, prevalence of mandatory rules in CESL with a special

focus on the duty of good faith, a comparative analysis of the some of the rules found in CESL, CISG and the UCC, and, finally, a brief analysis of the general rules of contract law found in CESL.

4.2.1 *Structure of generalized versus specialized rules*

Llewellyn in writing the initial draft of Article 2 built into the structure two relatively innovative ideas given this was prior to the consumer protection era. He wanted separate bodies of rules for B2C and B2B transactions.³⁶ His second idea was the creation of merchant tribunals to decide disputes in B2B disputes. The rationale here is that he believed that the average judge or jury does not possess the expertise to decide such disputes on the merits. It would also have meant more summarily decided cases given that commercial contract disputes would not have to wait years in the court house queue given the mass of non-commercial cases. This way the businesses would be able to move on more quickly and possibly preserve of their business relationship. Unfortunately, Llewellyn lost on both accounts.

However, in the case of separate bodies of rules for merchant and consumer transactions, Llewellyn was savvy enough to get his way by more covert means. Put simply, the merchant-consumer distinction is found throughout Article 2. In the definitional sections of Article 1 and 2, definitions are provided for consumer,³⁷ merchant,³⁸ and consumer contracts.³⁹ It is interesting to note that someone may be a merchant and a consumer depending on whether the trade comes within the merchant's area of expertise. Section 2-104(1) states that a merchant is "a person that deals in goods of the kind or otherwise holds itself out by occupation as having knowledge or skill peculiar to the practices or goods involved in the transaction or to which the knowledge or skill may be attributed by the person's employment of an agent or broker or other intermediary that holds itself out by occupation as having the knowledge or skill." This distinction is important because in the battle of forms scenario,⁴⁰ additional terms come into the contract in the B2B transactions, but not in a B2C transaction when the additional terms are provided by a business. Additionally, the written confirmation rule is restricted to offers made by merchants.⁴¹

In contrast to UCC Article 2, CESL is an example of a law that provides both general and area-specific or specialized bodies of rules. CESL has common rules

³⁶ See Zipporah Batshaw Wiseman, "The Limits of Vision: Karl Llewellyn and the Merchant Rules", *Harvard Law Review* 100 (1987), 465.

³⁷ UCC, Section 2-103(c).

³⁸ UCC, Section 2-104(1).

³⁹ UCC, Section 2-103(d).

⁴⁰ UCC, Section 2-207(1).

⁴¹ UCC, Section, 2-205.

for contract formation, but specialized sections of rules for sale of goods and supply of digital content, and sale of related-services; it has separate bodies of consumer protection rules, as well as rules protecting SMEs in B2B transactions. CESL also provides different remedial provisions for B2B and B2C transactions. In contrast, the UCC has common rules that apply to commercial and consumer transactions. Of course, the fact that CESL covers different subject matters partially explains its separate bodies of specialized rules. It is still important, however, to balance the need for specialized rules in certain instances. For example, could the remedies sections of CESL have been consolidated into a body of general rules? If so, than the specialized rules in this area adds unneeded complexity and makes CESL less user-friendly.

4.2.2 *Creation of status-based protections for SMEs*

The most controversial concept found in CESL is its distinction of large businesses from small-to-medium sized businesses. The idea that SMEs warrant status-based protection when dealing with large businesses is not a novel concept. The idea that the merchant-merchant or merchant-consumer distinction is a false dichotomy can be found in American case law and scholarly literature. The distinction is premised upon the informational and bargaining power disparities found in many B2C scenarios. In it in this context that consumer protection laws, including sales law, are based. But, those disparities can also be duplicated in B2B contracting. Professor Garvin argues that the merchant-consumer distinction is a false dichotomy “because small businesses do not fit cleanly” into either category.⁴² A small-to-medium sized company who supplies all its output to a single large business would likely be subject to the dictates and whims of its sole purchaser. The common law, UCC, and likely almost all other national contract laws fail to provide automatic protections to SMEs as does CESL.

In the American case of *A & M Produce Co. v. FMC Corp.*, the court found that a contract between an admittedly sophisticated farming company and a large conglomerate to be unconscionable.⁴³ Another court recognized a distinction between a small business contracting as a business versus a small business contracting as a consumer.⁴⁴ The rationale provided by the court was that a businessperson is often sophisticated when dealing in its core business, but is unsophisticated when dealing outside her area of expertise. The court argued

⁴² Larry T. Garvin, “Small Business and the False Dichotomies of Contract Law”, *Wake Forest Law Review* 40 (2005), 295, 296-97. See also, Blake D. Morant, “The Quest for Bargains in an Age of Contractual Formalism: Initiatives for Small Businesses”, *Journal of Small and Emerging Business Law* 7 (2003), 233 (analyzes the bargaining difficulties faced by small businesses).

⁴³ 135 Cal. Rptr. 473 (Cal. Ct. App. 1982).

⁴⁴ *Sosik v. Albin Marine, Inc.*, No. 020539B, WL 21500516 (Mass. Superior Court 2003).

that the seller was “a large sophisticated boat retailer.”⁴⁵ In contrast the purchasing company “was relatively inexperienced, particularly in the area of purchasing boats to be used commercially.”⁴⁶ The purchaser in this case was a small and new charter service company lead by a person with no previous experience in the business. CESL moves beyond this distinction – between SME as any other business in its area of expertise versus SME as a consumer in areas where it lacks expertise. CESL views SMEs as a type of consumer in B2SME transactions whether they possess expertise or not. Once again, this idea is not novel, but CESL, to the best of my knowledge, is the first to recognize the distinction in a private law instrument.

A question remains of whether courts have generally taken SME status into account in deciding cases. The answer in the common law is a resounding no! American and English courts work under the presumption that all businesses are created equal and should be treated as such.⁴⁷ So, there are no formal rules or protections aligned directly to SMEs in the common law, and by conjecture in the civil law. The final issue is whether SME status is relevant in the application of general policing doctrines, such as unconscionability (unfair terms), duress, mistake, and so forth, or in the application of excuse doctrines. The answer under UCC law in the area of unconscionability is again a resounding no! As mentioned elsewhere in this Chapter, the UCC makes no distinction between merchant and consumer in determining a party’s right to claim that a contract or a contract term is unconscionable.⁴⁸ Nonetheless, courts have overwhelmingly used the unconscionability doctrine to aid consumers. Despite the *A & M Procedure Co.* discussed above, courts rarely use unconscionability in merchant-to-merchant transactions. In *Ray Farmers Union Elevator Co. v. Weyrauch*, the Court proclaimed that “[a]lthough courts have been receptive to pleas of unconscionability raised by consumers; they have been reluctant to do so in commercial transactions.”⁴⁹

The rationality of the SME concept – given large informational and bargaining power disparities between large and small companies in some, but not all, transactions – is easy to understand. But, to link consumer-like protections to

⁴⁵ *Id.* at 7.

⁴⁶ *Id.*

⁴⁷ For example, Section 2-302 of the UCC recognizes the general policing doctrine of unconscionability. It does not limit the doctrine’s application to consumer transactions. Yet, even in cases of great bargaining power disparities between a large and small business the courts rarely invoke the doctrine to protect the weaker party. See, Larry A. DiMatteo & Bruce L. Rich, “A Consent Theory of Unconscionability: An Empirical Study of Law in Action”, *Florida State Law Review* 33 (2006), 1067 (statistically analyzed case law on unconscionability and found that a claim of unconscionability is rarely used when the party making the claim is a business or someone represented by an attorney).

⁴⁸ UCC, Section 2-302.

⁴⁹ 238 N.W.2d 47, 50 (N.D. 1975).

the distinction is highly problematic in practice. So, why does the CESL venture into such uncharted territory? The easiest response is that CESL is an attempt to capture at least a part of B2B transactions within a harmonized law. Is CESL's embrace of SME status protections practical? Will it discourage businesses from opting into CESL in B2SME relationships? The answer to the first question is in the negative; the answer to the second question is in the affirmative.

Regarding the first question, CESL Article 7 (2)'s definition of an SME is a bit unruly. It defines an SME as a trader with fewer than two-hundred fifty persons and with an "annual turnover" of less than fifty million Euros or an annual balance sheet not exceeding forty-three million Euros. Such a bright line rule provides clarity but its arbitrariness fails to deal directly with the problem of power disparities between businesses. Relative size is more important than a fixed number of employees and the amount of business revenue or net worth. A much larger company than those defined in Article 7 (2) may need similar protections vis-a-vis a much larger company. In addition, a SME may not need special protections against a company close, but outside, the definition of SME. Bargaining power often has to do with the uniqueness and quality of a good, than it does with the size of a company. A small company with a unique patented product may possess superior bargaining power over a much larger company seeking to manufacture or distribute the SME's product.

Also, the Article 7 (2) definition of SME is not the brightest of bright line rules. What happens if a business is an SME at the beginning of a contract and grows beyond SME status during the contract? Or, if a business downsizes to SME-size during the course of the contract, does it obtain SME protections? What if the downsizing was necessary due to actions of the larger business to the contract? The rational response is that the key point of determination is at the conclusion of the contract because that is where bargaining power disparities have their greatest impact – in the negotiation and drafting of the contract terms. But, shouldn't the change in status matter in judging the fairness of the performance and enforcement of the contract as well? Should a SME that is a subsidiary of a very large company automatically gain SME status? The answer to these questions, and to the appropriateness of SME protections in general, is that any bright line rule or definition of SME is impractical and fails to deal directly with the underlying problem that such status is intended to solve – overreaching by companies due to informational and power asymmetries. A better solution is to use contract law's general policing doctrines to deal with such disparities. The best that a sales law can do is to expressly specify the areas and types of transactions that a general policing doctrine can and should be applied. In the end, the opt in nature of CESL may mean that B2SME transactions will rarely come under CESL's jurisdiction because larger businesses will want to avoid the special protections provided to the other contracting party (SME).

4.2.3 Interpretive methodology

The interpretive methodology is provided in CESL Article 4 and mimics the one found in the CISG in that the first order method of interpretation is the use of general principles – expressed or implied. First, CESL is to be “interpreted autonomously.” Second, issues within its scope are to be interpreted in accordance with the objectives and the principles underlying it and *all* its provisions.⁵⁰ Thus, the express meta-principles provided in Articles 1 to 3 are the first means to interpret an ambiguity or gap in CESL. In addition, the interpreter is directed to interpret an Article in accordance with all of CESL’s provisions. This is a common interpretive methodology of reasoning by analogy using all related provisions found in a code.⁵¹ This way the eventual interpretation will “fit” in the Dworkinian sense the entire CESL.⁵² Unfortunately, in the case of the CISG, the search for interpretive answers within the code (reasoning by analogy using different provisions) is not expressly enunciated in CISG interpretive methodology.

The reasonableness standard, so pervasive in the UCC and the CISG, is encased in CESL Article 5. Additionally, the purposive interpretive methodology used in some civil law countries is found in CESL, as well as, the use of trade usages and practices relevant to the business or industry of the contracting parties. Finally, recourse to the reasonable person standard is provided.⁵³ Unfortunately, the use of purposive interpretation – “regards to the nature and purpose of the contract – is not expressly stated in the CISG. CESL’s reference to the use of trade usage and practices is not limited to those that are widely known in international trade as is found in the CISG.⁵⁴ In the area of interpretation – interpretation of legal provisions and interpretation of contracts – there is much to like about the CESL.

4.2.4 Substantive differences

Like the CISG, CESL does not require any formalities for the formation of a contract, but unlike the CISG it does not allow a country to opt out of the “no writing” requirement. CESL Article 7, unlike the CISG, provides a definition of a term that is “individually negotiated”. Alternatively, by default, it defines what is

⁵⁰ CESL, Article 4 (2).

⁵¹ See Larry A. DiMatteo & André Janssen, “Interpretive uncertainty: methodological solutions for interpreting the CISG”, *Nederlands Tijdschrift voor Handelsrecht (Dutch Journal of Commercial Law)* 2 (2012), 52.

⁵² See Ronald Dworkin, “Hard Cases”, *Harvard Law Review* 88 (1975), 1057; Ronald Dworkin, “Law as Interpretation”, *Texas Law Review* 60 (1981), 527.

⁵³ CESL, Article 5 (1) & (2).

⁵⁴ CISG, Article 9(2).

to be considered a “standard term” but it is a bit confusing since it refers to the generic “parties” – which could mean B2C, B2SME, SME2SME transactions. Is there or should there be a distinction between B2C, B2SME, and SME2SME in the area of the negotiated terms requirement? CESL Sections 1 and 2 simply assert that terms not negotiated do not become a part of the contract. But, they can become incorporated into the contract if the supplying party meets its burden of proving they were individually negotiated. This seems to suggest that even fair standard terms inserted by a business, SME, or consumer are not incorporated into the contract. This defeats the benefits of standardized contracting in the era of mass production, and greatly increases the transaction costs even in B2B (SME) transactions.

CISG Article 3 provides a simple template for mixed-sale transactions. In contracts in which the buyer provides the materials or a preponderant part of the contract is a supply of labour or services than the contract is not for a sale of goods and is outside the jurisdiction of the CISG. This is the same two-pronged test that is also found in UCC jurisprudence.⁵⁵ Unlike the CISG and the UCC, the expanded scope of CESL’s coverage to include digital content and related services brings more mixed contracts within its jurisdiction. Thus, the apportioning of elements of the contract to goods, digital content, and services becomes less of a concern. Of course, contracts that include non-related services or services excluded under CESL would still need to conform to CESL Article 9’s rules on mixed-purpose contracts. In cases where there is either a sale of goods or supply of digital content and related services, Article 9 directs the judge or arbiter to two separate bodies of rules – Part IV for goods and digital content and Part V for services. As noted above, one wonders if separate bodies of rules are necessary or whether at least some of the rules found in Parts IV and V could have been combined into a single set of rules. This would have made the CESL more user friendly and reduce the likelihood of confusion between the application of two sets of rules. Article 9(2) also seems problematic it allows for the divisibility of the contract into CESL parts for purposes of enforceability. This leads to the possibility where one party is forced to receive the services from a party who has delivered not totally satisfactory goods. Or, in a case where the seller-, supplier-, or service provider provides faulty preliminary services, the buyer may have to accept the delivery of goods or after sales services.

CESL Article 9(3) ameliorates the above possibilities by stating that Article 9(2) does not apply “where the buyer and customer cannot be expected to accept performance of the other parts or the non-performance is such as to justify termination of the contract as a whole.” Given the extended coverage of the CESL, detailed rules pertaining to mixed-contracts were necessitated; however, Article 9 is not well crafted in this regard. For example, it should also include the CISG-UCC “predominate part” test for cases where contracts

⁵⁵ See e.g. *Micro Data Systems, Inc. v. Dharma Systems*, 148 F.3d 649 (7th Cir. 1998).

include non-related services. Does CESL cover contracts where the supply of goods or digital content are not a predominate part of the contract? This is not a far-fetched proposition given the world of high technology, specialized services, and hybrid contracts. CESL makes this a greater possibility given that it excludes transport services and training services from its coverage.⁵⁶ These exclusions are somewhat mystifying given that these services are commonly found in the types of contracts covered by CESL. Sale of goods contracts, for example, generally delegate the obligations for transporting of the goods; in digital content supply contracts, especially those that include the providing of software, at times, include obligations for the supplier to provide training services to teach employees on how to use the new software. Another note that should be highlighted here is the fact that the CISG also may cover contracts that include the supply of digital content or services. Under the predominate part test, a contract consisting of 40 % sale of goods, 30 % digital content, and 30 % services would be covered under the CISG since the predominate part is the sale of goods. Of course, how a court or arbitrator treats the digital content component, such as software, will determine if the CISG actually applies. But, what is clear a contract that is 51 % sale of goods and 49 % services would be covered under the CISG.

4.2.5 Prevalence of immutable rules in CESL

The general law of contracts, as well as its sub-set, the law of sales, is a highly informal, flexible system of rules with a smattering of principles or standards. Other areas of contract or commercial law, such as the law of negotiable instruments and secured transactions, possess more highly formalized sets of mandatory rules. Such formal, mandatory rules are needed to make commercial paper negotiable or to securitize collateral. In contrast, general contract and sales laws are made up almost entirely of voluntary rules either consciously selected by the contracting parties or implied *ex post* by a court or an arbitral tribunal. There are very few mandatory rules, especially in the areas of contract formation, performance, and, arguably, in contract interpretation. And, this is how it must be because contract law *qua* private law is a reflection of freedom or individual autonomy. There are a relative modest number of general policing doctrines or meta-principles in the different legal systems and include principles such of good faith, abuse of rights, surprising terms, and unconscionability.

CESL is exceptional in that it possesses numerous immutable or mandatory rules. This is largely due to its attempt to harmonize consumer protection law and its designation of SMEs as a protected class. Part I of CESL provides general provisions applicable to all the types of contracts covered within the instrument.

⁵⁶ CESL, Explanatory Memorandum, Article 2 (m), 2011/0284 (COD).

Section 1 of Part I provides the foundational principles of freedom of contract, duty of good faith and fair dealing, and the duty to co-operate. CESL Article 2 provides the first of its numerous immutable rules – the duty of good faith and fair dealing may not be excluded or derogated in a contract. Unlike the CISG, good faith is not limited to the interpretation of CESL provisions, but applies to the contract itself and the conduct of the contracting parties. In addition, the duty to co-operate found in Article 3 is absent in the CISG.

The small amount of immutable rules found in the UCC – good faith and fair dealing, the claim of unconscionability, and the impracticability excuse – are the few areas where the UCC can be injected into a sales contract dispute other than by providing default rules. American courts have not broadly applied these mandatory doctrines. In comparison, the principle of good faith in the application of the CISG – especially by the German court system – has been more pronounced.⁵⁷ The good faith principle as applied through the German BGB (*Bürgerliches Gesetzbuch*) is best characterized as “the” core meta-principle in the interpretation of legal rules. The good faith principle is also prevalent throughout the CESL. In contrast, American courts have been restrained in applying it, instead, preferring to allow parties to strictly, if not zealously, enforce their contracts. Additionally, even though there is a general belief that there is a duty to cooperate in the performance of a contract within the American doctrine of good faith, a duty to re-negotiate – as found in CESL Article 89 – has been rejected.

The UCC’s unconscionability doctrine,⁵⁸ although applying both to B2B and B2C transactions, has primarily been applied as a consumer protection principle. There are only a handful of cases in which the unconscionability doctrine has been used to rescue a business party from an overly one-sided contract. Finally, the excuse of impracticability doctrine provides greater discretion in allowing a party out of a contract due to an unforeseeable event than is found in the common law’s impossibility and commercial frustration excuses. In reality, the courts have used this expanded excuse rule rather frugally. They have failed to use it expansively to adjust terms in a contract due to changed circumstances preferring to view hardship caused as an allocated risk rather than an unforeseeable event. The excuse doctrines found in the CISG and CESL – Article 79 CISG and Article 88 CESL – are similar in nature. However, Section 89 of CESL requires the parties to re-negotiate when performance becomes “excessively onerous” due to a change in circumstances subsequent to the conclusion of the contract. As with the UCC, there is no counterpart in the CISG.

Like the UCC, the CISG contains few immutable rules. The mandatory rules of the CISG primarily include: CISG interpretive methodology (Article

⁵⁷ This use of the good faith in the performance, enforcement, and interpretation of international sales contracts is common despite the fact that the CISG Article 7(1) only requires the use of good faith in the interpretation of CISG rules.

⁵⁸ UCC, Section 2-302.

7 through 9); writing and formality requirements of countries opting out of Article 11's "no writing" requirement, under Articles 12 and 96; and the excuse of impediment found in Article 79. As discussed previously, the duty of good faith has become immutable not by express mandate of the CISG, but through subsequent jurisprudence. The next section will briefly examine the role of good faith and good-faith related principles in the CESL, CISG and UCC.

4.2.5.1 *Duty of good faith as meta-principle*

There is no larger difference between the CESL, CISG and UCC than its expressed provisions dealing with the duty of good faith. In reverse order, the UCC notes that good faith and fair dealing is "honesty in fact and the observance reasonable commercial standards of fair dealing".⁵⁹ The CISG simply recognizes a duty of good faith in the interpretation of CISG provisions, but not a general duty of good faith between the contracting parties.⁶⁰ However, as previously noted, CISG jurisprudence has ignored the restriction on good faith and has generally applied it in the performance, enforcement, and interpretation of sales contracts. CESL broadly defines good faith and fair dealing as "conduct characterized by honesty, openness and consideration for the interests of the other party."⁶¹ The idea that a party has to be open and take into account the interests of the other party – outside their express contractual obligations – in the performance or enforcement of a contract is foreign to the common law. Of course there are exceptions such as the implication of the duty of best or reasonable efforts in the exclusive agency contract.

The broad characterization of good faith found in CESL would be considered an affront to the principle of freedom of contract under English and American common law, as well as under the UCC. CESL, like any other contract law, is founded on the principle of private autonomy.⁶² The market system works at its best when private parties are free to negotiate their own private law based upon their idiosyncratic preferences and valuations. Parties negotiating in their own self-interests generally produce more efficient results than allocations mandated by a governmental authority. Article 1 of the CESL makes this clear when it states that the "parties are free to conclude a contract and determine its contents", as well as being able to derogate from the provisions of the CESL.⁶³ That said CESL provides a number of immutable rules like any other contract law whether it being the CISG, UCC, English Sale of Goods Act, or the common law of contracts. But, there is a difference. Due to the fact that

⁵⁹ UCC, Section 1-201(b)(20).

⁶⁰ CISG, Article 7(1).

⁶¹ CESL, Explanatory Memorandum, Article 2 (b), 2011/0284 (COD).

⁶² CESL, Article 1 (freedom of contract).

⁶³ CESL, Article 2.

CESL is an attempt to harmonize the EU consumer protection *acquis* it contains more mandatory rules than are found in the CISG and UCC. This would not be so much of a concern if CESL only covered consumer transactions, but it also covers commercial transactions, albeit ones with one party being a SME. Despite its treatment of the SME as an entity in need of greater protections than is found in national contract laws or in the CISG, it is not certain that this is actually the case. Furthermore, the SME is treated like any other business in B2C transactions under CESL. So, the question remains, do most SMEs need the protections provided by CESL? Will the wider range of mandatory obligations imposed by CESL in B2SME and B2C transactions deter businesses from opting into CESL? The first question is beyond the competence of this Chapter, but the second question will be more fully examined below.

What are the additional mandatory rules incorporated into the CESL that are not found in the CISG or UCC? This Chapter will only provide a sampling of CESL's numerous mandatory rules. Articles 8 and 11 make sweeping limitations on the parties' flexibility to customize their contracts. Article 8 (3) states that: "In relations between a trader and a consumer the CESL may not be chosen partially, but only in its entirety." Article 11 follows by stating that: "Only the CESL shall govern the matters addressed in its rules." As noted above, CESL possesses a broadened good faith duty, which is further enhanced by the duty to cooperate in Article 3 and the duty to renegotiate due to changed circumstances in Article 89. In numerous situations, CESL transfers the burden of proof from the claimant to the defendant. Under Article 7, the trader has the burden of proving whether a contract term was individually negotiated.⁶⁴ Article 10 (6) states that certain general notice rules may not be excluded in B2C contracts.⁶⁵ Article 108 entitled "mandatory nature" states that the parties in a B2C contract may not derogate from Chapter 11's rules on buyer's remedies.

The most unique and demanding of the mandatory rules is the duty of the trader to provide pre-contractual information to the consumer. Part II, Chapter 2 contain seventeen articles detailing this mandatory obligation. Article 13 requires the trader to provide a list of nine items of information in distant or off-premises contracts. The information must be provided in plain and intelligible language and in a durable medium. Other Articles of the Chapter provide additional details as to the types of information needed to fulfill the notice requirements of Article 13. Article 17, for example, requires the trader to detail the consumer's right of withdrawal and suggests that the trade include "Model instructions of withdrawal." Article 19 prohibits the conclusion of a contract by telephone until the consumer signs the offer or sends written consent, and the trader must provide a confirmation on a durable medium. The Article fails to acknowledge the use of electronic signatures in the consumer's acceptance

⁶⁴ CESL, Article 7 (3), (4) & (5).

⁶⁵ CESL Article 10 (6) states that a trader may not exclude paragraphs 3 (effectiveness of notice) and 4 (receipt rule).

of the offer. Article 23 switches to B2B transactions and requires the supplier-seller to disclose all information that “would be contrary to good faith and dealing not to disclose.”⁶⁶ Section 3 of Part II provides additional duties relating to contracts concluded by electronic means. Article 24 deals with duties to all parties, while Article 25 provides additional duties in consumer contracts. Article 26 again switches the burden of proof to the trader to prove that the necessary information was provided and Article 27 states that the providing of pre-contractual information in B2C contracts cannot “derogate from or vary its effects.” Again, in the area of remedies for improper disclosure, the parties may not limit the remedies available in B2C contracts.⁶⁷ This sampling of mandatory rule in CESL leads to the question of whether CESL with its plethora of mandatory obligations will be attractive enough for traders to voluntarily opt-in?

4.2.6 CESL's general rules: conclusion of contracts

Chapter 3 of Part II provides the offer and acceptance rules for the formation or conclusion of a contract. These are provided as general rules of contracts applicable to all transactions covered by CESL. A few cursory comments will be made here on issues presented by the drafting of these rules. First, Article 31 includes the general intent to be bound requirement found in most contract laws, including the CISG and UCC. But, it also requires that the proposed contract possess “sufficient content and certainty for there to be a contract.”⁶⁸ This is a much broader requirement than is found in the CISG and the UCC. The CISG only requires that the goods be indicated and the price and quantity be at least implicitly fixed.⁶⁹ UCC jurisprudence has all but eliminated the definiteness requirement. Under the UCC, the parties only need to exhibit a general intent to be bound and the courts will salvage their contract lacking certainty through the use of the gap-fillers provided in the UCC. This is an acknowledgement that many sales of goods contracts, especially B2B contracts, are often incomplete and uncertain. So, Article 31 has the potential of increasing the uncertainty of the enforceability of contracts depending on how courts interpret the content and certainty requirement.

A major disappointment in the formation area is CESL's adoption of the CISG's modified acceptance rules. CESL provided an opportunity to learn from the disastrous provisions found in the UCC and CISG on this important issue. The battle of forms scenario is found in Section 2-207 of the UCC and is considered the most poorly drafted provision of the UCC. It is one of its most

⁶⁶ CESL, Article 23 (1).

⁶⁷ CESL, Article 29.

⁶⁸ CESL, Article 31 (1) (b).

⁶⁹ CISG, Article 14 (1).

confusing and fiercely litigated sections, which Professor Grant Gilmore – co-drafter of Article 9 of the UCC – called “arguably the greatest statutory mess of all time.”⁷⁰ Section 2-207 resulted in the creation of a number of minority rules among the American states – first shot doctrine, second shot doctrine, and the knock-out rule – thus, defeating the goal of harmonization in this area.

If Section 2-207 of the UCC is considered a horrible act of drafting, then Article 19 of the CISG is even worse! The attempt at defining materiality in CISG Article 19(3) makes it nearly impossible – unless the contracting parties agree to use a single, model contract – for B2B contracts to be legally formed upon the exchange of hopelessly conflicting forms. The UCC provision is only better because it fails to provide a definition of material, leaving it to the courts’ discretion to determine the materiality of a term. The American courts have used this discretion to effectively “legislate” materiality out of the UCC. Therefore, forms exchanged with conflicting terms almost always result in a binding contract under the UCC.

Unfortunately, CESL Article 38 makes the same mistake by adopting the CISG’s broad definition of materiality.⁷¹ However, CESL provides a subsequent provision dealing with the problem of “conflicting standard contract terms”, which is absent in the CISG. Article 39 CESL adopts the “knock-out rule” which is the most fair of the alternatives dealing with conflicting standard terms. It still fails to correct the “materiality problem” of Article 38 since it only deals with standard terms. Nonetheless, it provides a bright line rule missing in the CISG and the UCC. However, it does leave one question unanswered. It uses the term “conflicting” and does not address the scenario of a truly “additional” term. If a party’s form has a term with no counter-part in the other party’s form does it become a part of the contract or is it “knocked-out?” The one answer would be that this is not a case of conflict and the term would enter the contract provided that it is not considered to materially alter the offer under Article 38. The other answer to the scenario is that additional term-no term scenario is a conflict and the additional term does not enter the contract. This issue should be clarified before enactment.

5. CESL: doing what the CISG fails to do?

CESL intends to harmonise general and specialized areas of contract laws of EU Member States by creating a second or parallel national contract law regime

⁷⁰ Mark E. Roszkowski, “Symposium on Revised Article 2 of the Uniform Commercial Code-Section-by-Section Analysis”, *Southern Methodist University* 54 (2001), 927, 932 (quoting Letter from Grant Gilmore, Professor, to Robert Summers, Professor, Cornell University School of Law (September 10, 1980), reprinted in Richard E. Speidel et al., *Teaching Materials on Commercial and Consumer Law* 54-55 (3d ed. 1981).

⁷¹ CESL, Article 38 (2).

within each Member State. This second regime would be identical throughout the EU. CESL provides more detail, and arguably provides more clarity, than the more truncated rules of the CISG. But, clarity always needs to be balanced against the need for flexibility. The “as short a period” and “reasonable” inspection and notice of non-conformities requirements under CISG Articles 38 and 39 have caused a great deal of debate and litigation as courts have struggled to determine the reasonable time for inspection and notice. CESL provides a great deal of clarity by adopting a bright line rule of fourteen days for inspection. However, in some situations depending on the type of goods, buyer’s access to the goods and the means of inspection the fourteen-day period may be unreasonably short. Inspection times are highly context dependent and thus setting a fixed time for inspection risks causing injustice in given cases.

CESL Article 88 (1) adopts CISG Article 79(1) impediment excuse verbatim. However, CESL Article 88 (2) is an improvement over CISG Article 79(3). The CISG states that the exemption (excuse) is effective for only the period during which the impediment exists. It does not expressly deal with the case of a prolonged suspension. CESL, on the other hand, provides that “if the delay amounts to a fundamental non-performance, the other party may treat it as such.” Implicit in CISG Article 79 is that an extended period of suspension works a termination of the contract; however, CESL makes it explicit. CISG Article 79(4)’s notice of impediment requirement is duplicated in CESL Article 88 (3). However, unlike the CISG, CESL does not deal with the issue of a third-party impediment found in CISG Article 79(2). This may be due to CESL’s exclusion of coverage over third-party contracts. That said, this issue should be expressly dealt with under CESL Article 88.

Another example of CESL providing additional content in the sale of goods not found in the CISG is its hardship provision. This Article entitled “change of circumstances” rightfully acknowledges that in certain cases an event does not arise to the level of an impediment or excuse, but produces a hardship that the law should provide recourse. The difficulty of such a provision is the definitional problem of defining the type of hardship that triggers an obligation of the non-claiming party to re-negotiate the terms of the contract. The definitional problem is actually three-fold. First, what separates a mere hardship from an impediment or excuse? Second, how does one differentiate onerous hardship from an “excessively onerous” one?⁷² Thirdly, how does one distinguish between a change of circumstances and “an exceptional change of circumstances”?⁷³

Space does not allow for a fuller examination of the major and nuanced differences between CESL and the CISG. A few summary statements are offered here. First, the above examples indicate that CESL is not necessarily an improvement on the CISG. Greater clarity often restricts the needed flexibility of rules

⁷² CESL, Article 89 (1).

⁷³ Ibid.

to accommodate a great variety of fact scenarios. Whether additional clarity is an improvement is too large a question for this Chapter to undertake. The point here is simply that greater clarity often comes at a cost. Second, in the areas of contract formation and excuse (general rules), as well as remedies in the sale of goods (B2B) there is little in the way of “improvement” since, CESL adopts most of the CISG rules in these areas. Third, as pointed out in the modified acceptance area, CESL’s adoption of CISG rules in certain areas were cases of missed opportunities. This is especially difficult to fathom given that the CISG is twenty-five years old and its weaknesses are well-known in the case law and in scholarly commentary. Finally, CESL can be considered an improvement in the sense of its expanded coverage to consumer transactions, digital content, and related services.

5.1 CESL’s known weaknesses

CESL’s complex structure of general contract rules and specialized rules for sale of goods, supply of digital content and related serves, as well as its consumer protection and SME-protection rules may discourage traders from learning its contents and summarily not opting in. In the same vein, the numerous mandatory rules found in CESL may again discourage traders from opting in. Finally, the likely political decision in favour of an opt-in versus a mandatory or opt-out instrument diminishes CESL’s likelihood of becoming a meaningful law.

A known weakness of CESL is its failure to fully harmonize EU law in its chosen areas of coverage. Thus, parties from different countries doing business within one of their own countries would not be covered under CESL. Article 4 (5) of the Explanatory Memorandum states that where “the contract is concluded in the course of the operations of a branch, agency or other establishment of the trader, the place where the branch, agency or other establishment is located shall be treated as the place of the trader’s habitual residence.”⁷⁴ To fully harmonize EU law would require the application of CESL to both cross-border and domestic transactions. This lack of full harmonization opens the possibility of divergences in national laws and CESL.

Before the blueprint for an optional sales law was put forward, Reiner Schulze and Jules Stuyck, in the excellent conference book *Towards European Contract Law*⁷⁵ asserted that a globally efficient-type of sales would produce an optimal reduction in transactions costs, which would require an instrument that would cover domestic and trans-EU transactions, as well as

⁷⁴ CESL, Explanatory Memorandum, Article 4 (5), 2011/0284 (COD).

⁷⁵ Reiner Schulze & Jules Stuyck eds., *Towards a European Contract Law* (Munich: Sellier European Publishers 2011).

transactions between EU and non-EU parties that take place within an EU country:

A restriction to just cross-border transactions would be problematic because ... [the goal is to allow] businesses and consumers [to] obtain and market products and services within the whole internal market under the same legal conditions. It would be highly problematic if, in one Member State, foreign businesses could conclude contracts under other conditions (above all without being bound to particular provisions of national mandatory law) than domestic businesses due to the optional contract law only being applicable to cross-border transactions.⁷⁶

As noted above, CESL does not cover domestic transactions, even those involving a non-EU country or one involving the local branch of a company from another EU country. Both of these types of transactions are viewed as purely domestic transactions even if the parties are from different countries. Member States would have the ability to adopt the CESL as the law for the above excluded transactions. In its *Advice to the UK Government*, the English and Scottish Law Commissions suggested that if adopted the UK should consider expanding its coverage to include domestic transactions.⁷⁷ But, once again, the likelihood of full harmonization is extremely slim, in that all twenty-seven Member States would have to extend the coverage of the CESL for there to be a full harmonization of EU sales law.

6. CESL as a vehicle for future private law harmonization

The forward-looking promise of the CESL is that it sets a foundation for future harmonization efforts in other specialized types of contracts by its incorporation of general contract rules. Thus, its provisions dealing with the conclusion (formation) of contracts, pre-contractual informational duties, right of withdrawal, contract interpretation, and regulations of unfair terms can be re-used or adapted in the harmonization of insurance contracts, and other types of specialty contracts.⁷⁸

⁷⁶ Schulze & Stuyck, at 6.

⁷⁷ LAW COMMISSION AND SCOTTISH LAW COMMISSION, AN OPTIONAL COMMON EUROPEAN SALES LAW: ADVANTAGES AND PROBLEMS: ADVICE TO THE UK GOVERNMENT, published only online at <http://www.scotlawcom.gov.uk/news/advice-on-european-sales-law> or <http://www.justice.gov.uk/lawcommission/publications/1698.htm> (10 November 2011).

⁷⁸ Schulze & Stuyck, at 7.

Grant Gilmore is most famous for his work critically surveying the place of contract law within private law. In *The Death of Contract*,⁷⁹ Gilmore's central thesis was that the law of contracts, at least as it existed in twentieth century America, was largely artificial. In his estimation, it was the work of a handful of scholars, judges, and practitioners intent on building a system, while ignoring the more organic, historically-rooted development of the case law. Gilmore's central idea was that the general law of contracts is a residual category, that is, it is what is left over after all the specialized bodies of law have been added up. Gilmore alleged that rather than contract law coming first, and the various specialties being developed afterwards, it actually was the opposite, where contract enveloped pre-existing specialties, like negotiable instruments and sales.

Gilmore's controversial views aside, he does properly acknowledge the role of specialized rules as an important, if not dominant part of contract law. The enactment of CESL as a Regulation offers hope that future harmonization efforts based upon specific types of contracts will eventually harmonize all of EU contract law. The rules of contracts embedded in CESL, under Gilmore's thesis, are the residual category of general contract rules. If not contained in CESL, than under Gilmore's thesis they are what would be left after the development of specialized rules for the different contract-types. Instead, they are provided first and can be used to facilitate the development of harmonized rules for other types of contracting. Once all the specialized bodies of rules are in place, the residual category of rules can be re-presented as a general contract code.

7. CESL in the marketplace of law

In the market place of law, the set of rules that provide flexibility, clarity, and certainty should rise to the top of potential choices of law. Alternatively stated, the legal set of rules that are perceived by contracting parties as the most efficient and most reflective of the realities of the economic market place will be chosen to guide and facilitate their contractual transactions. The question becomes is CESL that kind of law that parties will want to select to govern their contracts? On the positive side, if CESL is seen as complimentary to other laws, such as the CISG, businesses may give it a hard look.

However, experience shows that opt-in laws often suffer a relatively quiet death from non-use. Professor Magnus uses the example of the Hague Uniform Sales Law: "the experience with opt-in solutions is not promising. England is still a Contracting State of the Hague Uniform Sales Law, the predecessor of the CISG, but ratified it under the reservation that the parties choose it. In 40

⁷⁹ Grant Gilmore, *The Death of Contract* (The Ohio State University Press, 1974, 2nd edition 1995).

years, no single case has reached the English courts concerning the Hague Sales Law.”⁸⁰ Thinking that businesspersons and their lawyers will read and select the CESL is being extremely optimistic. The likelihood of success is further diminished given the number of existing hard and soft laws that are readily available to contracting parties.⁸¹ The existing laws also provide the benefit of experience in practice, use in judicial and arbitral settings, and in-depth scholarly commentary. CESL represents something completely new and with that newness comes a great deal of uncertainty.

Professor Hector MacQueen has provided some early prognostications regarding the possibilities of enactment and implementation (opting-in) of the CESL. Regarding the passage of CESL, MacQueen states that the “proposal was published at an unpropitious moment as Member States struggled desperately to prevent the collapse of one of the EU’s vital symbols, the common currency. The chances of the CESL’s making its way successfully through even the qualified majority voting process are no more certain than those of the Herculean labours to save the euro.”⁸² As to the issue of the use of CESL after passage and whether it is substantially opted into he predicts that: (1) British merchants will pick U.K. Sales Law because of the extended period for consumer’s to reject under CESL and (2) that in B2SME transactions there is a greater possibility of opting-in since CESL provides greater clarity than some national laws and the CISG. But, this benefit of clarity needs to be balanced against the higher transaction costs represented by the need to conform to additional mandatory obligations, as well as the need to escape “status quo bias”. When the benefits of change are modest, often times people – merchants and lawyers – will stay with the status quo rather learning and applying a new law.

MacQueen notes that the *Advice to the UK Government* prepared by the Scottish and English Law Commissions, was skeptical about whether certain aspects of the CESL proposal would solve the perceived problems that CESL was meant to address.⁸³ He also ventured the proposition that CESL would be more likely to be enacted if it “focused more clearly or exclusively on the problems

⁸⁰ Ulrich Magnus, “CISG versus CESL” in CISG vs. *Regional Sales Law Unification* (Sellier European Law Publishers: München).

⁸¹ Stefan Vogenauer, “Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts: Coexistence, Competition, or Overkill of Soft Law?”, (2010) 6 *European Review of Contract Law*.

⁸² Hector MacQueen, “Europeanisation of Contract Law and the Proposed Common European Sales Law” in DiMatteo, Qi Zhou, Séverine Saintier, at el. eds., *Commercial Contract Law: Transatlantic Perspectives* (Cambridge University Press 2013).

⁸³ ENGLISH LAW COMMISSION and SCOTTISH LAW COMMISSION, AN OPTIONAL COMMON EUROPEAN SALES LAW: ADVANTAGES AND PROBLEMS; *ADVICE TO THE UK GOVERNMENT*, published only online at <http://www.scotlawcom.gov.uk/news/advice-on-european-sales-law> or <http://www.justice.gov.uk/lawcommission/publications/1698.htm> (10 November 2011).

of Internet trading.” In the end, CESL may be viewed as a symbolic and not a substantive watershed in the evolution of European private law. For MacQueen, the “optional nature of the instrument would provide an interesting experiment with which to test the claim that the variety of domestic laws in the European Union is a barrier to the achievement of a single market.” If sufficiently opted-in CESL could reduce the legal barriers faced by SMEs and Internet traders in transborder transactions. If not opted in, CESL may motivate EU institutions to promote a mandatory law. The fear is that consumer groups that view CESL as lowering the level of consumer protection could mobilize to prevent a second effort in the foreseeable future.

8. Conclusion

CESL is primarily a take it or leave it proposition in that if enacted as a Regulation it would have direct effect in all 27 EU countries. The reservation issues related to countries opting out of different parts of the CISG, such as being able to opt-out of the no writing requirement, would not be possible under CESL. Nor would the hundreds of amendments made by American states when enacting the UCC befall the unity represented by CESL. The current text of the CESL is likely to be modified in order to gain acceptance by Member States, but once enacted it will provide an identical, uniform text for all EU countries.

This Chapter reviewed three sales law instruments: the proposed Common European Sales Law (CESL), the Vienna Sales Convention (CISG), and the American Uniform Commercial Code (UCC). The purpose of the review was to gain insight from the history and substance of the previous instruments to assess the quality and likelihood of success for CESL. The common theme between the CISG and UCC were that both had long histories before they were enacted into law. The history of the UCC included numerous efforts at piecemeal uniform laws that were mostly failures. The CISG had an equally long history beginning with the work of Ernst Rabel in the early-twentieth century. The UCC and the CISG are testaments of enduring persistence and to some extent of missed opportunities. The CISG is the most successful attempt at unifying international sales law, but due to the necessity of compromise and failures to compromise, its scope and coverage is not as broad as one would like.

The drafters and promoters of CESL can learn from both the CISG and UCC experiences. If it fails to be adopted or if adopted, it is ignored, the UCC project shows that continued persistence may result in a future enactment of a better and more comprehensive instrument. The CISG experience shows the difficulty of needing agreement from numerous countries with different national laws and legal traditions. But, it is more likely that compromises to ensure enactment of CESL will not eviscerate much of its substance. For one, it is more comprehensive in its coverage than the CISG and it is presented in the context of an EU that has already successfully passed harmonizing laws. However, the

expanded EU possesses greater diversity given the different levels of legal and jurisprudential development among Western, Central, and Eastern European countries. This may present more of a problem at the application stage than as an obstacle to enactment.

The CISG and the Common Law: the Australian Experience

Bruno Zeller

I. Background

A quick look at the reported cases of the CISG indicates that the civil law countries have dealt with the CISG more frequently than common law countries. Furthermore it can also be observed that the common law countries in general have not applied the CISG as consistently as civil law countries. Arguably this is mainly due to a lack of appreciation of the interpretative mandate of the CISG pursuant to article 7 but also a clear lack of understanding of the implications of article 8. This is rather concerning as contract interpretation “[is] the lifeblood of commercial law.”¹ This paper will specifically look at Australia which has adopted the CISG in 1989.

First of all it must be mentioned that Australia is a Constitutional Monarchy that is the Governor General, the Queen of England’s representative is the Head of State. This can be seen as all legislation notes that it was “enacted by the Queen’s most Excellent Majesty.”

To understand the relationship between the CISG and Australian sales legislation two issues need to be taken into consideration. Sales laws and in this context contract law have two sources namely the common law and statute law. However it should be noted that “the distinctive feature of contemporary Australian law derives from the overwhelming importance of the law made by or under Parliament.”²

Common law which is judge-made law has its origin in England dating back to the 13th century. The early colonists took the law with them until the colonies established a court and parliamentary system. Therefore Australia followed English precedent. Today the law is in essence based on Australian decisions but can still rely on English precedents. Decisions by judges are either persuasive or binding. The simple rule is that a court is bound by a decision by a court higher in the same hierarchy and to an extent by decisions of their own hierarchy. Decisions outside the same hierarchy are merely persuasive except of course decisions by the High Court of Australia which are binding on all state courts.

¹ Calnan, R., *Construction of Commercial Contracts: A Practitioner’s Perspective*, in Burrows and Peel (eds) *Contract Terms*, (2007), at 17.

² Kirby, M., “Statutory Interpretation: The Meaning of Meaning” *Melbourne University Law Review* (2011) Vol 35, 113, at 114.

Furthermore the division of power within the Australian Federation also needs to be noted. The Australian Constitution basically defines two powers, first exclusive power that is only the Federal Government is allowed to legislate in this area and secondly concurrent power which means that both the states and the Federal government legislate in this area. Anything not governed by the two powers – the residual power – belongs to the states. Contract law is part of the residual power and hence is governed by the states. However it is possible that the Federal government enacts laws in the area of contract law to the extent it has power to do so such as insurance law.

The ratification of treaties and convention is a federal matter. The introduction of the CISG posed an interesting problem. The ratification process was a federal matter however the legislative process was a state matter. Hence the Federal government basically insisted that all the states need to adopt the CISG otherwise the federal government would not have ratified the CISG.

Originally each state adopted the Sale of Goods (Vienna Convention) Act. The State of Victoria in November 2010 as the only state amalgamated the domestic sales law with the CISG into one act namely the Goods Act 1958 (Vic).³ Part IV contains the enabling legislation and the CISG is attached in the schedule at the end. Of importance is the enabling legislation namely sections 86 and 87. S 86 declares that the “provisions of the Convention have the force of law in Victoria” and s 87 notes that the provisions of the Convention prevail over any other law in force in Victoria to the extent of any inconsistency.” In essence the CISG will prevail over domestic laws in cases of international sales as described in the CISG.

II. Introduction

Considering that the Australian States have adopted the CISG on April 1, 1989 only 22 cases were reported which is not an abundant use of the CISG. Anecdotaly the routine exclusion of the CISG appears still to be prominent. As an example the Federal defence department in their supply contracts routinely excludes the CISG.

However the real issue is that courts and counsels have not yet grasped the fundamental issues and advantages of the CISG. It is indeed a truism that recognition of laws emanating from conventions or soft laws like the UNIDROIT Principles is difficult if “nobody knows that it is there, [therefore] the new law has little capacity to shape behaviour.”⁴ This is certainly the case in Australia as the interpretation and application of the CISG exhibits a clear lack of applying the underlying principles of the CISG. Furthermore a recent research

³ Version No 107, No 6265 of 1958.

⁴ Gordon, J., and Rosett, A., “United States” in Bonell, M.J. A new Approach to International Commercial Contracts. Kluwer Law, London (1999) at 388.

undertaken by Lake⁵ indicates the obvious. 9 % of international and 55 % of British respondents were unfamiliar with the UNIDROIT Principles.⁶ It can be assumed that the Australian response would have been the same.

It is argued that several “structural dogmas” inhibit a successful uptake of the CISG. First the system of application and interpretation of international instruments is not compatible with a general common law approach of the application of precedents within a hierarchical system. Contract law in general is heard by state courts and on occasions federal courts. The High Court has not yet decided a case hence there is no binding precedent on the CISG which can guide all courts in Australia. Secondly academic writing does not enjoy the same significance as in civil law countries and as a result guidance from sources found on the Pace Website⁷ has not been consulted. Simply put academic criticism on past decision has not been taken into consideration and hence mistakes are repeated as judges and legal counsel rely on the somewhat faulty decisions of past domestic instead of – as article 7 CISG mandates – international jurisprudence.

Arguably therefore in Australia a “piecemeal” approach has taken place in regard to the application and interpretation of the CISG. Most cases arrived at a questionable decision regarding the application of the CISG despite suggesting that the CISG applies and articles were quoted. Arguably this is so as the path was not clear and sometimes even flawed. It is the misconception as expressed by many courts that the CISG and domestic law are either the same or similar that a careful treatment has not been felt to be warranted. The homeward trend in other words has not been overcome. On the contrary it appears to be entrenched in the principle of precedent.

This does however not indicate that Australia is a barren landscape in relation to uniform international laws. A good example is the application of the Warsaw convention. *Qantas Ltd & British Airways Plc v Povey*,⁸ indicates a clear difference between the treatment of the conventions and domestic laws. The interpretation of “accident” pursuant to the Warsaw convention was thoughtfully argued by relying on foreign jurisprudence such as *Air France v Saks*.⁹ There was no confusion or delineation between domestic and international jurisprudence and the outcome relied entirely on the analysis of foreign judgments.¹⁰ The

⁵ Lake, S., An empirical Study of the UNIDROIT Principles – *International and British Responses*, *Uniform Law Review*, 2011, 669,

⁶ Ibid at 672.

⁷ See Pace CISG website. This site should be consulted in preference to all others as it contains case law and an extensive bibliography of academic writing.

⁸ [2003] Victorian Supreme Court of Appeal 227.

⁹ 470 US 392 (1985)

¹⁰ Also compare now *Krum v Malaysian Airlines System Berhad*, [2004] Victorian Supreme Court 185, May 2004 relying on Povey.

judgment in a domestic air transport accident case¹¹ is most illuminating. The domestic Act in essence duplicates the Warsaw Convention.

Two issues had to be decided. First the plaintiff in a personal injury case did not frame his claim around the Act but rather relied on principles of Common Law. After he discovered his mistake during the trial he asked to amend the claim which as a consequence was outside the two year limitation period pursuant to article 34 of the Act. The court dismissed the appeal on the grounds that legislation overrides common law anyway but as initiating procedures vary greatly throughout the world international jurisprudence must be consulted for assistance as the wording of the Act must be given the same meaning all over the world. Despite being a domestic Act but modelled on the Warsaw convention Kirby J noted that when interpreting the Act the purposive approach must be chosen in line with the drafting history of the Convention.¹² The real significance of this case was the High Courts unequivocal statement that “no differentiation could be drawn on the basis that it was not obligatory for Australia to apply the language of the Warsaw Convention to domestic carriage.”¹³ The court went on to explain that the reason for the decision was that if a country has elected to ratify a Convention, “it must be assumed that an interpretation consistent with any treaty provision should be adopted, in so far as the treaty language was borrowed.”¹⁴

“No doubt this conclusion extends beyond this case and lends itself to the interpretation and application of whichever other international Convention. It is worth noting the High Court has confirmed the ruling in *Air Link Pty.Ltd v Paterson* in a similar case: *Agtrack (NT) Pty. Ltd. V Hatfield* [2005] HCA 38”¹⁵

Despite these tentative steps the courts in Australia have not responded when the application and interpretation of CISG cases was an issue.. One would assume that the High Court decisions to look to foreign jurisprudence would be followed by lower courts. However the invitation of the High Court to look beyond domestic case law was not taken up by lower courts when applying the CISG. It is therefore argued that the lack of appreciation of international developments at a State or Federal court level has inhibited the growth of not only the CISG but in general an appreciation of international developments in the area of contract law. It has been argued that despite significant disparities in reported cases between civil and common law countries it does not reflect

¹¹ *Air Link Pty.Ltd v Paterson* [2005] 223 Commonwealth Law Report, 283.

¹² *Ibid* at 312.

¹³ *Ibid* at 303.

¹⁴ *Ibid* at 304.

¹⁵ Zeller, B. Case Notes *Uniform. Law. Review.* 2005-4, at 908.

“a specific, inherent incompatibility of the common law with the CISG. Some of the alleged issues have been or are about to be overcome others are founded in ignorance and neglect, neither of which is specifically a common law vice.”¹⁶

It is argued that this is not correct. The view is far too simplistic and does not reflect the reality as seen today. The High court has taken only tentative steps towards recognition of international jurisprudence which it is argued is the cornerstone of a successful application of international conventions specifically looking at the mandate of article 7 CISG.

This paper will argue that in addition to the above noted “structural problems” the main inhibiting factor is the lack of understanding the different approach to interpretation of contractual clauses as found in articles 7 and specifically in article 8 and hence how it influences the application of the CISG.

It is argued that this issue coupled with the “homeward trend” is the root problem of the inability or perhaps reluctance of courts to embrace a uniform sales law when one party has its business in another country. It is further argued that the transplantation of a convention into domestic law does not guarantee an effective application and interpretation of the convention.

It is very timely that the Australian Government issued a discussion paper in 2012 “exploring the scope for reforming Australian contract law.”¹⁷ The discussion paper has flagged exactly the two issues which are the core problem of the lack of a proper understanding and hence application of the CISG. The most important points noted in the discussion paper is that “there may be a general lack of awareness of, and misunderstanding about some significant statutes within the legal profession”¹⁸ such as the CISG. Furthermore the discussion paper also notes that contractual interpretation and doctrinal difference play an important part specifically whether evidence of surrounding circumstance can be admitted or not.¹⁹

III. Interpretational challenges

As noted above two issues arguably hinder the courts application of the CISG. The homeward trend can be linked to the inability or unwillingness to understand and apply article 7 namely the “mandatory” request that “regard is to be

¹⁶ Henning The CISG and Common Law Courts: Is there Really a Problem? [2004] 35(2) *Victoria University Wellington Law Rev.* 711 at 713.

¹⁷ Attorney-General’s Department (Cth), *‘Improving Australia’s Law and Justice Framework: A discussion paper to explore the scope for reforming Australian contract law’* (Attorney-General’s Department, 2012).

¹⁸ Ibid at 3.7.

¹⁹ Ibid at 3.10.

had to its international character and to the need to promote uniformity in its application.”²⁰ The result is that courts have not looked at the abundantly available international jurisprudence but consulted their own previous imperfect decisions. In effect the courts viewed CISG cases in the same light as if they would apply domestic cases.

The second issue at hand is the clash of the parol evidence rule and article 8 of the CISG. The courts on occasions are grappling with this issue when dealing with domestic issues.

The same challenge is also evident when the UNIDROIT Principles are at issue.

This is evidenced by the fact that in some cases comparisons with the UNIDROIT Principles and the CISG are made but the answer is predictable. In *Franklins Pty Ltd v Metcash Trading Ltd*²¹ the court argued in relation to the interpretation of a contract:

Much ink has been spilt over the last 30 years on this topic. It is intimately connected in analysis with the applicable underpinning theory of the determination of contractual rights and liabilities. If, as the above references make clear, the governing theoretical framework as to the determination of contractual rights and obligations is the objective theory, it is difficult to see how later conduct has a place in the ascertainment of the parties’ objectively assessed intentions. How parties later acted, probative of what they themselves thought their obligations were, is difficult to reconcile with the objective paradigm.²²

The court did recognise that the objective theory is not the only theory in determining the intent of the parties and to that effect the court states:

Of course, if another paradigm were to be put in place, no such difficulty would arise. For instance, Arts 4.1-4.3 of the UNIDROIT Principles of International Commercial Contracts gives a primary role to the ascertainment of the actual common intention of the parties.

Article 8 of the Vienna Convention on International Sale of Goods (1980) (the “CISG”) is to similar effect to Art 4.2 of the UNIDROIT Principles.²³

It is instructive to note that the court did recognise that there are two theories to interpret contracts and especially Allsop J was aware of the CISG jurisprudence on this issue. However the court noted that in this instance being a domestic contract the parol evidence rule that is the objective theory is still to be used.

²⁰ Article 7(1) CISG.

²¹ [2009] New South Wales Court of Appeal 407 (16 December 2009).

²² Ibid at 6.

²³ Ibid at 6 and 7.

The problem is that the parol evidence rule is too entrenched and the Australian courts have not yet embraced the non-textual approach. It is interesting to note that the court also referred to Lord Hoffman's comments in *Chartbrook Limited v Persimmon Homes Limited*.²⁴ Lord Hoffman noted:

Supporters of the admissibility of pre-contractual negotiations draw attention to the fact that Continental legal systems seem to have little difficulty in taking them into account. Both the Unidroit Principles of International Commercial Contracts (1994 and 2004 revision) and the Principles of European Contract Law (1999) provide that in ascertaining the "common intention of the parties", regard shall be had to prior negotiations: articles 4.3 and 5.102 respectively. The same is true of the United Nations Convention on Contracts for the International Sale of Goods (1980). But these instruments reflect the French philosophy of contractual interpretation, which is altogether different from that of English law.²⁵

Lord Hoffman in essence repeated his stance that the common law does not permit the use of evidence of pre-contractual negotiations or subsequent conduct as an aid in constructing a written construct.²⁶ Arguably he was influenced by Lord Wilberforce in *Prenn v Simmonds*²⁷ who pointed out that admitting pre contractual conduct was unhelpful by noting:

"By the nature of things, where negotiations are difficult the parties' positions, with each passing letter, are changing and until a final agreement, though converging, still divergent. It is the final document which records a consensus ..."²⁸

It is absolutely clear that as Lord Wilberforce put it pre contractual negotiations in this case merely point to the fact that there was no census and that the final document is the consensus. However to take the words of Lord Wilberforce as being an absolute rule rather than a general rule is more than what the judgment suggests. It is undisputed that the opposite is possible. The parties merely put into their written contract issues they could not agree on in their pre contractual negotiations but left out the agreed terms. By analogy a letter writer does not communicate to the recipient what they both know but what is news to the

²⁴ [2009] United Kingdom House of Lords, 38.

²⁵ Ibid at 39.

²⁶ See Lord Hoffman in *Investor Compensation Scheme Ltd v West Bromwich Building Society*, [1998] 1 Weekly Law Report 896. see also <http://cisgw3.law.pace.edu/cases/090701uk.html>.

²⁷ [1971] 1 Weekly Law Report 1381.

²⁸ Ibid at 1384.

recipient. The same arguably applies to many contractual negotiations where the common knowledge does not find its way into a written contract.

Hence the pre contractual negotiations can be very helpful in understanding the meaning and intent of the parties. Arguably therefore the exclusionary rule might be useful as a general but not an absolute rule. This view is supported by Nicholls as he suggested four reasons why there should not be an absolute rule. For the purpose of this paper the most telling rule is “That is would assist in harmonising the common law with the current international trend and most importantly it would avert the danger that ‘justice may not be done’”²⁹

The suggestions by Nicholls certainly would not depart from the objective approach. From this point of view the common law and article 8(2) CISG are *at idem* though choosing a slightly different path. The pre-contractual and post contractual negotiations and hence the subjective intent of the parties can only be taken into consideration if both parties are aware of it or ought to be aware of it. Such intent must be measured objectively and will properly inform the person equally situated hence making sure that justice will be done.

Lord Hoffman nevertheless pointed to two fundamental differences between the Common Law and the CISG. First he observed that:

“One cannot in my opinion simply transpose rules based on one philosophy of contractual interpretation to another, or assume that the practical effect of admitting such evidence under the English system of civil procedure will be the same as that under a Continental system.”³⁰

Lord Hoffman furthermore noted as the second difference:

“English law, ... mixes up the ascertainment of intention with the rules of law by depersonalising the contracting parties and asking, not what their intentions actually were, but what a reasonable outside observer would have taken them to be.”³¹

To depersonalise the contractual intention of the parties and simply ask a reasonable outsider is not ascertaining the true intend of the parties. In effect it imposes onto the parties an outcome which neither of them really anticipated. McLauchlan asked the penetrating question:

²⁹ Nicholls, D., “My Kingdom for a Horse: The Meaning of Words.” (2005) *121 Law Quarterly Review*, 577, at 585.

³⁰ Hoffmann above n 24, at 39.

³¹ Ibid at 39.

“why allow evidence of the fact that the parties have “united in rejecting” a particular meaning, but disallow evidence of the fact that the parties have united in accepting a particular meaning?”³²

The answer to this question is indeed the drafting of article 8 CISG.

It should be noted that despite the English courts reluctance to depart from the parol evidence rule the UNIDROIT Principles and the CISG have tentatively found their way into case law. In *ProForce Recruit Ltd v Rugby Group Ltd*³³ – a domestic case – Mummery LJ noted:

“Careful consideration may have to be given to the aims to be achieved by contractual interpretation and the precise extent to which the law requires an objective interpretation. It may be appropriate to consider a number of international instruments applying to contracts. It is sufficient to take two examples. The UNIDROIT Principles of International Commercial Contracts give primacy to the common intention of the parties and on questions of interpretation requires regard to be had to all the circumstances, including the pre-contractual negotiations of the parties (art 4.3). The UN Convention on Contracts for the International Sale of Goods (1980) provides that a party’s intention is in certain circumstances relevant, and in determining that intention regard is to be had to all relevant circumstances, including preliminary negotiations.”³⁴

Similar sentiments were expressed in another English domestic case by Lady Ardon in *The Square Mile Partnership Ltd v Fitzmaurice McCall Ltd*.³⁵ It certainly can be argued that the English courts are slowly starting to become aware of the need to “modernize” contractual interpretation in order to stay in step with international developments.

The strength of article 8 CISG is that it not only endeavouring to look at the objective intent but tempers the outcome by introducing the subjective intent in order to clarify the true intent of the parties. This is especially so as in many circumstances the question evolves around the choice of words by the parties. It is not surprising that it has been observed by some authors that the idea of applying the subjective intent of parties has attracted a hostile reception from

³² McLauchlan, D. Common Assumptions and Contract Interpretation, (1997) 113 *Law Quarterly Review*. 237, at 242.

³³ [2006] England & Wales Court of Appeal Civil Division 69.

³⁴ Ibid n 36, [57].

³⁵ See for details United Kingdom 18 December 2006 Court of Appeal (Civil Division) (*The Square Mile Partnership Ltd v Fitzmaurice McCall Ltd*) [<http://cisgw3.law.pace.edu/cases/061218uk.html>] viewed 10 January 2008.

commercial practitioners³⁶ and therefore has “upset the horses in the commercial paddock.”³⁷ This is so due to the mistaken believe that it will unnecessarily prolong trial and the written material which is required will increase. However it is of interest to note that Steyn did make the observation that “possibly we are swimming against the tide.”³⁸ This view is shared by Briggs J who noted:

“If the private dictionary principle ... [is] a rule of contraction, the question as to the boundary between it and the policy exclusion of the parties’ negotiations as admissible background is ‘logically unfathomable.’”³⁹

The restrictive approach by Lord Hoffman is best summarised by McLaughlan who argues that:

“... If all the relevant background must be considered before determining the meaning of the contract, excluding the prior negotiations is unprincipled and unworkable, and the policy reasons advanced in support of the exclusion is unconvincing.”⁴⁰

The point which appears to have been forgotten by common law courts is that most contracts are a culmination of negotiations and many are performed without the presence of even a clear acceptance. Furthermore if parties could have foreseen the eventual dispute they would have put clauses into the contract to avoid such a situation. Most importantly contractual parties do not dwell on the meaning of words when they intended to close a deal hence not to look back and attempt to give a meaning to a term from the equally situated person’s point of view lacks credibility. Examining the special understanding between the parties is essential to give true meaning to their contractual intentions. Arguably it is trite to argue that subjective intent can mean anything else but “undisclosed” or “uncommunicated” intentions.⁴¹

Considering the above it could be argued that article 8 in essence has achieved exactly the right approach. The objective theory is still the first stop and the subjective intent is only needed if the objective approach does not supply the relevant clarity and required result. Furthermore article 8 has not upset “the horses in the international paddock”.

³⁶ See McLaughlan, D. Contract Interpretation: What is it About? 31 *Sydney Law Review* 5 (2009) 1, at 7.

³⁷ Steyn, J. “The Intractable Problem of the Interpretation of Legal Texts (2003) 24 *Sydney Law Review* 5, at 9.

³⁸ Ibid.

³⁹ *Chartbrook Ltd v Persimmon Homes Ltd* [2007] England & Wales High Court 409, at 43.

⁴⁰ McLaughlan above n 36, at 9.

⁴¹ Ibid at 12.

IV. The Australian perspective

Unfortunately in Australia the debate between the textual approach and a contextual one is not over yet and some judges and commentators such as Spiegelman⁴² writing extra judicially disagree with the contextual approach. Kirby on the other hand seems to agree with the contextual approach as the notes that “the interpretation of contracts is concerned as such with discovering the subjective intentions of writers of the words in question.”⁴³ Interestingly enough it was well established in Australia prior to the ICC⁴⁴ case that pre contractual conduct was admitted as long as it established objective background facts which were known by both parties.⁴⁵ Despite the reversal the views of the Australian courts appear to be changing again as a softening of the approach can be noted. First in *Australian Medic-Care Company Ltd v Hamilton Pharmaceutical Pty Limited*⁴⁶ the court noted

The orthodoxy in this country – and the orthodoxy recently reaffirmed in English law: see *Chartbrook Ltd v Persimmon Homes Ltd* – is that the negotiations of the parties prior to their contracting and their statements of their subjective intentions are, as a general rule, excluded by the parole evidence rule and cannot be used in the interpretation of the contract: Given the recent decision of the House of Lords, I would note without disrespect that this rule does not as of course commend itself in all parts of the common law world and, in particular, in parts of the United States

Secondly a further observation is:

... although the present state of the law in this country is not yet settled on whether it is possible to use post-contractual conduct as an aid to construction of a written contract, the more favoured view is that it is not: The criticisms of this view are, in the main, directed at its inflexibility particularly in relational contract settings.⁴⁷

It can be argued that the court in the above case did not fully embrace the meaning as expounded in *Chartbrook*. The court furthermore addressed post contractual conduct but left the pre-contractual contract “floating” and hence

⁴² Spiegelman, J., From Text to Context. (2007) 81 *Australian Law Journal*, 322. He specifically disagrees with the views expressed by Nicholls. See 331 to 334.

⁴³ Kirby, M., Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts. *Statute Law Review*, 24(2), 95, at 98.

⁴⁴ [1998] 1 *Weekly Law Review*, 896.

⁴⁵ McLauchlan above n 36, at 31.

⁴⁶ [2009] Federal Court of Australia, 1220 (30 October 2009).

⁴⁷ *Ibid* at 119.

it appear that pre-contractual and post-contractual conduct could arguable be two different issues requiring a solution. Kirby J. in *Agricultural and Rural Finance Pty Ltd v Gardiner and Another*⁴⁸ argued as the dissenting judge that the contextual approach is now the standard way to give meaning to words in the course of statutory interpretation.⁴⁹ He rejected the view of the Appeal court which argued that “because the agreement was written by definition it had a meaning before any subsequent conduct of the parties.”⁵⁰ Instead he argued:

“I would not accept this conclusion as stating an absolute rule. I do not agree that later communications and conduct of parties to an agreement are inadmissible when tendered to indicate acceptance by the parties of a particular meaning of the language used in their agreement.”⁵¹

Kirby J specifically argues in relation to the admissibility of post contractual conduct. However the question is why is pre contractual conduct not included in his argument? After all the true beginning of a construction of words and their meaning commences at the pre contractual period, then progresses possibly to a written statement and is followed by post contractual conduct. It is argued that all the “points” in the contractual life need to be reviewed as only then a consistent meaning that is the true meaning, can be elicited.

What the court indicated is that the exclusion of a “private dictionary” should not be an absolute rule. Kirby P. addressed this issue and arguably found the required balance as it is incidentally contained in article 8 CISG. He noted.

“In the circumstances, therefore, I consider that it was permissible for Bryson J to have regard to extrinsic evidence in order to find, from the past conduct of the parties and mutually know facts the sense in which they used the word ‘variations’ in cl. (2). This is not to explore their minds, as such. It is to determine from what was objectively known, the dictionary which they were in fact using for the word they choose.”⁵²

It can easily be seen that the common sense proposition as contained in article 8 CISG and applied by international courts is somewhat hidden by strained reasoning of Australian judges to – in effect – arrive at the meaning of words used by the parties as contained in the written contract. What Kirby P in effect applied was the ‘private dictionary’ or *Karen Oltmann* principle.⁵³ The word

⁴⁸ [2008] High Court of Australia, 57.

⁴⁹ Ibid at 115.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² *B & B Constructions (Aust) Pty Ltd v Brian A Cheeseman & Associates Pty Ltd*. 35 New South Wales Law Review, 227, at 237.

⁵³ McLaughlin above n 36, at 25.

“objectively known” arguably duplicates article 8 which notes that only statements and conduct has bearing on the facts if “the other party knew or could not have been unaware what the intent was.”⁵⁴

Unfortunately it can be observed that the strained reasoning of judges still leaves the objective theory in command. Spiegelman as an example does not agree with the contextual approach specifically he thinks that harmonising the common law with international instruments is not important. He argues:

“This is one of the many respects in which English law is likely to diverge from the common law of Australia, by reason of the influence upon English lawyers of the progressive integration of the United Kingdom into the European economic and political communities. For this reason alone it is necessary in the future for Australian lawyers to treat English authorities on such matters with caution.”⁵⁵

Such a view is surprising and possibly very simplistic as Australia and not England has ratified the CISG and hence needs to take note of a different interpretational regime. One would only need to think of a buyer in Melbourne using the same contract for the purchase of goods from Sydney and Paris and the same problem arises with each contract. The likelihood of different outcomes would be great which would not advance the buyers confidence in the legal system.

The conclusion which can be drawn is that domestic courts rely on the objective theory but are aware that the CISG and the UNIDROIT Principles are advocating another approach. This observation has already been made in 2002 by Kirby a Justice of the High Court of Australia. He noted that “developments [of international instruments] will inevitably tend to reduce the adherence of common law systems to their old literalist traditions.”⁵⁶

It is specifically instructive to note the New Zealand views expressed in *Hideo Yoshimoto v Canterbury Golf International Ltd.*⁵⁷ The New Zealand Court of Appeal found it necessary to refer to the UNIDROIT Principles and the CISG as they grappled with difficulties in interpreting a contract. Specifically the advantages of article 4.3 of the Principles were explained as allowing the court a more realistic approach in the interpretation of contracts. However the court did not apply the Principles or the CISG for that matter, as they were not prepared to go beyond these declarations. The court commented:

⁵⁴ Article 8 CISG.

⁵⁵ Spiegelman above n 42, at 332-3.

⁵⁶ Kirby, M., above n 43, at 104-5.

⁵⁷ Court of Appeal, Wellington, 2000 New Zealand Court of Appeal, 350.

“But while this Court could seek to depart from the law as applied in England and bring the law in New Zealand into line with these international conventions, I do not think it would be permitted to do so by the Privy Council.”⁵⁸

Arguably therefore there is sufficient evidence that domestic systems have engaged in considering the Principles in the process of “creeping” transplantation.

In Australia the court in *Franklin* did make a similar important comment namely that “if another paradigm were to be put in place, no such difficulty would arise.”⁵⁹ This is exactly the case with the application of the CISG as another paradigm has been put into place.

It is also worth mentioning that the *Principles of European Contract Law* have not gone completely unnoticed in Australia. It was mentioned three times in passing. Justice Finn who was on the working group of the UNIDROIT principles 2010 made reference to the PECL exploring the fact that common laws and the EU laws are different not only on a no-oral modification clause but more specifically also on the principle of good faith.⁶⁰

It is also apparent and to be noted that the interpretational tool is not the same in all common law countries. England by *depersonalising the contracting parties* appears to be the less likely to embrace the subjective intent of parties but in Australia the transplantation of the CISG has taken place and the subjective intent has become part of domestic law but has still not penetrated even into the interpretation of the CISG where it is a mandatory tool. The Australian stance in relation to the interpretation of contracts has at least recognised the differences in the common law between common law countries in relation to the interpretation of domestic contracts as it does not follow English precedent in all cases.

The real issue is that there is still a divide between the interpretations of contracts drafted by the domestic legislator and international bodies. This is so despite the fact that parliament ratified the CISG and hence it became part of Australian domestic law. “Flexible rationalism” as advocated by Nicholls⁶¹ has not yet penetrated the national/international mix of contract interpretation.

Arguably therefore the issue or problem at hand is that the profession or the court or both have not read article 7 and 8 closely enough to distinguish between domestic or international contract interpretations. Perhaps more plausible both articles are simply viewed through domestic eyes and hence domestic interpretations and methods are still used despite the fact that the CISG mandates differently.

⁵⁸ Ibid n 33 at [90]. It should be noted that the English Privy Council was still the highest court of Appeal in the New Zealand Court Hierarchy. This has now changed in 2004.

⁵⁹ *Franklin* above n 21.

⁶⁰ *GEC Marconi Systems Pty Limited v BHP Information Technology Pty Limited* [2003] Federal Court of Australia, 50 (12 February 2003).

⁶¹ Nicholls above n 29., at 591.

V. Interpretation of CISG cases

As discussed above the live issues amongst Australian courts is the textual vs the contextual approach and of course the principle of precedent. It is therefore not surprising that these principles are adopted when interpreting the CISG with obvious results.

Analyses of decided cases in Australia indicate that the homeward trend is very noticeable. In general no international case law has been quoted except in *Downs Investments Pty Ltd (in liq) v Perwaja Steel SDN BHD*.⁶² However of the forty-four cited cases, only two, *Delchi Carrier S.p.A. v Rotorex Corp.*⁶³ and *Roder Zelt- und Hallenbaukonstruktionen GmbH v Rosedown Park Pty Ltd (in liq)*,⁶⁴ had any connection to the CISG. The remainders were domestic cases and hence had no bearing on the matter and should not have been mentioned. Furthermore it is ironic that the only relevant foreign case which was relied upon by the court namely *Delchi Carriers*, is noted by many scholars as an example where the court could not overcome its ethnocentric interests.⁶⁵ Chan Leng Sun has put the problem succinctly by noting:

“It can be seen that common law jurists have a lot of baggage to discard when faced with the CISG. The tricky question is what to discard and what to apply in conjunction with the stipulations in the CISG. The CISG is not exhaustive. There is still an important role for domestic law, but there is a risk of the homeward trend even on matters governed by the CISG. The knee-jerk recourse to the comfort of familiar domestic methodology must be suppressed.”⁶⁶

It is a fact that domestic legislation – being similar but not the same as the CISG – can track the convention. It would be “trite to argue that because the laws are similar or even the same the outcome would be the same.”⁶⁷ Differences will emerge as the CISG must be read within its four corners and not one or sev-

⁶² [2002] 2 Queensland Reports 462.

⁶³ 71 F 3d 1024 (2nd Cir 1995).

⁶⁴ (1995) 57 Federal Court of Australia, 216.

⁶⁵ See for example Cook S “The UN Convention on Contracts for the International Sale of Goods: A Mandate to Abandon Legal Ethnocentric” (1997) 16 *Journal of Law and Commerce* 257.

⁶⁶ Presented in „Celebrating Success: 25 Years United Nations Convention on Contracts for the International Sale of Goods“ (Collation of Papers at UNCITRAL – SIAC Conference 22-23 September 2005, Singapore), [<http://cisgw3.law.pace.edu/cisg/biblio/sun1.html>].

⁶⁷ Zeller, B. *CISG and the Unification of International Trade Law*. (Routledge-Cavendish 2007) p 83.

eral articles in isolation. Most importantly article 7 and 8 are unique to the CISG and hence the interpretation of the CISG and of contracts uses different tools.

Many authors⁶⁸ advocated that the correct approach to an application of the CISG is to look at article 7 which mandates the international approach. Once interpreting the contract with the help of article 8 the obvious understanding is that the pre-contractual and post contractual conduct needs to be taken into consideration. International jurisprudence will assist the decision maker pursuant to article 7. The issue of the homeward trend associated with the lack of application of the correct interpretational tools is best illustrated by two Australian cases.

First *Guang Dong Zhi Gao Australia Pty Limited v Fortuna Network Pty Limited*⁶⁹ a recent case, is of interest. First the issue is that there are two plaintiffs, namely the Chinese principle and his Australian agent. It can be reasonably assumed that this is an issue to be dealt with under the CISG as the agent is in effect binding the principle by his actions and hence ultimately the issue is between the Chinese Principle and the Australian defendant. The court did recognise this fact by noting: "It is to be recalled that the Convention on the International Sale of Goods (CISG) governs the international trade agreement and disputes."⁷⁰

The court noted that the parol evidence rule is only to be used when the contract is "wholly in writing, and thus has no scope to operate until it has first been ascertained that the contract is wholly in writing."⁷¹ Besides the fact that the parol evidence rule is not applicable in effect the CISG would use the same argument by relying on article 8(2) which is the starting point anyway when interpreting contractual clauses. As the contract was not wholly in writing the court correctly stated that:

"In determining what are the terms of a contract that is partly written and partly oral, surrounding circumstances may be used as an aid to finding what the terms of the contract are."⁷²

However the court, instead of applying article 8 chose to base its judgment around domestic case law totally ignoring international jurisprudence. It is questionable why the court made reference to the CISG and then totally ignored the fact that the solution to the question must be found in articles and general principles contained within the four corners of the CISG. Furthermore

⁶⁸ See generally Zeller, B. *Four-Corners* – The Methodology for Interpretation and Application of the UN Convention on Contracts for the International Sale of Goods <http://www.cisg.law.pace.edu/cisg/biblio/4corners.html>.

⁶⁹ [2009] New South Wales Supreme Court, 1170 (4 November 2009).

⁷⁰ *Ibid* at 8.

⁷¹ *Ibid* at 3.

⁷² *Ibid* at 5.

the defendant did argue that they avoided the contract relying on articles 51 and 25. The contention of *Fortuna* was that their notice of avoidance was an oral one namely a conversation and that it is not necessary under the Vienna Convention for such a declaration to utilise any more formality than a simple oral avoidance. Pursuant to article 26 this is correct. However in order to ascertain this fact it required an examination of article 8 which was not undertaken. *Fortuna* only relied on article 51 but the importance of actually determining whether there was a fundamental breach was never elaborated on.

Secondly the lack of understanding of the interpretation and application of the CISG is best illustrated by another recent case namely *Castel Electronics Pty. Ltd. v. Toshiba Singapore Pte. Ltd.*⁷³ This case further illustrates the problem of courts referring to previous decision without understanding that they are faulty and hence should not be used. At least the court understood to look for CISG precedents but unfortunately only domestic ones.

The court noted that the CISG namely article 35 applies to the contract to the exclusion of any operation which the *Good Act* might otherwise have⁷⁴ but the claimant “invoked, further or alternatively, the warranties of fitness for purpose and merchantable quality implied by s 19(a) and (b) of the **Goods Act 1958** (Vic) (“the **Goods Act**”).⁷⁵ In essence article 7 was again ignored and furthermore it is an inconsistent argument to note that the CISG exclusively applies and then rely on the Goods Act.

This confusion is exemplified by the court stating:

“Those provisions[article 35] have been treated by Australian courts as imposing, effectively, the same obligations as the implied warranties of merchantable quality and fitness for purpose arising under s 19 of the **Goods Act**; see *Playcorp Pty Ltd v Taiyo Kogyo Ltd* [2003] VSC 108 at [235], *Ginza Pte Ltd v Vista Corp Pty Ltd* [2003] WASC 11, at [189]-[191] and *Summit Chemicals Pty Ltd v Vetrotex Espana SA* [2004] WASCA 109.”

The question is not whether the obligations are effectively the same as simply put the Goods Act does not apply. If at least the editorial notes re *Summit Chemicals*⁷⁶ quoted by the court would have been consulted the remarks by Zeller and Spagnolo would have shown that the above statement is patently wrong. Spagnolo specifically notes:

“Certainly, [Summit Chemicals] betrays a level of misunderstanding about the operation of the CISG. Buyer’s counsel sought to plead, inter alia, both

⁷³ <http://cisgw3.law.pace.edu/cases/100928a2.html>.

⁷⁴ Ibid para 122.

⁷⁵ *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* [2010] Federal Court of Australia, 1028 (28 September 2010) , at para 53.

⁷⁶ See [<http://cisgw3.law.pace.edu/cases/040527a2.html>].

the CISG and Sale of Goods Act as alternatives. Clearly, the CISG's application excludes that of the Sale of Goods Act, and had the seller's counsel made such an application, the Sale of Goods Act claims should have been struck out."⁷⁷

The fact of being unaware of the language and hence application of the CISG is further expressed in *Summit* where the plaintiff stated:

"In addition to reliance upon breach of implied terms of merchantable quality and fitness for purpose resulting from the application of s 14 of the Sale of Goods Act 1896, the [Seller] wishes to plead that there similar implied obligations together with a further implied obligation to ensure that the product was packaged in a manner adequate to preserve and protect it, resulting from the operation of the Sale of Goods (Vienna Convention) Act 1986 and Article 35 of the United Nations Conventions on Contract for the International Sale of Goods which are also to be relied upon to support the claims for breach of contract, breach of duty of care and for damages."⁷⁸

First contrary to s 14 of the Goods Act, article 35 CISG does not contain implied terms but express ones. Furthermore it is strange to note that the CISG is referred to in such a way as to give the impression that there are actually two instruments. Furthermore the CISG does not contain rules as to a breach of a duty of care which is a matter of tort law.

These cases demonstrate clearly the problem of assuming that domestic legislation is the same as article 35 CISG. It is argued that because of such a wrong assumption the obvious differences between domestic and international law are overlooked or not appreciated. The best example is that in *Summit Chemicals*, in *Playcorp* and *Giza* the application of articles 38 and 39 was totally overlooked. In *Playcorp* the issue was certainly alive as it took the buyer between seven to thirteen months to notify the seller of the defects.⁷⁹

Furthermore the pleadings were referred to as breach of implied conditions and not warranties. Translated into CISG language the cause of action should have been to plead fundamental breach and not just breach of contract. Fundamental breach was never raised.

A clear indication that the courts adopted the wrong interpretative tools is confirmed in a recent High Court decision where it is stated:

⁷⁷ Lisa Spagnolo, Editorial remarks, Australia 27 May 2004 Supreme Court of Western Australia – Appellate Court (*Summit Chemicals v Vetrotex Espana*) [<http://cisgw3.law.pace.edu/cases/040527a2.html>].

⁷⁸ Supreme Court of Western Australia – Court of Appeal, *Summit Chemicals Pty Ltd v Vetrotex Espana SA* 27 May 2004. at 35, <http://cisgw3.law.pace.edu/cases/040527a2.html>.

⁷⁹ Spagnolo above n 77.

“First, the [CISG] does not adopt a classification which uses those terms [as contained in the Goods Act]. Adopting them confuses the task of construing the Act’s provisions. It is necessary to pay attention to the text of applicable statutes in preference to judicial or other glosses on that language. Not only does adopting these terms distract attention from the language of the Act, it does so by introducing terms which are, so it seems, intended to convey value or other judgments about the social or economic consequences that are assumed or expected to follow from the making of or giving effect to the arrangement to which one of these descriptions is applied.”⁸⁰

As a matter of fact in all three quoted domestic CISG cases the editorial remarks by Zeller and Spagnolo criticise the same issues as described in the above judgment. It is no wonder that the court in *Castel Electronics* repeated the same mistake as recourse to domestic precedent instead to CISG jurisprudence was sought.

It has been argued that the scarcity and wrong application of the CISG is not to be blamed on “unwilling or ignorant judges.”⁸¹ It is the system itself which is to be blamed namely the adversarial approach where courts simply rely on the facts and arguments led by counsels. However this argument is a weak one as judges intend to take a more active response which is perfectly illustrated in *Perry Engineering*⁸² where the court noted that:

“To the extent that the plaintiff relies in the statement of claim upon the South Australian Sale of Goods Act and not the provisions of the Act which apply by virtue of the Vienna Convention, the plaintiff is precluded from pursuing such a course because it is only the provisions of the latter Act which apply. That being the case, the Court cannot precede to an assessment of damages based on the provisions of an Act of Parliament which the plaintiff acknowledges do not apply to the claim pursued by the plaintiff.”

Unfortunately Burley J. appears to be the exception to the rule that Australian courts have not properly addressed and interpreted the CISG which in effect is an Australian statute but interpreted by its own interpretative tools namely article 7 and 8.

It is instructive to look briefly at the New Zealand experience also a common law country and a close neighbour of Australia. For the purpose of this

⁸⁰ *Visy Paper Pty Limited and Others v and Australian Competition and Consumer Commission*, [2003] 216 Commonwealth Law Report, 1, at 10.

⁸¹ Henning, L above n 14, at 722.

⁸² Supreme Court of South Australia *Perry Engineering Pty Ltd (Receiver and Manager appt’d) v Bernold AG* No. SCGRG-99-1063 [2001] SASC 15 see also Australia 1 February 2001 Supreme Court of South Australia (*Perry Engineering v. Bernold*) [<http://cisgw3.law.pace.edu/cases/010201a2.html>].

paper it is sufficient to look at *Smallmon v Transport Sales Ltd.*⁸³ The issue, like in most Australian cases, hinged on the application of article 35(2). Stevens J. delivering the judgement noted that besides article 35(2) articles 7 and 8 are also relevant.⁸⁴ The court correctly argued that:

“Thus the Convention is to be given an autonomous interpretation requiring the Convention to be interpreted exclusively on its own terms and applying Convention-related decisions in overseas jurisdiction.”⁸⁵

The New Zealand court contrary to its Australian counterparts understood the fundamental first step in applying the CISG namely to consider article 7. The court taking recourse to academic writing namely Professor Schlechtriem was acutely aware of the dangers of the homeward trend and noted;

“In reading and understanding the provisions, concepts and words of the Convention, recourse to the understanding of these words and the like in domestic systems, in particular the domestic legal system of the reader, must be avoided. This seems to be self evident, but experience shows that practitioners and scholars tend to understand words and concepts of the Convention according to their familiar domestic law.”⁸⁶

To that end the court relied on Schlechtriem and Schwenzer and other authors and quoted exclusively international cases from Germany, the US, Austria, France and Spain, in total 8 cases.

It can be argued that the New Zealand courts, unlike Australia, has overcome the domestic “bias” and has embraced the interpretative mandate of the CISG. Arguably a contributing factor is that Victoria University in Wellington has published many articles on the CISG whereas in Australia this is not the case. As a matter of fact the leading Australian CISG academics nearly exclusively publish in overseas journals.

The conclusion is that with a mindset to exclude pre contractual and post contractual negotiations as practiced predominantly in common law countries combined with the homeward trend a proper application of the CISG is difficult. Furthermore because a correct application and understanding of article 7 namely the international view is also missing the homeward trend is an inevitable result.

Simply put article 7 and 8 have not been given the necessary attention which as a result affects the application of the CISG which needs to be read within its four corners. The result is that the proper application of the CISG has so far not

⁸³ [2011] New Zealand Court of Appeal, 340.

⁸⁴ Ibid at [35].

⁸⁵ Ibid at [38].

⁸⁶ Ibid.

been achieved. The problem is exacerbated by the fact that courts will refer to previous decisions which are incorrect hence they repeat previous problems. As long as the courts and legal professions approach remains firmly anchored in domestic law no progress will be achieved.

The time has come to follow Nicholls view that the exclusionary rule is not absolute and introduce coherence in the law specifically considering that it will conform to an increasing internationalisation of contract law. "Adherence to the exclusionary rule as an absolute rule would risk this country becoming isolated on this point in the field of commercial law."⁸⁷ This has been demonstrated when looking at 22 unfortunate decisions when dealing with the CISG in Australia.

VI. Questions for reform

It is timely that the Australian Government in the discussion paper asked for specific solutions to reform the contract law.⁸⁸ The government in essence suggested three reform options, namely restatement, simplification or substantial reforms of the contract law.⁸⁹

Considering the long tradition of the common law it would not be of any real value to follow the US path and introduce a restatement of contract law. The discussion paper correctly points to the most likely outcome namely that it might undermine predictability.⁹⁰ Besides the EU in their drive to unify contract law have not considered or introduced any restatements.

Taking the above discussion into consideration there is absolutely no value to either radically change the common law or introduce a new unified system such as the UNIDROIT Principles in the short term at least. A reform would not achieve the desired end namely to "bring the law of contract into line with international trends."⁹¹ The fact that the courts have not yet managed to properly apply and interpret the CISG which has been ratified by all the major trading partners except the United Kingdom and India suggests strongly that a reform is too premature. .

Considering that the major problem is the "homeward trend" which is rooted in the inability to overcome, the domestic statutory interpretation rules the short term and simple solution is to amend the Sale of Goods Act. Article 8 and 9 of the CISG ought to be inserted which will overcome the textual vs contextual dilemma. Every contract whether domestic or international will use the same interpretive tools which ought to overcome the current inability to correctly interpret the CISG and other international instruments. Hence the

⁸⁷ Nicholls above n 29, at 586.

⁸⁸ See discussion paper above n 17.

⁸⁹ Ibid at question 6.

⁹⁰ Discussion paper above n 17, at 6.4.

⁹¹ Ibid at 6.6.

first step arguably is to simplify the common law and bring it in step with international practices.

It must be remembered that the UNIDROIT Principles and the European contract law in effect incorporated article 8 CISG into their regime. A further issue which adds to the "simplification approach" is that there is relatively little use of the international principles as parties routinely opt out of the CISG.⁹² A conscious approach to first amend the Goods Act and the increased internationalisation of the curriculum young practitioners will understand the differences in domestic and international law. As a flow on effect to simply routinely exclude the CISG without sound reasons will potentially expose law firms to malpractice suits. One only has to compare a CISG case namely *MCC Marble*⁹³ and it is obvious that the outcome would have been different if the court would have applied common law interpretive techniques.

Secondly and importantly the internationalising of Australian contract law would have a flow on effect on conflict of laws issues. Simply put by not opting out of the CISG the problem of having to deal with differences in legal systems is minimised. However a choice of law selection is still necessary but it will be restricted to those issues where the CISG has a gap which needs to be filled by the chosen governing domestic law. An example could be article 4 CISG which excluded the validity of the contract and "the effect which the contract may have on the property in the goods sold."⁹⁴

In conclusion this article has shown that the biggest roadblock in an internationalisation of contract law is the inability of courts to abandon the common law approach to the interpretation of statute and contracts. By at least introducing article 8 and 9 CISG into the contract law namely the Goods Act clarity in interpretation of contracts would be achieved. It should also be noted that as a second phase a study of the CISG and other harmonised contract laws could see further simplifications of Australian contract laws and bring it further in line with international efforts mainly in the EU.

⁹² Ibid at 5.11.

⁹³ United States 29 June 1998 Federal Appellate Court [11th Circuit] (*MCC-Marble Ceramic Center v. Ceramica Nuova D'Agostino*) [<http://cisgw3.law.pace.edu/cases/980629u1.html>].

⁹⁴ Article 4(a) CISG.

CISG and OHADA Sales Law

Or the Relationship between Global and Regional Sales Law*

Franco Ferrari

I. Regional vs. global unification

As one can easily gather from the title of this paper, this paper does not purport to compare the substantive provisions of the United Nations Convention on Contracts for the International Sale of Goods,¹ (hereinafter, the “CISG”²), with

* Literature cited in abbreviated form: W.-A. Achilles, Kommentar zum UN-Kaufrechtsübereinkommen (CISG) (2000); B. Audit, La vente internationale de marchandises: Convention des Nations-Unies du 11 avril 1980 (1990); H. Bamberger/H. Roth (-I. Saenger), Kommentar zum Bürgerlichen Gesetzbuch III: §§ 1297-2385, EGBGB, CISG² (2007); C.M. Bianca/M. Bonell, Commentary on the International Sales Law: The 1980 Vienna Sales Convention (1987) (cited: Bianca/Bonell [-author]); C. Brunner, UN-Kaufrecht – CISG, Kommentar zum Übereinkommen über Verträge über den internationalen Warenkauf von 1980 (2004); L. Díez-Picazo, La compraventa internacional de mercaderías (1997) (cited: Díez-Picazo [-author]); F. Enderlein/D. Maskow/H. Strohbach Internationales Kaufrecht: Kaufrechtskonvention, Verjährungskonvention, Vertretungskonvention, Rechtsanwendungskonvention (1991); F. Ferrari et al., Internationales Vertragsrecht² (2012) (cited: Ferrari [-author]); R. Herber/B. Czerwenka, Internationales Kaufrecht, Kommentar zu dem Übereinkommen der Vereinten Nationen vom 11. April 1980 über Verträge über den internationalen Warenkauf (1991); J. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention³ (1999); J. Honnold/H. Flechtner, Uniform Law for International Sales under the 1980 United Nations Convention⁴ (2010); H. Honsell, Kommentar zum UN-Kaufrecht² (2007) (cited: Honsell [-author]); S. Kröll et al., UN Convention on Contracts for the International Sale of Goods (CISG). Commentary (2011) (cited: Kröll [-author]); Münchener Kommentar zum Bürgerlichen Gesetzbuch⁶, ed. by H. Westermann/W. Krüger III (2012) (cited: Münch. Komm. BGB [-author]); Münchener Kommentar zum Handelsgesetzbuch³, ed. by B. Grunewald VI (2012) (cited: Münch. Komm. HGB [-author]); K. Neumayer/C. Ming, Convention de Vienne sur les contrats de vente internationale de marchandises, Commentaire (1993); H. Rudolph, Kaufrecht der Import- und Exportverträge, Kommentierung des UN-Übereinkommens über internationale Warenkaufverträge mit Hinweisen für die Vertragspraxis (1996); P. Schlechtriem/I. Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG)³ (engl. ed., 2011) (cited: Schlechtriem/Schwenzer [-author], Commentary 2011); P. Schlechtriem/I. Schwenzer (eds.), Kommentar zum Einheitlichen UN-Kaufrecht –

those of the new³ OHADA Act relating to General Commercial Law adopted on 15 December 2010 (hereinafter, the “OHADA Act”). Rather, this paper will focus on a more general question that is triggered by regional unification efforts, such as those undertaken by OHADA, that touch upon issues dealt with by the CISG, namely that of whether such regional unification efforts can at all be justified in light of the CISG and its supposedly universal reach,⁴ which seems to render any regional unification effort superfluous.

As this paper will show, despite the CISG’s supposedly universal reach which seems to preclude regional unification efforts from being relevant at all, there is still (a lot of) room for regional unification efforts. The most obvious reason is that, despite the CISG’s success⁵ and its supposedly universal reach, the CISG does not really constitute a “universal” or “global” law, as the CISG, like any other uniform law convention,⁶ is not in force in every country in the world.⁷ As a consequence, the non-contracting States to the CISG can undertake regional

CISG⁶ (2012) (cited: *Schlechtriem/Schwenzer [-author]*, CISG-Komm. 2012); *J. v. Staudinger (U. Magnus)*, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen (Neubearb. 2005), Wiener UN-Kaufrecht (CISG); *W. Witz/H.-Ch. Salger/M. Lorenz*, International Einheitliches Kaufrecht (2000) (cited: *Witz/Salger/Lorenz [-author]*).

- ¹ For the English text of the United Nations Convention on Contracts for the International Sale of Goods, see 19 International Legal Materials (1980) 668 ff.
- ² *A. Flessner/Th. Kadner*, CISG? Zur Suche nach einer Abkürzung für das Wiener Übereinkommen über Verträge über den internationalen Warenkauf vom 11. April 1980, *Zeitschrift für Europäisches Privatrecht* 1995, 347-350.
- ³ For papers comparing the CISG’s rules with the 1997 OHADA Act on General Commercial Law, see, e.g., *F. Ferrari*, International sales law in the light of the OHBLA Uniform Act relating to general commercial law and the 1980 Vienna Sales Convention, *International Business Law Journal* 2001, 599-607; *U. Schroeter*, Das einheitliche Kaufrecht der afrikanischen OHADA-Staaten im Vergleich zum UN-Kaufrecht, *Recht in Afrika* 2001, 163-176.
- ⁴ For a reference in legal writing to the CISG’s “universal reach”, see *I. Barrière-Brousse*, La création normative des États. Point de vue privatiste, in: *La mondialisation du droit*, edited by E. Loquin/C. Kessedjian (Paris, 2000) 133 (139); *Ph. Kahn*, Convention de Vienne du 11 avril 1980 – Caractères et domaine d’application des règles conventionnelles, *Droit et pratique du commerce international* 1989, 385 (395); in case law, see ICC Court of Arbitration, Arbitral award n. 6281, *Journal du droit international* 1989, 1114.
- ⁵ For recent references to the CISG’s success, see *M.J. Bonell*, Do we need a Global Commercial Code?, *Dickinson Law Review* 106 (2001) 87 (88); *K. Sono*, The Rise of Anational Contract Law in the Age of Globalization, *Tulane Law Review* 75 (2001) 1185 (1185).
- ⁶ See *F. Ferrari*, Forum Shopping Despite International Uniform Contract Law Conventions, *International and Comparative Law Quarterly* 51 (2002) 689 (703-704).

unification efforts without having to be wary of violating a treaty obligation arising from being contracting States to the CISG.

What has just been said should not induce one, however, to believe that in those regions and countries where the CISG is in force, there can be no room for regional unification efforts. Even in those regions, the coming into force of the CISG does not preclude regional unification efforts from being relevant. This is also true in respect of the region constituted by the OHADA countries,⁸ three of which are contracting States to the CISG.⁹ One reason for this relates to the CISG's limited substantive sphere of application:¹⁰ as it is known, the CISG does not cover all contracts for the sale of goods. Pursuant to Article 2 of the CISG, for instance, the sale of ships, vessels, aircrafts, electricity, etc., are not governed by the CISG. The same can be said for the sale of goods that are neither moveable nor tangible (such as receivables), as only the sale of moveable tangible goods fall under the CISG's sphere of application.¹¹ The foregoing limits to the CISG's sphere of application open the door to regional unification efforts. Nothing prevents contracting States to the CISG from unifying the law on a regional level in those areas; moreover, in doing so, the contracting States to the CISG would not even have to worry about a potential conflict with the CISG, as the CISG does not deal with those areas at all.

The reason just mentioned does not, however, justify the OHADA regional unification efforts, as the OHADA Act basically mirrors the CISG's substantive sphere of application. While Article 235(1), for instance, excludes from the OHADA Act's substantive sphere of application the sale of goods bought

⁷ As of May 2012, 78 States have adopted the CISG; for an updated list of contracting States, see http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

⁸ For an updated list of OHADA countries, see <http://www.ohada.org/etats-parties.html>.

⁹ In Benin, the CISG entered into force on 1 August 2012; in Gabon, the CISG entered into force on 1 January 2006, and in Guinea, the CISG entered into force on 1 February 1992.

¹⁰ For a discussion of the CISG's sphere of application, see *K. Bell*, The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods, *Pace International Law Review* 8 (1996) 237-258 (1996); *G. de Nova*, L'ambito di applicazione "ratione materiae" della convenzione di Vienna, *Rivista trimestrale di diritto e procedura civile* 1990, 749-753; *F. Ferrari*, The Sphere of Application of the Vienna Sales Convention (The Hague, 1995).

¹¹ For this, see, in legal writing, *Schlechtriem/Schwenzer/Ferrari*, CISG-Komm. 2012, Art. 1, para. 12 ff.; in case law see Tribunale di Forlì 16 February 2009, available at: <http://cisgw3.law.pace.edu/cases/090216i3.html>; Tribunale di Forlì 11 December 2008, available at: <http://cisgw3.law.pace.edu/cases/081211i3.html>; Tribunale di Vigevano 12 July 2000, available at: <http://cisgw3.law.pace.edu/cases/000712i3.html>; Tribunale di Pavia 29 December 1999, available at: <http://cisgw3.law.pace.edu/cases/991229i3.html>; OLG Köln 26 August 1994, *Neue Juristische Wochenschrift Rechtprechungs-Report* 1995, 246.

for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use, Article 236 excludes those contracts from the OHADA Act's sphere of application which are excluded from the CISG's sphere of application pursuant to its Article 2(b)-(f). Furthermore, Article 236 of the OHADA Act also excludes from its sphere of application all "mobilisations et autres opérations sur créances ou instruments financiers". This, however, is not the only similarity. Like the CISG, the OHADA Act excludes from its sphere of application contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.¹² Unlike the CISG, the OHADA Act does not, however, exclude from its sphere of application contracts for the supply of goods to be manufactured or produced where the party ordering the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

There are additional reasons why there still is room for regional unification efforts even by contracting States to the CISG. One such reason is constituted by the CISG having not only a limited substantive sphere of application, but also a limited international sphere of application.¹³ In effect, according to Article 1(1) of the CISG, the internationality of a contract depends solely¹⁴ on the parties having their places of business (or, where the parties do not have a place of business, their habitual residence)¹⁵ – at the time of the conclusion of the contract¹⁶ – in different States.¹⁷ Where this "subjective" internationality requirement is not met, the contract is not sufficiently international for the CISG to apply,¹⁸ even if the contract's performance involves different States,¹⁹ as

¹² See Article 235(2) of the OHADA Act.

¹³ For a paper on the CISG's international sphere of application, see *K. Siehr*, *Der internationale Anwendungsbereich des UN-Kaufrechts*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 52 (1988) 587-616.

¹⁴ See *Ferrari/Saenger*, Art. 1 CISG, para. 9; *P. Schlechtriem/C. Witz*, *Convention de Vienne sur les contrats de vente internationale de marchandises* (Paris, 2008) para. 11; note, however, that this view has been opposed; according to *P. J.-H. Wang*, *Das Wiener Übereinkommen über internationale Warenkaufverträge vom 11. April 1980*, *Zeitschrift für vergleichende Rechtswissenschaft* 1988, 184 (187), the CISG should be applicable, not unlike the 1964 Hague Conventions, only where the sales contract is also characterized by an objective element such as those provided for by the ULIS and ULF.

¹⁵ See Article 10(b) of the CISG: „[...] if a party does not have a place of business, reference is to be made to his habitual residence.“

¹⁶ For this requirement, see *Tribunale di Forlì* 11 December 2008, available at: <http://cisgw3.law.pace.edu/cases/081211i3.html>; *Tribunale di Padova* 11 January 2005, available at: <http://www.unilex.info/case.cfm?pid=1&do=case&id=1005&step=FullText>; *Tribunale di Padova* 25 February 2004, available at: <http://cisgw3.law.pace.edu/cases/040225i3.html>; *Tribunale di Rimini* 26 November 2002, available at: <http://cisgw3.law.pace.edu/cases/021126i3.html>; *Tribunale di Vigevano* 12 July 2000, available at:

emphasized both in legal writing²⁰ and case law.²¹ For the purpose of regional unification efforts, this is important, as it creates room for regional unification efforts focusing on contracts for the sale of goods that do not meet the CISG's

<http://cisgw3.law.pace.edu/cases/000712i3.html>; OLG Dresden 27 December 1999, CISG-online no. 511.

¹⁷ For court decisions expressly referring to this “internationality” requirement, see Polimeles Protodikio Athinon, docket No. 4505/2009 (no date indicated), available at: <http://cisgw3.law.pace.edu/cases/094505gr.html#ii2>; Tribunale di Padova 31 March 2004, available at: <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/040331i3.html>; Tribunale di Padova 25 February 2004, available at: <http://cisgw3.law.pace.edu/cases/040225i3.html>; Tribunale di Rimini 26 November 2002, available at: <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/021126i3.html>; OLG Rostock 10 October 2001, available at: <http://cisgw3.law.pace.edu/cases/011010g1.html>; Tribunale di Vigevano 12 July 2000, available at: <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/000712i3.html>; OLG Köln 21 May 1996, available at: <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/960521g1.html>; OGH 10 November 1994, available at <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/941110a3.html>; OLG Köln 26 August, available at: <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/940826g1.html>.

¹⁸ For this conclusion, see also *Systems, Inc. v. EMC Corporation*, Superior Court of Massachusetts 28 February 2005, available at <http://cisgw3.law.pace.edu/cases/050228u1.html>.

¹⁹ On the other hand, where the internationality requirement is met, the contract can be considered international even if goods do not cross any border (see, e.g., *P. Schlechtriem*, From the Hague to Vienna – Progress in Unification of the Law of International Sales Contracts?, in: *The Transnational Law of International Commercial Transactions*, edited by N. Horn/C. Schmitthoff (New York, 1982) 125 (127).

²⁰ See *Herber/Czerwenka*, Art. 1, para. 11.

²¹ Compare *Kliff et al. v. Grace Label, Inc.*, U.S. District Court (S.D. Iowa, Central Division) 24 January 2005, available at: <http://cisgw3.law.pace.edu/cases/050125u1.html>: “Kliff suggests that because the contract in question calls for the manufacture of goods in the United States for delivery in Mexico it may be governed by the United Nations Convention on Contracts for the International Sale of Goods (“CISG”). The Court does not believe CISG is applicable. It expressly ‘applies to contracts of sale of goods between parties whose places of business are in different States.’ Referring to different countries. 15 U.S.C.App., Art. 1(1). See *Asante Technologies, Inc. v. PMC-Sierra, Inc.*, 164 F.Supp.2d 1142, 1147 & n.4 (N.D.Cal.2001). The contract was solely between two United States concerns with places of business in the United States. It provided for the shipment of the goods to Barcel in Mexico, but Barcel was not a party to the contract.” See also OLG Köln 27 November 1991, available at: <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/911127g1.html>: the German court refused to apply the CISG to a case where a German buyer had acquired tickets from a German seller for the 1990 Soccer World Cup final to be handed over in Rome, among others, on the grounds that the contract was not an international one.

internationality requirement, thus *a priori* avoiding conflicts with the CISG (and the violation of any treaty obligation). Of course, it is doubtful whether this would at all be practicable, as such efforts would exclude contracts the internationality requirement of which is among the most relevant ones.

Another reason why regional unification efforts in the area of international sales law have not become superfluous with the CISG's coming into force is constituted by the CISG's limited scope of application. Despite statements to the effect that the CISG is "a comprehensive code governing international sales of goods"²² that it addresses "contracting generally"²³ and, therefore, that it governs all international sales transactions²⁴ and "exhaustively deals with all problems,"²⁵ the CISG is neither a comprehensive code nor an exhaustive body of rules,²⁶ *i.e.*, it does not provide solutions to all matters that may originate from a contract for the international sale of goods.²⁷ Thus, in respect of those matters at least, there is space for regionally uniform rules the coming into force of which would not impact at all on obligations arising out of the CISG. Of course, most of the matters excluded from the CISG's scope of application, such as the agent-principal relationship,²⁸ the statute of limitations,²⁹ the effect on the property of the goods

²² B. Overby, Contract, in the Age of Sustainable Consumption, *Journal of Corporation Law* 27 (2002), 603 (606); see also M. Bradley/C.A. Schipani/A.K. Sundaram/J.P. Walsh, The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads, *Law and Contemporary Problems* 62 (2000) 9 (82), stating that the CISG "presents a comprehensive code governing contracts for the international sale of goods".

²³ L. Clark/J. Wool, Entry into Force of Transactional Private Law Treaties Affecting Aviation: Case Study – Proposed UNIDROIT/ICAO Convention as Applied to Aircraft Equipment, *Journal of Air Law and Commerce* 66 (2001) 1403 (1411 note 30).

²⁴ See, e.g., T. McNamara, U.N. Sale of Goods Convention: Finally Coming of Age?, 32-Feb. *Colorado Lawyer* (2003) 11 (16), stating that "the Convention presumptively and automatically governs all international trade transactions within the CISG's scope (an international sales contract)"; see also F. J. Friedman/D. Owens, Issues in Marketing and Sales Activities for Biotech Companies Around the World, *PLI/Pat* 66 (2001) 953 (964): "The UN's Convention on Contracts for the International Sale of Goods ("CISG") is contract law worldwide for those countries that have ratified it".

In case law see Cámara Nacional de Apelaciones en lo Comercial de Buenos Aires 21 July 2002, available at: <http://cisgw3.law.pace.edu/cisg/wais/db/cases2/020721a1.html>, stating that "the Convention becomes the common law of the international sale of goods in the countries that adopt it".

²⁵ BGH 19 February 2004, available at: <http://www.unilex.info/case.cfm?pid=1&do=cas&id=979&step=FullText>.

²⁶ See G. Benedetti, Commento all'art. 4 della Convenzione di Vienna, *Nuove Leggi civili commentate* 1989, 9 (9).

²⁷ See also F. Ferrari, What sources of law for contracts for the international sale of goods, *Internationales Handelsrecht* 2006, 1 (2).

sold internationally,³⁰ to just name a few, are issues that do not relate as much to sales law as to general contract law – or other areas of the law, such as property law. Given that the OHADA Act deals with “General Commercial Law”, it is unsurprising that it deals with some of the aforementioned issues expressly, such as agency, transfer of property and statute of limitations. Since, however, the OHADA Act also deals with issues governed by the CISG, the reasons for the OHADA unification efforts to be relevant even in the OHADA States that are contracting States to the CISG have to be found elsewhere; it is on those reasons that the next part of this paper will focus.

II. The CISG's implicit acknowledgement of regional unification efforts

The reasons mentioned so far, as to why regional unification of sales law can matter despite the CISG's purportedly universal reach, are all linked to the CISG's own limitations, both on territorial and substantive levels. Where the

²⁸ For decisions stating that the issue of agency and related matters are not dealt with by the Convention, see OLG Schleswig 24 October 2008, available at: <http://cisgw3.law.pace.edu/cases/081024g1.html>; LG Landshut 12 June 2008, available at: <http://cisgw3.law.pace.edu/cases/080612g2.html>; CIETAC, Arbitral award of 10 December 2007, available at: <http://cisgw3.law.pace.edu/cases/071210c1.html>; Tribunal cantonal du Valais 27 April 2007, available at: <http://cisgw3.law.pace.edu/cases/070427s1.html>; Cour d'Appel Versailles 13 October 2005, available at: <http://cisgw3.law.pace.edu/cases/051013f1.html>; CIETAC, Arbitral award of 1 October 2005, available at: <http://cisgw3.law.pace.edu/cases/051000c1.html>; Tribunal cantonal du Valais 27 May 2005, available at: <http://cisgw3.law.pace.edu/cases/050527s1.html>; CIETAC, Arbitral award CISG/2005/22 (no date indicated), available at: <http://cisgw3.law.pace.edu/cases/050400c1.html>.

²⁹ See *Maxxsonics USA, Inc. v. Fengshun Peiying Electro Acoustic Co., Ltd.*, U.S. District Court (N.D. Ill.) 21 March 2012, 2012 WL 962698; BGH, CISG-online no. 1900; AG Basel-Stadt 26 September 2008, CISG-online no. 1732; Court of First Instance of Athens, docket n. 4505/2009 (no date indicated), available at: <http://cisgw3.law.pace.edu/cases/094505gr.html>; Supreme Court Slovak Republic 30 April 2008, CISG-online no. 1873; Audiencia Provincial de Valencia 13 March 2007, available at: <http://turan.uc3m.es/cisg/sespan69.htm>; OLG Köln, 13 February 2006, CISG-online no. 1219.

³⁰ See OLG München 5 March 2008, available at: <http://cisgw3.law.pace.edu/cases/080305g1.html>; CIETAC, Arbitral Award of 18 April 2008, available at: <http://cisgw3.law.pace.edu/cases/080418c1.html>; *Usinor Industeel, v. Leeco Steel Products, Inc.*, U.S. District Court (North. Dist. Illinois) 28 March 2002, available at: <http://cisgw3.law.pace.edu/cases/020328u1.html>; *St. Paul Insurance Company et al. v. Neuromed Medical Systems & Support et al.*, U.S. District Court (S.D.N.Y.) 26 March 2002, available at: <http://cisgw3.law.pace.edu/cases/020326u1.html>.

CISG's rules do not come into play, there is, unsurprisingly, room for regional unification. One has to wonder, however, whether there is also room for efforts towards the regional unification of the law of contracts governed by – as well as matters subject to – CISG, such as those undertaken by OHADA, and which resulted, most recently, in the 2010 Act relating General Commercial Law. In other words, one has to wonder whether the results of regional unification efforts, such as those resulting from the efforts made by OHADA, have to always give way to the CISG if the results of regional unification efforts and the CISG are applicable in one and the same country to one and the same matter arising out of one and the same sales contract. If this were the case, all regional unification efforts would be thwarted where the CISG is applicable and governs. In this author's opinion, however, it is the CISG itself that gives way to regional unification efforts, and this can easily be gathered from some of the CISG's own provisions.

1. The CISG's provision on conflict of conventions (Article 90)

As the number of substantive uniform law conventions constantly increases (and so does, by implication, the possibility of different uniform law conventions being applicable to one and the same contract³¹), the drafters of the CISG, like the drafters of most recent substantive uniform law conventions,³² introduced a provision specifically designed to deal with conflict of conventions.³³ Indeed, Article 90 of the CISG states that “this Convention does not prevail over any international agreement which has already been or may be entered into.” Thus, if the parties have their respective place of business in contracting States to such conventions, the CISG's applicability is displaced in favour of that of any other international agreement concerning matters governed by the CISG.³⁴

³¹ See also *Ferrari (supra n. 27) 2*; *M. Torsello*, Common Features of Uniform Commercial Law Conventions. A Comparative Study Beyond the 1980 Uniform Sales Law (2004) 259 ff.

³² See Article 17 of the 1988 Unidroit Convention on International Leasing; Article 15 of the 1988 Unidroit Convention on International Factoring.

³³ For discussions of conflicts of conventions, see *C. Brière*, Les conflits de conventions internationales en droit privé (Paris, 2001); *B. Dutoit/F. Majoros*, Le lacis des conflits de conventions en droit privé et leurs solutions possibles, *Revue critique de droit international privé* 1984, 565-596; *A. Malan*, La concurrence des conventions internationales dans le droit des conflits de lois (Aix-en-Provence, 2002); *F. Majoros*, Konflikte zwischen Staatsverträgen auf dem Gebiete des Privatrechts, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 46 (1982), 84-117; *F. Majoros*, Les Conventions internationales en matière de droit privé. privé. Abrégé théorique et traité pratique (Paris, 1976); *F. Majoros*, Les conventions internationales en matière de droit privé.

This provision has given rise to various disputes, such as the one relating to the nature of international agreements that prevail over the CISG (*i.e.* whether the agreements that displace the CISG necessarily have to be multilateral ones,³⁵ or whether bilateral agreements can displace the CISG as well³⁶), and the one concerning the contents of international agreements that prevail over the CISG (*i.e.* whether the agreements have to be agreements on substantive law or whether they can also be ones dealing with conflict of laws).³⁷ For the purposes of these remarks, it is not important to solve these disputes; what is important, however, is the fact that nobody has ever denied that prevalence over the CISG is given to regional agreements as well. In other words, for an international

Partie spéciale: Le droit des conflits de conventions (Paris, 1980); *P. Volken*, Konventionskonflikte im internationalen Privatrecht (Zurich, 1977); *W.H. Wilting*, Vertragskonkurrenz im Völkerrecht (1994).

³⁴ See *Bianca/Bonell/Evans*, Art. 90, para. 2.1.

³⁵ *F. Enderlein/D. Maskow/H. Strohbach*, Internationales Kaufrecht (1991) Art. 90, para. 5.

³⁶ For this view, see *Achilles*, Art. 90, para. 1; *Bamberger/Roth/Saenger*, Art. 90, para. 1; *Brunner*, Art. 90, para. 1; *Diez-Picazo/Calvo Caravaca*, Art. 90 (703); *Ferrari/Mankowski*, Art. 90 CISG, para. 4; *Herber/Czerwenka*, Art. 90, para. 2; *M. Karollus*, UN-Kaufrecht (1991) 34; *Münch. Komm. BGB/Huber*, Art. 90, para. 2; *B. Piltz*, Internationales Kaufrecht² (2008), para. 2-171; *Schlechtriem/Schwenzer/Schlechtriem/Schwenzer/Hachem*, Commentary 2011, Art. 90, para. 2; *U. Schroeter*, UN-Kaufrecht und Europäisches Gemeinschaftsrecht (2005), § 9, para. 10 note 19; *Witz/Salger/Lorenz/Witz*, Art. 90, para. 2.

³⁷ Favoring the application of Article 90 CISG to also solve a conflicts between the CISG and private international conventions, see *Achilles*, Art. 90, para. 2; *B. Czerwenka*, Rechtsanwendungsprobleme im internationalen Kaufrecht. Das Kollisionsrecht bei grenzüberschreitenden Kaufverträgen und der Anwendungsbereich der internationalen Kaufrechtsübereinkommen (1988) 163; *Ferrari/Mankowski*, Art. 90 CISG, para. 2; *Herber/Czerwenka*, Art. 90, para. 3; *Münch. Komm. BGB/Huber*, Art. 90 CISG, para. 3; *Neumayer/Ming*, Art. 90, para. 1; *Schlechtriem/Schwenzer/Schlechtriem/Schwenzer/Hachem*, Commentary 2011, Art. 90, Rn. 8; *I. Schwenzer/P. Hachem/C. Kee*, Global Sales Law (Oxford, 2012) para. 3.33; *Staudinger/Magnus*, Art. 90, para. 5; *Witz/Salger/Lorenz/Witz*, Art. 90, para. 2; for the opposite view, excluding the applicability of Article 90 to „international agreements“ relating to private international law, see *M.J. Bonell/F. Liguori*, The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law – 1997 (Part 1), Uniform Law Review 1997, 385 (392); *Brunner*, Art. 90, para. 3; *Honsell/Siehr*, Art. 90, paras. 1 and 5 f.; *P. Kindler*, Die Anwendungsvoraussetzungen des Wiener Kaufrechtsübereinkommens der Vereinten Nationen im deutsch-italienischen Rechtsverkehr, Recht der internationalen Wirtschaft 1988, 776 (780); *A. Lohmann*, Parteiautonomie und UN-Kaufrecht (2004) 41; *Münch. Komm. HGB/Ferrari*, Art. 90, para. 4; *Schlechtriem/Schwenzer/Ferrari*,

agreement to prevail over the CISG by virtue of Article 90, it does not necessarily have to be an agreement with universal reach. Thus, by means of Article 90, the CISG itself acknowledges, at least implicitly, that there is room for regional unification in respect of “matters governed by this Convention”,³⁸ “provided that the parties have their places of business in States parties to such agreement[s]”.³⁹

In light of the fact that three OHADA countries are contracting States to the CISG, what has just been said is important insofar as it seems to allow the OHADA Act to prevail over the CISG in respect of intra-regional sales contracts, *i.e.*, where both parties have their place of business in OHADA countries, without violating any international law obligations under the CISG. This, however, requires the OHADA Act to be considered an “agreement” under Article 90 of the CISG. This issue is comparable to that of whether certain instruments emanating from the European Union, such as the Product Liability Directive,⁴⁰ the Directive on Consumer Sales,⁴¹ and the directives on combating late payment in commercial transactions⁴² constitute “agreements” under Article 90 of the CISG. Of course, those commentators who believe that these instruments are “agreements” and therefore prevail over the CISG⁴³ will necessarily have to hold the view that the OHADA Act as well as CISG constitutes an “international agreement” capable of prevailing over the CISG because, unlike (most) directives, the OHADA Act is directly applicable⁴⁴ in the OHADA countries pursuant to Article 10 of the OHADA Treaty⁴⁵ (thus making the OHADA Act more similar to an EU regulation rather than an EU directive).⁴⁶

CISG-Komm. 2012, Art. 90, para. 4; *P. Winship*, Private International Law and the U.N. Sales Convention, *Cornell International Law Journal* 21 (1988), 487 (532).

³⁸ Article 90 CISG.

³⁹ Article 90 CISG.

⁴⁰ See Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning the liability for defective products, OJ 1985 L 210, p. 29 ff.

⁴¹ See Council Directive 94/44/EEC on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171, p. 12 ff.; Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transaction, OJ 2011 L 48, p. 1 ff.

⁴² See Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, O.J. 2000 L 200, p. 35 ff.; Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions, OJ 2011, L 48, p. 1 ff.

⁴³ *Contra, i.e.* advocating the prevalence of EU directives over the CISG, *R. Herber*, UN-Kaufrechtsübereinkommen: Produkthaftung – Verjährung, *Monatsschrift für Deutsches Recht* 1993, 105 (106-107); *R. Herber*, Mangelfolgeschäden nach dem CISG und nationales Deliktsrecht, *Internationales Handelsrecht* 2001, 187 (187 f.); *Herber/Czerwenka*, Art. 90, para. 4; *Witz/Salger/Lorenz/Witz*, Art. 90, para. 3.

2. The CISG's partial exclusion due to an Article 92 declaration as an opening for regionally unified law

Article 90 is not the only CISG provision to acknowledge that there is room for regional unification. In this respect, Article 92 is important as well – maybe even more so than Article 90 – as Article 92 is a direct consequence of the insistence of various countries all belonging to a specific region, namely Scandinavia,⁴⁷ to allow contracting States to make a declaration by virtue of which they would not be bound by either Part II or Part III of the CISG, dealing with the “Formation of Contract” and “The Rights and Obligations of the Parties”, respectively. These countries did so, as they themselves wanted to make sure that their own rules on formation of contract, which present some peculiar characteristics they did not want to give up, would not be replaced by the CISG's rules on formation.⁴⁸

Unfortunately, however, the declaration of an Article 92 reservation is insufficient to guarantee the application of the domestic law of the reservation State. Indeed, despite an Article 92 reservation, the CISG may still prevail over the domestic law of the reservation State. This is due to the limited effect of a reservation declared under Article 92. Pursuant to this provision, a party that has its

⁴⁴ See also *J. Issa-Sayegh*, Quelques aspects techniques de l'intégration juridique: l'exemple des actes uniformes de l'OHADA, *Uniform Law Review* 1999, 5 (7); *P. Sarcevic*, The CISG and Regional Unification, in: *The 1980 Uniform Sales Law: Old Issues Revisited in the Light of Recent Experiences*. Verona Conference 2003, edited by F. Ferrari (Milan/Munich, 2003) 3 (15); *Schroeter* (*supra* n. 36), § 5, para. 27.

⁴⁵ For the text of the OHADA Treaty as revised by the revision adopted on 17 October 2008, see <http://www.ohada.org/documentation/fr/ohada/0,0/3618,traite-ohada-consolide-traite-1993-et-traite-2008-combines.html>.

⁴⁶ See also *Schroeter* (*supra* n. 36) 165.

⁴⁷ For this, see *Brunner*, Art. 92, para. 1; *Ferrari* (*supra* n. 27) 5; *Ferrari/Mankowski*, Art. 92, para. 1; *Herber/Czerwenka*, Art. 92, para. 1; Münch. Komm. BGB/*Huber*, Art. 92, para. 1; *Schlechtriem/Schwenzer/Ferrari*, CISG-Komm. 2012, Art. 92, para. 1; *Staudinger/Magnus*, Art. 92, para. 2; *Witz/Salger/Lorenz/Witz*, Art. 92, para. 1.

For more background information on the impact of the Scandinavian countries on the Article 92 reservation, see *M.M. Fogt*, The stipulation and interpretation of freight pre-paid delivery clauses under the CISG: Preliminary considerations for reform of Part II of CISG and a limited withdrawal of Scandinavian declarations, *European Legal Forum* 2003, 61-70; *S. Johannsen*, Der Vorbehalt der skandinavischen Staaten gemäß Art. 92 CISG (2004).

⁴⁸ It should be noted that no domestic rule is replaced by the CISG, as the CISG solely applies to “international” contracts. Thus, the CISG does not impact on domestic law, in the sense that it does not per se modify the domestic rules which already exist. This, of course, does not mean that the CISG cannot have any impact on domestic substantive law. In effect, due to its persuasiveness, the CISG has constituted the model of recent

relevant place of business in a reservation State is considered to have its place of business in a non-contracting State for the purposes of the Part excluded⁴⁹ (which is also why it has been suggested that the Article 92 reservation has an impact on the status of contracting State of the State declaring the reservation).⁵⁰ Thus, where one party has its place of business in a reservation State, the CISG can never be applicable by virtue of Article 1(1)(a) of the CISG in its entirety.⁵¹ Article 1(1)(a) will merely lead to the application of the Part by which both States in which the parties have their places of business are bound.⁵² This does not necessarily mean, however, that the Part to which the reservation relates does not apply;⁵³ rather, that Part's applicability will depend on whether the rules of private international law of the forum lead to the law of a contracting State that did not make such a declaration.⁵⁴ If they do, the Part excluded will

revisions of domestic law. In this respect, *see, e.g., E. Nau*, Das Gewährleistungsrecht in BGB, UN-Kaufrecht und den Reformvorschlägen der Schuldrechtskommission: ein Vergleich unter besonderer Berücksichtigung der Richtlinie (1999/44/EG) über den Verbrauchsgüterkauf (2003); *P. Schlechtriem*, 10 Jahr CISG – Der Einfluß des UN-Kaufrechts auf die Entwicklung des deutschen und des internationalen Schuldrechts, Internationales Handelsrecht 2001, 12-18; *P. Schlechtriem*, International Einheitliches Kaufrecht und neues Schuldrecht, in: Das neue Schuldrecht in der Praxis, edited by K. Schmidt et al. (2003) 71; *K. Sein/I. Kull*, Die Bedeutung des UN-Kaufrechts im estnischen Recht, Internationales Handelsrecht 2005, 138.

⁴⁹ See *Achilles*, Art. 92, para. 1; *Herber/Czerwenka*, Art. 92, para. 3; *Honsell/Siehr*, Art. 92, para. 1 *Kröll/Herre*, Art. 92, paras. 1 and 3; *Lookofsky*, The CISG in Denmark and Danish Courts, *Nordic J. Int'l L.* 80 (2011), 295 (299); *Münch. Komm. BGB/Huber*, Art. 92 CISG, para. 2; *Piltz* (*supra* n. 36), para. 2-89; *I. Sannini*, L'applicazione della Convenzione di Vienna sulla vendita internazionale negli Stati Uniti (Padua, 2006) 69; *Slechtriem/Schwenzer/Slechtriem/Schwenzer/Hachem*, Commentary 2011, Art. 92, para. 3; *Staudinger/Magnus*, Art. 92, para. 5; *M. Torsello*, Reservations to international uniform commercial law conventions, *Uniform Law Review* 2000, 85 (96).

In case law, see *OLG Hamm* 2 April 2009, CISG-online no. 1978; *Valero Marketing v. Greeni Oy*, U.S. District Court, New Jersey 15 June 2005, available at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/050615u1.html>; *Standard Bent Glass Corp. v. Glassrobots Oy*, U.S. Court of Appeals (3d Circuit) 20 June 2003, available at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/030620u1.html>; *Turku Court of Appeal* 12 April 2002, available at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020412f5.html>; *Corte d'appello di Milano* 23 January 2001, available at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/010123i3.html>.

⁵⁰ See *F. Ferrari*, Contracts for the International Sale of Goods (Leiden/Boston, 2012) 68; *Ferrari/Mankowski*, Art. 92, para. 5; *Münch. Komm. HGB/Benicke*, Art. 1, para. 30; *Staudinger/Magnus*, Art. 92, para. 5; *Torsello* (*supra* n. 49) 97.

⁵¹ See *J. Lookofsky*, Alive and Well in Scandinavia: CISG Part II, *Journal of Law and Commerce* 18 (1999), 289 (292); *Ferrari/Mankowski*, Art. 92 CISG, para. 6; *Staudinger/Magnus*, Art. 92, para. 5; *Torsello* (*supra* n. 49) 98.

apply by virtue of Article 1(1)(b),⁵⁵ and this even in the courts of a reservation State.⁵⁶ Where, on the other hand, the private international law rules lead to the law of a contracting State that declared the Article 92 reservation, that State's domestic law will apply.⁵⁷

From what has just been said, it follows that the Article 92 reservation is not the most effective tool for letting regionally uniform law – such as the law

⁵² For this conclusion, see also *Ferrari* (*supra* n. 50) 68.

In light of what has just been said, the decision rendered by OLG Naumburg 27 April 1999, available at <http://cisgw3.law.pace.edu/cases/990427g1.html>, is incorrect, as it makes applicable the CISG in its entirety by virtue of Article 1(1)(a), even though one of the parties to the contract had its place of business in Denmark, one of the Contracting States that declared an Article 92 reservation; incorrect also is OLG Frankfurt 4 March 1994, available at <http://cisgw3.law.pace.edu/cases/940304g1.html>, applying the CISG pursuant to its Article 1(1)(a), even though at the moment of the conclusion of the contract one of the parties had its place of business in Sweden, a Contracting State that had declared an Article 92 reservation.

For a critique of these decisions, see also Morten Fogt, *Rechtzeitige Rüge und Vertragsaufhebung bei Waren mit raschem Wertverlust nach UN-Kaufrecht*, *Zeitschrift für Europäisches Privatrecht* 580, 587 note 22 (2002).

⁵³ For this conclusion, see also *Ferrari* (*supra* n. 27) 5; *Herber/Czerwenka*, Art. 92, para. 3; *Lookofsky* (*supra* n. 49) 299; *Lookofsky* (*supra* n. 51) 294 f.

⁵⁴ See *Achilles*, Art. 92, para. 1; *Enderlein/Maskow/Strohbach*, Art. 92, para. 6; *F. Ferrari*, *La vendita internazionale*² (Padua, 2006) 80 ff.; *Ferrari/Mankowski*, Art. 92, para. 6; *H.M. Flechtner*, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)*, *Journal of Law and Commerce* 17 (1998), 187 (193 f.); *J. Lookofsky*, *The Scandinavian Experience*, in: *The 1980 Uniform Sales Law. Old issues revisited in the light of recent experiences*, edited by F. Ferrari (Munich/Milan, 2003), 95 (107); *Lookofsky* (*supra* n. 51) 294 f.; *U. Magnus*, *Das UN-Kaufrecht : Fragen und Probleme seiner praktischen Bewältigung*, *Zeitschrift für Europäisches Privatrecht* 1997, 823 (827 f.).

⁵⁵ For this conclusion, *Brunner*, Art. 92, para. 3; *Ferrari*, *La Convention de Vienna sur la vente internationale et le droit international privé*, *Journal du droit international* 2006, 27 (44); *Honnold/Flechtner*, para. 467; *Honsell/Siehr*, Art. 92, para. 1; *Lookofsky* (*supra* n. 49), 300; *Münch. Komm. BGB/Huber*, Art. 92, para. 2; *Münch. Komm. HGB/Benicke*, Art. 1, para. 30; *Rudolph*, Art. 92, Rn. 2; *Schlechtriem/Schwenzer/Schlechtriem/Schwenzer/Hachem*, *Commentary* 2011, Art. 92, para. 3; *Staudinger/Magnus*, Art. 92, para. 5; *Witz/Salger/Lorenz/Witz*, Art. 92, para. 2; in case law see OLG München 8 March 1995, available at: <http://cisgw3.law.pace.edu/cases/950308g1.html>: The court held that the CISG was applicable to the rights and obligations of the parties by virtue of Article 1(1)(a), but that the issue of the contract's formation could not be governed by Part II (Formation of Contracts) of the CISG, at least not by virtue of Article 1(1)(a), since Finland had declared an Article 92 reservation and therefore could not be considered a Contracting State in respect to that Part. Nevertheless, the court held that by virtue of

created by OHADA – prevail over the CISG. Consequently, even if the three OHADA countries that entered into force the CISG had declared an Article 92 reservation, the OHADA Act would not necessarily prevail over the CISG. Furthermore, the effects of an Article 92 reservation extend, if at all, only to a limited number of CISG provisions, rather than the CISG as a whole.

3. The CISG's provision on contracting states having closely related legal rules (Article 94)

The CISG contains another provision, Article 94, which allows one to state that the CISG itself justifies the undertaking of regional unification efforts in the area of sales law, such as those undertaken by OHADA, despite the coming into force of the CISG on a more global level,⁵⁸ since that provision requires the CISG to take a backseat vis-à-vis regional unification efforts under certain conditions.⁵⁹ Article 94, like Article 92, was introduced at the request of the Scandinavian countries,⁶⁰ which, it is worth pointing out, had unified their sales law on a regional level about eighty years prior to the adoption of the CISG. Article 94 allows contracting States to make a specific declaration rendering the CISG

Article 1(1)(b) the CISG had to govern the formation as well, since the German private international law rules made German law applicable to that issue; *contra*, without any valid reason, LG Bielefeld 12 December 2003, available at: <http://cisgw3.law.pace.edu/cases/031212g1.html> (applying German domestic law rather than Articles 14–24 CISG which the court should have applied due to the rules of private international law leading to the law of Germany, a Contracting State that had not declared an Article 92 reservation).

⁵⁶ For this conclusion in legal writing see *Achilles*, Art. 92, Rn. 1; *Ferrari/Kieninger/Mankowski u.a./Mankowski*, Art. 92, Rn. 6; *Herber/Czerwenka*, Art. 92, Rn. 3; *Schlechtriem/Schwenzer/Ferrari*, CISG-Komm. 2012, Art. 92, para. 3; *U. Schroeter*, Backbone or Backyard of the Convention? The CISG's Final Provisions, in: FS Kritzer, edited by C.B. Andersen/U.Schroeter (London, 2008), 425 (439); *Witz/Salger/Lorenz/Witz*, Art. 92, para. 2; in case law see Østre Landsret 23 April 1998, available at: <http://cisgw3.law.pace.edu/cases/980423d1.html>.

⁵⁷ See Turku Court of Appeal 12 April 2002, available at: <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020412f5.html>; Metropolitan Court of Budapest 21 May 1996, available at <http://cisgw3.law.pace.edu/cases/960521h1.html>; OLG Rostock 27 July 1995, available at: <http://cisgw3.law.pace.edu/cases/950727g1.html>.

⁵⁸ See also *F. Ferrari*, El papel de la unificación regional en la unificación del derecho de compravenda, in: *Como se codifica hoy el derecho comercial internacional?*, edited by J. Basedow/D.P. Fernandez Arroyo/J.A. Moreno Rodríguez (Asuncion, 2010) 227, 236; *Ferrari/Mankowski*, Art. 94, para. 1 f.; *H.-F. Müller*, Europäische Vertragsrechtskodifikation und UN-Kaufrecht, *Zeitschrift für Gemeinschaftsprivatrecht* 2006, 168 (173); *Schroeter* (*supra* n. 36) § 10, para. 5; *Staudinger/Magnus*, Art. 94, para. 1.

inapplicable to contractual relationships between parties that have their places of business in countries that have a sales law that is the same or closely related.⁶¹ Of course, whether the sales laws are to be considered as being largely uniform and therefore as triggering the inapplicability of the CISG where an Article 94 declaration has been made, is determined by the States declaring an Article 94 reservation themselves,⁶² which in itself may cause some problems.⁶³ One such problem relates to those instances where different countries make an Article 94 declaration, but subsequently decide to revise their law.⁶⁴ As in these cases the principal prerequisite for an Article 94 declaration will cease to exist, one may wonder whether courts will still have to take into account the effect generally produced by an Article 94 declaration, *i.e.*, whether the application of the CISG is excluded pursuant to Article 94.⁶⁵ This issue, which has to be solved in favour of the courts' having to give effect to an Article 94 declaration, even if the laws of the countries to which the declaration relates are not largely uniform anymore,⁶⁶ does, however, not arise in the context of OHADA, as there can be no doubt that the OHADA countries still "have the same or closely related legal rules on matters governed by [CISG]."⁶⁷

For the purposes of showing that unification efforts undertaken in a given region, such as that comprised of the OHADA countries, are justified and are

⁵⁹ For this, see also *Lookofsky* (*supra* n. 51) 290; *Rudolph*, Art. 94, para. 1; *Schlechtriem/Schwenzer/Schlechtriem/Schwenzer/Hachem*, Commentary 2011, Art. 94, para. 1; *Schroeter* (*supra* n. 36) § 10, para. 43.

⁶⁰ See United Nations Conference on Contracts for the International Sale of Goods, Official Records: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committees (Vienna, 10 March – 11 April 1980), edited by the United Nations (New York/Vienna, 1981) 436; *Ferrari* (*supra* n. 27) 6; O. R. S. 436; *Ferrari/Mankowski*, Art. 94, para. 4; *Schroeter* (*supra* n. 36) § 10, para. 2; *Staudinger/Magnus*, Art. 94, para. 3; *P. Volken*, Das Wiener Übereinkommen über den internationalen Warenkauf; Anwendungsvoraussetzungen und Anwendungsbereich, in: *Einheitliches Kaufrecht und nationales Obligationenrecht*, edited by P. Schlechtriem (1987) 81, 89.

⁶¹ See also *Lookofsky* (*supra* n. 51) 290.

⁶² *Achilles*, Art. 94, para. 2; *Brunner*, Art. 94, para. 2; *Enderlein/Maskow/Strohbach*, Art. 94, para. 1; *Ferrari/Mankowski*, Art. 94 CISG, para. 10; *Flechtner* (*supra* n. 54) 194; *Neumayer/Ming*, Art. 94, para. 1 note 1; *G. Reinhart*, UN-Kaufrecht. Kommentar zum Übereinkommen der Vereinten Nationen vom 11. April 1980 über den internationalen Warenkauf (1991), Art. 94, para. 4; *Schlechtriem/Schwenzer/Schlechtriem/Schwenzer/Hachem*, Commentary 2011, Art. 94, para. 5; *Staudinger/Magnus*, Art. 94, para. 5.

⁶³ *Torsello* (*supra* n. 49) 94f.

⁶⁴ This is what occurred with respect to the Scandinavian countries; see, e.g., *Kröll/Herre*, Art. 94, para. 7.

⁶⁵ In this author's opinion, for reasons relating to public international law the question posed in the text will have to be answered affirmatively.

not rendered futile by the coming into force of the CISG, Article 94 of the CISG is, in this author's opinion, the most relevant CISG provision.⁶⁸ Much more so than reliance on Articles 90 or 92 of the CISG, an Article 94 declaration by the three OHADA countries that are contracting States to the CISG, which those contracting States are allowed to make even now, *i.e.*, after the CISG's coming into force in those countries, as Article 94 clearly states that such a declaration "may [occur] at any time",⁶⁹ would – at least in the courts of those OHADA countries – allow the intra-regional sale of goods to be governed by the OHADA Act, where its applicability requirements are met, rather than by the CISG.

A comparison between Article 94 and Article 90 of the CISG may make it look like the latter provision is more favourable to regional unification, as it does not require a State to make a declaration for regional unification efforts to prevail over the CISG.⁷⁰ Indeed, whenever regional unification efforts result in an international agreement, that agreement prevails over the CISG pursuant to Article 90 without the need for any declaration,⁷¹ which is required, however, by Article 94. A closer look reveals, however, that Article 94 of the CISG is more favourable to regional unification of sales law than Article 90. This is because, in contrast to Article 90, Article 94 does not require that the result of regional unification efforts take the form of an international agreement. Thus, as long as two or more contracting States have the same or closely related rules on matters governed by the CISG, and they make a declaration under Article 94, contracts for the sale of goods concluded between parties having their relevant places of business in those contracting States will not be governed by the CISG, but rather by those rules, provided that they are applicable, even if those rules do not derive from an international agreement.⁷² Moreover, pursuant to Article 94,

⁶⁶ It is not up to the courts to judge whether the prerequisites for an Article 94 declaration exists (or continue to exist); if a reservation State does not want its courts to have to give effect to an Article 94 reservation, it has to either withdraw or denounce the reservation.

⁶⁷ Article 94(1) of the CISG.

⁶⁸ *F. Ferrari*, La place de la régionalisation dans l'unification du droit de la vente, *International Business Law Journal* 2004, 445 (451).

⁶⁹ See *Ferrari/Mankowski*, Art. 94, para. 11; *R. Herber*, Das Verhältnis des CISG zu anderen Übereinkommen und Rechtsnormen, insbesondere zum Gemeinschaftsrecht der EU, *Internationales Handelsrecht* 2004, 89 (90); *Rudolph*, Art. 94, para. 3; *Schlechtriem/Schwenzer/Schlechtriem/Schwenzer/Hachem*, Commentary 2011, Art. 94, para. 8; *Schroeter* (*supra* n. 36) § 10, para. 30

⁷⁰ See *Ferrari* (*supra* n. 68) 451.

⁷¹ *Achilles*, Art. 94, para. 1; *Brunner*, Art. 94, para. 1; *Ferrari/Mankowski*, Art. 94, para. 3; *Herber* (*supra* n. 69) 90; *Herber/Czerwenka*, Art. 94, para. 6; *Münch. Komm. BGB/P. Huber*, Art. 94, para. 1; *Rudolph*, Art. 94, para. 5; *Schlechtriem/Schwenzer/Ferrari*, CISG Komm. 2012, Art. 94, para. 2; *Staudinger/Magnus*, Art. 94, para. 6; *Witz/Salger/Lorenz/Witz*, Art. 94, para. 2

a contracting State which “has the same or closely related legal rules on matters governed by [the CISG] as one or more non-contracting States may at any time declare that the [CISG] is not to apply to contracts of sale or to their formation where the parties have their places of business in those States”, thus extending the *favor unificationis regionalis* beyond the limited ambit of contracting States.⁷³ As regards OHADA, this is important given that only three out of the seventeen countries are contracting States to the CISG.

It is worth pointing out that Article 94 of the CISG is also more favourable to regional unification than Article 92, and this for various reasons: Article 94 lets regionally uniform rules prevail over all CISG provisions, while the effect of an Article 92 declaration is more limited, since some CISG rules cannot be replaced simply by making an Article 92 declaration. This is true, for instance, in respect of the issue of statute of frauds, dealt with in Article 13. Furthermore, whereas an Article 92 declaration must be made “at the time of signature, ratification, acceptance, approval or accession”,⁷⁴ an Article 94 declaration may be made at any time,⁷⁵ thus making it easier for States to become involved in regional unification efforts (after the coming into force of the CISG). In this author's opinion, Article 94 of the CISG has another advantage over Article 92: It limits the determination of the prevalence of regionally uniform law over the CISG to the courts of the States making an Article 94 declaration.⁷⁶ Since an Article 94 declaration, unlike declarations under Articles 92 and 93, does not have an impact on the status of contracting State of the State making the declaration,⁷⁷ the courts of other contracting States will not be impacted by that declaration⁷⁸ and will have to apply the CISG to intra-regional sales contracts where the CISG's applicability requirements are met,⁷⁹ thus combining the advantages of regional unification with those of the universal unification aimed at by the CISG.

From what has been said thus far, it becomes evident that the CISG itself allows for regional unification efforts to be relevant despite its coming into force. This will allow regional legislators, such as OHADA, to continue to draft

⁷² See Ferrari (*supra* n. 68) 451.

⁷³ See Münch. Komm. BGB/Huber, Art. 94 CISG, para. 2.

⁷⁴ See Staudinger/Magnus, Art. 92, para. 3.

⁷⁵ See, apart from the commentators cited *supra* in n. 69, Schlechtriem/Schwenzer/Ferrari, CISG Komm. 2012, Art. 94, para. 2.

⁷⁶ For this conclusion, see Czerwenka (*supra* n. 37) 139-140.

⁷⁷ For this view, see Ferrari (*supra* n. 68) 452; Ferrari (*supra* n. 27) 6; *contra* Flechtner (*supra* n. 54) 194, stating that the Article 94 reservation “amounts to an alteration in the meaning of the term „Contracting State“ for the purposes of the scope provision (Article 1) of the Convention”; for this Ebenso MünchKommHGB/Benicke, Art. 1, Rn. 31; Torsello (*supra* n. 49) 94 ff.

⁷⁸ See also Honsell/Siehr, Art. 94, para. 2; *contra* Achilles, Art. 94, para. 3; Staudinger/Magnus, Art. 94, para. 7; Witz/Salger/Lorenz/Witz, Art. 94, para. 4; *contra* also Kröll/Herre, Art. 94, para. 5.

uniform law even in the areas covered by the CISG without any CISG treaty obligations being necessarily violated. Of course, this may require the domestic legislators to act so as to avoid such treaty violations. As regards the three OHADA countries which are also contracting States to the CISG, such violations may be prevented by simply making Article 94 declarations.

⁷⁹ *Contra* Münch. Komm. HGB/Benicke, Art. 1 CISG, para. 31.

CISG vs. CESL

Ulrich Magnus

I. Introduction¹

Europe is preparing a codification of an own sales law. The EU Commission published the Proposal for a Common European Sales Law (CESL) on 11 October 2011.² The Proposal consists of two instruments: The Regulation of the European Parliament and the Council which defines the scope of application of the Common European Sales Law and an Annex I to the Regulation on a Common European Sales Law; the Annex I contains the substantive sales law (in the following text “CESL” is used for the proposed Annex I and “Regulation” or “Chapeau Regulation” for the Proposal of the Regulation).

The whole proposal mainly intends to regulate cross-border sales. However, there is a rival already there: The same aim is pursued by the United Nations Convention on Contracts for the International Sale of Goods (CISG) of 1980 which 23³ of the 27 EU Member States have already ratified and which many of them apply since two decades.

The following paper examines the relationship between the CISG and the CESL. It starts with a comparison of CISG and CESL and finally tries to answer

¹ Only cited with the author's or editor's name: *H. Honsell* (ed.), *Kommentar zum UN-Kaufrecht* (2nd ed. 2010); *St. Kröll/L. Mistelis/P. Perales Viscasillas* (eds.), *UN Convention on Contracts for the International Sale of Goods (CISG). Commentary* (2011); *O. Remien/S. Herrler/P. Limmer* (eds.), *Gemeinsames Europäisches Kaufrecht für die EU? Analyse des Vorschlags der Europäischen Kommission für ein optionales Europäisches Vertragsrecht vom 11. Oktober 2011* (2012); *H. Schulte-Nölke/F. Zoll/N. Jansen/R. Schulze* (eds.), *Der Entwurf für ein optionales europäisches Kaufrecht* (2012); *M. Schmidt-Kessel* (ed.), *Ein einheitliches europäisches Kaufrecht? Eine Analyse des Vorschlags der Kommission* (2012); *P. Schlechtriem/I. Schwenzer* (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht (CISG)* (2008); *D. Staudenmayer*, *Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über ein Gemeinsames Europäisches Kaufrecht* (2012) (*Staudenmayer* is the EU official who is responsible for the CESL Regulation); *J. von Staudinger*, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Wiener UN-Kaufrecht (CISG)* (*U. Magnus*) (2005).

² COM (2011) 635 final.

³ Actually 24 EU Member States adhere to the Uniform Sales Law because the UK is still a Contracting State of the Hague Uniform Sales Law of 1964, the predecessor of the CISG.

whether or not this European variant of regional sales law unification is useful, recommendable or even necessary. Since the CISG almost exclusively regulates sales between merchants,⁴ also the comparison focuses mainly on CESL's provisions for professional sales and there on – practically important – differences between the two instruments rather than on a complete comparison of all their features.

II. Comparison between CISG and CESL

1. Comparison of objectives

The objectives of a legislative instrument have significant importance in particular for its interpretation and understanding. They form the fundament for the whole instrument.

a) CISG

The well known central objective of the CISG is the global unification of the substantive law of professional international sales of moveable goods. CISG covers all kinds of professional sales but principally excludes consumer sales.⁵ CISG is based on the insight that the sales laws of the national states differ rather widely and it is further based on the assumption that these differences impair international trade. It can be questioned whether these differences are really serious hindrances for international trade; normally merchants do not care too much about law when they conclude transborder contracts.⁶ However, the least that one can say is that the differences between the national sales laws certainly do not promote transactions across borders. Therefore, the solution of the CISG is to replace the otherwise applicable national law as far as the CISG reaches and is applicable. The CISG becomes applicable when the Convention has been ratified by a country and the CISG's conditions of application are met. But the parties may exclude the applicability of the CISG (so called opt out solution).

⁴ Although "the civil or commercial character of the parties or of the contract" is formally irrelevant (Art. 1 (3) CISG) consumer sales are in principle excluded (Art. 2 (a) CISG).

⁵ Art. 2 lit a CISG. The CISG covers however consumer sales which the seller could not recognize as such as well as sales where the consumer sells to a professional buyer.

⁶ However, the Eurobarometer 320 on European contract law in business-to-business transactions of 2011, p. 15 ss. and the Eurobarometer 321 on European contract law in consumer transactions of 2011, p. 19 ss., show that merchants when asked regard differences of contract law as a certain impediment for their trading across the border.

They can also derogate from or modify any single provision of the CISG.⁷ Party autonomy is the central fundament on which the CISG is built. However, where the parties did not agree otherwise the CISG's provisions apply automatically as default rules for sales falling within the CISG's scope.

b) CESL

The purpose of the CESL Regulation is defined by its Art. 1 as "to improve the conditions for the establishment and the functioning of the internal market by making available a uniform set of contract law rules."⁸ In essence it is the same idea that national differences of law are obstacles to international trade and therefore should be removed.⁹ Like the CISG on a global level CESL intends to achieve this aim within the EU. However, in contrast to the CISG, CESL does not automatically replace the differing national laws. CESL intends to facilitate international sales by offering a further (so called "second")¹⁰ sales law regime which in each Member State steps besides the existing domestic sales regime. This "second" regime is identical for all Member States: However, it is only applicable if the parties choose it. Although it contains mandatory provisions, the whole instrument is optional in the sense that it – and also its mandatory provisions – does not apply without a valid choice. In contrast to the CISG it is thus an opt-in solution. The drafters of CESL hope that the new instrument will attract such choice due to its inherent advantages. It is only a slight exaggeration that CISG and CESL compare like octroi and seduction.

Further, CESL does not intend to offer a sales regime for all international sales transactions. Its main purpose is to provide a special, largely protective sales regime for consumers and to a certain extent also for smaller enterprises: CESL therefore covers sales only between professional sellers and consumers and for sales between professional traders if one of them is a small or medium-sized enterprise (SME).¹¹ The SMEs are not too small; Art. 7 (2) Proposal defines a SME as an enterprise with less than 250 employees and less than 50 mill. € annual turnover or less than 43 mill. € annual balance sheet total (or the equiva-

⁷ See Art. 6 CISG. The only express exception is Art. 12 CISG (possibility of Contracting States to introduce a form requirement) which the parties cannot exclude. Moreover, the majority view is that they cannot exclude the principle of good faith (Art. 7 (1) CISG).

⁸ Art. 1 Chapeau Regulation; see also Explanatory Memorandum to the CESL, COM (2011) 635 final, p. 4.

⁹ See in particular Explanatory Memorandum to the CESL, COM (2011) 635 final, p. 1 ss.

¹⁰ See Explanatory Memorandum to the CESL, COM (2011) 635 final, p. 4.

¹¹ See Art. 7 (1) Chapeau Regulation.

lent in another currency).¹² The original coverage of CESL is thus limited and excludes international sales between larger enterprises. The Member States may, however, make CESL available also to big enterprises but the Member States must do so expressly.¹³

It is somewhat surprising that a completely optional instrument sets strict requirements for its scope of application. Actually, everybody who likes it can choose CESL as applicable to the own contract be the parties consumers, small or tall enterprises. One could argue that a choice outside the regulated scope of application cannot oust the otherwise applicable mandatory law as does the choice within the scope. A choice outside the provided scope would then only have the effect which the incorporation for instance of standard terms or of an INCOTERM would have. However, with respect to its effect on the otherwise applicable mandatory law, CESL sends ambivalent signs: Art. 11 Chapeau Regulation prescribes that where validly chosen “only the Common European Sales Law shall govern the matters addressed in its rules.” This sounds as if the choice of CESL should have the effect like a regular choice of law in conflict of laws. On the other hand, Recital 10 of the Regulation states that the “agreement to use the Common European Sales Law should therefore not amount to, and not be confused with, a choice of the applicable law within the meaning of the conflict-of-law rules and should be without prejudice to them.”¹⁴ Most commentators of the CESL Regulation infer from this that CESL can be chosen only if the rules of private international law lead to the law of a EU Member State (because the Regulation is directly applicable there).¹⁵ It can only be hoped that the final version of the Regulation will remove this ambiguity.

¹² The definition of small and medium-sized enterprises may raise considerable problems; see thereto *R. Koch* (in this book); *Th. Pfeiffer*, in: *Remien/Herrler/Limmer* 38 s.

¹³ Art. 13 lit. b Chapeau Regulation.

¹⁴ See thereto *M. Fornasier*, “28.” versus “2. Regime” – Kollisionsrechtliche Aspekte eines optionalen europäischen Vertragsrechts, *RabelsZ* 76 (2012) 401 (431 ss.); *P. Mankowski*, Der Vorschlag für ein Gemeinsames Europäisches Kaufrecht (CESL) und das Internationale Privatrecht, *RIW* 2012, 97 ss.; *D. Staudenmayer* p. XVIII.

¹⁵ See *M. Fornasier* *ibid.* 440; *P. Mankowski* *ibid.* 100; *H. Eidenmüller/N. Jansen/E.-M. Kieninger/G. Wagner/R. Zimmermann*, Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht, *Juristenzeitung* 2012, 269 ss. (273); *St. Leible*, in: *Remien/Herrler/Limmer* 24; *M. Stürner*, Das Verhältnis des Gemeinsamen Europäischen Kaufrechts zum Richtlinienrecht, in: *Schulte-Nölke/Zoll/Jansen/Schulze* 47 ss. (67); see in particular also *D. Staudenmayer* p. XVIII.

2. Relevance of CISG and CESL

The CISG has undeniable great relevance.¹⁶ It is often used in practice as the numbers of reported CISG decisions prove which grow each year considerably. Further, it is a cornerstone of international unification of contract law be this binding or soft law: it is, for instance, the basis of the OHADA Sales Law, of the PICC and the PECL, of the European Consumer Sales Directive of 1999, of the Draft Common Frame of Reference and last but not least of the CESL. The CISG is also an often used model for national legislation.¹⁷ As an example that stands for many others I only mention the German reform of 2002 of the German Civil Code (BGB) where the CISG had important influence on national law.

The practical relevance of the CESL remains to be seen in the future. The experience with opt-in solutions is not promising. England, still one of two remaining Contracting States of the Hague Uniform Sales Law, the predecessor of the CISG, ratified the Hague Law under the reservation that the parties choose it. In now 40 years no single case has reached the English courts concerning the Hague Sales Law.¹⁸

However, already now CESL has great theoretical importance. It is for the first time that the EU codifies contract law and tries to enact a complete regulation of the most important contract type. It is a great step ahead from the EU-typical piecemeal legislation in the past to this new codifying approach. The piecemeal legislation through EU Directives on private law matters suffered from considerable incoherency. It further led to a limited harmonisation only with many remaining differences between the national laws of the EU Member States because the Member States implemented the Directives in different ways and the Directives often provide for options.¹⁹

¹⁶ See thereto the comprehensive study by *F. Ferrari*, The CISG and its Impact on National Legal Systems – General Report, in: *F. Ferrari* (ed.), The CISG and its Impact on National Legal Systems (2008) 413 ss.

¹⁷ *F. Ferrari* *ibid.* 471 ss.

¹⁸ There is only one English decision which obiter cites the Hague Uniform Sales Law: *Butler Machine Tool Co. v. Ex Cell-O Corp.* [1979] 1 W.L.R. 401.

¹⁹ See for instance the Consumer Sales Directive under which the Member States may or may not introduce a two months period for the notice of defects (Art. 5 (2)) or may or may not allow the parties to shorten the liability period for second-hand goods (Art. 7 (2)).

3. Interpretation of CISG and CESL

a) CISG – international convention (Art. 7 CISG)

Unifying law can perform its purpose only if it is also interpreted uniformly. There is no central CISG court that could ensure uniform interpretation but the CISG contains a famous provision on interpretation with this aim: its Art. 7.²⁰ The provision requires a three step approach: first, an international and autonomous interpretation of all CISG provisions. That generally excludes any recourse to national understandings or solutions. In principle, the interpretation should be found within the four corners of the Convention itself.²¹ Moreover, relevant case law of other CISG States has to be taken into account.²²

Secondly, if there is a gap concerning questions principally covered by the CISG this so called internal gap has to be filled by recourse to the general principles underlying the CISG.²³ There is a number of such general principles that has found unanimous recognition, for instance the principle of prevailing party autonomy, of good faith and fair dealing in international trade or of freedom of form;²⁴ there are further general principles some of which are however disputed.²⁵

If there are no such general principles or if there is a question not falling within the CISG's scope (a so called external gap) the third step becomes necessary: the court or arbitration tribunal then has to apply the rules of private international law and by them to determine and apply the applicable domestic law.²⁶

²⁰ Art. 7 CISG: „(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. (2) 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.”

²¹ F. Ferrari, in: *Schlechtriem/Schwenzer* Art. 7 para 9; P. Perales Viscasillas, in: *Kröll/Mistelis/Perales Viscasillas* Art. 7 para. 13.

²² F. Ferrari *ibid.*; P. Perales Viscasillas, in: *Kröll/Mistelis/Perales Viscasillas* Art. 7 para. 12.

²³ Art. 7 (2) CISG.

²⁴ See in particular UNCITRAL Digest Art. 7 paras. 7 ss.

²⁵ For instance whether there is a general principle that in case of doubt the currency at the seller's place of business prevails; see thereto U. Magnus, in: *Staudinger* Art. 7 para. 53.

²⁶ Art. 7 (2) CISG.

b) CESL – EU-law, but specific interpretation provision (Art. 4 CESL)

Concerning the interpretation issue CESL differs in at least three respects from CISG: first, the CESL Regulation is EU law while the CISG is an international convention. EU law regularly follows its own interpretation rules²⁷ which are not identical with the interpretation rules for international conventions to which the Vienna Convention on the Law of Treaties can be applied. Secondly, there exists a central court, the ECJ, for the uniform interpretation of CESL. Whether the present reference procedure to the ECJ can effectively unify the interpretation of CESL may be doubted, though.²⁸ Thirdly, in contrast to CISG CESL's interpretation provision²⁹ requires only a two step approach: first autonomous interpretation; secondly, gap-filling by general principles. However, no third step with redress to private international law is expressly provided for. This purely autonomous solution evidently applies only to "(I)ssues within the scope of the Common European Sales Law".³⁰ Issues outside the scope of CESL (external gaps) are not dealt with by an explicit provision. However, Recital 27 of the Regulation mentions them: this Recital records a long, yet non-exhaustive list of those issues³¹ and provides that they are governed by the otherwise applicable law. This can be other international law, for instance the UN Convention on the Limitation Period in the International Sale of Goods, or the domestic law determined by private international law. For the filling of external gaps therefore the same rule applies as under the CISG.

Thus, Art. 4 (2) CESL deals only with internal gaps³² and evidently relies on the assumption that there are always general principles available to fill them.

²⁷ Under EU law the systematic interpretation requests and allows recourse to the whole body of Community law; further, the purposive interpretation, in particular the *effet utile* doctrine, plays the almost decisive role.

²⁸ Denying that the present reference procedure to the ECJ can ensure a uniform interpretation: *H. Ch. Grigoleit*, *Der Entwurf für ein Gemeinsames Europäisches Kaufrecht: Funktionsbedingungen, EU-Kompetenz und Perspektiven*, in: *Remien/Herrler/Limmer* 67 ss. (70 ss.).

²⁹ Art. 4 CESL: "(1) The Common European Sales Law is to be interpreted autonomously and in accordance with its objectives and the principles underlying it. (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. (3) Where there is a general rule and a special rule applying to a particular situation within the scope of the general rule, the special rule prevails in any case of conflict."

³⁰ See Art. 4 (2) CESL.

³¹ See thereto *B. Gsell*, *Der Verordnungsentwurf für ein Gemeinsames Europäisches Kaufrecht und die Problematik seiner Lücken*, in: *Remien/Herrler/Limmer* 145 ss. (149).

³² In the same sense *B. Gsell* *ibid*.

Where can such principles be found? Only within the CESL as the expression “underlying it and all its provisions” in Art. 4 (2) CESL seems to indicate? Does the specific “autonomous interpretation” at all allow any recourse to general EU law? To other international instruments? To the CISG? Again, the wording of Art. 4 (2) CESL gives the impression that any such recourse is strictly forbidden (“without recourse to the national law ... or to any other law”). It could even be argued that the fact that the Chapeau Regulation contains no interpretation rule whereas the CESL does means that the Chapeau Regulation is to be interpreted in accordance with the general EU interpretation rules while the CESL should be interpreted in another, namely “autonomous” way.

In my view the answer to the interpretation issue can and should be derived from the ECJ judgment in *Car Trim*.³³ There the Court had to decide whether the term “sale of goods” in Art. 5 No. 1 Brussels I Regulation included sales where the goods are to be manufactured. In extending the provision to such sales the Court did not only refer to other EU law but in particular to ‘international law’, namely to the CISG and the UN Convention on the Limitation Period in the International Sale of Goods: the ECJ took care that the term in the Brussels I Regulation should carry the same meaning as defined in the two Conventions.³⁴ The Court stated: “(T)he classification of a contract ... is governed by certain provisions of European Union law and international law which can affect the interpretation ...”³⁵ This must be understood that in international, not purely EU-internal contexts the Court opens the door for an international, even an inter-conventional method of interpretation of EU texts. For CESL such an interpretation is particularly appropriate and should be followed.

This means further that as far as possible CESL should be interpreted in the same sense as the corresponding provision or term in the CISG³⁶ (though not vice versa because CISG as a global instrument should not be interpreted in accordance with specific regional understandings). This is not only advisable because many CESL provisions at least as far as those on commercial sales are concerned have in substance or wording their original root in the CISG. Any exclusion of the CISG as a means for the interpretation of these CESL provisions would also disregard the rich experience, case law and doctrine on the CISG as a very helpful tool for CESL’s interpretation. The recourse to settled CISG law could further promote uniformity and legal certainty in the interpretation and application of CESL. Art. 4 (2) CESL should therefore be understood as

³³ ECJ [2010] ECR I-1255 (C-381/08, *Car Trim GmbH v. KeySafety Systems Srl*).

³⁴ ECJ *ibid.* paras. 36 ss.

³⁵ ECJ *ibid.* par. 34.

³⁶ But contra C. Herresthal, *Zur Dogmatik und Methodik des Gemeinsamen Europäischen Kaufrechts nach dem Vorschlag der Kaufrechts-Verordnung*, in: *Schulte-Nölke/Zoll/Jansen/Schulze* 85 ss. (90, 140).

directed against the recourse to national law and national interpretations³⁷ but not against a broad international interpretation of CESL with particular regard to the CISG.

The interpretation of the Chapeau Regulation and CESL can and should also make use of the general principles of European Union law and the *acquis communautaire*,³⁸ in particular with respect to consumer sales. Even the Draft Common Frame of Reference as well as the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law may be used for supporting a specific interpretation. Where however these principles conflict with those of the international instruments, in particular the CISG, the latter should be preferred. The reason is the potential global scope of application of CESL which is not strictly limited to EU-internal transactions. In case of conflict or doubt, the interpretation of CESL should therefore follow the internationally accepted meaning.

4. Relationship between CISG and CESL

a) *In principle no conflict*

As we have seen the objectives of CISG and CESL do not fully match but correspond to a certain extent only. CESL's primary aim is the facilitation of transborder trade for consumers and small businesses (primarily in the EU, although, if chosen, CESL applies also to sales contracts with one party from outside the EU³⁹), whereas the CISG aims at the facilitation of all kinds of professional international sales on a global level, generally excluding consumer sales.

On the other hand there is a rather wide overlap between CISG and CESL. This is most evident with respect to SMEs. Both instruments address these persons or enterprises. But while the CISG does not distinguish between tall and small enterprises CESL draws such a line. CESL does not intend to originally cover sales between 'big' traders, however allows the Member States to open CESL also for this category of businesses; the CESL-drafters evidently hold the instrument also for suitable for them. If the Member States follow this path and because big businesses in my view can always freely choose CESL there is an

³⁷ Insofar in accord: P.-Ch. Müller-Graff, *Der Introitus des optionalen Europäischen Kaufrechts: Das erste Kapitel im Kontext von Kodifikationskonzept und Primärrecht*, in: Schmidt-Kessel 51 ss. (67).

³⁸ Apparently also B. Gsell, *Der Verordnungsentwurf für ein Gemeinsames Europäisches Kaufrecht und die Problematik seiner Lücken*, in: Remien/Herrler/Limmer 145 ss. (151 ss.).

³⁹ See Art. 4 (2) Chapeau Regulation. However, there is no reason why parties with their place of business outside the EU should not be allowed to choose CESL as applicable law.

overlap between the CISG and the CESL also with respect to these businesses. And although the CISG does not intend to regulate consumer sales, in rare situations it nevertheless can cover consumer cases and then may overlap with the CESL in this respect, too.

But despite this rather wide overlap no true collision between the two instruments is intended to happen due to the optional character of CESL.⁴⁰ Apparently, CESL's drafters have in mind an uncomplicated coexistence of the two instruments; any competing application of both at the same time they regard as excluded.⁴¹ In general this is true: While the CISG applies automatically (unless clearly excluded) CESL on the contrary must clearly be chosen.⁴² Otherwise it remains inapplicable. For instance, consumer sales that exceptionally fall within the scope of the CISG have to be decided according to the CISG unless there is a clear choice of the CESL. If the CESL is validly chosen CESL's drafters intend this to mean the exclusion of the CISG.⁴³ Yet, it must be stressed that the exclusion of the CISG is a matter entirely regulated by the CISG itself that CESL cannot regulate. On the other hand, the choice of the law of a Non-CISG State generally constitutes an implicit exclusion of the CISG⁴⁴ and the choice of CESL would have to be regarded as a similar exclusion.

It is evident that CESL's drafters consider the traditional way of unification of law – with principally binding force of international instruments like the CISG (even though freedom of contract is the most important general principle within the CISG) – as unnecessary for the facilitation of international trade. They believe in the voluntary use of uniform rules that are optional even if they contain mandatory elements.

b) *Exceptional conflict*

Theoretically, there may be nonetheless a clash between the two instruments. It is possible that the exclusion of the CISG is invalid whereas the choice of CESL is valid. This situation may occur for instance in cases where a CISG State made use of the form reservation under Art. 96 and requires a contract to be

⁴⁰ See also *St. Leible*, Der räumlich-persönliche Anwendungsbereich des Gemeinsamen Europäischen Kaufrechts, in: *Remien/Herrler/Limmer* 21 ss. (33 s.).

⁴¹ This is to be inferred from Recital 25; *D. Staudenmayer* p. XX reports no problems concerning the relationship between CISG and CESL.

⁴² Art. 8 (1) Chapeau Regulation.

⁴³ See also Recital 25.

⁴⁴ See for instance *Oberlandesgericht Düsseldorf* 2 July 1993, *Recht der Internationalen Wirtschaft* 1993, 845; *Rechtbank van Koophandel Brüssel* 24 March 2004, *Tijdschrift voor Belgisch Handelsrecht* 2005, 781; *Tribunale di Padova* 11 January 2005, CISG-online no. 967; *Oberlandesgericht Linz* 23 January 2006, CISG-online no. 1377; *F. Ferrari*, in: *Schlechtriem/Schwenzer* Art. 6 para. 20.

in writing.⁴⁵ Then, if the exclusion of the CISG is not also in writing the exclusion would be invalid. A written choice of CESL would still constitute a written exclusion of CISG, though. However, a mere oral choice of CESL in such a case would not suffice to exclude the CISG. A similar case is that standard terms which exclude the CISG and opt for CESL are not incorporated under the CISG rules but under the CESL rules⁴⁶ (see to this difference below under II.6.a).

It is already discussed whether and how CESL's prevalence in such cases could be ensured.⁴⁷ If a regional organisation as the EU wants to unify the sales law for its Member States the CISG contains no provision that directly regulates this case. According to its Art. 90 the CISG gives priority to international agreements on same matters. The prevailing view is however that EU Regulations and Directives do not qualify as "international agreements".⁴⁸ Therefore, only Art. 94 CISG could be applied by analogy. According to this provision CISG States which have "the same or closely related legal rules on matters governed" by the CISG can declare that the CISG shall not apply if the parties have their places of business in those states.

5. Range of application

a) Covered contracts

The CISG is confined to sales and supply contracts. They include contracts where the seller manufactures or produces the goods except where the buyer supplies a substantial part of the necessary material.⁴⁹ Contracts with further service elements, for instance labour, are only covered where the value of the

⁴⁵ See already *M. Schmidt-Kessel*, Der Vorschlag der Kommission für ein Optionales Instrument – Einleitung, in: *Schmidt-Kessel* 1 ss. (22 s.).

⁴⁶ See also *M. Schmidt-Kessel* *ibid.* 22.

⁴⁷ See *St. Leible*, Der räumlich-persönliche Anwendungsbereich des Gemeinsamen Europäischen Kaufrechts, in: *Remien/Herrler/Limmer* 21 ss. (33 s.); *M. Schmidt-Kessel* *ibid.* 22.

⁴⁸ *F. Ferrari*, in: *Schlechtriem/Schwenzer* Art. 90 para. 3; *J. Herre*, in: *Kröll/Mistelis/Peralas Viscasillas* Art. 90 para. 8; *I. Saenger*, in: *Bamberger/Roth*, BGB (2nd ed. 2007) Art. 90 para. 1; *K. Siehr*, in: *Honsell* Art. 90 para. 7; *U. Magnus*, in: *Staudinger* Art. 90 para. 4 (for EU Directives); but contra *P. Mankowski*, in: *F. Ferrari* and others, *Internationales Vertragsrecht* (2nd ed. 2012) Art. 90 CISG para. 8 ss.; *P. Huber*, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (6th ed. 2011) Art. 90 para. 2 (priority of EU Regulations, however not of EU Directives).

⁴⁹ Art. 3 (1) CISG.

sales element exceeds the value of the service element.⁵⁰ CISG cases where the dispute focuses on the service element are rare, though.⁵¹

Similarly, CESL covers sales (which include contracts for the supply of goods to be manufactured or produced)⁵² and contracts for the supply of digital content, as well as service contracts which are related to the sales contract “such as installation, maintenance, repair or any other processing” and which the seller provides.⁵³ However, the value ratio between the sales element and the service element is irrelevant. CESL remains applicable even if the value of the labour or service element is higher than that of the sales element. On the other hand, CESL excludes certain accompanying services such as transport, training, telecommunications support and financial services⁵⁴ whereas the CISG covers them if their value is less than the sales part.

At first glance, the avoidance of the value ratio may appear as an advantage of CESL; for, it may remove uncertainty over the applicability. On the other hand, CESL covers contracts for work even with a small sales element. Thus, the distinction to mere contracts for work may become difficult and introduce some uncertainty at another edge.

As already mentioned the CISG excludes consumer sales in general while CESL covers them. Where the CISG exceptionally extends to a consumer sale because the professional seller could not recognise the buyer’s consumer character,⁵⁵ the CISG is applicable even if the sale is on credit in whatever form. The CESL, on the other hand, entirely excludes consumer sales on credit.⁵⁶

Under both instruments the covered contracts raise a number of qualification issues which may pose rather difficult questions.⁵⁷ Under CESL their number seems even greater than under the CISG.

⁵⁰ See Art. 3 (2) CISG.

⁵¹ See the collection (CLOUT) of decisions by UNCITRAL which counts only 14 decisions on Art. 3 (2) CISG out of about 1000 decisions. The most comprehensive collection (cisp. pace) reports 34 decisions on Art. 3 CISG out of almost 3000 decisions; only a part of them concerns Art. 3 (2) CISG.

⁵² Art. 2 (k) Chapeau Regulation.

⁵³ See Art. 2 (m) Chapeau Regulation.

⁵⁴ Art. 2 (m) (i) – (iv) Chapeau Regulation.

⁵⁵ See Art. 2 lit. a CISG.

⁵⁶ Art. 6 (2) sent. 1 Chapeau Regulation.

⁵⁷ An example is the definition of a sale on credit „in the form of a deferred payment, loan or other similar financial accommodation“ (Art. 6 (2) sent. 1 Chapeau Regulation). Is a sale at a rebate already such other similar financial accommodation?

b) *Covered goods*

Like the CISG CESL concerns primarily the substantive law of sale of moveable goods (“tangible movable items”).⁵⁸ Both instruments exclude electricity,⁵⁹ on further details concerning goods CISG and CESL differ, however more in formulation than in outcome. Only CESL expressly excludes natural gas as well as water and other types of gas “unless they are put up for sale in a limited volume or set quantity”.⁶⁰ Since in practice gas and water is generally sold in volume or specified quantities that means that these contracts are covered. They fall within the scope of both instruments.⁶¹ The same is true for the purchase of oil⁶² and nuclear material.⁶³

Contrary to the CISG which excludes “ships, vessels, hovercraft and or aircraft”⁶⁴ CESL does not specifically mention them and thus covers them. This avoids the moderate uncertainty under the CISG what constitutes a ship or vessel. However, CESL does not regulate the relation to registration requirements for ships and aircrafts.

The CISG (Art. 2 (d)) explicitly excludes “stocks, shares, investment securities, negotiable instruments or money” whereas CESL does not mention them. That can, however, not mean that CESL applies to them. Stocks, shares, investment securities, and negotiable instruments represent rights; they are no goods and fall for this reason also outside the scope of CESL. The ‘sale’ of money, for instance foreign currency, is generally no sale but an exchange contract and therefore neither instrument covers it.

In contrast to the CISG CESL particularly addresses the supply of digital content. It (Art. 2 (j) CESL) defines digital content as “data which are produced and supplied in digital form”. They include digital games or software and exclude services in electronic form. It is the prevailing view that the CISG also covers the sale of software, at least standard software whether or not it is on a tangible medium.⁶⁵

⁵⁸ Art. 2 (h) Chapeau Regulation.

⁵⁹ Art. 2 (f) CISG and Art. 2 (h) (i) Chapeau Regulation.

⁶⁰ Art. 2 (h) (ii) Chapeau Regulation.

⁶¹ See for the CISG *F. Ferrari*, in: *Schlechtriem/Schwenzer* Art. 2 para. 46; *U. Magnus*, in: *Staudinger*, Art. 2 para. 50; *K. Siehr*, in: *Honsell* Art. 2 para. 19.

⁶² See for the CISG the references in the preceding fn.

⁶³ *U. Magnus*, in: *Staudinger* Art. 2 para. 50.

⁶⁴ Art. 2 (e) CISG.

⁶⁵ See Oberster Gerichtshof (Austria) 21.6.2005, Internationales Handelsrecht 2005, 195 [196] with note *B. Piltz*; Oberlandesgericht Koblenz Recht der Internationalen Wirtschaft 1993, 936; Oberlandesgericht Köln Recht der Internationalen Wirtschaft 1994, 970; Landgericht Trier 17. 2. 2000, CISG-Pace; Rechtbank Arnhem 28.6.2006, CISG-online Nr 1265; indirectly also Bundesgerichtshof (Germany) 27.6.2007, Neue Juristische Wochenschrift 2007, 3501 [the application of the CISG on a sale of hard-

In essence, both instruments appear to cover the same range of electronically communicated information.

c) Covered legal aspects

aa) Formation of contract and contractual rights and obligations

Both CISG and CESL cover the formation of contract and regulate the contractual rights and obligations once a contract has been concluded. However, CESL expressly deals also with the pre-contractual phase and regulates cases of culpa in contrahendo to a certain extent. Even in purely professional sales the seller has specific pre-contractual information duties, in particular when the contract is concluded by electronic means.⁶⁶ Moreover, under CESL any information that a party supplies must be correct and not misleading.⁶⁷ Otherwise the other party can claim damages.⁶⁸ By contrast, the CISG does not expressly provide for specific rules on culpa in contrahendo and it is disputed whether, and if so, to which extent it covers this area. It seems the prevailing view that certain cases of culpa in contrahendo fall within the scope of the CISG.⁶⁹

ware and software by the lower court accepted without commentary]; *F. Ferrari*, in: *Schlechtriem/Schwenzer* Art. 2 para. 38; *J. Lookofsky*, *Understanding the CISG* (3rd ed. 2008) 19 ff; *U. Magnus*, in: *Staudinger* Art. 1 para. 44; *K. Siehr*, in: *Honsell* Art. 2 para. 8; probably also *L. Mistelis*, in: *Kröll/Mistelis/Perales Viscasillas* Art 1 para. 40.

⁶⁶ Art. 23 and 24 CESL.

⁶⁷ Art. 28 CESL.

⁶⁸ Art. 29 CESL.

⁶⁹ See in favour of a CISG damages claim if a party makes either misleading representations as to the goods or to the own creditworthiness (and the contract is concluded) or disrupts negotiations after having aroused the impression that it would conclude the contract and if the other party relied on this impression: *J. M. Bonell*, *Vertragsverhandlungen und culpa in contrahendo nach dem Wiener Kaufrechtsübereinkommen*, *Recht der Internationalen Wirtschaft* 1990, 693 ss.; *Ch. Benicke*, in: *Münchener Kommentar zum Handelsgesetzbuch* (2nd ed. 2007) Art. 4 para. 19; *K. Siehr*, in: *Honsell* Art. 4 para. 9; *U. Magnus*, in: *Staudinger* Art. 4 para. 42 ss.; contra *F. Ferrari*, in: *Schlechtriem/Schwenzer* Art 4 para. 46;

bb) Error, fraud, threat

Contrary to the CISG, CESL regulates defects in consent,⁷⁰ namely mistake,⁷¹ fraud,⁷² threat⁷³ and unfair exploitation⁷⁴ and awards the aggrieved party the right of avoidance in all of these cases. The CISG treats these problems as matters of validity which fall outside its scope and must be dealt with by the applicable national law. Under the CISG, an exception is a mistake concerning the quality of the goods⁷⁵ or the creditworthiness of the other party.⁷⁶ The CISG also regulates an error in transmission of a communication.⁷⁷

It is a shortcoming of the CISG that it does not provide rules for all kinds of defects of consent but leaves them to national law. However, in the CISG court practice the non-covered cases do not play a particularly significant role.⁷⁸

cc) Unfair contract terms

In accordance with the *acquis communautaire*, CESL contains provisions on unfair contract terms.⁷⁹ Unfair terms are generally invalid;⁸⁰ CESL's provisions on them are mandatory, even for transactions between businesses.⁸¹ However, CESL provides for different unfairness standards for B2C sales⁸² and B2B sales.⁸³ The measure for professional sales is rather open, though: standard terms are unfair if they deviate grossly from good commercial practice and are contrary to good faith and fair dealing.⁸⁴

⁷⁰ Art. 48-57 CESL.

⁷¹ Art. 48 CESL.

⁷² Art. 49 CESL.

⁷³ Art. 50 CESL.

⁷⁴ Art. 51 CESL.

⁷⁵ These cases are covered by Art. 45 ss CISG.

⁷⁶ This case is covered by Art. 71 CISG.

⁷⁷ Art. 27 CISG.

⁷⁸ There are only few published cases where mistake, fraud or threat was discussed in a CISG case; see for instance Landgericht Aachen Recht der Internationalen Wirtschaft 1993, 760 (761); Arbitration Court of the Chamber of Commerce Zürich (31 May 1996) UNILEX; Oberster Gerichtshof (Austria) Zeitschrift für Rechtsvergleichung 1997, 204 (207); Oberlandesgericht Hamburg Transportrecht-Internationales Handelsrecht 1999, 37 (39).

⁷⁹ Arts. 79-86 CESL.

⁸⁰ Art. 79 (1) CESL.

⁸¹ Art. 81 CESL.

⁸² See Arts 82-85 CESL.

⁸³ Art. 86 CESL.

⁸⁴ See Art. 86 (1) (b) CESL.

The CISG regards the matter of unfair contract terms as an aspect of material validity and refers it to the applicable national law.⁸⁵ The applicable national law then may or may not provide for a control of standard terms in business sales (for instance Swiss law still does not foresee such a control). The parties may even choose the insofar applicable law and thereby exclude any control.

Certainly, the uniform regulation of the issue of unfair contract terms is a progress with respect to harmonisation of law. It is unlikely that presently such a progress could be achieved on the global level which the CISG is addressing and in fact regulating. However, CESL's control standard for businesses is rather vague. It can be interpreted in a wider as well as in a narrower sense. It has already been suspected that courts will apply CESL's control standards for consumer sales to business sales.⁸⁶ At least, it will last a long time until a uniform practice and understanding of the control standard develops. Anyway, this issue is particularly relevant for consumer sales, less so for sales between businesses. The CISG is focussing only on the latter; it rarely covers consumer sales. A last point is that in contrast to the CISG parties cannot exclude the control of standard terms under CESL. This solution is not likely to meet with particular enthusiasm by business circles be they SMEs or Non-SMEs.⁸⁷

dd) Prescription

Also in contrast to the CISG CESL regulates prescription⁸⁸ and provides for two different prescription periods: a short one of two years which starts with the creditor's knowledge or negligent non-knowledge and a long one of ten years – and thirty years in case of damages claims for personal injuries –, which starts when the debtor did act or should have acted.⁸⁹ Evidently, the long period is the default rule that applies when the creditor did not and could not know of the own right.

The CISG on the other hand leaves the prescription issue to the applicable national law or to the UN Convention on the Limitation Period in the International Sale of Goods of 1974/80 where this Convention is applicable. However, only a good third⁹⁰ of the CISG States⁹¹ – and only few of the economically im-

⁸⁵ Art. 6 CISG.

⁸⁶ W. Ernst, Das AGB-Recht des Gemeinsamen Europäischen Kaufrechts, in: *Remien/Herrler/Limmer* 93 ss. (103).

⁸⁷ W. Ernst *ibid.* 104 suspects that this fact will 'kill' CESL's use between businesses. Requesting the possibility to exclude any standard terms control: *H. Eidenmüller/N. Jansen/E.-M. Kieninger/G. Wagner/R. Zimmermann* *Juristenzeitung* 2012, 280.

⁸⁸ Arts. 178-186 CESL.

⁸⁹ See Arts. 179 and 180 CESL.

⁹⁰ There are 29 States party to the Limitation Convention (1 February 2012).

⁹¹ There are 78 CISG States (1 June 2012).

portant CISG States⁹² – have ratified the Limitation Convention which provides for a mandatory prescription period of four years.⁹³

In comparison, CESL's prescription rules may appear superior to those of the UN Limitation Convention since they seem to be more flexible and adequate. However, criticism has been raised – in my view: justified – against CESL's mixture of a short (subjective) and long (objective) period of limitation where warranty claims are at stake because defective goods were delivered.⁹⁴ For such claims unless they concern bodily injury⁹⁵ legal certainty and efficiency of trade require an objective starting point (delivery of the goods); this is also the position under the UN Limitation Convention.⁹⁶ Further, a two years' limitation period – as in the Consumer Sales Directive⁹⁷ – is adequate. To require knowledge or negligent non-knowledge would be too uncertain and ten years would be too long for such cases.

ee) Omitted aspects: set-off, assignment, agency, capacity, violation of good morals, public policy, validity of penalties

There is a number of legal issues which have considerable practical relevance which neither CESL nor CISG regulates: first, this is set-off which parties rather often use as defence. Neither CESL nor CISG deal with it expressly; however, CISG probably covers set-off with claims out of CISG contracts or at least out of the same CISG contract.⁹⁸ Secondly, assignment is regulated neither by CESL nor by CISG. Thirdly, both instruments omit rules on representation or agency, an issue also rather often raised. Fourthly, both instruments leave further matters of material validity to the applicable national law, namely capacity, violation of good morals (*Sittenwidrigkeit*), violation of legal order and/or public policy, validity of penalties.

⁹² Thus far, the United States is the only economically important Contracting State of the Limitation Convention.

⁹³ Arts. 8 and 22 Limitation Convention; see further *U. Magnus*, Limitation in the International Arena – the United Nations Limitation Convention for International Sales, in: *O. Remien* (ed.), *Verjährungsrecht in Europa – zwischen Bewährung und Reform* (2011) 93 ss.

⁹⁴ See *H. Eidenmüller/N. Jansen/E.-M. Kieninger/G. Wagner/R. Zimmermann* *Juristenzeitung* 2012, 284.

⁹⁵ Art. 5 CISG excludes such claims from its scope; the CESL covers them.

⁹⁶ See Art. 10 (2) Limitation Convention.

⁹⁷ Art. 5 (1) Consumer Sales Directive.

⁹⁸ See *M. Djordjevic*, in: *Kröll/Mistelis/Perales Viscasillas* Art. 4 para. 41; *U. Magnus*, in: *Staudinger*, Art. 6 para. 47; *K. Siehr*, in: *Honsell* Art. 4 para. 24 s.; also *Bundesgerichtshof* (Germany) 23.6.2010, *Neue Juristische Wochenschrift* 2010, 3452 [para. 24] seems to follow this approach; but contra *F. Ferrari*, in: *Schlechtriem/Schwenzer* Art. 6 para. 40.

d) *Assessment*

The CESL regulates a number of legal issues which the CISG omits. The Explanatory Memorandum to the proposed CESL Regulation criticises that the CISG “leaves important matters outside its scope, such as defects in consent, unfair contract terms and prescription.”⁹⁹ However, partly the issues that CESL covers in addition are primarily or entirely relevant for consumer sales, namely the pre-contractual information duties, the right of withdrawal and the regulation of unfair contract terms. If at all, there is only a limited need to regulate these issues within the CISG. There is a slightly greater need that the CISG should cover all kinds of defects in consent. However, as mentioned, the practical experience does not prove an urgent need since there are not many CISG cases which raise this problem.

In sum, there are differences in the material scope of application of CISG and CESL; but they are of limited importance. In my view they do not justify to prefer the CESL over the CISG where the latter is applicable.

6. Some specific features

Ole Lando has counted seven points of CESL which he regards as an improvement on the CISG.¹⁰⁰ However, one has to admit that on six of them case law and legal doctrine on the CISG have already developed the solution now expressed in CESL. Insofar the improvement would be only a formal one which nevertheless would serve greater clarity and certainty. The only material improvement is CESL's provision on the rate of interest¹⁰¹ which is left open in the CISG. Some of Ole Lando's points will be dealt with in the following part.

a) *Incorporation of standard terms*

The CISG lacks a specific provision on when standard contract terms become part of the contract. The prevailing practice of the courts is to require the party using such terms to send them to the other party.¹⁰² A mere reference to

⁹⁹ COM (2011) 635 final, p. 5.

¹⁰⁰ O. Lando, CISG or CESL? Should the proposed EU Regulation on a Common European Sales Law (CESL) replace the United Nations Convention on International Sales (CISG)?, in: *Remien/Herrler/Limmer* 15 ss. (16 s.).

¹⁰¹ Art. 168 (5) CESL.

¹⁰² See in particular Bundesgerichtshof (Germany) *Internationales Handelsrecht* 2002, 12; also Oberlandesgericht München *Internationales Handelsrecht* 2009, 201 (203); Oberlandesgericht Celle *Internationales Handelsrecht* 2010, 81 (83); Oberlandesgericht Jena *Internationales Handelsrecht* 2011, 79 (81); Cour d'appel Paris JCP 1997 II 22772; Hof's-

standard terms does generally not suffice. The reason is the differences between standard contract terms in international sales. Parties mostly are not, and need not be, familiar with all these differences and should not be taken by surprise.

The CESL expressly addresses the problem. According to Art. 70 (1) CESL the party using the terms must take “reasonable steps to draw the other party’s attention to them, before or when the contract was concluded.” Art. 70 (2) CESL states that with respect to consumers a mere reference in a contract document, even if signed, does not suffice. By way of argumentum e contrario this could be understood to mean that between businesses a mere reference does generally suffice.¹⁰³ This would conflict with the practice under the CISG and should be avoided.

b) *Battle of forms*

In the CISG an explicit provision on conflicting standard contract terms is lacking whereas the CESL again expressly addresses the problem. According to Art. 39 (1) CESL, despite conflicting standard terms a contract is concluded if the parties reach agreement. The standard terms become “part of the contract to the extent that they are common in substance.”¹⁰⁴ This solution corresponds to the DCFR¹⁰⁵ and also to the UNIDROIT Principles.¹⁰⁶

It differs however from the solution the courts developed under the CISG. Here, the prevailing view of courts and writers neutralises the conflicting terms whereas the rest of the standard terms – that is to the extent that they do not conflict – remains applicable (‘knock out rule’).¹⁰⁷ It is doubtful whether a knock out rule is preferable that leaves the non-conflicting rest of standard terms intact or that only accepts the terms common in substance. One could imagine that businesses would prefer as much as possible of their standard conditions being maintained.¹⁰⁸

Hertogenbosch NIPR 2003 Nr 192; Tribunale di Rovereto CISG-online Nr 1590; contra however Oberster Gerichtshof (Austria) CISG-online Nr. 828; Oberlandesgericht Linz CISG-online Nr. 1087.

¹⁰³ Evidently *M. Schmidt-Kessel*, in: *Schmidt-Kessel* 22.

¹⁰⁴ Art. 39 (1) sent. 2 CESL.

¹⁰⁵ See Art. II.–4:209 DCFR.

¹⁰⁶ Art. 2.1.22 UNIDROIT Principles.

¹⁰⁷ See BGH IHR 2002, 16 (18); *U.P. Gruber*, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch* Art. 19 CISG para. 24; *U. Magnus*, in: *Commercial Challenges in the 21st Century – Jan Hellner in memoriam* (2007) 195; *P. Mankowski*, in: *F. Ferrari et al., Internationales Vertragsrecht* (2nd ed. 2012) Art. 19 CISG para. 35 ss; contra however for instance *F. Ferrari*, in: *Kröll/Mistelis/Perales Viscasillas* Art 19 para. 15.

¹⁰⁸ In the same sense *W. Ernst*, in: *Remien/Herrler/Limmer* 97.

c) *Seller's liability for pre-contractual statements*

The CESL goes much further than the CISG with the incorporation (and binding character) of pre-contractual statements. Art. 69 (1) CESL provides that statements “about the characteristics of what is to be supplied” become part of the contract irrespective whether made to the other party or publicly. Only two exceptions apply: first, “the other party was aware, or could be expected to have been aware when the contract was concluded that the statement was incorrect or could not otherwise be relied on”; second, “or the other party’s decision to conclude the contract could not have been influenced by the statement”.¹⁰⁹ Even statements made by third persons whom a business engages in advertising or marketing bind the business.¹¹⁰ These provisions, coupled with Art. 100 (f) CESL establish a far-reaching liability of sellers for pre-contractual statements even in sales between businesses. Further, the many vague requirements (statements “about the characteristics” of the goods, a party “expected to have been aware”, the statement “could not otherwise be relied on”, the decision to contract “could not have been influenced”) may give rise to disputes and lawsuits.

The CISG does not know of a similar liability for pre-contractual statements. Art. 35 (2) (b) CISG incorporate statements by which the *buyer* made known to the seller a particular purpose for which the goods are intended to be used. This is incomparable to the CESL solution. The latter is evidently influenced by the Consumer Sales Directive (Art. 2 (2) (d)) which much more modestly provided that goods must show the qualities “normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods ...” Here, the statement is not automatically incorporated into the contract but only an element for the interpretation of the qualities of the goods the consumer may reasonably expect.

d) *Performance claim*

The CISG grants a performance claim not in any event but only if the court seized would grant specific performance also under its national law.¹¹¹ CESL on the contrary recognises performance claims in general without any national limitation.

If specific performance is available, under the CISG, the buyer of non-conforming goods can claim “delivery of substitute goods only if the lack of conformity constitutes a fundamental breach”.¹¹² CESL allows such performance

¹⁰⁹ Art. 69 (1) (a) and (b) CESL.

¹¹⁰ Art. 69 (2) CESL.

¹¹¹ Art. 28 CISG.

¹¹² Art. 46 (2) CISG.

claim irrespective whether or not the breach was fundamental.¹¹³ Only if impossible, unlawful or uneconomical can performance no longer be requested.¹¹⁴ Since the delivery of a replacement comes close to a termination and new delivery, CESL's performance solution is in certain contrast to CESL's right of termination which generally presupposes a fundamental breach.¹¹⁵ In comparison to the CISG, CESL here favours the buyer.

e) *Termination*

Both CESL and CISG grant termination where the non-performance constitutes a fundamental breach,¹¹⁶ and both define a fundamental breach in rather similar words.¹¹⁷

Differences between the two exist with respect to the exclusion of the right of termination where the goods cannot be returned in substantially unimpaired condition. If this is the case, under the CISG the buyer loses its right to terminate the contract unless the damage to the goods is not attributable to the buyer.¹¹⁸ The CISG provision lists certain situations where this is the case so that the buyer does not lose its right of termination. The case law has given the provision further precision.¹¹⁹

Under the CESL, where the return of the goods is impossible the buyer is not precluded with the termination of the contract but has to pay the goods' monetary value.¹²⁰ Since the impossibility of return may be due to defects of the goods or other causes for which the seller bears the risk the CESL provides for the possibility to equitably modify either the duty to return or the duty to pay the monetary value.¹²¹ However, the CESL solution applies only if the (full) return or payment "would be grossly inequitable." Under CESL it is thus the task of the courts to develop in which groups of cases the full return or payment is grossly inequitable.

Again, in comparison to the CISG the CESL solution is slightly more favourable to the buyer than to the seller. On the other hand, the CESL solution is much more vague than the CISG's.

¹¹³ Art. 110 CESL.

¹¹⁴ Art. 110 (3) CESL.

¹¹⁵ Art. 114 (1) CESL.

¹¹⁶ See Art. 49 (1) (a) CISG and Art. 114 (1) CESL.

¹¹⁷ Art. 25 CISG and Art. 87 (2) (a) CESL, though Art. 87 (2) (b) CESL adds the case "that the non-performing party's future performance cannot be relied on."

¹¹⁸ Art. 82 CISG.

¹¹⁹ See for instance Bundesgerichtshof (Germany) *Neue Juristische Wochenschrift* 1997, 3311 (3312); Bundesgericht (Switzerland) CISG-online no. 1900.

¹²⁰ Art. 173 (1) CESL.

¹²¹ See art. 176 CESL.

f) *Cure*

Both the CISG and the CESL grant the seller a right to cure any non-conformity.¹²² Under the CISG the seller's right is subject to the right of termination (Art. 48).¹²³ Under CESL the seller can even block the buyer's right of termination: "An offer to cure is not precluded by notice of termination"¹²⁴ The mere offer of cure suspends the right of termination (though not in consumer sales).¹²⁵ Yet, the buyer may refuse the offer of cure in three situations:¹²⁶ if prompt and convenient cure is impossible, if future correct performance cannot be expected and if the "delay in performance would amount to a fundamental non-performance."¹²⁷ And although the buyer may refuse an offer of cure "only if cure cannot be effected promptly",¹²⁸ CESL gives the seller "a reasonable period of time to effect cure."¹²⁹ This evident contradiction between prompt and a reasonable time for cure should be corrected. Moreover, the CISG's formulation that cure should be effected "without unreasonable delay"¹³⁰ better expresses that the seller must cure rather quickly.

g) *Examination of goods and notification of defects*

Both CISG and CESL let the professional buyer's rights depend on orderly notification of any defect which normally requires the prior, timely and correct examination of the goods.¹³¹ Again, the regulation of both instruments is almost identical.¹³² However, in contrast to the CISG, the proposed CESL prescribes a maximum period of 14 days for the examination which starts with the delivery of the goods.¹³³ Under the CISG the length of the time for examination and notification is not precisely fixed but depends on the circumstances of the case. The majority of the courts follows a thumb-rule that in normal cases (no perishable goods, no complicated examination etc.) one month is the maximum.¹³⁴

¹²² Art. 48 CISG and Art. 109 CESL.

¹²³ Art. 48 (1) CISG.

¹²⁴ See Art. 109 (3) in connection with (6) and Art. 106 (2) (a) CESL.

¹²⁵ See Art. 106 (3) (a) CESL.

¹²⁶ Art. 109 (4) CESL.

¹²⁷ Art. 109 (4) (c) CESL.

¹²⁸ Art. 109 (4) (a) CESL.

¹²⁹ Art. 109 (5) CESL.

¹³⁰ Art. 48 (1) CISG.

¹³¹ Art. 38, 39 CISG and Art. 106 (2) (b), 121, 122 CESL.

¹³² See thereto F. Faust, in: Schulte-Nölke/Zoll/Jansen/Schulze 270 ss.

¹³³ Art. 121 (1) CESL.

¹³⁴ See, e.g., Bundesgerichtshof (Germany) Internationales Handelsrecht 2004, 201; Bundesgericht (Switzerland) Entscheidungen 130 III 258; Oberlandesgericht Stuttgart

If at all, one would have expected in CESL a fix period for the notification of defects after they had been or could have been discovered. For, while the necessary time for examination may considerably vary according to the nature of the goods, the technical requirements, the equipment of the buyer etc., the time needed for giving notice is relatively stable and less influenced by the circumstances of the case, perhaps except in the case of perishable goods. Therefore, if the 14 day period should survive it should be interpreted as the time where the examination of the goods should start at the latest but the process of examination can last longer.

A further difference between CISG and CESL concerns the relief the CISG provides for buyers who actually lost their remedies because they did not observe the examination and notification requirements: If they have a reasonable excuse they are still entitled to price reduction and damages (excluding lost profit).¹³⁵ The only relaxation CESL foresees is that the buyer need not notify the seller of a lack of quantity “if the buyer has reason to believe that the remaining goods will be delivered.”¹³⁶

h) Assessment

With the exception of the incorporation of pre-contractual statements into the contract, the formation part of both instruments shows only little substantive discrepancies. Even the different form of the knock out rule is unlikely to matter much in practice. However, the incorporation of pre-contractual statements into contracts even between businesses is a rather revolutionary step. The consequences lead to a liability for such statements and are likely to put a rather heavy burden on sellers for whom it may be a further cause not to choose the CESL.

Also in regard of the buyer's remedies the differences between CISG and CESL are moderate. Partly the CISG and partly the CESL is slightly more favourable to the buyer. The CISG appears to be more buyer-friendly than the CESL on two minor aspects: namely cure (where under the CISG termination trumps cure in case of any fundamental breach, not only delay), with respect to examination and notification (the CISG accepts a reasonable excuse for failures). The CESL on the other hand prefers the buyer by maintaining the buyer's right of termination even if the goods cannot be returned substantially unaltered.

The overall practical significance of all these differences is nonetheless limited.

Recht der Internationalen Wirtschaft 1995, 943 (944); Obergericht Luzern Schweizerische Zeitschrift für Internationales und Europäisches Recht 1997, 132 (133).

¹³⁵ Art. 44 CISG.

¹³⁶ Art. 122 (5) CESL.

III. CESL a useful, recommendable or necessary addition to CISG?

With CESL Europe pursues a very own and creative path of regional harmonisation of (international) sales law. To the existing CISG and the domestic sales laws it adds a further sales law that the parties may choose. CESL's actual competitor is the CISG which also regulates the international professional sale of goods. The competition (and therefore the comparison) between the two restricts itself mainly to the field of professional sales.

Is it useful, recommendable or necessary to introduce CESL in addition to the CISG? The CISG is an established international instrument which is applicable in the overwhelming majority of the EU Member States. It even applies automatically to many sales transactions with parties in the Non-CISG States in the EU¹³⁷ due to the rules of private international law.¹³⁸ It works quite well in practice. Does CESL constitute an improvement on CISG? A fair overall assessment which takes into account the major differences between the two instruments must probably deny this question.

In CESL there are some amendments which expressly state the solution which case law and doctrine on the CISG have meanwhile come to, for instance in regard of the battle of forms.¹³⁹ It is a certain progress to codify these solutions which the prevailing view developed for the CISG. It may ensure greater

¹³⁷ Ireland, Malta, Portugal, United Kingdom.

¹³⁸ According to its Art. 1 (1) (b) the CISG applies also where private international law leads to the law of a CISG State. Absent a choice of law the law of the seller is applicable under Art. 4 (1) (a) Rome I Regulation. Therefore sales between, for instance, German sellers and English buyers are governed by the CISG.

¹³⁹ Others such amendments (see also the improvement examples listed by *Ole Lando*, in: *Remien/Herrler/Limmer* 16 s.) are the express duty of the parties to act in good faith and to cooperate (Art. 2 and 3 CESL) which case law has recognised also for the CISG: see, for instance, Bundesgerichtshof (Germany) *Neue Juristische Wochenschrift* 2002, 370; further, the acceptance of open price contracts (see now Art. 31 CESL) which under Art. 14 and 55 CISG are not easily to be accepted but which case law also allows under the CISG (see, for instance, Landgericht Neubrandenburg 3 August 2005, *Internationales Handelsrecht* 2006, 26: price „to be fixed during the season“; without later fixation Art. 55 CISG applied; Tribunal cantonal Valais *Schweizerische Zeitschrift für Internationales und Europäisches Recht* 2008, 184). Still further, Art. 89 CESL expressly addresses the change of circumstances or hardship which the CISG does not expressly regulate but which the clearly prevailing view regards as a case falling under Art. 79 CISG, the general exemption provision (see *Honnold/Flechtner* para. 427.1; *I. Schwenzer*, in: *Schlechtriem/Schwenzer* Art. 79 para. 30; *U. Magnus*, in: *Staudinger* Art. 79 para. 24 all with many further references). Most CESL's rules on the interpretation of contracts (Art. 58-65) and on the contents and effects (Art. 66-78) explicitly express rules which the courts regularly apply under Art. 8 and 9 CISG. Some of them are on the other hand

clarity and certainty. However, in essence the express adoption of solutions which anyway prevail under the CISG do not appear to make the introduction of a new instrument urgently necessary.

Besides the codification of already existing and applied solutions CESL fills certain gaps which the CISG still leaves: these are some aspects of material validity, in particular avoidance because of fraud and threat, on unfair terms and prescription and also on the interest rate. In principle, such additions are useful because they relieve from the necessity to determine and apply the relevant domestic law. They thus can facilitate international trade. There are, however, certain objections: under practical aspects, the rules on fraud and threat are not often needed in international sales transactions. The same is mainly true for the prescription issue. The requirement to give notice of defects within due course makes it in the majority of cases superfluous to take recourse to prescription. Greater weight have objections against the contents of the proposed additions. The rules on unfair terms do not really constitute an improvement since the proposed control standard is rather vague. The prescription provisions should clearly distinguish between warranty claims (except for bodily harm) and other claims; the proposed rules fit only for the latter (including warranty claims for bodily harm). That CESL fixes the interest rate is a very recommendable amendment though its technical presentation is user-unfriendly and should be improved.¹⁴⁰ Moreover, it is unfortunately more than doubtful to exclude for professional parties any agreement on interest.¹⁴¹

As mentioned, both CISG and CESL omit issues such as set-off, assignment, agency/representation. Compared with the gaps that CESL fills these omissions have greater practical relevance (with the exception of the interest rate). The omitted issues still necessitate the recourse to private international law both under CISG and CESL.

Finally, some of CESL's proposed solutions remain behind the CISG solution and are certainly no progress, for instance CESL's regulation of the exclusion of the right of termination or the 14 day examination period. Others are doubtful with respect to their policy decision as for instance the seller's – in my view too wide – liability for pre-contractual statements.

In regard of international commercial sales transactions there appears to be no virtual necessity to enact an additional instrument alongside the CISG. The global unification of this branch of law is the correct answer in times of still increasing global trade relations. Regional unification of sales law would separate the region to a certain extent from the global legal network. For Europe it is thus the preferable way to convince and urge Ireland, Malta, Portugal and the UK as remaining Non-CISG EU States to ratify the Convention so that the

at least debatable, in particular the incorporation rule for standard terms (Art. 70 CESL) and for pre-contractual statements (Art. 69 CESL); see thereto above.

¹⁴⁰ In this sense also *E.-M. Kieninger*, in: *Schulte-Nölke/Zoll/Jansen/Schulze* 221 s.

¹⁴¹ See Art. 171 CESL; for critique see also *E.-M. Kieninger*, *ibid.* 222 s.

CISG would be applicable throughout the EU. A useful and needed addition to the CISG would be a uniform fixing of the rate of interest. However, this could be achieved by a Protocol to the CISG that would have to be negotiated and concluded under the auspices of UNCITRAL, although the difficulties to reach consensus on such a Protocol must not be underestimated.

In regard of international consumer sales CESL is a useful and recommendable step ahead though many of its provisions may need further refinement.

CESL is also a great theoretical step ahead on the harmonisation of the domestic sales law of the EU Member states. Even if in future not chosen by parties the instrument shows that a Common European Sales Law appears to be possible. Despite all scepticism against merchants' reliance on law different laws form barriers. Approximation of law helps to reduce these barriers. Insofar CESL supports this reduction of Inner-European legal barriers.

The vision of CESL's drafters is that CESL (by the choice of the parties) replaces all other law, namely not only the CISG but also the otherwise applicable domestic law for international sales as well as for internal sales both for (all kinds of) businesses and consumers. This dream of one law for all may not come true. But one should CESL give a chance.

IV. Conclusions

1. For commercial sales the rules of the CISG and the CESL are though not identical but in substance rather close.

2. In an overall comparison CESL is slightly more buyer-friendly. It is however not visible that convincing reasons compel to readjust the balance of obligations and rights between the parties which the CISG has established. On the other hand, it has to be admitted that in comparison to the CISG the CESL contains a number of provisions which constitute useful additions to the CISG although they mainly fix solutions already found, or at least proposed by a majority, for the interpretation of the CISG.

3. CESL's material scope is wider than the CISG's. However, most of the additions are relevant for consumer sales only. For commercial sales these additions do not significantly matter in practice.

4. Structure and style of the CISG appear more transparent and clearer in comparison to the CESL. This is only partly owed to the necessarily greater complexity of the CESL due to its mixture of international sales regulation and consumer/SME protection.

5. CESL provides for a too far-reaching incorporation and resulting liability of sellers for pre-contractual statements. This places a rather heavy burden on sellers the precise extent of which is not even clearly definable due to the use of many vague requirements. Another questionable rule is the specific form of the knock-out rule which the proposed CESL has adopted and which reduces conflicting standard terms to their common contents.

6. Its opt-in solution may sentence CESL to dead letter law. The economic incentives for businesses to use CESL appear to be too weak to attract its choice. The only incentive is that a business can choose CESL for both its consumer and business sales. However, for relevant questions like set-off, agency, assignment, capacity or violation of good morals the recourse to private international law and the applicable national law remains necessary.

7. If a recommendation should be given whether or not businesses should exclude the CISG and opt for the CESL the answer is rather clear: under the perspective of international commercial sales transactions there are no stringent reasons to opt for CESL and prefer it over the CISG.

8. For international commercial sales there is no urgent need to enact CESL. CISG with its global range and approach is preferable. However, since CESL is optional its enactment would do no harm. Moreover, CESL is an important theoretical step for Europe on the way to a more uniform and coherent contract law.

CISG, CESL, PICC and PECL

Robert Koch

I. Introduction¹

My initial thoughts when I read the proposed EU Regulation on a Common European Sales Law (CESL) (CESL regulation proposal)² were “there is the Convention on Contracts for the International Sale of Goods (CISG),³ there are the UNIDROIT’s Principles of International Commercial Contracts (PICC),⁴ there are the Principles of European Contract Law (PECL),⁵ so why do we need another instrument for international sales contracts?”. I felt disturbed by some of the terminology used in the CESL. It appeared to me as if the drafters’ primary purpose was not to make use of existing CISG terms, and I asked myself why one had not taken the CISG as a basic text enriched with provisions for filling up its gaps and deficiencies.⁶ This route might help convincing the four remaining EU Member States (UK, Ireland, Portugal and Malta) to ratify the CISG and might

¹ Only cited with the author’s or editor’s name: *H. Honsell* (ed.), *Kommentar zum UN-Kaufrecht* (2nd ed. 2010); *St. Kröll/L. Mistelis/P. Perales Viscasillas* (eds.), *UN Convention on Contracts for the International Sale of Goods (CISG). Commentary* (2011); *O. Remien/S. Herrler/P. Limmer* (eds.), *Gemeinsames Europäisches Kaufrecht für die EU? Analyse des Vorschlags der Europäischen Kommission für ein optionales Europäisches Vertragsrecht vom 11. Oktober 2011* (2012); *H. Schulte-Nölke/F. Zoll/N. Jansen/R. Schulze* (eds.), *Der Entwurf für ein optionales europäisches Kaufrecht* (2012); *M. Schmidt-Kessel* (ed.), *Ein einheitliches europäisches Kaufrecht? Eine Analyse des Vorschlags der Kommission* (2012); *P. Schlechtriem/I. Schwenzer* (eds.), *Kommentar zum Einheitlichen UN-Kaufrecht (CISG)* (5th ed. 2008); *J. von Staudinger*, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Wiener UN-Kaufrecht (CISG)* (*U. Magnus*) (2005).

² Proposal for a Regulation on a Common European Sales Law, COM (2011) 635 final, for the full text see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:EN:PDF>.

³ For the full text see <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>.

⁴ For the full text see <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>.

⁵ For the full text see <http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/>.

⁶ According to *H. Schulte-Noelke*, a member of the Expert Group, attempts to clarify unresolved issues under the CISG failed because the members of the Expert Group did not want to make use of existing CISG terminology (see *Schulte-Nölke*, p. 19).

also ensure uniform interpretation of the CISG within Europe. Moreover, due to the authority of the European Court of Justice its interpretation would most likely have an influence on the interpretation of the CISG in non-EU Member States which would help to reduce the transaction costs not only of the trade within the EU but also worldwide.

The EU Commission has taken another route by proposing a new set of rules as an opt-in instrument which can be chosen in contracts between businesses and consumers (b2c) and between businesses and businesses (b2b) where at least one of them is a small and medium-sized enterprise (SME). As a result, once the CESL regulation has become law, businesses will have the choice between national non-unified law (e.g. the German Commercial Code and the German Civil Code), the CESL, the CISG, the PICC, and the PECL. The arguments given by the EU Commission why there is a need for a new instrument different from the CISG, that is applicable in b2b-cross-border contracts for the sale of goods as long as not both parties are large enterprises, are not very forceful⁷ as the analysis of the (English and Wales) Law Commission and the Scottish Law Commission in its advice to the UK Government shows.⁸ And I do hope that the concerns expressed by the Law Commissions that “it may be more difficult to achieve ratification [of the CISG in the EU Member States that have not yet ratified the CISG] if the CESL were to be introduced” will turn out to be wrong.⁹

The aim of this contribution is not identifying and analyzing the extent to which the CESL, the CISG, the PICC and the PECL converge or diverge. What follows is an attempt to examine the interplay between these instruments, particularly the CISG and the CESL, and to identify the problems which follow from the existence of two competing instruments. To that end, I will first look at the objectives and the material, territorial and personal scope of the CESL, the CISG, the PICC and the PECL. Then, the legal nature of the four instruments will be discussed. Finally, the areas for potential conflicts between the CISG and the CESL will be identified.

⁷ See Explanatory Memorandum to the CESL regulation proposal, p. 5: “The Vienna Convention regulates certain aspects in contracts of sales of goods but leaves important matters outside its scope, such as defects in consent, unfair contract terms and prescription. Further limitations to its applicability arise as not all Member States have signed the Vienna Convention and there is no mechanism which could ensure its uniform interpretation.”

⁸ An Optional Common European Sales Law: Advantages and Problem, 2011, http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf, p. 96 ss.

⁹ An Optional Common European Sales Law: Advantages and Problem, 2011, http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf, p. 97.

II. Objectives of the CISG, the CESL, the PICC and the PECL

The objectives of the CISG, the CESL, the PICC and the PECL are somewhat different. The purpose of the CISG, according to its preamble, is “the development of international trade on the basis of equality and mutual benefit” as “an important element in promoting friendly relations among States” and to “contribute to the removal of legal barriers in international trade and promote the development of international trade”. Similarly, but much less driven by political but by economic concerns seems to be the rationale for the introduction of CESL. According to the CESL regulation proposal, CESL’s (only) objective is “to improve the conditions for the establishment and the functioning of the internal market” (see Art. 1 para. 1 EU Commission’s regulation proposal). In the eyes of the EU commission, “the need for traders to identify or negotiate the applicable law, to find out about the provisions of a foreign applicable law” is a “bottleneck[...] to cross-border economic activity that prevents the internal market from exploiting its full potential for growth and job creation”.¹⁰

The PICC and the PECL, whose subject matter is not sales law but general contract law, have been described as restatement somewhat modeled on the American Restatements of Law¹¹ and consist of Rules, Comments, and Notes.¹² According to their preamble, the PICC may be used as consensual basis of a contract, to interpret or supplement international uniform law instruments or domestic law, and/or may serve as a model for national and international legislators. The objective of the PECL „is to serve as a first draft of a part of a European Civil Code“.¹³

While the PICC have been revised twice since their first presentation in 1994¹⁴ there has been no revision of the PECL since the publication of the third

¹⁰ See recital (1) CESL regulation proposal.

¹¹ For more information regarding the American Restatement of Law, see the website of The American Law Institute at www.ali.org.

¹² O. Lando/H. Beale (eds.) *Principles of European Contract Law*, Parts I and II (The Hague: Kluwer Law International, 2000) and O. Lando et al. (eds.) *Principles of European Contract Law*, Part III, (The Hague: Kluwer Law International, 2003).

¹³ O. Lando, *The Principles of European Contract Law and the lex mercatoria*, in: *Private Law in the International Arena*, T.M.C. Asser Institut Press, The Hague, 2000, p. 397.

¹⁴ The third edition of the Principles was published in 2010. It has 211 articles in 11 chapters, including (for example) chapters in illegality, set-off and assignment of contracts. The UNIDROIT’s website is <http://www.unidroit.org>. The 2010 edition is available at <http://www.unidroit.org/english/principles/contracts/main.htm>. The UNILEX website is an important tool to understand the Principles as it provides official comments, cases and a bibliography relating to all the articles and book about the Principles: see <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=14311>.

part in 2002 by the Commission on European Contract Law.¹⁵ The Commission has been succeeded by the Study Group on a European Civil Code (Study Group). The Study Group has established seven Working Teams that have been further developing rules for specific types of contract. The sales sub-team of the Working Team on Sales, Services and Long-term Contracts drafted the Principles of European Law on Sales that were published in December 2004.¹⁶ Finally, in 2009 the Draft Common Frame of Reference was presented by the Study Group and the Research Group on Existing EC Private Law (Acquis Group), which in its second and third Books incorporates the PECL in a partly revised form. As it was intended by the Lando-Commission, the PECL therefore were actually used as the basis for harmonization but it is to be expected that the PECL will sooner or later fall to its doom as reference text and/or source of inspiration not only inside but also outside the EU.¹⁷

III. Scope of the CISG, the CESL, the PICC and the PECL

1. Material scope

What the CISG, the CESL, the PICC and PECL have in common is that they combine the civil law and the common law as well as international contract practices. The material scope of these instruments is, however, not identical.

a) *The CISG and the CESL*

Both the CISG (Art. 1 and Art. 3 para. 1) and the CESL (Art. 5 lit. a CESL regulation proposal) deal with contract of sales, including the manufacture or production of goods. While the CESL expressly applies to the supply of digital content whether or not supplied on a tangible medium which can be stored, processed

¹⁵ For the development from PECL to the DCFR see C. von Bar/E. Clive/H. Schulte-Nölke/H. Beale/J. Herre/J. Huet/M. Storme/S. Swann/P. Varul/A. Veneziano/F. Zoll (eds.), *Principles, Definitions and Model Rules of European Private Law*, 2009, p. 30 ss.; H. Eidenmüller/N. Jansen/E. Kieninger/G. Wagner/R. Zimmermann, *Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht*, *Juristenzeitung* 2012, 269, 270.

¹⁶ For a full text see <http://www.scribd.com/doc/46327455/Principles-of-European-Law-on-Sales-PELS>.

¹⁷ See M. Bonelli/R. Peleggi, *UNIDROIT Principles of International Commercial Contracts and Draft Common Frame of Reference: a Synoptical Table*, *Unif. L. Rev.* 2009, 437, 438 fn. 4 (stating that “the European Principles, though remaining a milestone in the development of European contract law, have, if not formally, then at least de facto, been supplanted by the DCFR”).

or accessed, and re-used by the user (e.g. software or music download) (Art. 5 lit. b CESL regulation proposal), the CISG is silent on that issue. Courts have considered contracts involving standard software stored on tangible medium¹⁸ but not custom-made software as contract of sale in terms of Art. 1 CISG.¹⁹ The majority of CISG-scholars is of the opinion that the transfer of digital content is covered by the CISG even if it is supplied on an intangible medium.²⁰ The CESL also expressly applies to services provided by the seller that are directly and closely related to specific goods or digital content, such as repair, maintenance or installation of the goods or the digital content (Art. 5 lit. c CESL regulation proposal). The same is true for the CISG unless repair, maintenance or installation of the goods or the digital content are the preponderant part of the obligations of the seller (Art. 3 para. 2 CISG).²¹ The sphere application of the PICC as well as the PECL is not limited to contract of sales but to all types of contractual obligations.

While the CISG only addresses the formation of sales contracts and the rights and obligations of the parties arising from it including the remedies for non-performance, the CESL in addition governs “pre-contractual information duties, the conclusion of a contract including formal requirements, the right of withdrawal and its consequences, avoidance of the contract resulting from a mistake, fraud, threats or unfair exploitation and the consequences of such avoidance, interpretation, the contents and effects of a contract, the assessment and consequences of unfairness of contract terms, restitution after avoidance and termination and the prescription and preclusion of rights”.²² According to Recital 24 CESL regulation proposal the following issues are not addressed

¹⁸ See Oberlandesgericht Köln (Germany) 26 August 1994, CISG-online no. 132 (Pace); Landgericht München (Germany) 8. February 1995, CISG-online no. 203 (Pace). See also *F. Ferrari*, in: Schlechtriem/Schwenzer, Art. 1 para. 38; *F. Diedrich*, Maintaining Uniformity in International Uniform Law Via Autonomous Interpretation: Software Contracts and the CISG, 8 Pace International Law Review (1996) 303, 325 s.

¹⁹ For a different view see Oberlandesgericht Koblenz (Germany) 17 September 1993, CISG-online no. 91 (Pace); Oberster Gerichtshof (Austria) 21 June 2005, CISG-online no. 1043.

²⁰ *U. Magnus*, in: Staudinger Art. 1 para. 44; *Hj. Schmitt*, Intangible Goods in Online-Kaufverträgen und der Anwendungsbereich des CISG, Computer und Recht 2001, 145, 147 et seq.; *B. Piltz*, Zur Frage der Qualifizierung einer Überlassung von Standardsoftware gegen Zahlung eines einmaligen Entgelts als Warenkauf im Sinne des Artikel 1 Absatz 1 CISG, Internationales Handelsrecht 2005, 197, 198; *F. Diedrich*, Anwendbarkeit des Wiener Kaufrechts auf Softwareüberlassungsverträge, Recht der Internationalen Wirtschaft 1993, 441, 452; *M. Endler/J. Daub*, Internationale Softwareüberlassung und UN-Kaufrecht, Computer und Recht 1993, 601, 605; *I. Sängler*, in: Bamberger/Roth, CISG Art. 1 para. 6; unclear *L. Mistelis*, in: Kröll/Mistelis/Viscasillas, Art. 1 para. 40.

²¹ See Handelsgericht des Kantons Zürich (Switzerland) 17 February 2000, CISG-online no. 637 (Pace).

²² See recital 25.

by the CESL: legal personality, the invalidity of a contract arising from lack of capacity, illegality or immorality, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law, the law of torts, and the issue of whether concurrent contractual and non-contractual liability claims can be pursued together.²³

While issues within the scope of the CISG, “which are not expressly settled in it [internal gaps] 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” (Art. 7 para. 2 CISG), internal gaps within the CESL “are to be settled in accordance with the objectives and 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” (Art. 4 para. 2 CESL). Although the CESL makes no mention of the DCFR, it is to be expected that the various provisions of the DCFR, which have not been included in the CESL, will be used to interpret the general provisions of the CESL.²⁴

b) *The PICC and the PECL*

The scope of PECL²⁵ and the PICC²⁶ goes beyond the CESL’s scope, since they also have rules on the plurality of debtors and creditors; assignment of claims; substitution of new Debtor and transfer of contract; set-off; and conditions.

²³ See recital 27.

²⁴ For a somewhat different statement see Advice of the Law Commissions, p. 41 (stating the “CESL makes no explicit reference to the DCFR, and we are not sure whether the DCFR commentary is intended to have any status in interpreting the CESL provisions”).

²⁵ The PECL is divided into seventeen chapters, namely “General Provisions” (Chapter 1); “Formation” (Chapter 2); “Authority of Agents” (Chapter 3); “Validity” (Chapter 4); “Interpretation” (Chapter 5); “Contents and Effects” (Chapter 6); “Performance” (Chapter 7); “Non-Performance and Remedies in General” (Chapter 8), “Particular Remedies for Non-Performance” (Chapter 9); “Plurality of Parties” (Chapter 10); “Assignment of Claims” (Chapter 11); “Substitution of New Debtor: Transfer of Contract” (Chapter 12); “Set-Off” (Chapter 13); “Prescription” (Chapter 14); “Illegality” (Chapter 15); “Conditions” (Chapter 16) and “Capitalisation of Interest” (Chapter 17).

²⁶ The third edition of the PICC has 211 articles in 11 chapters, namely “General Provisions” (1); “Formation and Authority of Agents” (Chapter 2); “Validity” (Chapter 3); “Interpretation” (Chapter 4); “Content and Third Party Rights” (Chapter 5); “Performance” (Chapter 6); “Non-Performance” (Chapter 7); “Set-Off” (Chapter 8); “Assignment of Rights, Transfer of Obligations, Assignment of Contracts” (Chapter 9); “Limitations Periods” (Chapter 10); “Plurality of Obligors and of Obligees” (Chapter 11).

2. Territorial scope

In terms of territorial scope, except for the PECL that also applies to domestic transactions, all instruments only cover cross-border situations.

a) *The CISG*

The CISG does not contain provisions that limit their application to sales transactions in a given continent or region.

b) *The CESL*

In light of its objective to “prevent the internal market from exploiting its full potential for growth and job creation”, the focus of the CESL is obviously on intra EU-cross border sales. The territorial scope, however, is not limited to such sales, since the CESL only requires that at least one party to a sales contract – either the buyer or the seller – is located in a Member State (Art. 4 para. 3 CESL regulation proposal). According to Recital 10 CESL regulation proposal the agreement to use the CESL should be a choice exercised within the scope of the respective national law which is applicable pursuant to Rome I-Regulation²⁷ or, in relation to pre-contractual information duties, pursuant to Rome II-Regulation,²⁸ or any other relevant conflict of law rule. Furthermore, Recital 14 states that “[t]he use of the Common European Sales Law should not be limited to cross-border situations involving only Member States, but should also be available to facilitate trade between Member States and third countries”. Whenever the forum’s conflict of laws rules lead to the application of a EU Member State’s law, the CESL is hence applicable not only to sales contracts between e. g. a French seller and a German buyer but also to contracts between a German seller and Russian buyer, or a Russian seller and an Italian buyer. The same is true in arbitration when the tribunal applies the conflict of laws rules which it considers applicable (see Art. 28 para. 2 Uncitral Model Law on International Commercial Arbitration).

c) *The PICC and the PECL*

While the PECL are intended to be applied as general rules of contract law in the EU,²⁹ the PICC’s sphere of application is universal.

²⁷ Regulation (EC) No. 593/2008.

²⁸ Regulation (EC) No 864/2007.

²⁹ See Article 1:101 para. 1 PECL.

3. Personal scope

a) *The CISG*

The CISG is focused on b2b-contracts as can be seen from the preamble's reference to international trade and its objective on the promotion of international trade. Private actors are usually not directly involved in international trade. The personal scope of the CISG is, however, not limited to b2b-cross-border sales. According to Art. 2 lit. a the CISG does not apply to sales of goods bought for personal, family or household use. The decisive factor is hence not the status of the buyer or seller but the buyer's intended use at the time of the conclusion of the contract.³⁰ As a consequence, the CISG will even apply where the seller is a consumer and the intended use of the goods bought is not a personal one.³¹ For example, if a professor living in Hamburg sells his used car to a dealer in Poland, the contract will be governed by the CISG (by virtue of Art. 1 para. 1 lit. a CISG). Where goods are not only bought for a personal but also for a professional use (so-called "dual-use" or "mixed use" of goods), most legal writers are of the opinion that the exception of Art. 2 lit. a only applies if the goods are intended to be used exclusively for personal purposes.³² So far, then has been no case law on this issue.

Moreover, the seller must have known or ought to have known that the goods were bought for any such use. That might be not always the case in internet sales when the buyer uses not his private e-mail address but his work e-mail address for purchasing goods which can be used not only for personal purposes. For example, if a law professor uses his university e-mail address for the purchase of a text book on the CESL, the seller has no reason to believe that it was not purchased for the use in the professor's institute but for personal use. If the professor later complains about defects, which he could have discovered in case of proper examination after delivery (e.g. missing pages), the seller may rely on Art. 39 CISG.

³⁰ See Art. 1 para. 3 CISG: "Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention."

³¹ *F. Spohnheimer*, in: Kröll/Mistelis/Viscasillas, Art. 2 para. 9.

³² *F. Spohnheimer*, in: Kröll/Mistelis/Viscasillas, Art. 2 para. 14; *K. Siehr*, in: Honsell, Art. 2 para. 13; *I. Schwenzer/P. Hachem*, in: Schlechtriem/Schwenzer, Art. 2 para. 7; *U. Magnus*, in: Staudinger Kommentar (2005), Art. 2 para. 17; *B. Piltz*, Internationales Kaufrecht (2008), paras 2-61; *D. Martiny*, in: F. Säcker/R. Rixecker (eds.), Münchener Kommentar zum BGB (5th ed. 2010), Anhang Art. 4 Rom I-VO para. 44; *C. Benicke*, in: K. Schmidt (ed.), in: Münchener Kommentar zum HGB (2nd ed. 2007), Art. 2 CISG para. 4; for a different view see *A. Lüderitz/A. Fenge*, in: Soergel, Bürgerliches Gesetzbuch (2000), Art. 2 CISG para. 3.

b) *The CESL*

In contrast, the CESL focuses on the status of the parties in that it only applies if the seller is a trader. The buyer must not necessarily be a consumer. If the buyer is a trader, however, at least one of the parties – either the seller or the buyer – must be a small or medium sized enterprise (or SME) which is, by definition, a business that employs fewer than 250 persons and has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million (Art. 7 para. 2 EU Commission's regulation proposal). Contracts concluded between private individuals and contracts between traders, none of which is an SME, thus fall outside the scope of CESL.

The definition of an SME has been taken from the EU Commission Recommendation 2003/361 concerning the definition of micro, small and medium-sized enterprises.³³ According to Art. 1 of the Recommendation's Annex "[a]n enterprise is considered to be any entity engaged in an economic activity, irrespective of its legal form. This includes, in particular, self-employed persons and family businesses engaged in craft or other activities, and partnerships or associations regularly engaged in an economic activity". The determination of whether the thresholds for the three criteria (staff headcount, annual turnover and/or annual balance sheet) are met depends on the data contained in the last approved enterprise's annual accounts (see Art. 4 para. 1 Recommendation's Annex).³⁴ For newly established enterprises, which have not approved annual accounts, the enterprise must make a realistic bona fide estimate made in the course of the financial year (see Art. 4 para. 3 Recommendation's Annex).³⁵ If the enterprise exceeds the headcount or financial ceilings during the course of the reference year, it will retain the SME status with which it began the year. It will lose the status, however, if it goes above the ceilings over two consecutive accounting periods. On the other hand, the enterprise would gain SME status if it were a large enterprise, but then would fall below the ceilings for two consecutive accounting periods (see Art. 4 para. 2 Recommendation's Annex).

The definition and determination of an SME is unfortunate. Since it is not always clear whether an enterprise, at the time of the conclusion, qualifies for SME status it may in certain circumstances result in significant legal uncertainty.³⁶ If

³³ EU Commission Recommendation 2003/361 of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, O.J. L 124, 20.5.2003, p. 36.

³⁴ See European Commission, The new SME definition, User guide and model declaration, http://ec.europa.eu/enterprise/policies/sme/files/sme_definition/sme_user_guide_en.pdf, p. 16.

³⁵ See European Commission, The new SME definition, User guide and model declaration, http://ec.europa.eu/enterprise/policies/sme/files/sme_definition/sme_user_guide_en.pdf, p. 13.

³⁶ See *Th. Pfeiffer*, Anwendungsbereich: Vertragsparteien und Vertragsgegenstand, in: Remien/Herrler/Limmer, p. 38 s.

the bona fide estimate turns out to be wrong because e.g. at that point of time the thresholds are exceeded or the enterprise goes above the ceilings over two consecutive accounting periods, the CESL will not be applicable by force of the proposed CESL regulation (see Arts. 3, 8). This begs the question of whether the CESL, in this situation, applies like a set of terms and conditions incorporated in the contract (see *infra* III. 2.).

c) *The PICC and the PECL*

The PICC and the PECL do not contain rules making its application dependent on the status of the parties or the intended use of the goods by the buyer. However, the PICC are focused on business-to-business contracts as can be seen from the preamble's text according to which "[t]hese Principles set forth general rules for international commercial contracts ..." and the reference to the *lex mercatoria*. In contrast, the personal scope of PECL is not limited to transactions involving consumers and businesses.

III. Legal status of CISG, CESL, PICC and PECL

The CISG, the CESL, the PICC and PECL have a different legal status.

1. The CISG

The CISG becomes part of the domestic law once a state has ratified, accepted or approved it (Contracting State). If a suit is brought against a party, which has its places of business in a Contracting State, the CISG autonomously applies to the dispute provided that the state where the claimant is located is also a contracting state (Art. 1 para. 1 lit. a CISG). Where only one party's state is a Contracting State, the CISG applies if the conflict-of-law rules of a given forum lead to the law of a Contracting State (Art. 1 para. 1 lit. b CISG). According to Art. 6 CISG the parties may exclude the application of the CISG or derogate from or vary the effect of any of its provisions (opt out). Whether or not there is an agreement to that effect is determined by the CISG's rules on interpretation (Art. 8 CISG) and formation (Art. 14 et seq. CISG) as the legal regime applicable to the contract.³⁷ The parties must have reached consensus on the (partial) exclusion

³⁷ M. Hesselink, *European Review of Private Law* 2012, 195, 201; F. Ferrari, in: Schlechtriem/Schwenzer, Art. 14 paras. 13-14; for a different view L. Mistelis, in: Kröll/Mistelis/Viscasillas, Art. 6 para. 10 (stating that an agreement of the parties aiming to exclude the CISG "should be seen as a stand-alone agreement and should be governed by the law it selects or failing that by the law applicable by virtue of conflict of laws rules").

or variation of or derogation from the CISG. The great majority of courts³⁸ and scholars³⁹ generally accept that the applicability of the CISG can be excluded not only expressly but also implicitly. One example for an implicit exclusion is the reference to domestic non-unified law or to a set of rules such as the German Civil Code (BGB) or the German Commercial Code (HGB). The reference to specific provisions of non-unified law such as sect. 377 HGB may be considered as derogation from Arts. 38, 39 CISG.

2. The CESL

While the CISG is binding by force of law, the CESL is only applicable if the parties have agreed on its application (opt-in) (see Arts. 3 and 8 CESL regulation proposal). According to Art. 11 CESL regulation proposal “only the CESL shall govern the matters addressed in its rules”. Once the parties have opted-in for the CESL, it thus provides within its material scope an alternative regime on the level of national contract law (“second contract law regime”) that would be applicable in the absence of an agreement on the CESL.⁴⁰ Matters not addressed by the CESL are governed by the national law which needs to be determined by the conflict-of-law rules of the forum in accordance with the Rome I and the Rome II Regulation or any other relevant conflict-of-law rule.⁴¹ If the parties have not agreed on the applicable law but only on the application of CESL, the former will be determined on the basis of the default rules in Art. 4 of the Rome I Regulation where the forum is in a EU Member State.⁴²

³⁸ For case law see UNCITRAL Digest Art. 6 fn. 29.

³⁹ See *F. Ferrari*, in: Schlechtriem/Schwenzer, Art. 6 para. 18; *L. Mistelis*, in: Kröll/Mistelis/Viscasillas, Art. 6 para. 16; *I. Saenger*, in: Bamberger/Roth, Art. 6 para. 2; *K. Bell*, 8 Pace Int'l L. J. (1996), 237, 255; *K. Siehr*, in: Honsell, Art. 6 para. 6; *P. Huber/S. Kröll*, Deutsche Rechtsprechung zum UN-Kaufrecht in den Jahren 2001/2002, Praxis des Internationalen Privat- und Verfahrensrechts 2003, 309, 310; *C. Benicke*, in: Münchener Kommentar zum HGB, Art. 6 para. 10; *B. Nicholas*, The Vienna Convention on International Sales Law, 105 L. Q. R. (1989), 201, 208; for a different view: *P. Ostendorf/N. Neumann/V. Ventsch*, Möglichkeiten und Grenzen von Haftungsbeschränkungen in internationalen Lieferverträgen zwischen Unternehmen, Internationales Handelsrecht 2006, 21, 22 (stating that an exclusion requires an express statement). For case law see UNCITRAL Digest Art. 6 fn. 29.

⁴⁰ See Explanatory Memorandum to the CESL regulation proposal, p. 6.

⁴¹ See Explanatory Memorandum to the CESL regulation proposal, p. 6.

⁴² See *P. Mankowski*, Gemeinsames Europäisches Kaufrecht, Recht der Internationalen Wirtschaft 2012, 97, 100 s. (discussing the relationship between the CESL and the Rome I Regulation).

Where the forum is outside the EU, the applicable law cannot be determined by the Rome I Regulation or Rome II Regulation but by the forum's conflict-of-law rules. In case of arbitration, according to Art. 28 para. 2 Uncitral Model Law on International Commercial Arbitration the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable in the absence of a parties' choice of the applicable substantive law. If the conflict-of-law rules lead to the application of a EU-Member State law, the question is whether the CESL regulation is qualified as the law of a EU-Member State. Under the Rome I Regulation, this question can certainly be answered in the affirmative. According to Art. 20 Rome I regulation "[t]he application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation". As Article 288 TFEU explicitly provides, a regulation, once it has become law, is binding in its entirety and directly applicable in all Member States. Assuming that the forum's conflict-of-law rules have a provision to the same effect as Article 20 Rome I Regulation, the validity of the agreement on CESL will be determined by Art. 8 para. 1 CESL regulation proposal.

As far as the personal scope of the CESL is not concerned because none of the parties is an SME, it is left up to the parties to nevertheless agree on the CESL. In this case, as mentioned before, the CESL applies like a set of terms and conditions incorporated in the contract.⁴³ The parties are only bound to the extent that the CESL provisions do not contradict mandatory rules of the applicable (supra-)national law. A different issue is whether the CESL provisions form part of the contract when the parties erroneously believed that the personal scope of the CESL was concerned, or when an enterprise, which was at the time of the contract conclusion an SME, later in the course of business dealings grows to a large business. Here is the crucial question. According to which rules should the consequences of an agreement on the CESL be assessed: the rules on interpretation of the CESL (Arts. 30 et seq.), the CISG (Art. 8, 14 et seq.) or the non-unified applicable law (see *infra* VI. 2. b)?

3. The PICC and the PECL

Like the CESL, the PICC and the PECL will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them. However, the legal status of the CESL on the one hand, and the PICC and the PECL on the other one, is different. Once the parties have opt in for the CESL, the CESL by force of law (see Art. 11 CESL regulation proposal) governs the matters addressed in its rules. Moreover, no mandatory law of the EU and

⁴³ According to Art. 13 lit. (b) CESL regulation proposal the EU-Member States have the option to extend the CESL to contracts between large businesses.

the EU-Member States is applicable. By contrast, the PICC and the PECL, by their very nature, have no own normative force since they have not been enacted by a (supra-)national legislator. Where the parties have expressly agreed on the PICC or the PECL, the agreement itself as well as the text of PICC or the PECL are subject to the *jus cogens* of the EU law and the domestic laws of the EU-Member States.⁴⁴ In this case, the PICC and PECL will bind the parties only to the extent that they do not contradict mandatory rules of the applicable (supra-)national law.

The PICC or the PECL can have normative force only derived from (supra-)national law. Examples can be found in the CISG where Art. 9 para. 1 CISG states that “[t]he parties are bound by any usage to which they have agreed ...”, or where Art. 9 para. 2 CISG states “[t]he parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned”.⁴⁵ According to Art. 8 para. 3 CISG trade usages can be of relevance in the determination of a party’s intent.⁴⁶

⁴⁴ For somewhat contradicting arguments see *O. Lando*, in: Remien/Herrler/Limmer, p. 19 (stating that “[i]t seems now to be almost generally accepted that arbitral tribunals may apply the PICC and the PECL as the law governing the contract ... By the end of 29 December 2011 it had reported 160 arbitral awards that had referred to or mentioned the PICC. Only few of them applied the PICC as the law governing the contract.”)

⁴⁵ See e.g. United States Federal Appellate Court [5th Circuit] (*BP Oil International v. Empresa Estatal Petroleos de Ecuador*) 11 June 2003, <http://cisgw3.law.pace.edu/cases/030611u1.html> (holding that “[t]he CISG incorporates Incoterms through article 9(2) [...]. Even if the usage of Incoterms is not global, the fact that they are well known in international trade means that they are incorporated through article 9(2)”).

⁴⁶ There is an abundant literature relating to the relationship between the CISG and the PICC and the CISG and the PECL. See *M. Bonell*, General Report, in: *A New Approach to International Commercial Contracts: The UNIDROIT Principles of International Commercial Contracts*, XVth International Congress of Comparative Law, Bristol, 26 July-1 August 1998 (Kluwer Law International 1999) p. 12-13 (stating that in order for individual provisions to be used to fill gaps in the CISG, they must be the expression of general principles also underlying the CISG); see also *U. Magnus*, *Die allgemeinen Grundsätze im UN-Kaufrecht*, 59 *Rabels Zeitschrift* 492-93 (1995) (stating that the PICC are to be considered as additional general principles in the context of the CISG because they vastly correspond both to the respective provisions of the CISG as well as to the general principles which have been derived from the CISG); *B. Zeller*, *Journal of Law and Commerce* [Vol. 26:115] *The UNIDROIT Principles of Contract Law; Is there Room for their Inclusion into Domestic Contracts?* (stating that “[d]ue to the extended application of the Principles in arbitration the argument can be advanced that the theoretical or soft law stage has passed and the Principles have entered into the

The CESL contains similar provisions in Art. 67⁴⁷ and Art. 59 lit. d CESL.⁴⁸ Unlike the CISG, Art. 67 para. 2 CESL – the counterpart to Art. 9 para. 2 CISG – does not expressly require the usage to be observed in international trade. Rather, it provides that traders are bound by “a usage which would be considered generally applicable by traders in the same situation as the parties”. Since CESL is only applicable to cross-border transaction it is, however, plausible to conclude that this provision at least includes international usages.⁴⁹ Art. 59 lit. d CESL, the counterpart to Art. 8 para. 3 CISG, provides that “[i]n interpreting a contract, regard may be had, in particular, to: (d) usages which would be considered generally applicable by parties in the same situation”. Comparable provisions can be found in most non-unified domestic laws (e.g. sect. 346 German Commercial Code (HGB)). Therefore the PICC and the PECL may have derived normative force when they reflect usages of international trade. They have, moreover, normative force when they reflect general principles in the meaning of Art. 7 para. 2 CISG or Art. 4 para. 2 CESL.⁵⁰

phase of ‘case-hardened’ law”); see also C. Fountoulakis, The Parties’ Choice of “Neutral Law” in International Sales Contracts, 7 European Journal of Law Reform, 2005, 303, 322 (stating that UNIDROIT Principles are not “real law” but “merely a collection of general acknowledged principles”).

⁴⁷ Art. 67 [Usages and practices in contracts between traders] reads as follows:

1. In a contract between traders, the parties are bound by any usage which they have agreed should be applicable and by any practice they have established between themselves.
2. The parties are bound by a usage which would be considered generally applicable by traders in the same situation as the parties.
3. Usages and practices do not bind the parties to the extent to which they conflict with contract terms which have been individually negotiated or any mandatory rules of the Common European Sales Law.

⁴⁸ Art. 59 [Relevant matters] reads as follows: In interpreting a contract, regard may be had, in particular, to: (d) usages which would be considered generally applicable by parties in the same situation.

⁴⁹ For a somewhat different statement see Bernstein, An (Un) Common Frame of Reference: An American Perspective on the Jurisprudence of the CESL, p. 4, <http://www.law.uchicago.edu/files/files/Bernstein%20paper.pdf> (stating that the reference in Art. 67 para. 2 to usages “might or not be interpreted as including only international usage”).

⁵⁰ It is to be noted that the European Regulation Proposal (Rome I) of December 2005 (COM(2005) 650 final, 2005/0261 (COD) recommended that the PICC will be authorized as being a possible choice when deciding the applicable contractual law. The proposed Art. 3 para. 2 reads as follows: “The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community ...” See also Explanatory Memorandum, Article-by-Article Commentary, Art. 3: “To further boost the impact of the parties’ will, a key principle of the Convention, paragraph 2 authorizes the parties to choose as the applicable law a non-

IV. Interplay with the CISG, the CESL, the PICC and the PECL

The following example illustrates the interaction between the various instruments and identifies a possible conflict between the CISG and the CESL.

1. Case Study

A German large business (seller) entered into a contract with a medium-sized Russian company (buyer). The Contract provided that the seller designs, builds and delivers production lines for different baking products. The payment of the price was to be effected by bank transfer in the following way: “30 %-advance within 10 bank days from the date of signing the Contract, 20 %-within 10 bank days from the date of the receipt by fax of shipping documents, 50 %-each month in equal parts within the period of 12 months from the date of registration of the Customs goods declaration at Russian’s Customs”. The buyer made the 30 %-advance payment. Before the due date of delivery there was a change in the management of the buyer. The new management of the buyer indicated doubts about the investment into the production line and asked the seller for a price reduction and requested for modification of the Contract e.g. the equipment and the payment conditions. The seller was not willing to renegotiate the contract, and did not deliver the production line to Russia on the due date since he feared not to receive the full purchase price. The buyer, on the other hand, was not interested in the delivery. 5 months after the due date of delivery, and without having set a *Nachfrist*, the buyer declared the contract avoided and requested the seller to return the advance payment. The seller refused the return of advance payment and counter-claimed damages. The seller argued that the buyer had breached the contract by requesting for modification of the contract. The buyer invoked, in the alternative, set-off against seller’s claim for restitution of the advance payment. The buyer then filed an action under Article 5(1)(b) of the Brussels I Regulation in the Hamburg District Court.

2. The CISG or the CESL: Which comes first?

The Hamburg District court will first have to decide whether the CISG (by virtue of Art. 1 para. 1 lit. a) or the CESL (by virtue of Arts. 3, 8 and 11 CESL regulation proposal) is the starting point for the further determination of the applicable regime.

State body of law. The form of words used would authorize the choice of the UNIDROIT principles, the Principles of European Contract Law or a possible future optional Community instrument, while excluding the *lex mercatoria*, which is not precise enough, or private codifications not adequately recognized by the international community ...”

a) *The CESL as a starting point?*

There is no rule in the proposed CESL regulation according to which the regulation shall not prejudice the application of international conventions which deal with the formation of the contract of sale and lay down the rights and obligations of the seller and the buyer. In light of the primacy of Community law, Art. 11 CESL regulation proposal and the lack of any provision clarifying the relationship between the CESL and the CISG, one is inclined to start not with the forum's conflict-of-law rules but with the proposed regulation by looking at whether an agreement on the CESL is valid or not. Assuming that there is no such agreement the court must find out whether the issues at stake fall into the scope of the CISG, and, if not, apply non-unified national law. Where the parties have agreed on the CESL, the court has to determine whether the scope of the CESL is concerned.

Apart from the set-off, here, all other issues are covered by express provisions of the CESL. Provided that at least one of the parties is/was an SME at the time of the conclusion of the contract, the court will therefore apply the CESL. If the court follows the prevailing view expressed in case law⁵¹ and doctrine⁵² that set-off is not governed by the CISG, the court must resort to the applicable non-unified national law to be determined by the Rome I Regulation, unless it considers the PICC (Art. 8) or the PECL (Art. 13) rules on set-off applicable. The same is true where the parties have excluded the CISG and have not agreed on the CESL. In such case the German Commercial Code (HGB) (by virtue of the Rome I Regulation) applies. According to sect. 346 HGB when interpreting the significance and effect of acts and omissions as between merchants reasonable account must be taken of the practices and customs that apply in business dealings.

⁵¹ See e.g. Bundesgerichtshof (Germany) 23 June 2010, CISG-online no. 2129 (Pace); Bundesgericht (Switzerland) 20 December 2006, CISG-online no. 1426 (Pace); Oberster Gerichtshof (Austria), Internationales Handelsrecht 2002, 27; Oberlandesgericht Köln (Germany) 19 May 2008, CISG-online no. 1700 (Pace); Landgericht München (Germany) 20 March 1995, CISG-online no. 164 (Pace); Tribunal di Vigevano (Italy) 12 July 2000, CLOUT Case No. 378]; Oberlandesgericht Koblenz (Germany), 31 January. 1997, OLG REPORT Koblenz 1997, 37; Oberlandesgericht Düsseldorf (Germany), 22 July 2004, <http://cisgw3.law.pace.edu/cases/040722g1.html>.

⁵² For example *M. Bonell*, The CISG, European Contract Law and the Development of a World Contract Law, 56 American Journal of Comparative Law (2008) 1 (3); *S. Eisele/A. Kritzer*, in: *Kritzer/Vanto/Vanto/Eisele*, International Contract Manual, Vol. 4 § 84:33(c); *F. Ferrari*, in: *Ferrari/Flechtner/Brand*, Draft Digest and Beyond (2004), p. 108; *J. Honnold/H. Flechtner*, Uniform Law (2009), Art. 4 para. 70; *Huber*, Some introductory remarks on the CISG, 6 Internationales Handelsrecht (2006) 234 (Pace); *I. Saenger*, in: BeckOK CISG, Art. 4 para. 19.

If the court does not follow the prevailing opinion but (not only) *Ulrich Magnus*' opposing view with regard to set-off,⁵³ it will not resort to non-unified national law.⁵⁴ Rather, the court will apply the CISG and perhaps the set-off rules of the PICC or the PECL as usages in terms of Art. 9 para. 2 CISG or because the court finds they reflect general principles in the meaning of Art. 7 para. 2 CISG underlying the Arts. 81 para. 2, 84 para. 2 and 88 para. 3 CISG.

b) *The CISG as a starting point?*

According to Recital 10 CESL regulation proposal “[t]he agreement to use the Common European Sales Law should be a choice exercised within the scope of the respective national law which is applicable pursuant to [Rome I Regulation] or, in relation to pre-contractual information duties, pursuant to [Rome II Regulation], or any other relevant conflict of law rule. The agreement to use the Common European Sales Law should therefore not amount to, and not be confused with, a choice of the applicable law within the meaning of the conflict-of-law rules and should be without prejudice to them. This Regulation will therefore not affect any of the existing conflict of law rules.” In light of these considerations and Art. 25 Rome I Regulation which states that the regulation shall not prejudice the application of international conventions, which lay down conflict-of-law rules relating to contractual obligations, it seems more plausible to conclude that the CISG is always the starting point irrespective of whether it is directly applicable (Art. 1 para. 1 lit. a CISG) or indirectly because the

⁵³ *U. Magnus*, in: Staudinger, Art. 14 para. 40 (1999), Art. 4 para. 47 (relying on Art. 84 para. CISG to justify including set-off of receivables arising from the same transaction governed by the CISG into the CISG's scope of application; *M. Djordjevic*, in: Kröll/Mistelis/Viscasillas, Art. 4 para. 39; see also *S. Kröll*, Selected Problems Concerning the CISG's Scope of Application, 25 Journal of Law and Commerce 2005/06, 39, 52 (stating that Arts. 58 and 81 both provide for concurrent performance of the mutual obligation); *M. Bridge*, in: Kröll/Mistelis/Viscasillas, Art. 84 para. 8 (stressing that “a general denial of set-off as a subject dealt with by the Convention is too widely stated”).

⁵⁴ In favor of set-off, where there are two reciprocal claims arising under the CISG see e.g. Kantonsgericht Zug (Switzerland), 14 December 2009, <http://globalsaleslaw.com/content/api/cisg/urteile/2026.pdf>; Landgericht Stuttgart (Germany), 29 October 2009, <http://cisgw3.law.pace.edu/cases/091029g1.html>; Oberlandesgericht München (Germany) 19 October 2006, CISG-online no. 1394 (Pace); Amtsgericht Duisburg (Germany) 13 April 2000, CLOUT case no. 360; Hanseatisches Oberlandesgericht Hamburg (Germany) 26 November 1999, CISG-online no. 515 (Pace); Landgericht Mönchengladbach (Germany) 15 July 2003, CISG-online no. 813 (Pace).

conflict-of-law rules lead to the application of the law of a Contracting State (Art. 1 para. 1 lit. b CISG).⁵⁵

If the CISG is the starting point the court has to determine whether the issues in dispute fall within the material, territorial and personal scope of the CISG, and, if so, whether the parties have excluded or deviated from the CISG in accordance with Art. 6 CISG (see Annex). At this point, the court must look if there is an agreement between the parties on the CESL. Such an agreement can be not only made expressly but also clearly demonstrated by the terms of the contract or the circumstances of the case.⁵⁶ Assuming in the case at hand the parties have agreed on the CESL, the opt in for the CESL qualifies as an implied exclusion of or derogation from the CISG. Otherwise the agreement on the CESL would have no practical meaning. In this regard the agreement on CESL is different from the choice of the law of a contracting state which in itself does not amount to an implied exclusion because the CISG is part of the contracting state law.⁵⁷ On the other hand, there is no room for an implied exclusion of or derogation from the CISG by choosing the CESL when the issues in case are not covered by the material scope of the CESL but by the CISG's scope. In practice, such an occurrence will be very exceptional since the CESL's scope is much broader than the CISG's one. However, one exceptional case could be the issue of set-off as it has just been mentioned.

Assuming that the Russian buyer was not a medium but a large business at the time of the conclusion of the contract or, when the German seller has renegotiated the contract with the Russian buyer, at the time the contract was modified. In these cases the CESL is not applicable by virtue of the proposed regulation (see Art. 7 CESL regulation proposal). The CESL provisions, however, may have contractual force in that they form part of the contract. The question of whether the parties have included the CESL *in toto* or only single CESL provisions, and at the same time, have derogated from the CISG is to be

⁵⁵ For the relationship between the CESL and the conflict-of-law rules see also *M. Fornasier* 76 *RabelsZ* 2012, 401, 428 s.

⁵⁶ See *H. Eidenmüller/N. Jansen/E. Kieninger/G. Wagner/R. Zimmermann*, Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht, *Juristenzeitung* 2012, 269, 276 (requiring for the sake of clarity an express agreement).

⁵⁷ See e.g. Oberster Gerichtshof (Austria) 14 January 2002, CISG-online no. 643 (Pace); Hof van Beroep Gent (Belgium) 15 May 2002, CISG-Online no. 746 (Pace); Cour d'appel Paris (France) 6 November 2001, CISG-online no. 677 (Pace); Supreme Court of Queensland (Australia) 17 November 2000, CISG-online no. 587 (Pace); Bundesgerichtshof (Germany) 25 November 1998, CISG-online no. 353 (Pace); Bundesgerichtshof (Germany) 23 July 1997, CISG-online no. 276 (Pace); Kantonsgericht Nidwalden (Switzerland) 3 December 1997, CISG-online no. 331 (Pace); Handelsgericht des Kantons Zürich (Switzerland) 5 February 1997, CISG-online no. 327 (Pace); Cour de cassation (France) 17 December 1996, CISG-online no. 220 (Pace); Rechtbank s'Gravenhage (Netherlands) 7 June 1995, CISG-online no. 369 (Pace).

assessed in accordance with the CISG's rules on interpretation and formation of the contract. The crucial question is whether or not the parties wanted to make the application of the CESL conditional on its application by force of Art. 7 CESL regulation proposal. If the parties knew at the time of the agreement on the CESL that they were large businesses, the question would have been answered in the negative. Here, the agreement on the CESL has the same meaning as if the parties expressly agreed on the PICC or the PECL. In case when both parties or only one party erroneously believed that the personal scope of the CESL was concerned, there is no clear answer to this question. If no interpretation of the parties' statements is possible, recourse to non-unified domestic law will be necessary where the validity of the contract is affected.

3. How to deal with a positive conflict between the CESL and the CISG

There is a potential area of conflict between the CESL and the CISG due to different requirements for the inclusion of standard terms.⁵⁸ According to the Bundesgerichtshof, the German Supreme Court, under the CISG standard terms must be made available to the other party at the time of contracting. A reference to the inclusion of the standard terms is not sufficient.⁵⁹ There is no such requirement under the proposed CESL regulation with regard to b2b-transactions. Assuming that the agreement on the CESL is a standard contract term, which was not incorporated into the contract because the term had not been supplied to the other party prior to the conclusion of the contract, there will be no valid exclusion of or derogation from the CISG. Some German authors suggest that whenever the parties have agreed on CESL but have failed to reach an agreement on the exclusion of the CISG, the regulation introducing the CESL should prevail due to Art. 90 CISG.⁶⁰ It is, however, debatable whether or not regulations fall into the scope of Art. 90 CISG. First, the regulation is not an "international agreement" in the sense of Art. 90 CISG. Second, even if the

⁵⁸ See *M. Hesselink*, How to Opt into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation, *European Review of Private Law*, Vol. 1, 201, ss. 195-212, 2012.

⁵⁹ Bundesgerichtshof (Germany) 27 November 2007 CISG-online no. 1617 (Pace); Bundesgerichtshof (Germany) 31 October 2001 CISG-online no. 617 (Pace); Oberlandesgericht Celle (Germany) 24 July 2009 2007 CISG-online no. 1906 (Pace); see also Cour d'appel Paris (France) 13 December 1995, <http://cisgw3.law.pace.edu/cases/951213f1.html>; Arrondissementsrechtbank Utrecht (Netherlands) 21 January 2009, <http://cisgw3.law.pace.edu/cases/090121n1.html>.

⁶⁰ See *P. Mankowski*, CESL—who needs it?, *Internationales Handelsrecht* 2012, 45, 47; *P. Mankowski*, in: Ferrari/Kieninger/Mankowski u.a., *Internationales Vertragsrecht* (2nd ed. 2011) Art. 90 para. 10; MünchKomm-BGB/Huber Art. 90 para. 2.

regulation was to be considered as an international agreement, the EU-Member States are not “parties to such agreements”.⁶¹ If the regulation does not fall into the scope of Art. 90 CISG, next, the question arises whether the EU-Member States are obliged by virtue of Art. 351 TFEU⁶² to make a reservation under Art. 94 CISG.⁶³

V. Conclusions

According to *Hans Schulte-Nölke*, a member of the Study Group, the CESL is “mainly a composite of templates not only taken from the EU legislation and international treaties such as the CISG, but also from texts like the DCFR [Draft Common Frame of Reference] and the PECL”.⁶⁴ In light of this statement, I hope that you understand that I did not deal with the contents of the CESL but have restricted myself to the scope of and the interplay between the CISG, the CESL, the PICC and the PECL. In my view, it is not sensible to identify the provisions which were taken from the CISG, the PICC or the PECL and to start speculating whether the national courts, and ultimately the ECJ, will take into account the case law on the CISG or the PICC when interpreting the CESL. It is to be expected that, in the absence of an official commentary, the courts will seek for guidance in the commentary to the DCFR. As *Thomas Ackermann* has pointed out: The DCFR provides in fact a blue print for the European codification of

⁶¹ See *P. Schlechtriem*, in: Schlechtriem/Schwenzer, Art. 90 paras. 12-13 and *Hachem*, in: Schlechtriem/Schwenzer, Commentary (2010), Art. 90 para. 5; *Herre*, in: Kröll/Mistelis/Viscasillas, UN-Convention on the International Sales of Goods (CISG), Art. 90 para. 8; see also *F. Ferrari*, in: Ferrari/Flechtner/Brand, Draft Digest and Beyond (2003), p. 105.

⁶² Article 351 TFEU reads as follows: The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties. To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude. In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.

⁶³ *M. Schmidt-Kessel* p. 22 s.; *S. Leible* p. 32 s.; see also *P. Mankowski*, in: Ferrari/Kieninger/Mankowski u.a., Internationales Vertragsrecht 2. Auflage 2011 Art. 94 para. 5.

⁶⁴ See *H. Schulte-Noelke*, p. 20.

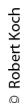
private law⁶⁵ which appears to be the ultimate aim not only of the EU Commission but also of the academics involved in the codification process.

The inclusion of b2b-transactions within the scope of CESL will de facto create a competition between the CESL and the CISG, and it is to be feared that there will be unfortunately no winners, only losers. In this regard I would like to quote *Michael Bonell*: “For the purpose of unification or harmonization of law there is nothing worse than duplication of work leading to the adoption of different instruments competing with one another in the same area.” He made this quote in an article dealing with the co-existence between the PICC and the PECL.⁶⁶ *Bonell* denied such a duplication primarily because of the different territorial scope of the PICC and the PECL. Outside Europe or in commercial transactions involving non-Europeans, it would be the PICC that applied, while within the EU or in purely intra-European contracts, it would be the PECL that prevailed. As shown above, the CESL’s territorial scope is not limited to sales transactions within the EU, thus there is significant duplication between the CISG and the CESL.

Moreover, the inclusion of b2b-transactions into CESL’s scope sends the wrong signal to the business community because it produces the negative impression that the CISG has failed, which is false. To the contrary, the CISG has just begun flowering as the growing number of cases and countries ratifying the CISG shows. Obviously, the EU Commission favors regional over global sales law harmonization. This impression is reinforced by the criticism of the EU Commission of the CISG that appears to be highly speculative and only as a pretext to justify the extension of the CESL to b2b-contracts. In conclusion, the CESL’s scope of application should be limited to consumer sales.

⁶⁵ *T. Ackermann*, Public Supply of Optional Standardized Consumer Contracts: A Rationale for the Common European Sales Law?, p. 2, <http://www.law.uchicago.edu/files/files/Ackermann%20paper.pdf>; *B. Gsell*, Der Verordnungsentwurf GEK und die Problematik seiner Lücken, in: *Remien/Herrler/Limmer*, p. 153 s.

⁶⁶ *M. Bonell*, The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes? 26 *Uniform Law Review* (1996) 229-246; for a similar statement with regard to the CESL see the UK Law Commissions’ Advice to the UK Government, p. xii (pointing out that “[t]he main problem appears to be that businesses have too much choice. It is difficult for small and medium enterprises to find out about different legal systems, as this usually involves expensive legal advice. Businesses tend to favor their own legal system, making it difficult to negotiate on choice of law with businesses from other states”).



Concluding Remarks

Ulrich Magnus

With its Common European Sales Law Europe pursues a very own and innovative path of regional harmonisation of (international) sales law. Thus far, CESL has no model or counterpart in other regions of the world. Other regions have coordinated the coexistence of the global sales law CISG and regional sales law in different ways.

However, it can be observed that regions like the United States, Australia (the two can be regarded as regions not only because of their territorial extension but because of the wide legislative independence of their units) or the OHADA countries provide for a separate regionally uniform or at least harmonised sales law as well. Regional sales law unification is thus not unusual. The CISG expressly makes provision for this situation. Art. 94 CISG allows a special reservation that gives priority to regionalised sales law where two or more countries have the same or closely related sales laws and if the parties to such sales are seated in two of those countries. The Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) have declared this reservation when adopting the CISG. For sales between parties of these states the CISG remains inapplicable. A federal state whose units enjoy rather broad independent competences in civil law matters can, however, not make use of Art. 94 CISG, because a sale between separate units of a federal state is not between different States as required by Art. 1 (1) CISG. Such a sale is not an international one in the sense of the CISG.

1. The easiest way of the coexistence of global and regional sales law is exemplified by Australia. The whole continent has adopted the CISG; but all separate units of the Australian Federation which like the single US States enjoy broad independent competences in civil law matters are also governed by the Common Law with specific sale of goods acts which are all modelled after the English Sale of Goods Act of 1893. Therefore, the internal sales law of all units of the Australian Federation is rather identical due to the mutual Common Law basis. To this basis the CISG merely is added for international sales where at least one party from outside Australia is involved. The borderline between CISG and internal sales law is easy to draw: The CISG's provisions on its scope of application clearly designate the borderline between the applicable national and international sales law.

Australia evidently regards it as unnecessary to further unify the domestic sales laws of its different units. The common Common Law basis appears to be sufficiently strong, so that remaining differences are not considered to impede trade between the units. For inter-federal transactions the applicable domestic

law serves as default rule. In essence this is an opt-out solution because for commercial sales most domestic provisions are of a dispositive nature. For international sales the Australian Federation trusts the CISG and does not intend to displace it.

2. Rather different is the example of the United States. Although the sales law of the single US States has also its basis in the Common Law, the United States always regarded it necessary to unify the sales law of the single US States in order to facilitate inner-US trade. However, for constitutional reasons they did so not by binding law on the central level but by uniform model acts proposed by the National Conference of Commissioners on Uniform State Laws.¹ These acts are mere recommendations; the legislators of the single US States may or may not adopt them. One of the first model acts was the Uniform Sales Act of 1906 (modelled after the English Sale of Goods act of 1893) which however found only limited acceptance among the US States. Therefore the National Commission in cooperation with the American Law Institute prepared a Uniform Commercial Code whose Chapter 2 regulates sales. This model act was adopted by all US States. Only Louisiana with its Civil Law tradition refused to adopt the UCC's Sales Chapter.²

Thus, the inner-US unification of sales law, prepared on the central level as non-binding instrument, became binding law through a kind of synchronic enactment by the legislators of the single US States. Even on the state level it is binding only in the sense that it automatically applies if the parties did not agree otherwise. For commercial sales Chapter 2, with the exception of very few provisions, has the character of a default rule. Again it is an opt-out solution. Thus, the UCC in fact harmonised the law for a territory that in economic and social terms is widely comparable to the present EU. On the other hand, the US also ratified the CISG which applies to all single US States though not for sales among them. For international commercial sales where at least one party from another CISG State is involved³ the CISG has to be applied if the further requirements for its application are met. Rather similar to Australia, there is no real competition between the CISG and the UCC. Where the CISG is applicable it prevails over the internally harmonised law, though the parties may exclude it. But unless excluded it applies like the UCC as automatic default rule.

In comparison to the European scene it is interesting that on the central level there are only unofficial, quasi-private attempts to unify the US sales law. These attempts are doomed to failure unless they can convince the legislators of

¹ Today the Uniform Law Commission.

² In 2003 a revised version of Chapter 2 was proposed but was not adopted by any US State and has now been retracted.

³ The US declared the reservation of Art. 95 CISG which excludes the possibility of Art. 1 (1) (b) CISG to apply the CISG even if not both parties have their place of business in different CISG States but private international law leads to the law of a CISG State.

the single states of their necessity and quality. The actual decision on a harmonisation measure like the UCC then occurs on the level of the single states. However, it should be borne in mind that the general Common Law background facilitates further harmonisation by statutory provisions. The differences between the sales laws of the single US States are not as great as the differences between the sales laws of the Member States of the EU. It is all the more remarkable that despite the very closely related sales laws of the single US States the US felt it necessary to further unify this area of law for the trade between the sister states.

3. Quite another example of rivalry between the CISG and regional sales law is to be found in the African OHADA (Organisation pour l'Harmonisation en Afrique du droit des Affaires). This supranational organisation with own competences and an own central court was formed by an international treaty of 1993 between states of Africa's mid-west. Today, OHADA has 16 Member States.⁴ Only very few of them, namely Benin, Gabon and Guinea, have ratified the CISG. However, the OHADA itself has enacted uniform acts which become binding and directly applicable in the Member States. Among those acts the Uniform Act on General Commercial Law is the most important one. It is more or less a commercial code, which was first enacted in 1998 and has been revised in 2010. It also provides for rules on commercial sales which widely copy the CISG.⁵ Thus, a modified CISG has become the sales law among and in the OHADA states. The OHADA Sales Law is applicable if the parties have their place of business in an OHADA State or if the rules of private international law lead to the law of an OHADA State.⁶ However, the parties can agree otherwise and exclude the application of the OHADA Sales Law.⁷ In principle, it is an opt-out solution.

The relationship between the CISG and the OHADA Sales Law is not clear in every respect. However, where both parties are seated in the same OHADA State – be that even a CISG State – it is clear that only OHADA Sales Law applies unless the parties agree otherwise. For, the CISG does not cover purely domestic sales. If the parties are seated in two different OHADA States which are no CISG States the solution is likewise clear: OHADA Sales Law applies.

Problems arise where the parties are seated in two OHADA States which are also CISG States (Benin, Gabon, Guinea). Does the OHADA Sales Law or the CISG prevail? As Prof. Ferrari has pointed out in his contribution to this book OHADA's Uniform Acts probably do not qualify as "international agree-

⁴ The Democratic Republic of Congo has announced its accession to the OHADA but apparently not yet deposited its respective formal declaration.

⁵ Book VIII (Art. 234 ss.) of the Uniform Act on General Commercial Law: For critical comments on the deviations of these provisions from the CISG see *F. Ferrari* (in this book).

⁶ Art. 234 (2) Uniform Act on General Commercial Law.

⁷ Ibid.

ments” which Art. 90 CISG gives automatically priority to if the parties have their places of business in contracting states of such agreements; no declaration of the involved states would be necessary, then. The directly applicable Uniform Acts are, however, of a specific nature: They are enactments of a supranational organisation (similar to EU Regulations) to which the preferable view applies Art. 94 CISG. If a supranational organisation intends to unify the law for its territory and to give it priority over the CISG, the organisation⁸ and its states should make this clear by respective declarations in accordance with Art. 94 CISG. This is in the interest of clarity and certainty of international trade.

Yet, none of OHADA’s CISG States nor the OHADA itself has made such a declaration.⁹ Can it be inferred from Art. 94 CISG, then, that the regional unification does *not* prevail over the CISG as long as no such declaration has been made? The answer must probably be in the positive. Art. 98 CISG provides that under the CISG “no reservations are permitted except those expressly authorised in this Convention.” Thus, if Art. 90 CISG does not apply then declarations according to Art. 94 CISG are the only possibility to give regional sales law unification priority over the CISG. Without such declarations the CISG prevails.

A similar conflict on the applicability of the OHADA Sales Law or the CISG can arise when private international law leads to the law of an OHADA/CISG State and the parties are seated in two OHADA States. Should OHADA law or CISG apply? The solution should be the same as proposed above. Without a declaration under Art. 94 CISG the CISG should prevail.¹⁰

In contrast to Australia and the United States the OHADA forms a region consisting of independent states. Again, they felt the necessity to unify the sales law for the trade between them (and also for the internal trade in the OHADA States) and took the CISG as the partly modified model for their regional sales law unification. Thus far, lacking declarations in accordance with Art. 94 CISG the CISG States of the OHADA must apply the CISG to sales where the parties have their places of business in two different OHADA/CISG States. Do they apply the OHADA Sales Law to these cases they would violate their duties arising from the ratification of the CISG. The regional unification is therefore incomplete without the respective declarations according to Art. 94 CISG.

⁸ Although the CISG does not mention supranational organisations which like the EU or the OHADA strive for economic or political integration such organisations should be treated alike with a state. A model for this is already the Hague Convention on Choice of Court Agreements of 2005 whose Art. 29 and 30 treat such organisations as a state.

⁹ See the status of ratifications at UNCITRAL.

¹⁰ In the same sense *U. Schroeter*, UN-Kaufrecht und Europäisches Gemeinschaftsrecht. Verhältnis und Wechselwirkungen (2005) 354 s.

4. Like the other regions Europe with CESL attempts as well to achieve a primarily¹¹ regional variant of sales law unification. The EU does not extend the CISG to all its Member States and to the trade between them; it would also be doubtful if it had the competence so to do; however, it could, like the OHADA, enact a Regulation containing the CISG provisions as EU law for transborder sales. But though the aim of a regionalised sales law is more or less identical CESL's method differs from all of the other models. The most obvious difference is CESL's optional character: in contrast to the other models the EU relies on an opt-in solution. The future will tell whether this has any effect in practice. The EU further relies on a threefold layer: first, domestic sales law of the Member States (though already harmonised to a moderate extent by the Consumer Sales Directive), secondly, the CISG for international sales even within the EU, and thirdly, the optional CESL.

In comparison to the UCC it is hardly imaginable that CESL can bring about a comparable unification of the national sales laws of the EU Member States as does the UCC for the single US States. On the one hand, this is all the more remarkable because in the US the unification is achieved by way of recommendation (to the single States' legislators) not by central legislation. On the other hand, the almost uniform Common Law background and Common Law tradition that is present both in the United States (except Louisiana) and in Australia is lacking in Europe.

In contrast to the UCC CESL instead operates by way of the directly applicable central Regulation which here however in essence gives a mere recommendation to the parties of sales transactions. Its function is not much more than an offer of certain standard terms. For this reason it is also unnecessary that the EU or its CISG Member States make a declaration according to Art. 94 CISG. CESL does not unify the sales law for the EU-internal market but merely permits parties to opt for a single law for their sales transactions. Compared to the American scene the approach is less ambitious with respect to unification but more flexible if compared to the OHADA approach.

For international sales even between EU Member States CESL leaves the CISG unaffected. The relationship between the two is clearer than the relationship between the OHADA Sales Law and the CISG. To offer an option for a slightly different law for international commercial sales than the CISG already provides for is not entirely convincing. Seen alone under the aspect of international commercial sales transactions there is no need for CESL. The globalisation of trade relations requires on the contrary globalised law as well. Yet, insofar CESL's optional character is a more convincing solution than to replace the CISG by a modified copy as the OHADA Sales Law does. CESL's advantage, however, may be seen in its all-embracing approach. If EU Member States so

¹¹ CESL covers however also sales with parties from outside the EU; see Art. 4 (2) and (3) (b) Chapeau Regulation according to which only one of the parties must have its seat or address in an EU Member State.

enact,¹² CESL can be opted for all kinds of domestic sales, consumer sales and international sales. Ideally, one set of rules, the CESL, would serve all purposes and fit all possible sales situations.

In essence, even though many details of CESL could benefit from improvement, this innovative instrument of approximating sales law should be given a chance. It can prove whether or not an optional instrument can effectively promote uniformity of law.

¹² See Art. 13 Chapeau Regulation.

Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law

11 October 2011, COM(2011) 635 final

Explanatory Memorandum

1. Context of the proposal

- **Grounds for and objectives of the proposal**

Differences in contract law between Member States hinder traders and consumers who want to engage in cross-border trade within the internal market. The obstacles which stem from these differences dissuade traders, small and medium-sized enterprises (SME) in particular, from entering cross border trade or expanding to new Member States' markets. Consumers are hindered from accessing products offered by traders in other Member States.

Currently, only one in ten of Union traders, involved in the sale of goods, exports within the Union and the majority of those who do only export to a small number of Member States. Contract law related barriers are one of the major factors contributing to this situation. Surveys¹ show that out of the range of obstacles to cross-border trade including tax regulations, administrative requirements, difficulties in delivery, language and culture, traders ranked contract-law-related obstacles among the top barriers to cross-border trade.

The need for traders to adapt to the different national contract laws that may apply in cross-border dealings makes cross-border trade more complex and costly compared to domestic trade, both for business-to-consumer and for business-to-business transactions.

Additional transaction costs compared to domestic trade usually occur for traders in cross-border situations. They include the difficulty in finding out about the provisions of an applicable foreign contract law, obtaining legal advice, negotiating the applicable law in business-to-business transactions and adapting contracts to the requirements of the consumer's law in business-to-consumer transactions.

In cross-border transactions between a business and a consumer, contract law related transaction costs and legal obstacles stemming from differences between different national mandatory consumer protection rules have a significant impact. Pursuant to Article 6 of Regulation 593/2008 of the European Parliament and of the Council of

¹ Eurobarometers 320 on European contract law in business-to-business transactions of 2011, p. 15 and Eurobarometer 321 on European contract law in consumer transactions of 2011, p. 19.

17 June 2008 on the law applicable to contractual obligations (Rome I),² whenever a business directs its activities to consumers in another Member State, it has to comply with the contract law of that Member State. In cases where another applicable law has been chosen by the parties and where the mandatory consumer protection provisions of the Member State of the consumer provide a higher level of protection, these mandatory rules of the consumer's law need to be respected. Traders therefore need to find out in advance whether the law of the Member State of the consumer's habitual residence provides a higher level of protection and ensure that their contract is in compliance with its requirements. The existing harmonisation of consumer law at Union level has led to a certain approximation in some areas but the differences between Member States' laws remain substantial. In e-commerce transactions, traders incur further contract law related costs which stem from the need to adapt the business's website to the legal requirements of each Member State where they direct their activity.

In cross-border transactions between traders, parties are not subject to the same restrictions on the applicable law. However, the economic impact of negotiating and applying a foreign law is also high. The costs resulting from dealings with various national laws are burdensome particularly for SME. In their relations with larger companies, SME generally have to agree to apply the law of their business partner and bear the costs of finding out about the content of the foreign law applicable to the contract and of complying with it. In contracts between SME, the need to negotiate the applicable law is a significant obstacle to cross-border trade. For both types of contracts (business-to-business and business-to-consumer) for SME, these additional transaction costs may even be disproportionate to the value of the transaction.

These additional transaction costs grow proportionately to the number of Member States into which a trader exports. Indeed, the more countries they export to, the greater the importance traders attach to differences in contract law as a barrier to trade. SME are particularly disadvantaged: the smaller a company's turnover, the greater the share of transaction costs.

Traders are also exposed to increased legal complexity in cross-border trade, compared to domestic trade, as they often have to deal with multiple national contract laws with differing characteristics.

Dealing with foreign laws adds complexity to cross-border transactions. Traders ranked the difficulty in finding out the provisions of a foreign contract law first among the obstacles to business-to-consumer transactions and third for business-to-business transactions.³ Legal complexity is higher when trading with a country whose legal system is fundamentally different while it has been demonstrated empirically that bilateral trade between countries which have a legal system based on a common origin is much higher than trade between two countries without this commonality.⁴

² OJ L 177, 4.7.2008, p. 6.

³ Eurobarometer 320 on European contract law in business-to-business transactions of 2011, p. 15 and Eurobarometer 321 on European contract law in consumer transactions of 2011, p. 19.

⁴ A. Turrini and T. Van Ypersele, *Traders, courts and the border effect puzzle*, Regional Science and Urban Economics, 40, 2010, p. 82: "Analysing international trade across OECD countries we show that controlling for countries specific factors, distance, the presence

Thus, differences in contract law and the additional transaction costs and complexity that they generate in cross-border transactions dissuade a considerable number of traders, in particular SME, from expanding into markets of other Member States. These differences also have the effect of limiting competition in the internal market. The value of the trade foregone each year between Member States due to differences in contract law alone amounts to tens of billions of Euros.

The missed opportunities for cross-border trade also have a negative impact upon European consumers. Less cross-border trade, results in fewer imports and less competitiveness between traders. This can lead to a more limited choice of products at a higher price in the consumer's market.

While cross-border shopping could bring substantial economic advantages of more and better offers, the majority of European consumers shop only domestically. One of the important reasons for this situation is that, because of the differences of national laws consumers are often uncertain about their rights in cross-border situations. For example, one of their main concerns is what remedies they have when a product purchased from another Member State is not in conformity with the contract. Many consumers are therefore discouraged to purchase outside their domestic market. They miss out on opportunities in the internal market, since better offers in terms of quality and price can often be found in another Member State.

E-commerce facilitates the search for offers as well as the comparison of prices and other conditions irrespective of where a trader is established. However, when consumers try to place orders with a business from another Member State, they are often faced with the business practice of refusal to sell which is often due to differences in contract law.

The overall **objective** of the proposal is to improve the establishment and the functioning of the internal market by facilitating the expansion of cross-border trade for business and cross-border purchases for consumers. This objective can be achieved by making available a self-standing uniform set of contract law rules including provisions to protect consumers, the Common European Sales Law, which is to be considered as a second contract law regime within the national law of each Member State.

Traders should be able to apply the Common European Sales Law in all their cross-border dealings within the European Union instead of having to adapt to different national contract laws, provided that the other party to the contract agrees. It should cover the full life cycle of a contract and thus comprise most of the areas which are relevant when concluding cross-border contracts. As a result, the need for traders to find out about the national laws of other Member States would be limited to only some, much less important, matters which are not covered by the Common European Sales Law. In business-to-consumer transactions there would be no further need to identify the mandatory consumer protection provisions in the consumer's law, since the Common European Sales Law would contain fully harmonised consumer protection rules providing for a high standard of protection throughout the whole of the European Union. In cross-border transactions between traders, negotiations about the applicable law could run more smoothly, as the contracting parties would have the opportunity to agree on

of common border and common language [...], similar legal systems have a significant impact on trade [...]. If two countries share common origins for their legal system, on average they exhibit trade flows 40 % larger.”

the use of the Common European Sales Law – equally accessible to both of them – to govern their contractual relationship.

As a direct consequence, traders could save on the additional contract law related transaction costs and could operate in a less complex legal environment for cross-border trade on the basis of a single set of rules across the European Union. Thus, traders would be able to take better advantage of the internal market by expanding their trade across borders and, consequently, competition in the internal market would increase. Consumers would benefit from better access to offers from across the European Union at lower prices and would face fewer refusals of sales. They would also enjoy more certainty about their rights when shopping cross-border on the basis of a single set of mandatory rules which offer a high level of consumer protection.

General context

With its Communication of 2001,⁵ the Commission launched a process of extensive public consultation on the fragmented legal framework in the area of contract law and its hindering effects on cross-border trade. In July 2010, the Commission launched a public consultation by publishing a ‘Green Paper on policy options for progress towards a European contract law for consumers and businesses’ (Green Paper), which set out different policy options on how to strengthen the internal market by making progress in the area of European contract law.

In response to the Green Paper, the European Parliament issued a Resolution on 8 June 2011 in which it expressed its strong support for an instrument which would improve the establishment and the functioning of the internal market and bring benefits to traders, consumers and Member States’ judicial systems.

The Commission Communication ‘Europe 2020’ recognises the need to make it easier and less costly for traders and consumers to conclude contracts with partners in other Member States, notably by making progress towards an optional European contract law. The Digital Agenda for Europe⁶ envisages an optional instrument in European contract law to overcome the fragmentation of contract law and boost consumer confidence in e-commerce.

• Existing provisions in the area of the proposal

There are significant differences between the contract laws in the Member States. The Union initially started to regulate in the field of contract law by means of minimum harmonisation Directives adopted in the field of consumer protection law. The minimum harmonisation approach meant that Member States had the possibility to maintain or introduce stricter mandatory requirements than those provided for in the *acquis*. In practice, this approach has led to divergent solutions in the Member States even in areas which were harmonised at Union level. In contrast, the recently adopted Consumer

⁵ COM (2001) 398, 11.7.2001.

⁶ COM (2010) 245 final, 26.8.2010, p. 13.

Rights Directive fully harmonises the areas of pre-contractual information to be given to consumers, the consumer's right of withdrawal in distance and off-premises contracts, as well as certain aspects of delivery of goods and passing of risk.

In respect of relations between traders, the Union has regulated the area of combating late payments by setting up rules on minimum interest rates. At international level, the Vienna Convention on International Sales of Goods (the Vienna Convention) applies by default whenever the parties have not chosen to apply another law. The Vienna Convention regulates certain aspects in contracts of sales of goods but leaves important matters outside its scope, such as defects in consent, unfair contract terms and prescription. Further limitations to its applicability arise as not all Member States have signed the Vienna Convention⁷ and there is no mechanism which could ensure its uniform interpretation.

Some Union legislation is relevant for both business-to-consumer and business-to-business relations. The E-commerce Directive⁸ contains rules on the validity of contracts concluded by electronic means and on certain pre-contractual requirements.

In the field of private international law, the Union has adopted instruments on choice of law, in particular Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I),⁹ and, in relation to pre-contractual information duties, Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).¹⁰ The first of those instruments sets out rules for determining the applicable law in the area of contractual obligations and the second in the field of non-contractual obligations, including those which arise from pre-contractual statements.

The Rome I Regulation and Rome II Regulation will continue to apply and will be unaffected by the proposal. It will still be necessary to determine the applicable law for cross-border contracts. This will be done by the normal operation of the Rome I Regulation. It can be determined by the parties themselves (Article 3 of the Rome I Regulation) and, if they do not do so, this will be done on the basis of the default rules in Article 4 of the Rome I Regulation. As regards consumer contracts, under the conditions of Article 6(1) of the Rome I Regulation, if the parties have not chosen the applicable law, that law is the law of the habitual residence of the consumer.

The Common European Sales Law will be a second contract law regime within the national law of each Member State. Where the parties have agreed to use the Common European Sales Law, its rules will be the only national rules applicable for matters falling within its scope. Where a matter falls within the scope of the Common European Sales Law, there is thus no scope for the application of any other national rules. This agreement to use the Common European Sales Law is a choice between two different sets of sales law within the same national law and does therefore not amount to, and must not be

⁷ Exceptions are the UK, Ireland, Portugal and Malta.

⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1-16.

⁹ OJ L 177, 4.7.2008, p. 6.

¹⁰ OJ L 199, 31.7.2007, p. 40.

confused with, the previous choice of the applicable law within the meaning of private international law rules.

Since the Common European Sales Law will not cover every aspect of a contract (e.g. illegality of contracts, representation) the existing rules of the Member State's civil law that is applicable to the contract will still regulate such residual questions.

Under the normal operation of the Rome I Regulation there are however restrictions to the choice of law for business-to-consumer transactions. If the parties choose in business-to-consumer transactions the law of another Member State than the consumer's law, such a choice may under the conditions of Article 6(1) of the Rome I Regulation not deprive the consumer of the protection of the mandatory provisions of the law of his habitual residence (Article 6 (2) of the Rome I Regulation). The latter provision however can have no practical importance if the parties have chosen within the applicable national law the Common European Sales Law. The reason is that the provisions of the Common European Sales Law of the country's law chosen are identical with the provisions of the Common European Sales Law of the consumer's country. Therefore the level of the mandatory consumer protection laws of the consumer's country is not higher and the consumer is not deprived of the protection of the law of his habitual residence.

- **Consistency with the other policies and objectives of the Union**

This proposal is consistent with the objective of attaining a high level of consumer protection as it contains mandatory rules of consumer protection from which the parties cannot derogate to the detriment of the consumer. Furthermore, the level of protection of these mandatory provisions is equal or higher than the current *acquis*.

The proposal is also consistent with the Union policy of helping SME benefit more from the opportunities offered by the internal market. The Common European Sales Law can be chosen in contracts between traders where at least one of them is an SME, drawing upon the Commission Recommendation 2003/361¹¹ concerning the definition of micro, small and medium-sized enterprises while taking into account future developments.

Finally, the proposal is consistent with the international trade policy of the Union, in that it does not discriminate against parties from third countries who could also choose to apply the Common European Sales Law as long as one party to the contract is established in a Member State.

This proposal is without prejudice to future Commission initiatives concerning the liability for infringements of the Treaty on the functioning of the European Union, for example relating to the competition rules.

¹¹ OJ L 124, 20.5.2003, p. 36.

2. Results of consultations with the interested parties and impact assessments

• Consultation of interested parties

With the publication of the Green Paper, the Commission launched an extensive public consultation which closed on 31 January 2011. In response to the Green Paper consultation, the Commission received 320 replies from all categories of stakeholders from across the Union. Many respondents saw value in Option 1 (publication of the results of the Expert Group) and Option 2 (a toolbox for the Union legislator). Option 4 (an optional instrument of European contract law) received support either independently or in combination with a toolbox from several Member States as well as other stakeholders; provided that it fulfilled certain conditions, such as a high level of consumer protection, and clarity and user-friendliness of the provisions. One of the main concerns in the stakeholders' responses to the Green Paper was the lack of clarity in relation to the substantive content of a possible European contract law instrument. The Commission addressed this concern by giving stakeholders the opportunity to comment on the Feasibility Study developed by the Expert Group on a European contract law.

The Green Paper responses also expressed preferences for the material scope of the instrument. As a result, the proposal focuses on contracts for the sale of goods.

By a Decision of 26 April 2010,¹² the Commission set up the Expert Group on European contract law. This Group was tasked with developing a Feasibility Study on a possible future European contract law instrument covering the main aspects which arose in practice in cross-border transactions.

A key stakeholder group (businesses and consumer associations, representatives of the banking and insurance sectors and of the legal professions of lawyers and notaries) was set up in September 2010 with the purpose of giving practical input to the Expert Group on the user-friendliness of the rules developed for the Feasibility Study. The Feasibility Study was published on 3 May 2011 and an informal consultation was open until 1 July 2011.

• Impact Assessment

The Impact Assessment (IA) analysed the seven policy options set out in the Green Paper; the IA Report contains the full description and analysis of these options.

These options were: the baseline scenario (no policy change), a toolbox for the legislator, a Recommendation on a Common European Sales Law, a Regulation setting up an optional Common European Sales Law, a Directive (full or minimum harmonisation) on a mandatory Common European Sales Law, a Regulation establishing a European contract law and a Regulation establishing a European Civil Code.

On a comparative analysis of the impacts of these options, the IA Report arrived at the conclusion that the options of an optional uniform contract law regime, a full harmonisation Directive and a Regulation establishing a mandatory uniform contract

¹² OJ L 105, 27.4.2010, p. 109.

law regime would meet the policy objectives. While the latter two would considerably reduce transaction costs for traders and offer a less complex legal environment for those wishing to trade cross-border, these options would however also create a considerable burden for traders as those who only traded domestically would also need to adapt to a new legislative framework. The costs attached to familiarise themselves with such a new mandatory law would be particularly significant when compared to an optional uniform contract law regime, because they would impact upon all traders. An optional uniform contract law regime would on the other hand only create one-off costs for those traders wishing to use it for their cross-border trade. The establishment of an optional uniform contract law regime was therefore reasoned to be the most proportionate action as it would reduce transaction costs experienced by traders exporting to several Member States and give consumers more product choice at a lower price. It would also, at the same time increase the level of consumer protection offered to consumers who shopped across a border thereby creating confidence as they would experience the same set of rights across the Union.

3. Legal elements of the proposal

- **Summary of the proposed action**

The Proposal provides for the establishment of a Common European Sales Law. It harmonises the national contract laws of the Member States not by requiring amendments to the pre-existing national contract law, but by creating within each Member State's national law a second contract law regime for contracts covered by its scope that is identical throughout the European Union and will exist alongside the pre-existing rules of national contract law. The Common European Sales Law will apply on a voluntary basis, upon an express agreement of the parties, to a cross-border contract.

- **Legal basis**

This proposal is based on Article 114 Treaty on the Functioning of the European Union (TFEU).

The proposal provides for a single uniform set of fully harmonised contract law rules including consumer protection rules in the form of a Common European Sales Law which is to be considered as a second contract law regime within the national law of each Member State available in cross-border transactions upon a valid agreement by the parties. This agreement does not amount to, and must not be confused with, a choice of the applicable law within the meaning of private international law rules. Instead, this choice is made within a national law which is applicable according to the private international law rules.

This solution has as its objective the establishment and the functioning of the internal market. It would remove obstacles to the exercise of fundamental freedoms which result from differences between national laws, in particular from the additional transaction costs and perceived legal complexity experienced by traders when concluding cross-

border transactions and the lack of confidence in their rights experienced by consumers when purchasing from another EU country – all of which have a direct effect on the establishment and functioning of the internal market and limit competition.

In accordance with Article 114 (3) TFEU, the Common European Sales Law would guarantee a high level of consumer protection by setting up its own set of mandatory rules which maintain or improve the level of protection that consumers enjoy under the existing EU consumer law.

• **Subsidiarity principle**

The proposal complies with the subsidiarity principle as set out in Article 5 of the Treaty on European Union (TEU).

The objective of the proposal – i.e. to contribute to the proper functioning of the internal market by making available a voluntary uniform set of contract law rules – has a clear cross-border dimension and cannot be sufficiently achieved by the Member States in the framework of their national systems.

As long as differences of national contract laws continue to create significant additional transaction costs for cross-border transactions, the objective of completing the internal market by facilitating the expansion of cross-border trade for traders and cross-border purchases for consumers cannot be fully achieved.

By adopting un-coordinated measures at the national level, Member States will not be able to remove the additional transaction costs and legal complexity stemming from differences in national contract laws that traders experience in cross-border trade in the EU. Consumers will continue to experience reduced choice and limited access to products from other Member States. They will also lack the confidence which comes from knowledge of their rights.

The objective of the proposal could therefore be better achieved by action at Union level, in accordance with the principle of subsidiarity. The Union is best placed to address the problems of legal fragmentation by a measure taken in the field of contract law which approximates the rules applicable to cross-border transactions. Furthermore, as market trends evolve and prompt Member States to take action independently, for example in regulating the emerging digital content market, regulatory divergences leading to increased transaction costs and gaps in the protection of consumers are likely to grow.

• **Proportionality principle**

The proposal complies with the principle of proportionality as set out in Article 5 TEU.

The scope of the proposal is confined to the aspects which pose real problems in cross-border transactions and does not extend to aspects which are best addressed by national laws. In respect of the material scope, the proposal contains provisions regulating the rights and obligations of the parties during the life-cycle of the contract, but it does not touch for example, upon the rules on representation which are less likely to become litigious. In terms of territorial scope, the proposal covers cross-border situations where the problems of additional transactions costs and legal complexity arise. Finally,

the personal scope of the proposal is limited to transactions where the internal market problems are mainly found, i.e. business-to-business relations where at least one of the parties is an SME and business-to-consumer relations. Contracts concluded between private individuals and contracts between traders none of which is an SME are not included, as there is no demonstrable need for action for these types of cross-border contracts. The Regulation leaves Member States two options: to decide to make the Common European Sales Law also available to parties for use in an entirely domestic setting and to contracts concluded between traders neither of which is an SME.

The proposal is a proportionate action, when compared to other possible solutions analysed, because of the optional and voluntary nature of the Common European Sales Law. This means that its application is dependent upon an agreement by the parties to a contract whenever it is jointly considered beneficial for a particular cross-border transaction. The fact that the Common European Sales Law represents an optional set of rules applying only in cross-border cases means also that it can lower barriers to cross-border trade without interfering with deeply embedded national legal systems and traditions. The Common European Sales Law will be an optional regime in addition to pre-existing contract law rules without replacing them. Thus the legislative measure will only go as far as necessary to create further opportunities for traders and consumers in the single market.

- **Choice of instruments**

The instrument chosen for this initiative is a Regulation on an optional Common European Sales Law.

A non-binding instrument such as a toolbox for the EU legislator or a Recommendation addressed to Member States would not achieve the objective to improve the establishment and functioning of the internal market. A Directive or a Regulation replacing national laws with a non-optional European contract law would go too far as it would require domestic traders who do not want to sell across borders to bear costs which are not outweighed by the cost savings that only occur when cross-border transactions take place. In addition, a Directive setting up minimum standards of a non-optional European contract law would not be appropriate since it would not achieve the level of legal certainty and the necessary degree of uniformity to decrease the transaction costs.

4. Budgetary implication

After the adoption of the proposal, the Commission will set up a database for the exchange of information concerning final judgments referring to the Common European Sales Law or any other provision of the Regulation, as well as relevant judgements of the Court of Justice of the European Union. The costs associated with this data-base are likely to grow as more final judgments become available. At the same time, the Commission will organise training sessions for legal practitioners using the Common European Sales

Law.¹³ These costs are likely to decrease with time, as knowledge about how the Common European Sales Law works spreads.

5. Additional information

• Simplification

The proposal for an optional second contract law regime has the advantage that, without replacing the national contract laws in the Member States, it allows parties to use one single set of contract law rules across the EU. This self-standing, uniform set of rules has the potential of offering parties a solution to the most prevalent problems which could arise in cross-border situations in relation to contract law. Therefore, for traders this option would eliminate the need for research of different national laws. To help consumers understand their rights in the Common European Sales Law, a standard information notice would be presented to them which would inform them about their rights.

Finally, the proposal has the potential of ensuring the future coherence of the EU legislation in other policy areas where contract law becomes relevant.

• Review clause

The proposal provides for a review of the application of the Common European Sales Law or any other provision of the Regulation 5 years after its date of application, taking into account, amongst others, the need to extend further the scope in relation to business-to-business contracts, market and technological developments in respect of digital content and future developments of the Union acquis. For this purpose, the Commission will submit a report, if necessary accompanied by proposals to amend the Regulation, to the European Parliament, the Council and the European Economic and Social Committee.

• European Economic Area

The proposed Regulation concerns an EEA matter and should therefore extend to the EEA.

• Explanation of the proposal

The proposal consists of three main parts: a Regulation, Annex I to the Regulation containing the contract law rules (the Common European Sales Law) and Annex II containing a Standard Information Notice.

¹³ Commission Communication on Building Trust in EU-wide Justice: a New Dimension to European Judicial Training, COM (2011) 551 final, 13.9.2011.

A. The Regulation

Article 1 sets out the objective and subject matter of the Regulation.

Article 2 contains a list of definitions for terms used in the Regulation. While some definitions already exist in the relevant *acquis*, others are concepts defined here for the first time.

Article 3 explains the optional nature of the contract law rules in cross-border contracts for sale of goods, supply of digital content and provision of related services.

Article 4 sets out the territorial scope of the Regulation which is limited to cross-border contracts.

Article 5 states the material scope of contracts for sale of goods and supply of digital content and related services, such as installation and repair.

Article 6 excludes mixed-purposes contracts and instalment sales from the scope of application.

Article 7 describes the personal scope of application which extends to business-to-consumer and those business-to-business contracts where at least one party is an SME.

Article 8 explains that the choice for the Common European Sales Law requires an agreement of the parties to that effect. In contracts between a business and a consumer, the choice of the Common European Sales Law is valid only if the consumer's consent is given by an explicit statement separate from the statement indicating the agreement to conclude a contract.

Article 9 contains several information requirements about the Common European Sales Law in contracts between a trader and a consumer. In particular the consumer shall receive the information notice in Annex II.

Article 10 requires Member States to ensure that there are sanctions in place for breaches by the traders of the duty to comply with the special requirements established by Articles 8 and 9.

Article 11 explains that as a consequence of the valid choice of the Common European Sales Law this is the only applicable law for the matters addressed in its rules and that consequently other national rules do not apply for matters falling within its scope. The choice of the Common European Sales Law operates retroactively to cover compliance with and remedies for failure to comply with the pre-contractual information duties.

Article 12 clarifies that the Regulation is without prejudice to the information requirements of Directive 2006/123/EC on services in the internal market.¹⁴

Article 13 presents the possibility for Member States to enact legislation which makes the Common European Sales Law available to parties for use in an entirely domestic setting and for contracts between traders, neither of which is an SME.

Article 14 requires Member States to notify final judgments of their courts which give an interpretation of the provisions of the Common European Sales Law or any other provision of the Regulation. The Commission will set up a database of such judgments.

Article 15 contains a review clause.

Article 16 provides that the Regulation will enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

¹⁴ OJ L 376, 27.12.2006, p. 36.

B. Annex I

Annex I contains the text of the Common European Sales Law.

Part I 'Introductory provisions' sets out the general principles of contract law which all parties need to observe in their dealings, such as good faith and fair dealing. The principle of freedom of contract also assures parties that, unless rules are explicitly designated as mandatory, for example rules of consumer protection, they can deviate from the rules of the Common European Sales Law.

Part II 'Making a binding contract' contains provisions on the parties' right to receive essential pre-contractual information and rules on how agreements are concluded between two parties. This part also contains specific provisions which give consumers a right to withdraw from distance and off-premises contracts. Finally it includes provisions on avoidance of contracts resulting from mistake, fraud, threat or unfair exploitation.

Part III 'Assessing what is in the contract' makes general provisions for how contract terms need to be interpreted in case of doubt. It also contains rules on the content and effects of contracts as well as which contract terms may be unfair and are therefore invalid.

Part IV 'Obligations and remedies of the parties to a sales contract' looks closely at the rules specific to sales contracts and contracts for the supply of digital content which contain the obligations of the seller and of the buyer. This part also contains rules on the remedies for non-performance of buyers and sellers.

Part V 'Obligations and remedies of the parties to a related services contract' concerns cases where a seller provides, in close connection to a contract of sale of goods or supply of digital content, certain services such as installation, repair or maintenance. This part explains what specific rules apply in such a situation, in particular what the parties' rights and obligations under such contracts are.

Part VI 'Damages and interest' contains supplementary common rules on damages for loss and on interest to be paid for late payment.

Part VII 'Restitution' explains the rules which apply on what must be returned when a contract is avoided or terminated.

Part VIII 'Prescription' regulates the effects of the lapse of time on the exercise of rights under a contract.

Appendix 1 contains the Model instruction on withdrawal that must be provided by the trader to the consumer before a distance or an off-premises contract is concluded, while *Appendix 2* provides for a Model withdrawal form.

C. Annex II

Annex II comprises the Standard Information Notice on the Common European Sales Law that must be provided by the trader to the consumer before an agreement to use of the Common European Sales Law is made.

Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee,¹⁵

Having regard to the opinion of the Committee of the Regions,¹⁶

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) There are still considerable bottlenecks to cross-border economic activity that prevent the internal market from exploiting its full potential for growth and job creation. Currently, only one in ten traders in the Union exports goods within the Union and the majority of those who do, only export to a small number of Member States. From the range of obstacles to cross-border trade including tax regulations, administrative requirements, difficulties in delivery, language and culture, traders consider the difficulty in finding out the provisions of a foreign contract law among the top barriers in business-to-consumer transactions and in business-to-business transactions. This also leads to disadvantages for consumers due to limited access to goods. Different national contract laws therefore deter the exercise of fundamental freedoms, such as the freedom to provide goods and services, and represent a barrier to the functioning and continuing establishment of the internal market. They also have the effect of limiting competition, particularly in the markets of smaller Member States.
- (2) Contracts are the indispensable legal tool for every economic transaction. However, the need for traders to identify or negotiate the applicable law, to find out about the provisions of a foreign applicable law often involving translation, to obtain legal advice to make themselves familiar with its requirements and to adapt their contracts to different national laws that may apply in cross-border dealings makes cross-border trade more complex and costly compared to domestic trade. Contract-law-related barriers are thus a major contributing factor in dissuading a considerable number of export-oriented traders from entering cross-border trade or expanding their operations into more Member States. Their deterrent effect is particularly strong for small and medium-sized enterprises (SME) for which the costs of entering multiple foreign markets are often particularly high in relation to their turnover. As a consequence, traders miss out on cost savings they could achieve if it were possible to market goods and services on the basis of one uniform contract law for all their cross-border transactions and, in the online environment, one single web-site.
- (3) Contract law related transaction costs which have been shown to be of considerable proportions and legal obstacles stemming from the differences between national

¹⁵ OJ C , , p. .

¹⁶ OJ C , , p. .

mandatory consumer protection rules have a direct effect on the functioning of the internal market in relation to business-to-consumer transactions. Pursuant to Article 6 of Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Regulation (EC) No 593/2008),¹⁷ whenever a trader directs its activities to consumers in another Member State the consumer protection provisions of the Member State of the consumer's habitual residence that provide a higher level of protection and cannot be derogated from by agreement by virtue of that law will apply, even where another applicable law has been chosen by the parties. Therefore, traders need to find out in advance whether the consumer's law provides higher protection and ensure that their contract is in compliance with its requirements. In addition, in e-commerce, web-site adaptations which need to reflect mandatory requirements of applicable foreign consumer contract laws entail further costs. The existing harmonisation of consumer law at Union level has led to a certain approximation in some areas. However the differences between Member States' laws remain substantial; existing harmonisation leaves Member States a broad range of options on how to comply with the requirements of Union legislation and where to set the level of consumer protection.

- (4) The contract-law-related barriers which prevent traders from fully exploiting the potential of the internal market also work to the detriment of consumers. Less cross-border trade results in fewer imports and less competition. Consumers may be disadvantaged by a limited choice of goods at higher prices both because fewer foreign traders offer their products and services directly to them and also indirectly as a result of restricted cross-border business-to-business trade at the wholesale level. While cross-border shopping could bring substantial economic advantages in terms of more and better offers, many consumers are also reluctant to engage in cross-border shopping, because of the uncertainty about their rights. Some of the main consumer concerns are related to contract law, for instance whether they would enjoy adequate protection in the event of purchasing defective products. As a consequence, a substantial number of consumers prefer to shop domestically even if this means they have less choice or pay higher prices.
- (5) In addition, those consumers who want to benefit from price differences between Member States by purchasing from a trader from another Member State are often hindered due to a trader's refusal to sell. While e-commerce has greatly facilitated the search for offers as well as the comparison of prices and other conditions irrespective of where a trader is established, orders by consumers from abroad are very frequently refused by traders which refrain from entering into cross-border transactions.
- (6) Differences in national contract laws therefore constitute barriers which prevent consumers and traders from reaping the benefits of the internal market. Those contract-law-related barriers would be significantly reduced if contracts could be based on a single uniform set of contract law rules irrespective of where parties are established. Such a uniform set of contract law rules should cover the full life cycle of a contract and thus comprise the areas which are the most important when concluding contracts. It should also include fully harmonised provisions to protect consumers.

¹⁷ OJ L 177, 4.7.2008, p. 6.

- (7) The differences between national contract laws and their effect on cross-border trade also serve to limit competition. With a low level of cross-border trade, there is less competition, and thus less incentive for traders to become more innovative and to improve the quality of their products or to reduce prices. Particularly in smaller Member States with a limited number of domestic competitors, the decision of foreign traders to refrain from entering these markets due to costs and complexity may limit competition, resulting in an appreciable impact on choice and price levels for available products. In addition, the barriers to cross-border trade may jeopardise competition between SME and larger companies. In view of the significant impact of the transaction costs in relation to turnover, an SME is much more likely to refrain from entering a foreign market than a larger competitor.
- (8) To overcome these contract-law-related barriers, parties should have the possibility to agree that their contracts should be governed by a single uniform set of contract law rules with the same meaning and interpretation in all Member States, a Common Sales Law. The Common European Sales Law should represent an additional option increasing the choice available to parties and open to use whenever jointly considered to be helpful in order to facilitate cross-border trade and reduce transaction and opportunity costs as well as other contract-law-related obstacles to cross-border trade. It should become the basis of a contractual relationship only where parties jointly decide to use it.
- (9) This Regulation establishes a Common European Sales Law. It harmonises the contract laws of the Member States not by requiring amendments to the pre-existing national contract law, but by creating within each Member State's national law a second contract law regime for contracts within its scope. This second regime should be identical throughout the Union and exist alongside the pre-existing rules of national contract law. The Common European Sales Law should apply on a voluntary basis, upon an express agreement of the parties, to a cross-border contract.
- (10) The agreement to use the Common European Sales Law should be a choice exercised within the scope of the respective national law which is applicable pursuant to Regulation (EC) No 593/2008 or, in relation to pre-contractual information duties, pursuant to Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Regulation (EC) No 864/2007),¹⁸ or any other relevant conflict of law rule. The agreement to use the Common European Sales Law should therefore not amount to, and not be confused with, a choice of the applicable law within the meaning of the conflict-of-law rules and should be without prejudice to them. This Regulation will therefore not affect any of the existing conflict of law rules.
- (11) The Common European Sales Law should comprise of a complete set of fully harmonised mandatory consumer protection rules. In line with Article 114(3) of the Treaty, those rules should guarantee a high level of consumer protection with a view to enhancing consumer confidence in the Common European Sales Law and thus provide consumers with an incentive to enter into cross-border contracts on that basis. The rules should maintain or improve the level of protection that consumers enjoy under Union consumer law.

¹⁸ OJ L 199, 31.7.2007, p. 40.

- (12) Since the Common European Sales Law contains a complete set of fully harmonised mandatory consumer protection rules, there will be no disparities between the laws of the Member States in this area, where the parties have chosen to use the Common European Sales Law. Consequently, Article 6(2) Regulation (EC) No 593/2008, which is predicated on the existence of differing levels of consumer protection in the Member States, has no practical importance for the issues covered by the Common European Sales Law.
- (13) The Common European Sales Law should be available for cross-border contracts, because it is in that context that the disparities between national laws lead to complexity and additional costs and dissuade parties from entering into contractual relationships. The cross-border nature of a contract should be assessed on the basis of the habitual residence of the parties in business-to-business contracts. In a business-to-consumer contract the cross-border requirement should be met where either the general address indicated by the consumer, the delivery address for the goods or the billing address indicated by the consumer are located in a Member State, but outside the State where the trader has its habitual residence.
- (14) The use of the Common European Sales Law should not be limited to cross-border situations involving only Member States, but should also be available to facilitate trade between Member States and third countries. Where consumers from third countries are involved, the agreement to use the Common European Sales Law, which would imply the choice of a foreign law for them, should be subject to the applicable conflict-of-law rules.
- (15) Traders engaging in purely domestic as well as in cross-border trade transactions may also find it useful to make use of a single uniform contract for all their transactions. Therefore Member States should be free to decide to make the Common European Sales Law available to parties for use in an entirely domestic setting.
- (16) The Common European Sales Law should be available in particular for the sale of movable goods, including the manufacture or production of such goods, as this is the economically single most important contract type which could present a particular potential for growth in cross-border trade, especially in e-commerce.
- (17) In order to reflect the increasing importance of the digital economy, the scope of the Common European Sales Law should also cover contracts for the supply of digital content. The transfer of digital content for storage, processing or access, and repeated use, such as a music download, has been growing rapidly and holds a great potential for further growth but is still surrounded by a considerable degree of legal diversity and uncertainty. The Common European Sales Law should therefore cover the supply of digital content irrespective of whether or not that content is supplied on a tangible medium.
- (18) Digital content is often supplied not in exchange for a price but in combination with separate paid goods or services, involving a non-monetary consideration such as giving access to personal data or free of charge in the context of a marketing strategy based on the expectation that the consumer will purchase additional or more sophisticated digital content products at a later stage. In view of this specific market structure and of the fact that defects of the digital content provided may harm the economic interests of consumers irrespective of the conditions under which it has been provided, the avail-

ability of the Common European Sales Law should not depend on whether a price is paid for the specific digital content in question.

- (19) With a view to maximising the added value of the Common European Sales Law its material scope should also include certain services provided by the seller that are directly and closely related to specific goods or digital content supplied on the basis of the Common European Sales Law, and in practice often combined in the same or a linked contract at the same time, most notably repair, maintenance or installation of the goods or the digital content.
- (20) The Common European Sales Law should not cover any related contracts by which the buyer acquires goods or is supplied with a service, from a third party. This would not be appropriate because the third party is not part of the agreement between the contracting parties to use the rules of the Common European Sales Law. A related contract with a third party should be governed by the respective national law which is applicable according pursuant to Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict of law rule.
- (21) In order to tackle the existing internal market and competition problems in a targeted and proportionate fashion, the personal scope of the Common European Sales Law should focus on parties who are currently dissuaded from doing business abroad by the divergence of national contract laws with the consequence of a significant adverse impact on cross-border trade. It should therefore cover all business-to consumer transactions and contracts between traders where at least one of the parties is an SME drawing upon Commission Recommendation 2003/361 of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises.¹⁹ This should, however, be without prejudice to the possibility for Member States to enact legislation which makes the Common European Sales Law available for contracts between traders, neither of which is an SME. In any case, in business-to-business transactions, traders enjoy full freedom of contract and are encouraged to draw inspiration from the Common European Sales Law in the drafting of their contractual terms.
- (22) The agreement of the parties to a contract is indispensable for the application of the Common European Sales Law. That agreement should be subject to strict requirements in business-to-consumer transactions. Since, in practice, it will usually be the trader who proposes the use of the Common European Sales Law, consumers must be fully aware of the fact that they are agreeing to the use of rules which are different from those of their pre-existing national law. Therefore, the consumer's consent to use the Common European Sales Law should be admissible only in the form of an explicit statement separate from the statement indicating the agreement to the conclusion of the contract. It should therefore not be possible to offer the use of the Common European Sales Law as a term of the contract to be concluded, particularly as an element of the trader's standard terms and conditions. The trader should provide the consumer with a confirmation of the agreement to use the Common European Sales Law on a durable medium.
- (23) In addition to being a conscious choice, the consent of a consumer to the use of the Common European Sales Law should be an informed choice. The trader should therefore not only draw the consumer's attention to the intended use of the Com-

¹⁹ OJ L 124, 20.5.2003, p. 36.

mon European Sales Law but should also provide information on its nature and its salient features. In order to facilitate this task for traders, thereby avoiding unnecessary administrative burdens, and to ensure consistency in the level and the quality of the information communicated to consumers, traders should supply consumers with the standard information notice provided for in this Regulation and thus readily available in all official languages in the Union. Where it is not possible to supply the consumer with the information notice, for example in the context of a telephone call, or where the trader has failed to provide the information notice, the agreement to use the Common European Sales Law should not be binding on the consumer until the consumer has received the information notice together with the confirmation of the agreement and has subsequently expressed consent.

- (24) In order to avoid a selective application of certain elements of the Common European Sales Law, which could disturb the balance between the rights and obligations of the parties and adversely affect the level of consumer protection, the choice should cover the Common European Sales Law as a whole and not only certain parts of it.
- (25) Where the United Nations Convention on Contracts for the International Sale of Goods would otherwise apply to the contract in question, the choice of the Common European Sales Law should imply an agreement of the contractual parties to exclude that Convention.
- (26) The rules of the Common European Sales Law should cover the matters of contract law that are of practical relevance during the life cycle of the types of contracts falling within the material and personal scope, particularly those entered into online. Apart from the rights and obligations of the parties and the remedies for non-performance, the Common European Sales Law should therefore govern pre-contractual information duties, the conclusion of a contract including formal requirements, the right of withdrawal and its consequences, avoidance of the contract resulting from a mistake, fraud, threats or unfair exploitation and the consequences of such avoidance, interpretation, the contents and effects of a contract, the assessment and consequences of unfairness of contract terms, restitution after avoidance and termination and the prescription and preclusion of rights. It should settle the sanctions available in case of the breach of all the obligations and duties arising under its application.
- (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 legal personality, the invalidity of a contract arising from lack of capacity, illegality or immorality, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law and 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.
- (28) The Common European Sales Law should not govern any matters outside the remit of contract law. This Regulation should be without prejudice to the Union or national law in relation to any such matters. For example, information duties which are imposed for the protection of health and safety or environmental reasons should remain outside the

scope of the Common European Sales Law. This Regulation should further be without prejudice to the information requirements of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.²⁰

- (29) Once there is a valid agreement to use the Common European Sales Law, only the Common European Sales Law should govern the matters falling within its scope. The rules of the Common European Sales Law should be interpreted autonomously in accordance with the well-established principles on the interpretation of Union legislation. Questions concerning matters falling within the scope of the Common European Sales Law which are not expressly settled by it should be resolved only by interpretation of its rules without recourse to any other law. The rules of the Common European Sales Law should be interpreted on the basis of the underlying principles and objectives and all its provisions.
- (30) Freedom of contract should be the guiding principle underlying the Common European Sales Law. Party autonomy should be restricted only where and to the extent that this is indispensable, in particular for reasons of consumer protection. Where such a necessity exists, the mandatory nature of the rules in question should be clearly indicated.
- (31) The principle of good faith and fair dealing should provide guidance on the way parties have to cooperate. 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. The concrete requirements resulting from the principle of good faith and fair dealing should depend, amongst others, on the relative level of expertise of the parties and should therefore be different in business-to-consumer transactions and in business-to-business transactions. In transactions between traders, good commercial practice in the specific situation concerned should be a relevant factor in this context.
- (32) The Common European Sales Law should aim at the preservation of a valid contract whenever possible and appropriate in view of the legitimate interests of the parties.
- (33) The Common European Sales Law should identify well-balanced solutions taking account the legitimate interests of the parties in designating and exercising the remedies available in the case of non-performance of the contract. In business-to-consumer contracts the system of remedies should reflect the fact that the non-conformity of goods, digital content or services falls within the trader's sphere of responsibility.
- (34) In order to enhance legal certainty by making the case-law of the Court of Justice of the European Union and of national courts on the interpretation of the Common European Sales Law or any other provision of this Regulation accessible to the public, the Commission should create a database comprising the final relevant decisions. With a view to making that task possible, the Member States should ensure that such national judgments are quickly communicated to the Commission.
- (35) It is also appropriate to review the functioning of the Common European Sales Law or any other provision of this Regulation after five years of operation. The review should take into account, amongst other things, the need to extend further the scope in relation to business-to-business contracts, market and technological developments in respect of digital content and future developments of the Union acquis.

²⁰ OJ L 376, 27.12.2006, p. 36.

- (36) Since the objective of this Regulation, namely to contribute to the proper functioning of the internal market by making available a uniform set of contract law rules that can be used for cross-border transactions throughout the Union, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on the European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.
- (37) This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and specifically Articles 16, 38 and 47 thereof,

HAVE ADOPTED THIS REGULATION:

Article 1 – Objective and subject matter

1. The purpose of this Regulation is to improve the conditions for the establishment and the functioning of the internal market by making available a uniform set of contract law rules as set out in Annex I ('the Common European Sales Law'). These rules can be used for cross-border transactions for the sale of goods, for the supply of digital content and for related services where the parties to a contract agree to do so.
2. This Regulation enables traders to rely on a common set of rules and use the same contract terms for all their cross-border transactions thereby reducing unnecessary costs while providing a high degree of legal certainty.
3. In relation to contracts between traders and consumers, this Regulation comprises a comprehensive set of consumer protection rules to ensure a high level of consumer protection, to enhance consumer confidence in the internal market and encourage consumers to shop across borders.

Article 2 – Definitions

For the purpose of this Regulation, the following definitions shall apply:

- (a) 'contract' means an agreement intended to give rise to obligations or other legal effects;
- (b) 'good faith and fair dealing' means a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question;
- (c) 'loss' means economic loss and non-economic loss in the form of pain and suffering, excluding other forms of non-economic loss such as impairment of the quality of life and loss of enjoyment;
- (d) 'standard contract terms' means contract terms which have been drafted in advance for several transactions involving different parties, and which have not been individually negotiated by the parties within the meaning of Article 7 of the Common European Sales Law;
- (e) 'trader' means any natural or legal person who is acting for purposes relating to that person's trade, business, craft, or profession;
- (f) 'consumer' means any natural person who is acting for purposes which are outside that person's trade, business, craft, or profession;

- (g) 'damages' means a sum of money to which a person may be entitled as compensation for loss, injury or damage;
- (h) 'goods' means any tangible movable items; it excludes:
 - (i) electricity and natural gas; and
 - (ii) water and other types of gas unless they are put up for sale in a limited volume or set quantity;
- (i) 'price' means money that is due in exchange for goods sold, digital content supplied or a related service provided;
- (j) 'digital content' means data which are produced and supplied in digital form, whether or not according to the buyer's specifications, including video, audio, picture or written digital content, digital games, software and digital content which makes it possible to personalise existing hardware or software; it excludes:
 - (i) financial services, including online banking services;
 - (ii) legal or financial advice provided in electronic form;
 - (iii) electronic healthcare services;
 - (iv) electronic communications services and networks, and associated facilities and services;
 - (v) gambling;
 - (vi) the creation of new digital content and the amendment of existing digital content by consumers or any other interaction with the creations of other users;
- (k) 'sales contract' means any contract under which the trader ('the seller') transfers or undertakes to transfer the ownership of the goods to another person ('the buyer'), and the buyer pays or undertakes to pay the price thereof; it includes a contract for the supply of goods to be manufactured or produced and excludes contracts for sale on execution or otherwise involving the exercise of public authority;
- (l) 'consumer sales contract' means a sales contract where the seller is a trader and the buyer is a consumer;
- (m) 'related service' means any service related to goods or digital content, such as installation, maintenance, repair or any other processing, provided by the seller of the goods or the supplier of the digital content under the sales contract, the contract for the supply of digital content or a separate related service contract which was concluded at the same time as the sales contract or the contract for the supply of digital content; it excludes:
 - (i) transport services,
 - (ii) training services,
 - (iii) telecommunications support services; and
 - (iv) financial services;
- (n) 'service provider' means a seller of goods or supplier of digital content who undertakes to provide a customer with a service related to those goods or that digital content;
- (o) 'customer' means any person who purchases a related service;
- (p) 'distance contract' means any contract between the trader and the consumer under an organised distance sales scheme concluded without the simultaneous physical presence of the trader or, in case the trader is a legal person, a natural person representing the trader and the consumer, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded;
- (q) 'off-premises contract' means any contract between a trader and a consumer:

- (i) concluded in the simultaneous physical presence of the trader or, where the trader is a legal person, the natural person representing the trader and the consumer in a place which is not the trader's business premises, or concluded on the basis of an offer made by the consumer in the same circumstances; or
- (ii) concluded on the trader's business premises or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the trader's business premises in the simultaneous physical presence of the trader or, where the trader is a legal person, a natural person representing the trader and the consumer; or
- (iii) concluded during an excursion organised by the trader or, where the trader is a legal person, the natural person representing the trader with the aim or effect of promoting and selling goods or supplying digital content or related services to the consumer;
- (r) 'business premises' means:
 - (i) any immovable retail premises where a trader carries out activity on a permanent basis, or
 - (ii) any movable retail premises where a trader carries out activity on a usual basis;
- (s) 'commercial guarantee' means any undertaking by the trader or a producer to the consumer, in addition to legal obligations under Article 106 in case of lack of conformity to reimburse the price paid or to replace or repair, or service goods or digital content in any way if they do not meet the specifications or any other requirements not related to conformity set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract;
- (t) 'durable medium' means any medium which enables a party to store information addressed personally to that party in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;
- (u) 'public auction' means a method of sale where goods or digital content are offered by the trader to the consumer who attends or is given the possibility to attend the auction in person, through a transparent, competitive bidding procedure run by an auctioneer and where the successful bidder is bound to purchase the goods or digital content;
- (v) 'mandatory rule' means any provision the application of which the parties cannot exclude, or derogate from or the effect of which they cannot vary;
- (w) 'creditor' means a person who has a right to performance of an obligation, whether monetary or non-monetary, by another person, the debtor;
- (x) 'debtor' means a person who has an obligation, whether monetary or non-monetary, to another person, the creditor;
- (y) 'obligation' means a duty to perform which one party to a legal relationship owes to another party.

Article 3 – Optional nature of the Common European Sales Law

The parties may agree that the Common European Sales Law governs their cross-border contracts for the sale of goods, for the supply of digital content and for the provision of related services within the territorial, material and personal scope as set out in Articles 4 to 7.

Article 4 – Cross-border contracts

1. The Common European Sales Law may be used for cross-border contracts.
2. For the purposes of this Regulation, a contract between traders is a cross-border contract if the parties have their habitual residence in different countries of which at least one is a Member State.
3. For the purposes of this Regulation, a contract between a trader and a consumer is a cross-border contract if:
 - (a) either the address indicated by the consumer, the delivery address for goods or the billing address are located in a country other than the country of the trader's habitual residence; and
 - (b) at least one of these countries is a Member State.
4. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. The habitual residence of a trader who is a natural person shall be that person's principal place of business.
5. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment of a trader, the place where the branch, agency or any other establishment is located shall be treated as the place of the trader's habitual residence.
6. For the purpose of determining whether a contract is a cross-border contract the relevant point in time is the time of the agreement on the use of the Common European Sales Law.

Article 5 – Contracts for which the Common European Sales Law can be used

The Common European Sales Law may be used for:

- (a) sales contracts;
- (b) contracts for the supply of digital content whether or not supplied on a tangible medium which can be stored, processed or accessed, and re-used by the user, irrespective of whether the digital content is supplied in exchange for the payment of a price.
- (c) related service contracts, irrespective of whether a separate price was agreed for the related service.

Article 6 – Exclusion of mixed-purpose contracts and contracts linked to a consumer credit

1. The Common European Sales Law may not be used for mixed-purpose contracts including any elements other than the sale of goods, the supply of digital content and the provision of related services within the meaning of Article 5.
2. The Common European Sales Law may not be used for contracts between a trader and a consumer where the trader grants or promises to grant to the consumer credit in the form of a deferred payment, loan or other similar financial accommodation. The Common European Sales Law may be used for contracts between a trader and a consumer where goods, digital content or related services of the same kind are supplied on a continuing basis and the consumer pays for such goods, digital content or related services for the duration of the supply by means of instalments.

Article 7 – Parties to the contract

1. The Common European Sales Law may be used only if the seller of goods or the supplier of digital content is a trader. Where all the parties to a contract are traders, the Common

European Sales Law may be used if at least one of those parties is a small or medium-sized enterprise ('SME').

2. For the purposes of this Regulation, an SME is a trader which
 - (a) employs fewer than 250 persons; and
 - (b) has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million, or, for an SME which has its habitual residence in a Member State whose currency is not the euro or in a third country, the equivalent amounts in the currency of that Member State or third country.

Article 8 – Agreement on the use of the Common European Sales Law

1. The use of the Common European Sales Law requires an agreement of the parties to that effect. The existence of such an agreement and its validity shall be determined on the basis of paragraphs 2 and 3 of this Article and Article 9, as well as the relevant provisions in the Common European Sales Law.
2. In relations between a trader and a consumer the agreement on the use of the Common European Sales Law shall be valid only if the consumer's consent is given by an explicit statement which is separate from the statement indicating the agreement to conclude a contract. The trader shall provide the consumer with a confirmation of that agreement on a durable medium.
3. In relations between a trader and a consumer the Common European Sales Law may not be chosen partially, but only in its entirety.

Article 9 – Standard Information Notice in contracts between a trader and a consumer

1. In addition to the pre-contractual information duties laid down in the Common European Sales Law, in relations between a trader and a consumer the trader shall draw the consumer's attention to the intended application of the Common European Sales Law before the agreement by providing the consumer with the information notice in Annex II in a prominent manner. Where the agreement to use the Common European Sales Law is concluded by telephone or by any other means that do not make it possible to provide the consumer with the information notice, or where the trader has failed to provide the information notice, the consumer shall not be bound by the agreement until the consumer has received the confirmation referred to in Article 8(2) accompanied by the information notice and has expressly consented subsequently to the use of the Common European Sales Law.
2. The information notice referred to in paragraph 1 shall, if given in electronic form, contain a hyperlink or, in all other circumstances, include the indication of a website through which the text of the Common European Sales Law can be obtained free of charge.

Article 10 – Penalties for breach of specific requirements

Member States shall lay down penalties for breaches by traders in relations with consumers of the requirements set out in Articles 8 and 9 and shall take all the measures necessary to ensure that those penalties are applied. The penalties thus provided shall be effective, proportionate and dissuasive. Member States shall notify the relevant provisions to the Commission no later than [1 year after the date of application of this Regulation] and shall notify any subsequent changes as soon as possible.

Article 11 – Consequences of the use of the Common European Sales Law

Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules. Provided that the contract was actually concluded, the Common European Sales Law shall also govern the compliance with and remedies for failure to comply with the pre-contractual information duties.

Article 12 – Information requirements resulting from the Services Directive

This Regulation is without prejudice to the information requirements laid down by national laws which transpose the provisions of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market and which complement the information requirements laid down in the Common European Sales Law.

Article 13 – Member States' options

A Member State may decide to make the Common European Sales Law available for:

- (a) contracts where the habitual residence of the traders or, in the case of a contract between a trader and a consumer, the habitual residence of the trader, the address indicated by the consumer, the delivery address for goods and the billing address, are located in that Member State; and/or
- (b) contracts where all the parties are traders but none of them is an SME within the meaning of Article 7(2).

Article 14 – Communication of judgments applying this Regulation

1. Member States shall ensure that final judgments of their courts applying the rules of this Regulation are communicated without undue delay to the Commission.
2. 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.

Article 15 – Review

1. By ... *[4 years after the date of application of this Regulation]*, Member States shall provide the Commission with information relating to the application of this Regulation, in particular on the level of acceptance of the Common European Sales Law, the extent to which its provisions have given rise to litigation and on the state of play concerning differences in the level of consumer protection between the Common European Sales Law and national law. That information shall include a comprehensive overview of the case law of the national courts interpreting the provisions of the Common European Sales Law.
2. By ... *[5 years after the date of application of this Regulation]*, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a detailed report reviewing the operation of this Regulation, and taking account of, amongst others, the need to extend the scope in relation to business-to-business contracts, market and technological developments in respect of digital content and future developments of the Union acquis.

Article 16 – Entry into force and application

1. This Regulation shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Union*.
2. It shall apply from [6 months after its the entry into force].

This Regulation shall be binding in its entirety and directly applicable in the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

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Part I – Introductory provisions**Chapter 1 – General principles and application****Section 1 – General principles****Article 1 – Freedom of contract**

1. Parties are free to conclude a contract and to determine its contents, subject to any applicable mandatory rules.
2. Parties may exclude the application of any of the provisions of the Common European Sales Law, or derogate from or vary their effects, unless otherwise stated in those provisions.

Article 2 – Good faith and fair dealing

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

Article 3 – 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.

Section 2 – Application**Article 4 – Interpretation**

1. The Common European Sales Law is to be interpreted autonomously and in accordance with its objectives and the principles underlying it.
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.

3. Where there is a general rule and a special rule applying to a particular situation within the scope of the general rule, the special rule prevails in any case of conflict.

Article 5 – Reasonableness

1. Reasonableness is to be objectively ascertained, having regard to the nature and purpose of the contract, to the circumstances of the case and to the usages and practices of the trades or professions involved.
2. Any reference to what can be expected of or by a person, or in a particular situation, is a reference to what can reasonably be expected.

Article 6 – No form required

Unless otherwise stated in the Common European Sales Law, a contract, statement or any other act which is governed by it need not be made in or evidenced by a particular form.

Article 7 – Not individually negotiated contract terms

1. A contract term is not individually negotiated if it has been supplied by one party and the other party has not been able to influence its content.
2. Where one party supplies a selection of contract terms to the other party, a term will not be regarded as individually negotiated merely because the other party chooses that term from that selection.
3. A party who claims that a contract term supplied as part of standard contract terms has since been individually negotiated bears the burden of proving that it has been.
4. In a contract between a trader and a consumer, the trader bears the burden of proving that a contract term supplied by the trader has been individually negotiated.
5. In a contract between a trader and a consumer, contract terms drafted by a third party are considered to have been supplied by the trader, unless the consumer introduced them to the contract.

Article 8 – Termination of a contract

1. To 'terminate a contract' means to bring to an end the rights and obligations of the parties under the contract with the exception of those arising under any contract term providing for the settlement of disputes or any other contract term which is to operate even after termination.
2. Payments due and damages for any non-performance before the time of termination remain payable. Where the termination is for non-performance or for anticipated non-performance, the terminating party is also entitled to damages in lieu of the other party's future performance.
3. The effects of termination on the repayment of the price and the return of the goods or the digital content, and other restitutionary effects, are governed by the rules on restitution set out in Chapter 17.

Article 9 – Mixed-purpose contracts

1. Where a contract provides both for the sale of goods or the supply of digital content and for the provision of a related service, the rules of Part IV apply to the obligations and

remedies of the parties as seller and buyer of goods or digital content and the rules of Part V apply to the obligations and remedies of the parties as service provider and customer.

2. Where, in a contract falling under paragraph 1, the obligations of the seller and the service provider under the contract are to be performed in separate parts or are otherwise divisible, then if there is a ground for termination for non-performance of a part to which a part of the price can be apportioned, the buyer and customer may terminate only in relation to that part.
3. Paragraph 2 does not apply where the buyer and customer cannot be expected to accept performance of the other parts or the non-performance is such as to justify termination of the contract as a whole.
4. Where the obligations of the seller and the service provider under the contract are not divisible or a part of the price cannot be apportioned, the buyer and the customer may terminate only if the non-performance is such as to justify termination of the contract as a whole.

Article 10 – Notice

1. This Article applies in relation to the giving of notice for any purpose under the rules of the Common European Sales Law and the contract. ‘Notice’ includes the communication of any statement which is intended to have legal effect or to convey information for a legal purpose.
2. A notice may be given by any means appropriate to the circumstances.
3. A notice becomes effective when it reaches the addressee, unless it provides for a delayed effect.
4. A notice reaches the addressee:
 - (a) when it is delivered to the addressee;
 - (b) when it is delivered to the addressee’s place of business or, where there is no such place of business or the notice is addressed to a consumer, to the addressee’s habitual residence;
 - (c) in the case of a notice transmitted by electronic mail or other individual communication, when it can be accessed by the addressee; or
 - (d) when it is otherwise made available to the addressee at such a place and in such a way that the addressee could be expected to obtain access to it without undue delay.
 The notice has reached the addressee after one of the requirements in point (a), (b), (c) or (d) is fulfilled, whichever is the earliest.
5. A notice has no effect if a revocation of it reaches the addressee before or at the same time as the notice.
6. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of paragraphs 3 and 4 or derogate from or vary its effects.

Article 11 – Computation of time

1. The provisions of this Article apply in relation to the computation of time for any purpose under the Common European Sales Law.
2. Subject to paragraphs 3 to 7:
 - (a) a period expressed in days starts at the beginning of the first hour of the first day and ends with the expiry of the last hour of the last day of the period;

- (b) a period expressed in weeks, months or years starts at the beginning of the first hour of the first day of the period, and ends with the expiry of the last hour of whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day from which the period runs; with the qualification that if, in a period expressed in months or in years, the day on which the period should expire does not occur in the last month, it ends with the expiry of the last hour of the last day of that month.
- 3. Where a period expressed in days, weeks, months or years is to be calculated from a specified event, action or time the day during which the event occurs, the action takes place or the specified time arrives does not fall within the period in question.
- 4. The periods concerned include Saturdays, Sundays and public holidays, save where these are expressly excepted or where the periods are expressed in working days.
- 5. Where the last day of a period is a Saturday, Sunday or public holiday at the place where a prescribed act is to be done, the period ends with the expiry of the last hour of the following working day. This provision does not apply to periods calculated retroactively from a given date or event.
- 6. Where a person sends another person a document which sets a period of time within which the addressee has to reply or take other action but does not state when the period is to begin, then, in the absence of indications to the contrary, the period is calculated from the moment the document reaches the addressee.
- 7. For the purposes of this Article:
 - (a) “public holiday” with reference to a Member State, or part of a Member State, of the European Union means any day designated as such for that Member State or part in a list published in the Official Journal of the European Union; and
 - (b) “working days” means all days other than Saturdays, Sundays and public holidays.

Article 12 – Unilateral statements or conduct

- 1. A unilateral statement indicating intention is to be interpreted in the way in which the person to whom it is addressed could be expected to understand it.
- 2. Where the person making the statement intended an expression used in it to have a particular meaning and the other party was aware, or could be expected to have been aware, of that intention, the expression is to be interpreted in the way intended by the person making the statement.
- 3. Articles 59 to 65 apply with appropriate adaptations to the interpretation of unilateral statements indicating intention.
- 4. The rules on defects in consent in Chapter 5 apply with appropriate adaptations to unilateral statements indicating intention.
- 5. Any reference to a statement referred to in this Article includes a reference to conduct which can be regarded as the equivalent of a statement.

Part II – Making a binding contract

Chapter 2 – Pre-contractual information

Section 1 – Pre-contractual information to be given by a trader dealing with a consumer

Article 13 – Duty to provide information when concluding a distance or off-premises contract

1. A trader concluding a distance contract or off-premises contract has a duty to provide the following information to the consumer, in a clear and comprehensible manner before the contract is concluded or the consumer is bound by any offer:
 - (a) the main characteristics of the goods, digital content or related services to be supplied, to an extent appropriate to the medium of communication and to the goods, digital content or related services;
 - (b) the total price and additional charges and costs, in accordance with Article 14;
 - (c) the identity and address of the trader, in accordance with Article 15;
 - (d) the contract terms, in accordance with Article 16;
 - (e) the rights of withdrawal, in accordance with Article 17;
 - (f) where applicable, the existence and the conditions of the trader's after-sale customer assistance, after-sale services, commercial guarantees and complaints handling policy;
 - (g) where applicable, the possibility of having recourse to an Alternative Dispute Resolution mechanism to which the trader is subject and the methods for having access to it;
 - (h) where applicable, the functionality, including applicable technical protection measures, of digital content; and
 - (i) where applicable, any relevant interoperability of digital content with hardware and software which the trader is aware of or can be expected to have been aware of.
2. The information provided, except for the addresses required by point © of paragraph 1, forms an integral part of the contract and shall not be altered unless the parties expressly agree otherwise.
3. For a distance contract, the information required by this Article must:
 - (a) be given or made available to the consumer in a way that is appropriate to the means of distance communication used;
 - (b) be in plain and intelligible language; and
 - (c) insofar as it is provided on a durable medium, be legible.
4. For an off-premises contract, the information required by this Article must:
 - (a) be given on paper or, if the consumer agrees, on another durable medium; and
 - (b) be legible and in plain, intelligible language.
5. This Article does not apply where the contract is:
 - (a) for the supply of foodstuffs, beverages or other goods which are intended for current consumption in the household, and which are physically supplied by a trader on frequent and regular rounds to the consumer's home, residence or workplace;
 - (b) concluded by means of an automatic vending machine or automated commercial premises;
 - (c) an off-premises contract if the price or, where multiple contracts were concluded at

the same time, the total price of the contracts does not exceed EUR 50 or the equivalent sum in the currency agreed for the contract price.

Article 14 – Information about price and additional charges and costs

1. The information to be provided under point (b) of Article 13 (1) must include:
 - (a) the total price of the goods, digital content or related services, inclusive of taxes, or where the nature of the goods, digital content or related services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated; and
 - (b) where applicable, any additional freight, delivery or postal charges and any other costs or, where these cannot reasonably be calculated in advance, the fact that such additional charges and costs may be payable.
2. In the case of a contract of indeterminate duration or a contract containing a subscription, the total price must include the total price per billing period. Where such contracts are charged at a fixed rate, the total price must include the total monthly price. Where the total price cannot be reasonably calculated in advance, the manner in which the price is to be calculated must be provided.
3. Where applicable, the trader must inform the consumer of the cost of using the means of distance communication for the conclusion of the contract where that cost is calculated other than at the basic rate.

Article 15 – Information about the identity and address of the trader

The information to be provided under point © of Article 13 (1) must include:

- (a) the identity of the trader, such as its trading name;
- (b) the geographical address at which the trader is established;
- (c) the telephone number, fax number and e-mail address of the trader, where available, to enable the consumer to contact the trader quickly and communicate with the trader efficiently;
- (d) where applicable, the identity and geographical address of any other trader on whose behalf the trader is acting; and
- (e) where different from the address given pursuant to points (b) and (d) of this Article, the geographical address of the trader, and where applicable that of the trader on whose behalf it is acting, where the consumer can address any complaints.

Article 16 – Information about the contract terms

The information to be provided under point (d) of Article 13 (1) must include:

- (a) the arrangements for payment, delivery of the goods, supply of the digital content or performance of the related services and the time by which the trader undertakes to deliver the goods, to supply the digital content or to perform the related services;
- (b) where applicable, the duration of the contract, the minimum duration of the consumer's obligations or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract; and
- (c) where applicable, the existence and conditions for deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader;
- (d) where applicable, the existence of relevant codes of conduct and how copies of them can be obtained.

Article 17 – Information about rights of withdrawal when concluding a distance or off-premises contract

1. Where the consumer has a right of withdrawal under Chapter 4, the information to be provided under point (e) of Article 13 (1) must include the conditions, time limit and procedures for exercising that right in accordance with Appendix 1, as well as the model withdrawal form set out in Appendix 2.
2. Where applicable, the information to be provided under point (e) of Article 13(1) must include the fact that the consumer will have to bear the cost of returning the goods in case of withdrawal and, for distance contracts, that the consumer will have to bear the cost of returning the goods in the event of withdrawal if the goods by their nature cannot be normally returned by post.
3. Where the consumer can exercise the right of withdrawal after having made a request for the provision of related services to begin during the withdrawal period, the information to be provided under point (e) of Article 13(1) must include the fact that the consumer would be liable to pay the trader the amount referred to in Article 45 (5).
4. The duty to provide the information required by paragraphs 1, 2 and 3 may be fulfilled by supplying the Model instructions on withdrawal set out in Appendix 1 to the consumer. The trader will be deemed to have fulfilled these information requirements if he has supplied these instructions to the consumer correctly filled in.
5. Where a right of withdrawal is not provided for in accordance with points © to (i) of Article 40 (2) and paragraph 3 of that Article, the information to be provided under point (e) of Article 13 (1) must include a statement that the consumer will not benefit from a right of withdrawal or, where applicable, the circumstances under which the consumer loses the right of withdrawal.

Article 18 – Off-premises contracts: additional information requirements and confirmation

1. The trader must provide the consumer with a copy of the signed contract or the confirmation of the contract, including where applicable, the confirmation of the consumer's consent and acknowledgment as provided for in point (d) of Article 40(3) on paper or, if the consumer agrees, on a different durable medium.
2. Where the consumer wants the provision of related services to begin during the withdrawal period provided for in Article 42(2), the trader must require that the consumer makes such an express request on a durable medium.

Article 19 – Distance contracts: additional information and other requirements

1. When a trader makes a telephone call to a consumer, with a view to concluding a distance contract, the trader must, at the beginning of the conversation with the consumer, disclose its identity and, where applicable, the identity of the person on whose behalf it is making the call and the commercial purpose of the call.
2. If the distance contract is concluded through a means of distance communication which allows limited space or time to display the information, the trader must provide at least the information referred to in paragraph 3 of this Article on that particular means prior to the conclusion of such a contract. The other information referred to in Article 13 shall be provided by the trader to the consumer in an appropriate way in accordance with Article 13(3).

3. The information required under paragraph 2 is:
 - (a) the main characteristics of the goods, digital content or related services, as required by point (a) of Article 13 (1);
 - (b) the identity of the trader, as required by point (a) of Article 15;
 - (c) the total price, including all items referred to in point (b) of Article 13 (1) and Article 14(1) and (2);
 - (d) the right of withdrawal; and
 - (e) where relevant, the duration of the contract, and if the contract is for an indefinite period, the requirements for terminating the contract, referred to in point (b) of Article 16.
4. A distance contract concluded by telephone is valid only if the consumer has signed the offer or has sent his written consent indicating the agreement to conclude a contract. The trader must provide the consumer with a confirmation of that agreement on a durable medium.
5. The trader must give the consumer a confirmation of the contract concluded, including where applicable, of the consent and acknowledgement of the consumer referred to in point (d) of Article 40(3), and all the information referred to in Article 13 on a durable medium. The trader must give that information in reasonable time after the conclusion of the distance contract, and at the latest at the time of the delivery of the goods or before the supply of digital content or the provision of the related service begins, unless the information has already been given to the consumer prior to the conclusion of the distance contract on a durable medium.
6. Where the consumer wants the provision of related services to begin during the withdrawal period provided for in Article 42(2), the trader must require that the consumer makes an express request to that effect on a durable medium.

Article 20 – Duty to provide information when concluding contracts other than distance and off-premises contracts

1. In contracts other than distance and off-premises contracts, a trader has a duty to provide the following information to the consumer, in a clear and comprehensible manner before the contract is concluded or the consumer is bound by any offer, if that information is not already apparent from the context:
 - (a) the main characteristics of the goods, digital content or related services to be supplied, to an extent appropriate to the medium of communication and to the goods, digital content or related services;
 - (b) the total price and additional charges and costs, in accordance with Article 14(1);
 - (c) the identity of the trader, such as the trader's trading name, the geographical address at which it is established and its telephone number;
 - (d) the contract terms in accordance with points (a) and (b) of Article 16;
 - (e) where applicable, the existence and the conditions of the trader's after-sale services, commercial guarantees and complaints handling policy;
 - (f) where applicable, the functionality, including applicable technical protection measures of digital content; and
 - (g) where applicable, any relevant interoperability of digital content with hardware and software which the trader is aware of or can be expected to have been aware of.

2. This Article does not apply where the contract involves a day-to-day transaction and is performed immediately at the time of its conclusion.

Article 21 – Burden of proof

The trader bears the burden of proof that it has provided the information required by this Section.

Article 22 – Mandatory nature

The parties may not, to the detriment of the consumer, exclude the application of this Section or derogate from or vary its effects.

Section 2 – Pre-contractual information to be given by a trader dealing with another trader

Article 23 – Duty to disclose information about goods and related services

1. Before the conclusion of a contract for the sale of goods, supply of digital content or provision of related services by a trader to another trader, the supplier has a duty to disclose by any appropriate means to the other trader any information concerning the main characteristics of the goods, digital content or related services to be supplied which the supplier has or can be expected to have and which it would be contrary to good faith and fair dealing not to disclose to the other party.
2. In determining whether paragraph 1 requires the supplier to disclose any information, regard is to be had to all the circumstances, including:
 - (a) whether the supplier had special expertise;
 - (b) the cost to the supplier of acquiring the relevant information;
 - (c) the ease with which the other trader could have acquired the information by other means;
 - (d) the nature of the information;
 - (e) the likely importance of the information to the other trader; and
 - (f) good commercial practice in the situation concerned.

Section 3 – Contracts concluded by electronic means

Article 24 – Additional duties to provide information in distance contracts concluded by electronic means

1. This Article applies where a trader provides the means for concluding a contract and where those means are electronic and do not involve the exclusive exchange of electronic mail or other individual communication.
2. The trader must make available to the other party appropriate, effective and accessible technical means for identifying and correcting input errors before the other party makes or accepts an offer.
3. The trader must provide information about the following matters before the other party makes or accepts an offer:
 - (a) the technical steps to be taken in order to conclude the contract;

- (b) whether or not a contract document will be filed by the trader and whether it will be accessible;
 - (c) the technical means for identifying and correcting input errors before the other party makes or accepts an offer;
 - (d) the languages offered for the conclusion of the contract;
 - (e) the contract terms.
4. The trader must ensure that the contract terms referred to in point (e) of paragraph 3 are made available in alphabetical or other intelligible characters and on a durable medium by means of any support which permits reading, recording of the information contained in the text and its reproduction in tangible form.
 5. The trader must acknowledge by electronic means and without undue delay the receipt of an offer or an acceptance sent by the other party.

Article 25 – Additional requirements in distance contracts concluded by electronic means

1. Where a distance contract which is concluded by electronic means would oblige the consumer to make a payment, the trader must make the consumer aware in a clear and prominent manner, and immediately before the consumer places the order, of the information required by point (a) of Article 13 (1), Article 14(1) and (2), and point (b) of Article 16.
2. The trader must ensure that the consumer, when placing the order, explicitly acknowledges that the order implies an obligation to pay. Where placing an order entails activating a button or a similar function, the button or similar function must be labelled in an easily legible manner only with the words “order with obligation to pay” or similar unambiguous wording indicating that placing the order entails an obligation to make a payment to the trader. Where the trader has not complied with this paragraph, the consumer is not bound by the contract or order.
3. The trader must indicate clearly and legibly on its trading website at the latest at the beginning of the ordering process whether any delivery restrictions apply and what means of payment are accepted.

Article 26 – Burden of proof

In relations between a trader and a consumer, the trader bears the burden of proof that it has provided the information required by this Section.

Article 27 – Mandatory nature

In relations between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Section or derogate from or vary its effects.

Section 4 – Duty to ensure that information supplied is correct

Article 28 – Duty to ensure that information supplied is correct

1. A party who supplies information before or at the time a contract is concluded, whether in order to comply with the duties imposed by this Chapter or otherwise, has a duty to take reasonable care to ensure that the information supplied is correct and is not misleading.

2. A party to whom incorrect or misleading information has been supplied in breach of the duty referred to in paragraph 1, and who reasonably relies on that information in concluding a contract with the party who supplied it, has the remedies set out in Article 29.
3. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Section 5 – Remedies for breach of information duties

Article 29 – Remedies for breach of information duties

1. A party which has failed to comply with any duty imposed by this Chapter is liable for any loss caused to the other party by such failure.
2. Where the trader has not complied with the information requirements relating to additional charges or other costs as referred to in Article 14 or on the costs of returning the goods as referred to in Article 17(2) the consumer is not liable to pay the additional charges and other costs.
3. The remedies provided under this Article are without prejudice to any remedy which may be available under Article 42 (2), Article 48 or Article 49.
4. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Chapter 3 – Conclusion of contract

Article 30 – Requirements for the conclusion of a contract

1. A contract is concluded if:
 - (a) the parties reach an agreement;
 - (b) they intend the agreement to have legal effect; and
 - (c) the agreement, supplemented if necessary by rules of the Common European Sales Law, has sufficient content and certainty to be given legal effect.
2. Agreement is reached by acceptance of an offer. Acceptance may be made explicitly or by other statements or conduct.
3. Whether the parties intend the agreement to have legal effect is to be determined from their statements and conduct.
4. Where one of the parties makes agreement on some specific matter a requirement for the conclusion of a contract, there is no contract unless agreement on that matter has been reached.

Article 31 – Offer

1. A proposal is an offer if:
 - (a) it is intended to result in a contract if it is accepted; and
 - (b) it has sufficient content and certainty for there to be a contract.
2. An offer may be made to one or more specific persons.
3. A proposal made to the public is not an offer, unless the circumstances indicate otherwise.

Article 32 – Revocation of offer

1. An offer may be revoked if the revocation reaches the offeree before the offeree has sent an acceptance or, in cases of acceptance by conduct, before the contract has been concluded.
2. Where a proposal made to the public is an offer, it can be revoked by the same means as were used to make the offer.
3. A revocation of an offer is ineffective if:
 - (a) the offer indicates that it is irrevocable;
 - (b) the offer states a fixed time period for its acceptance; or
 - (c) it was otherwise reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

Article 33 – Rejection of offer

When a rejection of an offer reaches the offeror, the offer lapses.

Article 34 – Acceptance

1. Any form of statement or conduct by the offeree is an acceptance if it indicates assent to the offer.
2. Silence or inactivity does not in itself constitute acceptance.

Article 35 – Time of conclusion of the contract

1. Where an acceptance is sent by the offeree the contract is concluded when the acceptance reaches the offeror.
2. Where an offer is accepted by conduct, the contract is concluded when notice of the conduct reaches the offeror.
3. Notwithstanding paragraph 2, where by virtue of the offer, of practices which the parties have established between themselves, or of a usage, the offeree may accept the offer by conduct without notice to the offeror, the contract is concluded when the offeree begins to act.

Article 36 – Time limit for acceptance

1. An acceptance of an offer is effective only if it reaches the offeror within any time limit stipulated in the offer by the offeror.
2. Where no time limit has been fixed by the offeror the acceptance is effective only if it reaches the offeror within a reasonable time after the offer was made.
3. Where an offer may be accepted by doing an act without notice to the offeror, the acceptance is effective only if the act is done within the time for acceptance fixed by the offeror or, if no such time is fixed, within a reasonable time.

Article 37 – Late acceptance

1. A late acceptance is effective as an acceptance if without undue delay the offeror informs the offeree that the offeror is treating it as an effective acceptance.
2. Where a letter or other communication containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without undue delay, the offeror informs the offeree that the offer has lapsed.

Article 38 – Modified acceptance

1. A reply by the offeree which states or implies additional or different contract terms which materially alter the terms of the offer is a rejection and a new offer.
2. Additional or different contract terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are presumed to alter the terms of the offer materially.
3. A reply which gives a definite assent to an offer is an acceptance even if it states or implies additional or different contract terms, provided that these do not materially alter the terms of the offer. The additional or different terms then become part of the contract.
4. A reply which states or implies additional or different contract terms is always a rejection of the offer if:
 - (a) the offer expressly limits acceptance to the terms of the offer;
 - (b) the offeror objects to the additional or different terms without undue delay; or
 - (c) the offeree makes the acceptance conditional upon the offeror's assent to the additional or different terms, and the assent does not reach the offeree within a reasonable time.

Article 39 – Conflicting standard contract terms

1. Where the parties have reached agreement except that the offer and acceptance refer to conflicting standard contract terms, a contract is nonetheless concluded. The standard contract terms are part of the contract to the extent that they are common in substance.
2. Notwithstanding paragraph 1, no contract is concluded if one party:
 - (a) has indicated in advance, explicitly, and not by way of standard contract terms, an intention not to be bound by a contract on the basis of paragraph 1; or
 - (b) without undue delay, informs the other party of such an intention.

Chapter 4 – Right to withdraw in distance and off-premises contracts between traders and consumers**Article 40 – Right to withdraw**

1. During the period provided for in Article 42, the consumer has a right to withdraw from the contract without giving any reason, and at no cost to the consumer except as provided in Article 45, from:
 - (a) a distance contract;
 - (b) an off-premises contract, provided that the price or, where multiple contracts were concluded at the same time, the total price of the contracts exceeds EUR 50 or the equivalent sum in the currency agreed for the contract price at the time of the conclusion of the contract.
2. Paragraph 1 does not apply to:
 - (a) a contract concluded by means of an automatic vending machine or automated commercial premises;
 - (b) a contract for the supply of foodstuffs, beverages or other goods which are intended for current consumption in the household and which are physically supplied by the

- trader on frequent and regular rounds to the consumer's home, residence or work-place;
- (c) a contract for the supply of goods or related services for which the price depends on fluctuations in the financial market which cannot be controlled by the trader and which may occur within the withdrawal period;
 - (d) a contract for the supply of goods or digital content which are made to the consumer's specifications, or are clearly personalised;
 - (e) a contract for the supply of goods which are liable to deteriorate or expire rapidly;
 - (f) a contract for the supply of alcoholic beverages, the price of which has been agreed upon at the time of the conclusion of the sales contract, the delivery of which can only take place after 30 days from the time of conclusion of the contract and the actual value of which is dependent on fluctuations in the market which cannot be controlled by the trader;
 - (g) a contract for the sale of a newspaper, periodical or magazine with the exception of subscription contracts for the supply of such publications;
 - (h) a contract concluded at a public auction; and
 - (i) a contract for catering or services related to leisure activities which provides for a specific date or period of performance.
3. Paragraph 1 does not apply in the following situations:
- (a) where the goods supplied were sealed, have been unsealed by the consumer and are not then suitable for return due to health protection or hygiene reasons;
 - (b) where the goods supplied have, according to their nature, been inseparably mixed with other items after delivery;
 - (c) where the goods supplied were sealed audio or video recordings or computer software and have been unsealed after delivery;
 - (d) where the supply of digital content which is not supplied on a tangible medium has begun with the consumer's prior express consent and with the acknowledgement by the consumer of losing the right to withdraw;
 - (e) the consumer has specifically requested a visit from the trader for the purpose of carrying out urgent repairs or maintenance. Where on the occasion of such a visit the trader provides related services in addition to those specifically requested by the consumer or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the right of withdrawal applies to those additional related services or goods.
4. Where the consumer has made an offer which, if accepted, would lead to the conclusion of a contract from which there would be a right to withdraw under this Chapter, the consumer may withdraw the offer even if it would otherwise be irrevocable.

Article 41 – Exercise of right to withdraw

1. The consumer may exercise the right to withdraw at any time before the end of the period of withdrawal provided for in Article 42.
2. The consumer exercises the right to withdraw by notice to the trader. For this purpose, the consumer may use either the Model withdrawal form set out in Appendix 2 or any other unequivocal statement setting out the decision to withdraw.
3. Where the trader gives the consumer the option to withdraw electronically on its trading website, and the consumer does so, the trader has a duty to communicate to the

consumer an acknowledgement of receipt of such a withdrawal on a durable medium without delay. The trader is liable for any loss caused to the other party by a breach of this duty.

4. A communication of withdrawal is timely if sent before the end of the withdrawal period.
5. The consumer bears the burden of proof that the right of withdrawal has been exercised in accordance with this Article.

Article 42 – Withdrawal period

1. The withdrawal period expires after fourteen days from:
 - (a) the day on which the consumer has taken delivery of the goods in the case of a sales contract, including a sales contract under which the seller also agrees to provide related services;
 - (b) the day on which the consumer has taken delivery of the last item in the case of a contract for the sale of multiple goods ordered by the consumer in one order and delivered separately, including a contract under which the seller also agrees to provide related services;
 - (c) the day on which the consumer has taken delivery of the last lot or piece in the case of a contract where the goods consist of multiple lots or pieces, including a contract under which the seller also agrees to provide related services;
 - (d) the day on which the consumer has taken delivery of the first item where the contract is for regular delivery of goods during a defined period of time, including a contract under which the seller also agrees to provide related services;
 - (e) the day of the conclusion of the contract in the case of a contract for related services concluded after the goods have been delivered;
 - (f) the day when the consumer has taken delivery of the tangible medium in accordance with point (a) in the case of a contract for the supply of digital content where the digital content is supplied on a tangible medium;
 - (g) the day of the conclusion of the contract in the case of a contract where the digital content is not supplied on a tangible medium.
2. Where the trader has not provided the consumer with the information referred to in Article 17 (1), the withdrawal period expires:
 - (a) after one year from the end of the initial withdrawal period, as determined in accordance with paragraph 1; or
 - (b) where the trader provides the consumer with the information required within one year from the end of the withdrawal period as determined in accordance with paragraph 1, after fourteen days from the day the consumer receives the information.

Article 43 – Effects of withdrawal

Withdrawal terminates the obligations of both parties under the contract:

- (a) to perform the contract; or
- (b) to conclude the contract in cases where an offer was made by the consumer.

Article 44 – Obligations of the trader in the event of withdrawal

1. The trader must reimburse all payments received from the consumer, including, where applicable, the costs of delivery without undue delay and in any event not later than fourteen days from the day on which the trader is informed of the consumer's decision to

withdraw from the contract in accordance with Article 41. The trader must carry out such reimbursement using the same means of payment as the consumer used for the initial transaction, unless the consumer has expressly agreed otherwise and provided that the consumer does not incur any fees as a result of such reimbursement.

2. Notwithstanding paragraph 1, the trader is not required to reimburse the supplementary costs, if the consumer has expressly opted for a type of delivery other than the least expensive type of standard delivery offered by the trader.
3. In the case of a contract for the sale of goods, the trader may withhold the reimbursement until it has received the goods back, or the consumer has supplied evidence of having sent back the goods, whichever is earlier, unless the trader has offered to collect the goods.
4. In the case of an off-premises contract where the goods have been delivered to the consumer's home at the time of the conclusion of the contract, the trader must collect the goods at its own cost if the goods by their nature cannot be normally returned by post.

Article 45 – Obligations of the consumer in the event of withdrawal

1. The consumer must send back the goods or hand them over to the trader or to a person authorised by the trader without undue delay and in any event not later than fourteen days from the day on which the consumer communicates the decision to withdraw from the contract to the trader in accordance with Article 41, unless the trader has offered to collect the goods. This deadline is met if the consumer sends back the goods before the period of fourteen days has expired.
2. The consumer must bear the direct costs of returning the goods, unless the trader has agreed to bear those costs or the trader failed to inform the consumer that the consumer has to bear them.
3. The consumer is liable for any diminished value of the goods only where that results from handling of the goods in any way other than what is necessary to establish the nature, characteristics and functioning of the goods. The consumer is not liable for diminished value where the trader has not provided all the information about the right to withdraw in accordance with Article 17 (1).
4. Without prejudice to paragraph 3, the consumer is not liable to pay any compensation for the use of the goods during the withdrawal period.
5. Where the consumer exercises the right of withdrawal after having made an express request for the provision of related services to begin during the withdrawal period, the consumer must pay to the trader an amount which is in proportion to what has been provided before the consumer exercised the right of withdrawal, in comparison with the full coverage of the contract. The proportionate amount to be paid by the consumer to the trader must be calculated on the basis of the total price agreed in the contract. Where the total price is excessive, the proportionate amount must be calculated on the basis of the market value of what has been provided.
6. The consumer is not liable for the cost for:
 - (a) the provision of related services, in full or in part, during the withdrawal period, where:
 - (i) the trader has failed to provide information in accordance with Article 17(1) and (3); or

- (ii) the consumer has not expressly requested performance to begin during the withdrawal period in accordance with Article 18(2) and Article 19(6);
- (b) for the supply, in full or in part, of digital content which is not supplied on a tangible medium where:
 - (i) the consumer has not given prior express consent for the supply of digital content to begin before the end of the period of withdrawal referred to in Article 42(1);
 - (ii) the consumer has not acknowledged losing the right of withdrawal when giving the consent; or
 - (iii) the trader has failed to provide the confirmation in accordance with Article 18(1) and Article 19(5).
- 7. Except as provided for in this Article, the consumer does not incur any liability through the exercise of the right of withdrawal.

Article 46 – Ancillary contracts

1. Where a consumer exercises the right of withdrawal from a distance or an off-premises contract in accordance with Articles 41 to 45, any ancillary contracts are automatically terminated at no cost to the consumer except as provided in paragraphs 2 and 3. For the purpose of this Article an ancillary contract means a contract by which a consumer acquires goods, digital content or related services in connexion to a distance contract or an off-premises contract and these goods, digital content or related services are provided by the trader or a third party on the basis of an arrangement between that third party and the trader.
2. The provisions of Articles 43, 44 and 45 apply accordingly to ancillary contracts to the extent that those contracts are governed by the Common European Sales Law.
3. For ancillary contracts which are not governed by the Common European Sales Law the applicable law governs the obligations of the parties in the event of withdrawal.

Article 47 – Mandatory nature

The parties may not, to the detriment of the consumer, exclude the application of this Chapter or derogate from or vary its effects.

Chapter 5 – Defects in consent

Article 48 – Mistake

1. A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:
 - (a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different contract terms and the other party knew or could be expected to have known this; and
 - (b) the other party:
 - (i) caused the mistake;
 - (ii) caused the contract to be concluded in mistake by failing to comply with any pre-contractual information duty under Chapter 2, Sections 1 to 4;
 - (iii) 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; or

(iv) made the same mistake.

2. A party may not avoid a contract for mistake if the risk of the mistake was assumed, or in the circumstances should be borne, by that party.
3. An inaccuracy in the expression or transmission of a statement is treated as a mistake of the person who made or sent the statement.

Article 49 – Fraud

1. A party may avoid a contract if the other party has induced the conclusion of the contract by fraudulent misrepresentation, whether by words or conduct, or fraudulent non-disclosure of any information which good faith and fair dealing, or any pre-contractual information duty, required that party to disclose.
2. Misrepresentation is fraudulent if it is made with knowledge or belief that the representation is false, or recklessly as to whether it is true or false, and is intended to induce the recipient to make a mistake. Non-disclosure is fraudulent if it is intended to induce the person from whom the information is withheld to make a mistake.
3. In determining whether good faith and fair dealing require a party to disclose particular information, regard should be had to all the circumstances, including:
 - (a) whether the party had special expertise;
 - (b) the cost to the party of acquiring the relevant information;
 - (c) the ease with which the other party could have acquired the information by other means;
 - (d) the nature of the information;
 - (e) the apparent importance of the information to the other party; and
 - (f) in contracts between traders good commercial practice in the situation concerned

Article 50 – Threats

A party may avoid a contract if the other party has induced the conclusion of the contract by the threat of wrongful, imminent and serious harm, or of a wrongful act.

Article 51 – Unfair exploitation

A party may avoid a contract if, at the time of the conclusion of the contract:

- (a) that party was dependent on, or had a relationship of trust with, the other party, was in economic distress or had urgent needs, was improvident, ignorant, or inexperienced; and
- (b) the other party knew or could be expected to have known this and, in the light of the circumstances and purpose of the contract, exploited the first party's situation by taking an excessive benefit or unfair advantage.

Article 52 – Notice of avoidance

1. Avoidance is effected by notice to the other party.
2. A notice of avoidance is effective only if it is given within the following period after the avoiding party becomes aware of the relevant circumstances or becomes capable of acting freely:
 - (a) six months in case of mistake; and
 - (b) one year in case of fraud, threats and unfair exploitation.

Article 53 – Confirmation

Where the party who has the right to avoid a contract under this Chapter confirms it, expressly or impliedly, after becoming aware of the relevant circumstances, or becoming capable of acting freely, that party may no longer avoid the contract.

Article 54 – Effects of avoidance

1. A contract which may be avoided is valid until avoided but, once avoided, is retrospectively invalid from the beginning.
2. Where a ground of avoidance affects only certain contract terms, the effect of avoidance is limited to those terms unless it is unreasonable to uphold the remainder of the contract.
3. The question whether either party has a right to the return of whatever has been transferred or supplied under a contract which has been avoided, or to a monetary equivalent, is regulated by the rules on restitution in Chapter 17.

Article 55 – Damages for loss

A party who has the right to avoid a contract under this Chapter or who had such a right before it was lost by the effect of time limits or confirmation is entitled, whether or not the contract is avoided, to damages from the other party for loss suffered as a result of the mistake, fraud, threats or unfair exploitation, provided that the other party knew or could be expected to have known of the relevant circumstances.

Article 56 – Exclusion or restriction of remedies

1. Remedies for fraud, threats and unfair exploitation cannot be directly or indirectly excluded or restricted.
2. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, directly or indirectly exclude or restrict remedies for mistake.

Article 57 – Choice of remedy

A party who is entitled to a remedy under this Chapter in circumstances which afford that party a remedy for non-performance may pursue either of those remedies.

Part III – Assessing what is in the contract

Chapter 6 – Interpretation

Article 58 – General rules on interpretation of contracts

1. A contract is to be interpreted according to the common intention of the parties even if this differs from the normal meaning of the expressions used in it.
2. Where one party intended an expression used in the contract to have a particular meaning, and at the time of the conclusion of the contract the other party was aware, or could be expected to have been aware, of that intention, the expression is to be interpreted in the way intended by the first party.
3. Unless otherwise provided in paragraphs 1 and 2, the contract is to be interpreted according to the meaning which a reasonable person would give to it.

Article 59 – Relevant matters

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.

Article 60 – Reference to contract as a whole

Expressions used in a contract are to be interpreted in the light of the contract as a whole.

Article 61 – Language discrepancies

Where a contract document is in two or more language versions none of which is stated to be authoritative and where there is a discrepancy between the versions, the version in which the contract was originally drawn up is to be treated as the authoritative one.

Article 62 – Preference for individually negotiated contract terms

To the extent that there is an inconsistency, contract terms which have been individually negotiated prevail over those which have not been individually negotiated within the meaning of Article 7.

Article 63 – Preference for interpretation which gives contract terms effect

An interpretation which renders the contract terms effective prevails over one which does not.

Article 64 – Interpretation in favour of consumers

1. Where there is doubt about the meaning of a contract term in a contract between a trader and a consumer, the interpretation most favourable to the consumer shall prevail unless the term was supplied by the consumer.
2. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Article 65 – Interpretation against supplier of a contract term

Where, in a contract which does not fall under Article 64, there is doubt about the meaning of a contract term which has not been individually negotiated within the meaning of Article 7, an interpretation of the term against the party who supplied it shall prevail.

Chapter 7 – Contents and effects

Article 66 – Contract terms

The terms of the contract are derived from:

- (a) the agreement of the parties, subject to any mandatory rules of the Common European Sales Law;
- (b) any usage or practice by which parties are bound by virtue of Article 67;
- (c) any rule of the Common European Sales Law 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.

Article 67 – Usages and practices in contracts between traders

1. In a contract between traders, the parties are bound by any usage which they have agreed should be applicable and by any practice they have established between themselves.
2. The parties are bound by a usage which would be considered generally applicable by traders in the same situation as the parties.
3. Usages and practices do not bind the parties to the extent to which they conflict with contract terms which have been individually negotiated or any mandatory rules of the Common European Sales Law.

Article 68 – Contract terms which may be implied

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 Common European Sales Law, 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.
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.

Article 69 – Contract terms derived from certain pre-contractual statements

1. Where the trader makes a statement before the contract is concluded, either to the other party or publicly, about the characteristics of what is to be supplied by that trader under the contract, the statement is incorporated as a term of the contract unless:
 - (a) the other party was aware, or could be expected to have been aware when the contract was concluded that the statement was incorrect or could not otherwise be relied on as such a term; or
 - (b) the other party's decision to conclude the contract could not have been influenced by the statement.
2. For the purposes of paragraph 1, a statement made by a person engaged in advertising or marketing for the trader is regarded as being made by the trader.
3. Where the other party is a consumer then, for the purposes of paragraph 1, a public statement made by or on behalf of a producer or other person in earlier links of the chain of

transactions leading to the contract is regarded as being made by the trader unless the trader, at the time of conclusion of the contract, did not know and could not be expected to have known of it.

4. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Article 70 – Duty to raise awareness of not individually negotiated contract terms

1. Contract terms supplied by one party and not individually negotiated within the meaning of Article 7 may be invoked against the other party only if the other party was aware of them, or if the party supplying them took reasonable steps to draw the other party's attention to them, before or when the contract was concluded.
2. For the purposes of this Article, in relations between a trader and a consumer contract terms are not sufficiently brought to the consumer's attention by a mere reference to them in a contract document, even if the consumer signs the document.
3. The parties may not exclude the application of this Article or derogate from or vary its effects.

Article 71 – Additional payments in contracts between a trader and a consumer

1. In a contract between a trader and a consumer, a contract term which obliges the consumer to make any payment in addition to the remuneration stated for the trader's main contractual obligation, in particular where it has been incorporated by the use of default options which the consumer is required to reject in order to avoid the additional payment, is not binding on the consumer unless, before the consumer is bound by the contract, the consumer has expressly consented to the additional payment. If the consumer has made the additional payment, the consumer may recover it.
2. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Article 72 – Merger clauses

1. Where a contract in writing includes a term stating that the document contains all contract terms (a merger clause), any prior statements, undertakings or agreements which are not contained in the document do not form part of the contract.
2. Unless the contract otherwise provides, a merger clause does not prevent the parties' prior statements from being used to interpret the contract.
3. In a contract between a trader and a consumer, the consumer is not bound by a merger clause.
4. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

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.

Article 74 – Unilateral determination by a party

1. Where the price or any other contract term is to be determined by one party and that party's determination is grossly unreasonable then the price normally charged or term normally used in comparable circumstances at the time of the conclusion of the contract or, if no such price or term is available, a reasonable price or a reasonable term is substituted.
2. The parties may not exclude the application of this Article or derogate from or vary its effects.

Article 75 – Determination by a third party

1. Where a third party is to determine the price or any other contract term and cannot or will not do so, a court may, unless this is inconsistent with the contract terms, appoint another person to determine it.
2. Where a price or other contract term determined by a third party is grossly unreasonable, the price normally charged or term normally used in comparable circumstances at the time of the conclusion of the contract or, if no such price is available, a reasonable price, or a reasonable term is substituted.
3. For the purpose of paragraph 1 a 'court' includes an arbitral tribunal.
4. In relations between a trader and a consumer the parties may not to the detriment of the consumer exclude the application of paragraph 2 or derogate from or vary its effects.

Article 76 – Language

Where the language to be used for communications relating to the contract or the rights or obligations arising from it cannot be otherwise determined, the language to be used is that used for the conclusion of the contract.

Article 77 – Contracts of indeterminate duration

1. Where, in a case involving continuous or repeated performance of a contractual obligation, the contract terms do not stipulate when the contractual relationship is to end or provide for it to be terminated upon giving notice to that effect, it may be terminated by either party by giving a reasonable period of notice not exceeding two months.
2. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

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.
3. When one of the contracting parties is bound to render a performance to the third party under the contract, then:
 - (a) the third party has the same rights to performance and remedies for non-performance as if the contracting party was bound to render the performance under a contract with the third party; and

- (b) the contracting party who is bound may assert against the third party all defences which the contracting party could assert against the other party to the contract.
- 4. The third party may reject a right conferred upon them by notice to either of the contracting parties, if that is done before it has been expressly or impliedly accepted. On such rejection, the right is treated as never having accrued to the third party.
- 5. The contracting parties may remove or modify the contract term conferring the right if this is done before either of them has given the third party notice that the right has been conferred.

Chapter 8 – Unfair contract terms

Section 1 – General provisions

Article 79 – Effects of unfair contract terms

- 1. A contract term which is supplied by one party and which is unfair under Sections 2 and 3 of this Chapter is not binding on the other party.
- 2. Where the contract can be maintained without the unfair contract term, the other contract terms remain binding.

Article 80 – Exclusions from unfairness test

- 1. Sections 2 and 3 do not apply to contract terms which reflect rules of the Common European Sales Law which would apply if the terms did not regulate the matter.
- 2. Section 2 does not apply to the definition of the main subject matter of the contract, or to the appropriateness of the price to be paid in so far as the trader has complied with the duty of transparency set out in Article 82.
- 3. Section 3 does not apply to the definition of the main subject matter of the contract or to the appropriateness of the price to be paid.

Article 81 – Mandatory nature

The parties may not exclude the application of this Chapter or derogate from or vary its effects.

Section 2 – Unfair contract terms in contracts between a trader and a consumer

Article 82 – Duty of transparency in contract terms not individually negotiated

Where a trader supplies contract terms which have not been individually negotiated with the consumer within the meaning of Article 7, it has a duty to ensure that they are drafted and communicated in plain, intelligible language.

Article 83 – Meaning of “unfair” in contracts between a trader and a consumer

- 1. In a contract between a trader and a consumer, a contract term supplied by the trader which has not been individually negotiated within the meaning of Article 7 is unfair for the purposes of this Section if it causes a significant imbalance in the parties' rights and

obligations arising under the contract, to the detriment of the consumer, contrary to good faith and fair dealing.

2. When assessing the unfairness of a contract term for the purposes of this Section, regard is to be had to:
 - (a) whether the trader complied with the duty of transparency set out in Article 82;
 - (b) the nature of what is to be provided under the contract;
 - (c) the circumstances prevailing during the conclusion of the contract;
 - (d) to the other contract terms; and
 - (e) to the terms of any other contract on which the contract depends.

Article 84 – Contract terms which are always unfair

A contract term is always unfair for the purposes of this Section if its object or effect is to:

- (a) exclude or limit the liability of the trader for death or personal injury caused to the consumer through an act or omission of the trader or of someone acting on behalf of the trader;
- (b) exclude or limit the liability of the trader for any loss or damage to the consumer caused deliberately or as a result of gross negligence;
- (c) limit the trader's obligation to be bound by commitments undertaken by its authorised agents or make its commitments subject to compliance with a particular condition the fulfilment of which depends exclusively on the trader;
- (d) exclude or hinder the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to an arbitration system not foreseen generally in legal provisions that apply to contracts between a trader and a consumer;
- (e) confer exclusive jurisdiction for all disputes arising under the contract to a court for the place where the trader is domiciled unless the chosen court is also the court for the place where the consumer is domiciled;
- (f) give the trader the exclusive right to determine whether the goods, digital content or related services supplied are in conformity with the contract or gives the trader the exclusive right to interpret any contract term;
- (g) provide that the consumer is bound by the contract when the trader is not;
- (h) require the consumer to use a more formal method for terminating the contract within the meaning of Article 8 than was used for conclusion of the contract;
- (i) grant the trader a shorter notice period to terminate the contract than the one required of the consumer;
- (j) oblige the consumer to pay for goods, digital content or related services not actually delivered, supplied or rendered;
- (k) determine that non-individually negotiated contract terms within the meaning of Article 7 prevail or have preference over contract terms which have been individually negotiated.

Article 85 – Contract terms which are presumed to be unfair

A contract term is presumed to be unfair for the purposes of this Section if its object or effect is to:

- (a) restrict the evidence available to the consumer or impose on the consumer a burden of proof which should legally lie with the trader;

- (b) inappropriately exclude or limit the remedies available to the consumer against the trader or a third party for non-performance by the trader of obligations under the contract;
- (c) inappropriately exclude or limit the right to set-off claims that the consumer may have against the trader against what the consumer may owe to the trader;
- (d) permit a trader to keep money paid by the consumer if the latter decides not to conclude the contract, or perform obligations under it, without providing for the consumer to receive compensation of an equivalent amount from the trader in the reverse situation;
- (e) require a consumer who fails to perform obligations under the contract to pay a disproportionately high amount by way of damages or a stipulated payment for non-performance;
- (f) entitle a trader to withdraw from or terminate the contract within the meaning of Article 8 on a discretionary basis without giving the same right to the consumer, or entitle a trader to keep money paid for related services not yet supplied in the case where the trader withdraws from or terminates the contract;
- (g) enable a trader to terminate a contract of indeterminate duration without reasonable notice, except where there are serious grounds for doing so;
- (h) automatically extend a contract of fixed duration unless the consumer indicates otherwise, in cases where contract terms provide for an unreasonably early deadline for giving notice;
- (i) enable a trader to alter contract terms unilaterally without a valid reason which is specified in the contract; this does not affect contract terms under which a trader reserves the right to alter unilaterally the terms of a contract of indeterminate duration, provided that the trader is required to inform the consumer with reasonable notice, and that the consumer is free to terminate the contract at no cost to the consumer;
- (j) enable a trader to alter unilaterally without a valid reason any characteristics of the goods, digital content or related services to be provided or any other features of performance;
- (k) provide that the price of goods, digital content or related services is to be determined at the time of delivery or supply, or allow a trader to increase the price without giving the consumer the right to withdraw if the increased price is too high in relation to the price agreed at the conclusion of the contract; this does not affect price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described;
- (l) oblige a consumer to perform all their obligations under the contract where the trader fails to perform its own;
- (m) allow a trader to transfer its rights and obligations under the contract without the consumer's consent, unless it is to a subsidiary controlled by the trader, or as a result of a merger or a similar lawful company transaction, and such transfer is not likely to negatively affect any right of the consumer;
- (n) allow a trader, where what has been ordered is unavailable, to supply an equivalent without having expressly informed the consumer of this possibility and of the fact that the trader must bear the cost of returning what the consumer has received under the contract if the consumer exercises a right to reject performance;
- (o) allow a trader to reserve an unreasonably long or inadequately specified period to accept or refuse an offer;
- (p) allow a trader to reserve an unreasonably long or inadequately specified period to perform the obligations under the contract;

- (q) inappropriately exclude or limit the remedies available to the consumer against the trader or the defences available to the consumer against claims by the trader;
- (r) subject performance of obligations under the contract by the trader, or subject other beneficial effects of the contract for the consumer, to particular formalities that are not legally required and are unreasonable;
- (s) require from the consumer excessive advance payments or excessive guarantees of performance of obligations;
- (t) unjustifiably prevent the consumer from obtaining supplies or repairs from third party sources;
- (u) unjustifiably bundle the contract with another one with the trader, a subsidiary of the trader, or a third party, in a way that cannot be expected by the consumer;
- (v) impose an excessive burden on the consumer in order to terminate a contract of indeterminate duration;
- (w) 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.

Section 3 – Unfair contract terms in contracts between traders

Article 86 – Meaning of “unfair” in contracts between traders

1. In a contract between traders, a contract term is unfair for the purposes of this Section only if:
 - (a) it forms part of not individually negotiated terms within the meaning of Article 7; and
 - (b) it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.
2. When assessing the unfairness of a contract term for the purposes of this Section, regard is to be had to:
 - (a) the nature of what is to be provided under the contract;
 - (b) the circumstances prevailing during the conclusion of the contract;
 - (c) the other contract terms; and
 - (d) the terms of any other contract on which the contract depends.

Part IV – Obligations and remedies of the parties to a sales contract or a contract for the supply of digital content

Chapter 9 – General provisions

Article 87 – Non-performance and fundamental non-performance

1. Non-performance of an obligation is any failure to perform that obligation, whether or not the failure is excused, and includes:
 - (a) non-delivery or delayed delivery of the goods;
 - (b) non-supply or delayed supply of the digital content;
 - (c) delivery of goods which are not in conformity with the contract;
 - (d) supply of digital content which is not in conformity with the contract;

- (e) non-payment or late payment of the price; and
 - (f) any other purported performance which is not in conformity with the contract.
2. Non-performance of an obligation by one party is fundamental if:
- (a) it substantially deprives the other party of what that party was entitled to expect under the contract, unless at the time of conclusion of the contract the non-performing party did not foresee and could not be expected to have foreseen that result; or
 - (b) it is of such a nature as to make it clear that the non-performing party's future performance cannot be relied on.

Article 88 – Excused non-performance

1. A party's non-performance of an obligation is excused if it is due to an impediment beyond that party's control and if that party could not be expected to have taken the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.
2. Where the impediment is only temporary the non-performance is excused for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the other party may treat it as such.
3. The party who is unable to perform has a duty to ensure that notice of the impediment and of its effect on the ability to perform reaches the other party without undue delay after the first party becomes, or could be expected to have become, aware of these circumstances. The other party is entitled to damages for any loss resulting from the breach of this duty.

Article 89 – Change of circumstances

1. 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.

2. If the parties fail to reach an agreement within a reasonable time, then, upon request by either party a court may:
 - (a) 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
 - (b) terminate the contract within the meaning of Article 8 at a date and on terms to be determined by the court.
3. Paragraphs 1 and 2 apply only if:
 - (a) the change of circumstances occurred after the time when the contract was concluded;
 - (b) the party relying on the change of circumstances did not at that time take into account, and could not be expected to have taken into account, the possibility or scale of that change of circumstances; and
 - (c) the aggrieved party did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances.
4. For the purpose of paragraphs 2 and 3 a 'court' includes an arbitral tribunal.

Article 90 – Extended application of rules on payment and on goods or digital content not accepted

1. Unless otherwise provided, the rules on payment of the price by the buyer in Chapter 12 apply with appropriate adaptations to other payments.
2. Article 97 applies with appropriate adaptations to other cases where a person is left in possession of goods or digital content because of a failure by another person to take them when bound to do so.

Chapter 10 – The seller's obligations

Section 1 – General provisions

Article 91 – Main obligations of the seller

The seller of goods or the supplier of digital content (in this part referred to as 'the seller') must:

- (a) deliver the goods or supply the digital content;
- (b) transfer the ownership of the goods, including the tangible medium on which the digital content is supplied;
- (c) ensure that the goods or the digital content are in conformity with the contract;
- (d) ensure that the buyer has the right to use the digital content in accordance with the contract; and
- (e) deliver such documents representing or relating to the goods or documents relating to the digital content as may be required by the contract.

Article 92 – Performance by a third party

1. A seller may entrust performance to another person, unless personal performance by the seller is required by the contract terms.
2. A seller who entrusts performance to another person remains responsible for performance.
3. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of paragraph (2) or derogate from or vary its effects.

Section 2 – Delivery

Article 93 – Place of delivery

1. Where the place of delivery cannot be otherwise determined, it is:
 - (a) in the case of a consumer sales contract or a contract for the supply of digital content which is a distance or off-premises contract, or in which the seller has undertaken to arrange carriage to the buyer, the consumer's place of residence at the time of the conclusion of the contract;
 - (b) in any other case,
 - (i) where the contract of sale involves carriage of the goods by a carrier or series of carriers, the nearest collection point of the first carrier ;
 - (ii) where the contract does not involve carriage, the seller's place of business at the time of conclusion of the contract.

2. If the seller has more than one place of business, the place of business for the purposes of point (b) of paragraph 1 is that which has the closest relationship to the obligation to deliver.

Article 94 – Method of delivery

1. Unless agreed otherwise, the seller fulfils the obligation to deliver:
 - (a) in the case of a consumer sales contract or a contract for the supply of digital content which is a distance or off-premises contract or in which the seller has undertaken to arrange carriage to the buyer, by transferring the physical possession or control of the goods or the digital content to the consumer;
 - (b) in other cases in which the contract involves carriage of the goods by a carrier, by handing over the goods to the first carrier for transmission to the buyer and by handing over to the buyer any document necessary to enable the buyer to take over the goods from the carrier holding the goods; or
 - (c) in cases that do not fall within points (a) or (b), by making the goods or the digital content, or where it is agreed that the seller need only deliver documents representing the goods, the documents, available to the buyer.
2. In points (a) and (c) of paragraph 1, any reference to the consumer or the buyer includes a third party, not being the carrier, indicated by the consumer or the buyer in accordance with the contract.

Article 95 – Time of delivery

1. Where the time of delivery cannot be otherwise determined, the goods or the digital content must be delivered without undue delay after the conclusion of the contract.
2. In contracts between a trader and a consumer, unless agreed otherwise by the parties, the trader must deliver the goods or the digital content not later than 30 days from the conclusion of the contract.

Article 96 – Seller's obligations regarding carriage of the goods

1. Where the contract requires the seller to arrange for carriage of the goods, the seller must conclude such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.
2. Where the seller, in accordance with the contract, hands over the goods to a carrier and if the goods are not clearly identified as the goods to be supplied under the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.
3. Where the contract does not require the seller to effect insurance in respect of the carriage of the goods, the seller must, at the buyer's request, provide the buyer with all available information necessary to enable the buyer to effect such insurance.

Article 97 – Goods or digital content not accepted by the buyer

1. A seller who is left in possession of the goods or the digital content because the buyer, when bound to do so, has failed to take delivery must take reasonable steps to protect and preserve them.

2. The seller is discharged from the obligation to deliver if the seller:
 - (a) deposits the goods or the digital content on reasonable terms with a third party to be held to the order of the buyer, and notifies the buyer of this; or
 - (b) sells the goods or the digital content on reasonable terms after notice to the buyer, and pays the net proceeds to the buyer.
3. The seller is entitled to be reimbursed or to retain out of the proceeds of sale any costs reasonably incurred.

Article 98 – Effect on passing of risk

The effect of delivery on the passing of risk is regulated by Chapter 14.

Section 3 – Conformity of the goods and digital content

Article 99 – Conformity with the contract

1. In order to conform with the contract, the goods or digital content must:
 - (a) be of the quantity, quality and description required by the contract;
 - (b) be contained or packaged in the manner required by the contract; and
 - (c) be supplied along with any accessories, installation instructions or other instructions required by the contract.
2. In order to conform with the contract the goods or digital content must also meet the requirements of Articles 100, 101 and 102, save to the extent that the parties have agreed otherwise.
3. In a consumer sales contract, any agreement derogating from the requirements of Articles 100, 102 and 103 to the detriment of the consumer is valid only if, at the time of the conclusion of the contract, the consumer knew of the specific condition of the goods or the digital content and accepted the goods or the digital content as being in conformity with the contract when concluding it.
4. In a consumer sales contract, the parties may not, to the detriment of the consumer, exclude the application of paragraph 3 or derogate from or vary its effects.

Article 100 – Criteria for conformity of the goods and digital content

The goods or digital content must:

- (a) be fit for any particular purpose made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for the buyer to rely, on the seller's skill and judgement;
- (b) be fit for the purposes for which goods or digital content of the same description would ordinarily be used;
- (c) possess the qualities of goods or digital content which the seller held out to the buyer as a sample or model;
- (d) be contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods;
- (e) be supplied along with such accessories, installation instructions or other instructions as the buyer may expect to receive;
- (f) possess the qualities and performance capabilities indicated in any pre-contractual statement which forms part of the contract terms by virtue of Article 69; and

- (g) possess such qualities and performance capabilities as the buyer may expect. When determining what the consumer may expect of the digital content regard is to be had to whether or not the digital content was supplied in exchange for the payment of a price.

Article 101 – Incorrect installation under a consumer sales contract

1. Where goods or digital content supplied under a consumer sales contract are incorrectly installed, any lack of conformity resulting from the incorrect installation is regarded as lack of conformity of the goods or the digital content if:
 - (a) the goods or the digital content were installed by the seller or under the seller's responsibility; or
 - (b) the goods or the digital content were intended to be installed by the consumer and the incorrect installation was due to a shortcoming in the installation instructions.
2. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Article 102 – Third party rights or claims

1. The goods must be free from and the digital content must be cleared of any right or not obviously unfounded claim of a third party.
2. As regards rights or claims based on intellectual property, subject to paragraphs 3 and 4, the goods must be free from and the digital content must be cleared of any right or not obviously unfounded claim of a third party:
 - (a) under the law of the state where the goods or digital content will be used according to the contract or, in the absence of such an agreement, under the law of the state of the buyer's place of business or in contracts between a trader and a consumer the consumer's place of residence indicated by the consumer at the time of the conclusion of the contract; and
 - (b) which the seller knew of or could be expected to have known of at the time of the conclusion of the contract.
3. In contracts between businesses, paragraph 2 does not apply where the buyer knew or could be expected to have known of the rights or claims based on intellectual property at the time of the conclusion of the contract.
4. In contracts between a trader and a consumer, paragraph 2 does not apply where the consumer knew of the rights or claims based on intellectual property at the time of the conclusion of the contract.
5. In contracts between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Article 103 – Limitation on conformity of digital content

Digital content is not considered as not conforming to the contract for the sole reason that updated digital content has become available after the conclusion of the contract.

Article 104 – Buyer's knowledge of lack of conformity in a contract between traders

In a contract between traders, the seller is not liable for any lack of conformity of the goods if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of the lack of conformity.

Article 105 – Relevant time for establishing conformity

1. The seller is liable for any lack of conformity which exists at the time when the risk passes to the buyer under Chapter 14.
2. In a consumer sales contract, any lack of conformity which becomes apparent within six months of the time when risk passes to the buyer is presumed to have existed at that time unless this is incompatible with the nature of the goods or digital content or with the nature of the lack of conformity.
3. In a case governed by point (a) of Article 101(1) any reference in paragraphs 1 or 2 of this Article to the time when risk passes to the buyer is to be read as a reference to the time when the installation is complete. In a case governed by point (b) of Article 101(1) it is to be read as a reference to the time when the consumer had reasonable time for the installation.
4. Where the digital content must be subsequently updated by the trader, the trader must ensure that the digital content remains in conformity with the contract throughout the duration of the contract.
5. In a contract between a trader and a consumer, the parties may not, to the detriment of a consumer, exclude the application of this Article or derogate from or vary its effect.

Chapter 11 – The buyer's remedies

Section 1 – General provisions

Article 106 – Overview of buyer's remedies

1. In the case of non-performance of an obligation by the seller, the buyer may do any of the following:
 - (a) require performance, which includes specific performance, repair or replacement of the goods or digital content, under Section 3 of this Chapter;
 - (b) withhold the buyer's own performance under Section 4 of this Chapter;
 - (c) terminate the contract under Section 5 of this Chapter and claim the return of any price already paid, under Chapter 17;
 - (d) reduce the price under Section 6 of this Chapter; and
 - (e) claim damages under Chapter 16.
2. If the buyer is a trader:
 - (a) the buyer's rights to exercise any remedy except withholding of performance are subject to cure by the seller as set out in Section 2 of this Chapter; and
 - (b) the buyer's rights to rely on lack of conformity are subject to the requirements of examination and notification set out in Section 7 of this Chapter.
3. If the buyer is a consumer:
 - (a) the buyer's rights are not subject to cure by the seller; and
 - (b) the requirements of examination and notification set out in Section 7 of this Chapter do not apply.
4. If the seller's non-performance is excused, the buyer may resort to any of the remedies referred to in paragraph 1 except requiring performance and damages.
5. The buyer may not resort to any of the remedies referred to in paragraph 1 to the extent that the buyer caused the seller's non-performance.
6. Remedies which are not incompatible may be cumulated.

Article 107 – Limitation of remedies for digital content not supplied in exchange for a price

Where digital content is not supplied in exchange for the payment of a price, the buyer may not resort to the remedies referred to in points (a) to (d) of Article 106(1) . The buyer may only claim damages under point (e) of Article 106 (1) for loss or damage caused to the buyer's property, including hardware, software and data, by the lack of conformity of the supplied digital content, except for any gain of which the buyer has been deprived by that damage.

Article 108 – Mandatory nature

In a contract between a trader and a consumer, the parties may not, to the detriment of the consumer, exclude the application of this Chapter, or derogate from or vary its effect before the lack of conformity is brought to the trader's attention by the consumer.

Section 2 – Cure by the seller

Article 109 – Cure by the seller

1. A seller who has tendered performance early and who has been notified that the performance is not in conformity with the contract may make a new and conforming tender if that can be done within the time allowed for performance.
2. In cases not covered by paragraph 1 a seller who has tendered a performance which is not in conformity with the contract may, without undue delay on being notified of the lack of conformity, offer to cure it at its own expense.
3. An offer to cure is not precluded by notice of termination.
4. The buyer may refuse an offer to cure only if:
 - (a) cure cannot be effected promptly and without significant inconvenience to the buyer;
 - (b) the buyer has reason to believe that the seller's future performance cannot be relied on; or
 - (c) delay in performance would amount to a fundamental non-performance.
5. The seller has a reasonable period of time to effect cure.
6. The buyer may withhold performance pending cure, but the rights of the buyer which are inconsistent with allowing the seller a period of time to effect cure are suspended until that period has expired.
7. Notwithstanding cure, the buyer retains the right to claim damages for delay as well as for any harm caused or not prevented by the cure.

Section 3 – Requiring performance

Article 110 – Requiring performance of seller's obligations

1. The buyer is entitled to require performance of the seller's obligations.
2. The performance which may be required includes the remedying free of charge of a performance which is not in conformity with the contract.
3. Performance cannot be required where:
 - (a) performance would be impossible or has become unlawful; or

- (b) the burden or expense of performance would be disproportionate to the benefit that the buyer would obtain.

Article 111 – Consumer’s choice between repair and replacement

1. Where, in a consumer sales contract, the trader is required to remedy a lack of conformity pursuant to Article 110(2) the consumer may choose between repair and replacement unless the option chosen would be unlawful or impossible or, compared to the other option available, would impose costs on the seller that would be disproportionate taking into account:
 - (a) the value the goods would have if there were no lack of conformity;
 - (b) the significance of the lack of conformity; and
 - (c) whether the alternative remedy could be completed without significant inconvenience to the consumer.
2. If the consumer has required the remedying of the lack of conformity by repair or replacement pursuant to paragraph 1, the consumer may resort to other remedies only if the trader has not completed repair or replacement within a reasonable time, not exceeding 30 days. However, the consumer may withhold performance during that time.

Article 112 – Return of replaced item

1. Where the seller has remedied the lack of conformity by replacement, the seller has a right and an obligation to take back the replaced item at the seller’s expense.
2. The buyer is not liable to pay for any use made of the replaced item in the period prior to the replacement.

Section 4 – Withholding performance of buyer’s obligations

Article 113 – Right to withhold performance

1. A buyer who is to perform at the same time as, or after, the seller performs has a right to withhold performance until the seller has tendered performance or has performed.
2. A buyer who is to perform before the seller performs and who reasonably believes that there will be non-performance by the seller when the seller’s performance becomes due may withhold performance for as long as the reasonable belief continues.
3. The performance which may be withheld under this Article is the whole or part of the performance to the extent justified by the non-performance. Where the seller’s obligations are to be performed in separate parts or are otherwise divisible, the buyer may withhold performance only in relation to that part which has not been performed, unless the seller’s non-performance is such as to justify withholding the buyer’s performance as a whole.

Section 5 – Termination

Article 114 – Termination for non-performance

1. A buyer may terminate the contract within the meaning of Article 8 if the seller’s non-performance under the contract is fundamental within the meaning of Article 87 (2).

2. In a consumer sales contract and a contract for the supply of digital content between a trader and a consumer, where there is a non-performance because the goods do not conform to the contract, the consumer may terminate the contract unless the lack of conformity is insignificant.

Article 115 – Termination for delay in delivery after notice fixing additional time for performance

1. A buyer may terminate the contract in a case of delay in delivery which is not in itself fundamental if the buyer gives notice fixing an additional period of time of reasonable length for performance and the seller does not perform within that period.
2. The additional period referred to in paragraph 1 is taken to be of reasonable length if the seller does not object to it without undue delay.
3. Where the notice provides for automatic termination if the seller does not perform within the period fixed by the notice, termination takes effect after that period without further notice.

Article 116 – Termination for anticipated non-performance

A buyer may terminate the contract before performance is due if the seller has declared, or it is otherwise clear, that there will be a non-performance, and if the non-performance would be such as to justify termination.

Article 117 – Scope of right to terminate

1. Where the seller's obligations under the contract are to be performed in separate parts or are otherwise divisible, then if there is a ground for termination under this Section of a part to which a part of the price can be apportioned, the buyer may terminate only in relation to that part.
2. Paragraph 1 does not apply if the buyer cannot be expected to accept performance of the other parts or the non-performance is such as to justify termination of the contract as a whole.
3. Where the seller's obligations under the contract are not divisible or a part of the price cannot be apportioned, the buyer may terminate only if the non-performance is such as to justify termination of the contract as a whole.

Article 118 – Notice of termination

A right to terminate under this Section is exercised by notice to the seller.

Article 119 – Loss of right to terminate

1. The buyer loses the right to terminate under this Section if notice of termination is not given within a reasonable time from when the right arose or the buyer became, or could be expected to have become, aware of the non-performance, whichever is later.
2. Paragraph 1 does not apply:
 - (a) where the buyer is a consumer; or
 - (b) where no performance at all has been tendered.

Section 6 – Price reduction

Article 120 – Right to reduce price

1. A buyer who accepts a performance not conforming to the contract may reduce the price. The reduction is to be proportionate to the decrease in the value of what was received in performance at the time performance was made compared to the value of what would have been received by a conforming performance.
2. A buyer who is entitled to reduce the price under paragraph 1 and who has already paid a sum exceeding the reduced price may recover the excess from the seller.
3. A buyer who reduces the price cannot also recover damages for the loss thereby compensated but remains entitled to damages for any further loss suffered.

Section 7 – Requirements of examination and notification in a contract between traders

Article 121 – Examination of the goods in contracts between traders

1. In a contract between traders the buyer is expected to examine the goods, or cause them to be examined, within as short a period as is reasonable not exceeding 14 days from the date of delivery of the goods, supply of digital content or provision of related services.
2. If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.
3. If the goods are redirected in transit, or redispached by the buyer before the buyer has had a reasonable opportunity to examine them, and at the time of the conclusion of the contract the seller knew or could be expected to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

Article 122 – Requirement of notification of lack of conformity in sales contracts between traders

1. In a contract between traders the buyer may not rely on a lack of conformity if the buyer does not give notice to the seller within a reasonable time specifying the nature of the lack of conformity.
The time starts to run when the goods are supplied or when the buyer discovers or could be expected to discover the lack of conformity, whichever is later.
2. The buyer loses the right to rely on a lack of conformity if the buyer does not give the seller notice of the lack of conformity within two years from the time at which the goods were actually handed over to the buyer in accordance with the contract.
3. Where the parties have agreed that the goods must remain fit for a particular purpose or for their ordinary purpose during a fixed period of time, the period for giving notice under paragraph 2 does not expire before the end of the agreed period.
4. Paragraph 2 does not apply in respect of the third party claims or rights referred to in Article 102.
5. The buyer does not have to notify the seller that not all the goods have been delivered if the buyer has reason to believe that the remaining goods will be delivered.

6. The seller is not entitled to rely on this Article if the lack of conformity relates to facts of which the seller knew or could be expected to have known and which the seller did not disclose to the buyer.

Chapter 12 – The buyer’s obligations

Section 1 – General provisions

Article 123 – Main obligations of the buyer

1. The buyer must:
 - (a) pay the price;
 - (b) take delivery of the goods or the digital content; and
 - (c) take over documents representing or relating to the goods or documents relating to digital content as may be required by the contract.
2. Point (a) of paragraph 1 does not apply to contracts for the supply of digital content where the digital content is not supplied in exchange for the payment of a price.

Section 2 – Payment of the price

Article 124 – Means of payment

1. Payment shall be made by the means of payment indicated by the contract terms or, if there is no such indication, by any means used in the ordinary course of business at the place of payment taking into account the nature of the transaction .
2. A seller who accepts a cheque or other order to pay or a promise to pay is presumed to do so only on condition that it will be honoured. The seller may enforce the original obligation to pay if the order or promise is not honoured.
3. The buyer’s original obligation is extinguished if the seller accepts a promise to pay from a third party with whom the seller has a pre-existing arrangement to accept the third party’s promise as a means of payment.
4. In a contract between a trader and a consumer, the consumer is not liable, in respect of the use of a given means of payment, for fees that exceed the cost borne by the trader for the use of such means.

Article 125 – Place of payment

1. Where the place of payment cannot otherwise be determined it is the seller’s place of business at the time of conclusion of the contract.
2. If the seller has more than one place of business, the place of payment is the place of business of the seller which has the closest relationship to the obligation to pay.

Article 126 – Time of payment

1. Payment of the price is due at the moment of delivery.
2. The seller may reject an offer to pay before payment is due if it has a legitimate interest in so doing.

Article 127 – Payment by a third party

1. A buyer may entrust payment to another person. A buyer who entrusts payment to another person remains responsible for payment.
2. The seller cannot refuse payment by a third party if:
 - (a) the third party acts with the assent of the buyer; or
 - (b) the third party has a legitimate interest in paying and the buyer has failed to pay or it is clear that the buyer will not pay at the time that payment is due.
3. Payment by a third party in accordance with paragraphs 1 or 2 discharges the buyer from liability to the seller.
4. Where the seller accepts payment by a third party in circumstances not covered by paragraphs 1 or 2 the buyer is discharged from liability to the seller but the seller is liable to the buyer for any loss caused by that acceptance.

Article 128 – Imputation of payment

1. Where a buyer has to make several payments to the seller and the payment made does not suffice to cover all of them, the buyer may at the time of payment notify the seller of the obligation to which the payment is to be imputed.
2. If the buyer does not make a notification under paragraph 1 the seller may, by notifying the buyer within a reasonable time, impute the performance to one of the obligations.
3. An imputation under paragraph 2 is not effective if it is to an obligation which is not yet due or is disputed.
4. In the absence of an effective imputation by either party, the payment is imputed to that obligation which satisfies one of the following criteria in the sequence indicated:
 - (a) the obligation which is due or is the first to fall due;
 - (b) the obligation for which the seller has no or the least security;
 - (c) the obligation which is the most burdensome for the buyer;
 - (d) the obligation which arose first.

If none of those criteria applies, the payment is imputed proportionately to all the obligations.
5. The payment may be imputed under paragraph 2, 3 or 4 to an obligation which is unenforceable as a result of prescription only if there is no other obligation to which the payment could be imputed in accordance with those paragraphs.
6. In relation to any one obligation a payment by the buyer is to be imputed, first, to expenses, secondly, to interest, and thirdly, to principal, unless the seller makes a different imputation.

Section 3 – Taking delivery

Article 129 – Taking delivery

The buyer fulfils the obligation to take delivery by:

- (a) doing all the acts which could be expected in order to enable the seller to perform the obligation to deliver; and
- (b) taking over the goods, or the documents representing the goods or digital content, as required by the contract.

Article 130 – Early delivery and delivery of wrong quantity

1. If the seller delivers the goods or supplies the digital content before the time fixed, the buyer must take delivery unless the buyer has a legitimate interest in refusing to do so.
2. If the seller delivers a quantity of goods or digital content less than that provided for in the contract the buyer must take delivery unless the buyer has a legitimate interest in refusing to do so.
3. If the seller delivers a quantity of goods or digital content greater than that provided for by the contract, the buyer may retain or refuse the excess quantity.
4. If the buyer retains the excess quantity it is treated as having been supplied under the contract and must be paid for at the contractual rate.
5. In a consumer sales contract paragraph 4 does not apply if the buyer reasonably believes that the seller has delivered the excess quantity intentionally and without error, knowing that it had not been ordered.
6. This Article does not apply to contracts for the supply of digital content where the digital content is not supplied in exchange for the payment of a price.

Chapter 13 – The seller's remedies

Section 1 – General provisions

Article 131 – Overview of seller's remedies

1. In the case of a non-performance of an obligation by the buyer, the seller may do any of the following:
 - (a) require performance under Section 2 of this Chapter;
 - (b) withhold the seller's own performance under Section 3 of this Chapter;
 - (c) terminate the contract under Section 4 of this Chapter; and
 - (d) claim interest on the price or damages under Chapter 16.
2. If the buyer's non-performance is excused, the seller may resort to any of the remedies referred to in paragraph 1 except requiring performance and damages.
3. The seller may not resort to any of the remedies referred to in paragraph 1 to the extent that the seller caused the buyer's non-performance.
4. Remedies which are not incompatible may be cumulated.

Section 2 – Requiring performance

Article 132 – Requiring performance of buyer's obligations

1. The seller is entitled to recover payment of the price when it is due, and to require performance of any other obligation undertaken by the buyer.
2. Where the buyer has not yet taken over the goods or the digital content and it is clear that the buyer will be unwilling to receive performance, the seller may nonetheless require the buyer to take delivery, and may recover the price, unless the seller could have made a reasonable substitute transaction without significant effort or expense.

Section 3 – Withholding performance of seller's obligations

Article 133 – Right to withhold performance

1. A seller who is to perform at the same time as, or after, the buyer performs has a right to withhold performance until the buyer has tendered performance or has performed.
2. A seller who is to perform before the buyer performs and who reasonably believes that there will be non-performance by the buyer when the buyer's performance becomes due may withhold performance for as long as the reasonable belief continues. However, the right to withhold performance is lost if the buyer gives an adequate assurance of due performance or provides adequate security.
3. The performance which may be withheld under this Article is the whole or part of the performance to the extent justified by the non-performance. Where the buyer's obligations are to be performed in separate parts or are otherwise divisible, the seller may withhold performance only in relation to that part which has not been performed, unless the buyer's non-performance is such as to justify withholding the seller's performance as a whole.

Section 4 – Termination

Article 134 – Termination for fundamental non-performance

A seller may terminate the contract within the meaning of Article 8 if the buyer's non-performance under the contract is fundamental within the meaning of Article 87 (2).

Article 135 – Termination for delay after notice fixing additional time for performance

1. A seller may terminate in a case of delay in performance which is not in itself fundamental if the seller gives a notice fixing an additional period of time of reasonable length for performance and the buyer does not perform within that period.
2. The period is taken to be of reasonable length if the buyer does not object to it without undue delay. In relations between a trader and a consumer, the additional time for performance must not end before the 30 day period referred to Article 167(2).
3. Where the notice provides for automatic termination if the buyer does not perform within the period fixed by the notice, termination takes effect after that period without further notice.
4. In a consumer sales contract, the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Article 136 – Termination for anticipated non-performance

A seller may terminate the contract before performance is due if the buyer has declared, or it is otherwise clear, that there will be a non-performance, and if the non-performance would be fundamental.

Article 137 – Scope of right to terminate

1. Where the buyer's obligations under the contract are to be performed in separate parts or are otherwise divisible, then if there is a ground for termination under this Section

of a part which corresponds to a divisible part of the seller's obligations, the seller may terminate only in relation to that part.

2. Paragraph 1 does not apply if the non-performance is fundamental in relation to the contract as a whole.
3. Where the buyer's obligations under the contract are not to be performed in separate parts, the seller may terminate only if the non-performance is fundamental in relation to the contract as a whole.

Article 138 – Notice of termination

A right to terminate the contract under this Section is exercised by notice to the buyer.

Article 139 – Loss of right to terminate

1. Where performance has been tendered late or a tendered performance otherwise does not conform to the contract the seller loses the right to terminate under this Section unless notice of termination is given within a reasonable time from when the seller has become, or could be expected to have become, aware of the tender or the lack of conformity.
2. A seller loses a right to terminate by notice under Articles 136 unless the seller gives notice of termination within a reasonable time after the right has arisen.
3. Where the buyer has not paid the price or has not performed in some other way which is fundamental, the seller retains the right to terminate.

Chapter 14 – Passing of risk

Section 1 – General provisions

Article 140 – Effect of passing of risk

Loss of, or damage to, the goods or the digital content after the risk has passed to the buyer does not discharge the buyer from the obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Article 141 – Identification of goods or digital content to contract

The risk does not pass to the buyer until the goods or the digital content are clearly identified as the goods or digital content to be supplied under the contract, whether by the initial agreement, by notice given to the buyer or otherwise.

Section 2 – Passing of risk in consumer sales contracts

Article 142 – Passing of risk in a consumer sales contract

1. In a consumer sales contract, the risk passes at the time when the consumer or a third party designated by the consumer, not being the carrier, has acquired the physical possession of the goods or the tangible medium on which the digital content is supplied.
2. In a contract for the supply of digital content not supplied on a tangible medium, the risk passes at the time when the consumer or a third party designated by the consumer for this purpose has obtained the control of the digital content.

3. Except where the contract is a distance or off-premises contract, paragraphs 1 and 2 do not apply where the consumer fails to perform the obligation to take over the goods or the digital content and the non-performance is not excused under Article 88. In this case, the risk passes at the time when the consumer, or the third party designated by the consumer, would have acquired the physical possession of the goods or obtained the control of the digital content if the obligation to take them over had been performed.
4. Where the consumer arranges the carriage of the goods or the digital content supplied on a tangible medium and that choice was not offered by the trader, the risk passes when the goods or the digital content supplied on a tangible medium are handed over to the carrier, without prejudice to the rights of the consumer against the carrier.
5. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Section 3 – Passing of risk in contracts between traders

Article 143 – Time when risk passes

1. In a contract between traders the risk passes when the buyer takes delivery of the goods or digital content or the documents representing the goods.
2. Paragraph 1 is subject to Articles 144, 145 and 146.

Article 144 – Goods placed at buyer's disposal

1. If the goods or the digital content are placed at the buyer's disposal and the buyer is aware of this, the risk passes to the buyer at the time when the goods or digital content should have been taken over, unless the buyer was entitled to withhold taking of delivery pursuant to Article 113.
2. If the goods or the digital content are placed at the buyer's disposal at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods or digital content are placed at the buyer's disposal at that place.

Article 145 – Carriage of the goods

1. This Article applies to a contract of sale which involves carriage of goods.
2. If the seller is not bound to hand over the goods at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract.
3. If the seller is bound to hand over the goods to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place.
4. The fact that the seller is authorised to retain documents controlling the disposition of the goods does not affect the passing of the risk.

Article 146 – Goods sold in transit

1. This Article applies to a contract of sale which involves goods sold in transit.
2. The risk passes to the buyer as from the time the goods were handed over to the first carrier. However, if the circumstances so indicate, the risk passes to the buyer when the contract is concluded.

3. If at the time of the conclusion of the contract the seller knew or could be expected to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

Part V – Obligations and remedies of the parties to a related service contract

Chapter 15 – Obligations and remedies of the parties

Section 1 – Application of certain general rules on sales contracts

Article 147 – Application of certain general rules on sales contracts

1. The rules in Chapter 9 apply for the purposes of this Part.
2. Where a sales contract or a contract for the supply of digital content is terminated any related service contract is also terminated.

Section 2 – Obligations of the service provider

Article 148 – Obligation to achieve result and obligation of care and skill

1. The service provider must achieve any specific result required by the contract.
2. In the absence of any express or implied contractual obligation to achieve a specific result, the service provider must perform the related service with the care and skill which a reasonable service provider would exercise and in conformity with any statutory or other binding legal rules which are applicable to the related service.
3. In determining the reasonable care and skill required of the service provider, regard is to be had, among other things, to:
 - (a) the nature, the magnitude, the frequency and the foreseeability of the risks involved in the performance of the related service for the customer;
 - (b) if damage has occurred, the costs of any precautions which would have prevented that damage or similar damage from occurring; and
 - (c) the time available for the performance of the related service.
4. Where in a contract between a trader and a consumer the related service includes installation of the goods, the installation must be such that the installed goods conform to the contract as required by Article 101.
5. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of paragraph 2 or derogate from or vary its effects.

Article 149 – Obligation to prevent damage

The service provider must take reasonable precautions in order to prevent any damage to the goods or the digital content, or physical injury or any other loss or damage in the course of or as a consequence of the performance of the related service.

Article 150 – Performance by a third party

1. A service provider may entrust performance to another person, unless personal performance by the service provider is required.

2. A service provider who entrusts performance to another person remains responsible for performance.
3. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of paragraph 2 or derogate from or vary its effects.

Article 151 – Obligation to provide invoice

Where a separate price is payable for the related service, and the price is not a lump sum agreed at the time of conclusion of the contract, the service provider must provide the customer with an invoice which explains, in a clear and intelligible way, how the price was calculated.

Article 152 – Obligation to warn of unexpected or uneconomic cost

1. The service provider must warn the customer and seek the consent of the customer to proceed if:
 - (a) the cost of the related service would be greater than already indicated by the service provider to the customer; or
 - (b) the related service would cost more than the value of the goods or the digital content after the related service has been provided, so far as this is known to the service provider.
2. A service provider who fails to obtain the consent of the customer in accordance with paragraph 1 is not entitled to a price exceeding the cost already indicated or, as the case may be, the value of the goods or digital content after the related service has been provided.

Section 3 – Obligations of the customer

Article 153 – Payment of the price

1. The customer must pay any price that is payable for the related service in accordance with the contract.
2. The price is payable when the related service is completed and the object of the related service is made available to the customer.

Article 154 – Provision of access

Where it is necessary for the service provider to obtain access to the customer's premises in order to perform the related service the customer must provide such access at reasonable hours.

Section 4 – Remedies

Article 155 – Remedies of the customer

1. In the case of non-performance of an obligation by the service provider, the customer has, with the adaptations set out in this Article, the same remedies as are provided for the buyer in Chapter 11, namely:
 - (a) to require specific performance;

- (b) to withhold the customer's own performance;
 - (c) to terminate the contract;
 - (d) to reduce the price; and
 - (e) to claim damages.
2. Without prejudice to paragraph 3, the customer's remedies are subject to a right of the service provider to cure whether or not the customer is a consumer.
 3. In the case of incorrect installation under a consumer sales contract as referred to in Article 101 the consumer's remedies are not subject to a right of the service provider to cure.
 4. The customer, if a consumer, has the right to terminate the contract for any lack of conformity in the related service provided unless the lack of conformity is insignificant.
 5. Chapter 11 applies with the necessary adaptations, in particular:
 - (a) in relation to the right of the service provider to cure, in contracts between a trader and a consumer, the reasonable period under Article 109 (5) must not exceed 30 days;
 - (b) in relation to the remedying of a non-conforming performance Articles 111 and 112 do not apply; and
 - (c) Article 156 applies instead of Article 122.

Article 156 – Requirement of notification of lack of conformity in related service contracts between traders

1. In a related service contract between traders, the customer may rely on a lack of conformity only if the customer gives notice to the service provider within a reasonable time specifying the nature of the lack of conformity.
The time starts to run when the related service is completed or when the customer discovers or could be expected to discover the lack of conformity, whichever is later.
2. The service provider is not entitled to rely on this Article if the lack of conformity relates to facts of which the service provider knew or could be expected to have known and which the service provider did not disclose to the customer.

Article 157 – Remedies of the service provider

1. In the case of a non-performance by the customer, the service provider has, with the adaptations set out in paragraph 2, the same remedies as are provided for the seller in Chapter 13, namely:
 - (a) to require performance;
 - (b) to withhold the service provider's own performance;
 - (c) to terminate the contract; and
 - (d) to claim interest on the price or damages.
2. Chapter 13 applies with the necessary adaptations. In particular Article 158 applies instead of Article 132 (2).

Article 158 – Customer's right to decline performance

1. The customer may at any time give notice to the service provider that performance, or further performance of the related service is no longer required.
2. Where notice is given under paragraph 1:
 - (a) the service provider no longer has the right or obligation to provide the related service; and

- (b) the customer, if there is no ground for termination under any other provision, remains liable to pay the price less the expenses that the service provider has saved or could be expected to have saved by not having to complete performance.
3. In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Part VI – Damages and interest

Chapter 16 – Damages and interest

Section 1 – Damages

Article 159 – Right to damages

1. A creditor is entitled to damages for loss caused by the non-performance of an obligation by the debtor, unless the non-performance is excused.
2. The loss for which damages are recoverable includes future loss which the debtor could expect to occur.

Article 160 – General measure of damages

The general measure of damages for loss caused by non-performance of an obligation is such sum as will put the creditor into the position in which the creditor would have been if the obligation had been duly performed, or, where that is not possible, as nearly as possible into that position. Such damages cover loss which the creditor has suffered and gain of which the creditor has been deprived.

Article 161 – Foreseeability of loss

The debtor is liable only for loss which the debtor foresaw or could be expected to have foreseen at the time when the contract was concluded as a result of the non-performance.

Article 162 – Loss attributable to creditor

The debtor is not liable for loss suffered by the creditor to the extent that the creditor contributed to the non-performance or its effects.

Article 163 – Reduction of loss

1. The debtor is not liable for loss suffered by the creditor to the extent that the creditor could have reduced the loss by taking reasonable steps.
2. The creditor is entitled to recover any expenses reasonably incurred in attempting to reduce the loss.

Article 164 – Substitute transaction

A creditor who has terminated a contract in whole or in part and has made a substitute transaction within a reasonable time and in a reasonable manner may, in so far as it is entitled to damages, recover the difference between the value of what would have been payable under the terminated contract and the value of what is payable under the substitute transaction, as well as damages for any further loss.

Article 165 – Current price

Where the creditor has terminated the contract and has not made a substitute transaction but there is a current price for the performance, the creditor may, in so far as entitled to damages, recover the difference between the contract price and the price current at the time of termination as well as damages for any further loss.

Section 2 – Interest on late payments: general provisions

Article 166 – Interest on late payments

1. Where payment of a sum of money is delayed, the creditor is entitled, without the need to give notice, to interest on that sum from the time when payment is due to the time of payment at the rate specified in paragraph 2.
2. The interest rate for delayed payment is:
 - (a) where the creditor's habitual residence is in a Member State whose currency is the euro or in a third country, the rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question, or the marginal interest rate resulting from variable-rate tender procedures for the most recent main refinancing operations of the European Central Bank, plus two percentage points;
 - (b) where the creditor's habitual residence is in a Member State whose currency is not the euro, the equivalent rate set by the national central bank of that Member State, plus two percentage points.
3. The creditor may recover damages for any further loss.

Article 167 – Interest when the debtor is a consumer

1. When the debtor is a consumer, interest for delay in payment is due at the rate provided in Article 166 only when non-performance is not excused.
2. Interest does not start to run until 30 days after the creditor has given notice to the debtor specifying the obligation to pay interest and its rate. Notice may be given before the date when payment is due.
3. A term of the contract which fixes a rate of interest higher than that provided in Article 166, or accrual earlier than the time specified in paragraph 2 of this Article is not binding to the extent that this would be unfair according to Article 83.
4. Interest for delay in payment cannot be added to capital in order to produce interest.
5. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.

Section 3 – Late payments by traders

Article 168 – Rate of interest and accrual

1. Where a trader delays the payment of a price due under a contract for the delivery of goods, supply of digital content or provision of related services without being excused by virtue of Article 88, interest is due at the rate specified in paragraph 5 of this Article.

2. Interest at the rate specified in paragraph 5 starts to run on the day which follows the date or the end of the period for payment provided in the contract. If there is no such date or period, interest at that rate starts to run:
 - (a) 30 days after the date when the debtor receives the invoice or an equivalent request for payment; or
 - (b) 30 days after the date of receipt of the goods, digital content or related services, if the date provided for in point (a) is earlier or uncertain, or if it is uncertain whether the debtor has received an invoice or equivalent request for payment.
3. Where conformity of goods, digital content or related services to the contract is to be ascertained by way of acceptance or examination, the 30 day period provided for in point (b) of paragraph 2 begins on the date of the acceptance or the date the examination procedure is finalised. The maximum duration of the examination procedure cannot exceed 30 days from the date of delivery of the goods, supply of digital content or provision of related services, unless the parties expressly agree otherwise and that agreement is not unfair according to Article 170.
4. The period for payment determined under paragraph 2 cannot exceed 60 days, unless the parties expressly agree otherwise and that agreement is not unfair according to Article 170.
5. The interest rate for delayed payment is:
 - (a) where the creditor's habitual residence is in a Member State whose currency is the euro or in a third country, the interest rate applied by the European Central Bank to its most recent main refinancing operation carried out before the first calendar day of the half-year in question, or the marginal interest rate resulting from variable-rate tender procedures for the most recent main refinancing operations of the European Central Bank, plus eight percentage points;
 - (b) where the creditor's habitual residence is in a Member State whose currency is not the euro, the equivalent rate set by the national central bank of that Member State, plus eight percentage points.
6. The creditor may recover damages for any further loss.

Article 169 – Compensation for recovery costs

1. Where interest is payable in accordance with Article 168, the creditor is entitled to obtain from the debtor, as a minimum, a fixed sum of EUR 40 or the equivalent sum in the currency agreed for the contract price as compensation for the creditor's recovery costs.
2. The creditor is entitled to obtain from the debtor reasonable compensation for any recovery costs exceeding the fixed sum referred to in paragraph 1 and incurred due to the debtor's late payment.

Article 170 – Unfair contract terms relating to interest for late payment

1. A contract term relating to the date or the period for payment, the rate of interest for late payment or the compensation for recovery costs is not binding to the extent that the term is unfair. A term is unfair if it grossly deviates from good commercial practice, contrary to good faith and fair dealing, taking into account all circumstances of the case, including the nature of the goods, digital content or related service.
2. For the purpose of paragraph 1, a contract term providing for a time or period for payment or a rate of interest less favourable to the creditor than the time, period or rate

specified in Articles 167 or 168, or a term providing for an amount of compensation for recovery costs lower than the amount specified in Article 169 is presumed to be unfair.

3. For the purpose of paragraph 1, a contract term excluding interest for late payment or compensation for recovery costs is always unfair.

Article 171 – Mandatory nature

The parties may not exclude the application of this Section or derogate from or vary its effects.

Part VII – Restitution

Chapter 17 – Restitution

Article 172 – Restitution on avoidance or termination

1. Where a contract is avoided or terminated by either party, each party is obliged to return what that party (“the recipient”) has received from the other party.
2. The obligation to return what was received includes any natural and legal fruits derived from what was received.
3. On the termination of a contract for performance in instalments or parts, the return of what was received is not required in relation to any instalment or part where the obligations on both sides have been fully performed, or where the price for what has been done remains payable under Article 8 (2), unless the nature of the contract is such that part performance is of no value to one of the parties.

Article 173 – Payment for monetary value

1. Where what was received, including fruits where relevant, cannot be returned, or, in a case of digital content whether or not it was supplied on a tangible medium, the recipient must pay its monetary value. Where the return is possible but would cause unreasonable effort or expense, the recipient may choose to pay the monetary value, provided that this would not harm the other party’s proprietary interests.
2. The monetary value of goods is the value that they would have had at the date when payment of the monetary value is to be made if they had been kept by the recipient without destruction or damage until that date.
3. Where a related service contract is avoided or terminated by the customer after the related service has been performed or partly performed, the monetary value of what was received is the amount the customer saved by receiving the related service.
4. In a case of digital content the monetary value of what was received is the amount the consumer saved by making use of the digital content.
5. Where the recipient has obtained a substitute in money or in kind in exchange for goods or digital content when the recipient knew or could be expected to have known of the ground for avoidance or termination, the other party may choose to claim the substitute or the monetary value of the substitute. A recipient who has obtained a substitute in money or kind in exchange for goods or digital content when the recipient did not know and could not be expected to have known of the ground for avoidance or termination may choose to return the monetary value of the substitute or the substitute.

6. In the case of digital content which is not supplied in exchange for the payment of a price, no restitution will be made.

Article 174 – Payment for use and interest on money received

1. A recipient who has made use of goods must pay the other party the monetary value of that use for any period where:
 - (a) the recipient caused the ground for avoidance or termination;
 - (b) the recipient, prior to the start of that period, was aware of the ground for avoidance or termination; or
 - (c) having regard to the nature of the goods, the nature and amount of the use and the availability of remedies other than termination, it would be inequitable to allow the recipient the free use of the goods for that period.
2. A recipient who is obliged to return money must pay interest, at the rate stipulated in Article 166, where :
 - (a) the other party is obliged to pay for use; or
 - (b) the recipient gave cause for the contract to be avoided because of fraud, threats and unfair exploitation.
3. For the purposes of this Chapter, a recipient is not obliged to pay for use of goods received or interest on money received in any circumstances other than those set out in paragraphs 1 and 2.

Article 175 – Compensation for expenditure

1. Where a recipient has incurred expenditure on goods or digital content, the recipient is entitled to compensation to the extent that the expenditure benefited the other party provided that the expenditure was made when the recipient did not know and could not be expected to know of the ground for avoidance or termination.
2. A recipient who knew or could be expected to know of the ground for avoidance or termination is entitled to compensation only for expenditure that was necessary to protect the goods or the digital content from being lost or diminished in value, provided that the recipient had no opportunity to ask the other party for advice.

Article 176 – Equitable modification

Any obligation to return or to pay under this Chapter may be modified to the extent that its performance would be grossly inequitable, taking into account in particular whether the party did not cause, or lacked knowledge of, the ground for avoidance or termination.

Article 177 – Mandatory nature

In relations between a trader and a consumer the parties may not, to the detriment of the consumer, exclude the application of this Chapter or derogate from or vary its effects.

Part VIII – Prescription

Chapter 18 – Prescription

Section 1 – General provisions

Article 178 – Rights subject to prescription

A right to enforce performance of an obligation, and any right ancillary to such a right, is subject to prescription by the expiry of a period of time in accordance with this Chapter.

Section 2 – Periods of prescription and their commencement

Article 179 – Periods of prescription

1. The short period of prescription is two years.
2. The long period of prescription is ten years or, in the case of a right to damages for personal injuries, thirty years.

Article 180 – Commencement

1. The short period of prescription begins to run from the time when the creditor has become, or could be expected to have become, aware of the facts as a result of which the right can be exercised.
2. The long period of prescription begins to run from the time when the debtor has to perform or, in the case of a right to damages, from the time of the act which gives rise to the right.
3. Where the debtor is under a continuing obligation to do or refrain from doing something, the creditor is regarded as having a separate right in relation to each non-performance of the obligation.

Section 3 – Extension of periods of prescription

Article 181 – Suspension in case of judicial and other proceedings

1. The running of both periods of prescription is suspended from the time when judicial proceedings to assert the right are begun.
2. Suspension lasts until a final decision has been made, or until the case has been otherwise disposed of. Where the proceedings end within the last six months of the prescription period without a decision on the merits, the period of prescription does not expire before six months have passed after the time when the proceedings ended.
3. Paragraphs 1 and 2 apply, with appropriate adaptations, to arbitration proceedings, to mediation proceedings, to proceedings whereby an issue between two parties is referred to a third party for a binding decision and to all other proceedings initiated with the aim of obtaining a decision relating to the right or to avoid insolvency.
4. Mediation means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the

national law. Mediation ends by an agreement of the parties or by declaration of the mediator or one of the parties.

Article 182 – Postponement of expiry in the case of negotiations

If the parties negotiate about the right, or about circumstances from which a claim relating to the right might arise, neither period of prescription expires before one year has passed since the last communication made in the negotiations or since one of the parties communicated to the other that it does not wish to pursue the negotiations.

Article 183 – Postponement of expiry in case of incapacity

If a person subject to an incapacity is without a representative, neither period of prescription of a right held by that person expires before one year has passed since either the incapacity has ended or a representative has been appointed.

Section 4 – Renewal of periods of prescription

Article 184 – Renewal by acknowledgement

If the debtor acknowledges the right vis-à-vis the creditor, by part payment, payment of interest, giving of security, set-off or in any other manner, a new short period of prescription begins to run.

Section 5 – Effects of prescription

Article 185 – Effects of prescription

1. After expiry of the relevant period of prescription the debtor is entitled to refuse performance of the obligation in question and the creditor loses all remedies for non-performance except withholding performance.
2. Whatever has been paid or transferred by the debtor in performance of the obligation in question may not be reclaimed merely because the period of prescription had expired at the moment that the performance was carried out.
3. The period of prescription for a right to payment of interest, and other rights of an ancillary nature, expires not later than the period for the principal right.

Section 6 – Modification by agreement

Article 186 – Agreements concerning prescription

1. The rules of this Chapter may be modified by agreement between the parties, in particular by either shortening or lengthening the periods of prescription.
2. The short period of prescription may not be reduced to less than one year or extended to more than ten years.
3. The long period of prescription may not be reduced to less than one year or extended to more than thirty years.

4. The parties may not exclude the application of this Article or derogate from or vary its effects.
5. In a contract between a trader and a consumer this Article may not be applied to the detriment of the consumer.

Appendix 1 – Model instructions on withdrawal

Right of withdrawal

You have the right to withdraw from this contract within 14 days without giving any reason. The withdrawal period expires after 14 days from the day [1].

To exercise the right of withdrawal, you must inform us ([2]) of your decision to withdraw from this contract by a clear statement (e.g. a letter sent by post, fax or e-mail). You may use the attached model withdrawal form, but it is not obligatory. [3]

To meet the withdrawal deadline, it is sufficient for you to send your communication concerning your exercise of the right of withdrawal before the withdrawal period has expired.

Effects of withdrawal

If you withdraw from this contract, we will reimburse all payments received from you, including the costs of delivery (with the exception of the supplementary costs resulting from your choice of a type of delivery other than the least expensive type of standard delivery offered by us), without undue delay and in any event not later than 14 days from the day on which we are informed about your decision to withdraw from this contract. We will carry out such reimbursement using the same means of payment as you used for the initial transaction, unless you have expressly agreed otherwise; in any event, you will not incur any fees as a result of such reimbursement. [4]

[5]

[6]

Instructions for completion:

[1] Insert one of the following texts between inverted commas here:

- a) in the case of a related service contract or a contract for the supply of water, gas or electricity, where they are not put up for sale in a limited volume or set quantity, of district heating or of digital content which is not supplied on a tangible medium: “of the conclusion of the contract.”;
- b) in the case of a sales contract: “on which you acquire, or a third party other than the carrier and indicated by you acquires, physical possession of the goods.”;
- c) in the case of a contract relating to multiple goods ordered by the consumer in one order and delivered separately: “on which you acquire, or a third party other than the carrier and indicated by you acquires, physical possession of the last good.”;
- d) in the case of a contract relating to delivery of a good consisting of multiple lots or pieces: “on which you acquire, or a third party other than the carrier and indicated by you acquires, physical possession of the last lot or piece.”;

- e) in the case of a contract for regular delivery of goods during a defined period of time: “on which you acquire, or a third party other than the carrier and indicated by you acquires, physical possession of the first good.”
- [2] Insert your name, geographical address and, where available, your telephone number, fax number and e-mail address.
- [3] If you give the option to the consumer to electronically fill in and submit information about his or her withdrawal from the contract on your website, insert the following: “You can also electronically fill in and submit the model withdrawal form or any other clear statement on our website [insert internet address]. If you use this option, we will communicate to you an acknowledgement of receipt of such a withdrawal on a durable medium (e.g. by e-mail) without delay.”
- [4] In the case of sales contracts in which you have not offered to collect the goods in the event of withdrawal insert the following: “We may withhold reimbursement until we have received the goods back or you have supplied evidence of having sent back the goods, whichever is the earliest”.
- [5] If the consumer has received goods in connection with the contract, insert the following:
- [a] insert:
- “We will collect the goods.”; or
 - “You shall send back the goods or hand them over to us or ____ [insert the name and geographical address, where applicable, of the person authorised by you to receive the goods], without undue delay and in any event not later than 14 days from the day on which you communicate your withdrawal from this contract to us. The deadline is met if you send back the goods before the period of 14 days has expired.”
- [b] insert either:
- “We will bear the cost of returning the goods.”; or
 - “You will have to bear the direct cost of returning the goods.”; or
 - If, in a distance contract, you do not offer to bear the cost of returning the goods and the goods, by their nature, cannot normally be returned by post: “You will have to bear the direct cost of returning the goods, ____ EUR [insert the amount].”; or if the cost of returning the goods cannot reasonably be calculated in advance: “You will have to bear the direct cost of returning the goods. The cost is estimated to a maximum of approximately ____ EUR [insert the amount].”; or
 - If, in an off-premises contract, the goods, by their nature, cannot normally be returned by post and have been delivered to the consumer’s home at the time of the conclusion of the contract: “We will collect the goods at our own expense.”
- [c] “You are only liable for any diminished value of the goods resulting from the handling other than what is necessary to establish the nature, characteristics and functioning of the goods.”
- [6] In the case of a contract for the provision of related services insert the following: “If you requested to begin the performance of related services during the withdrawal period, you shall pay us an amount which is in proportion to what has been provided until you have communicated us your withdrawal from this contract, in comparison with the full coverage of the contract.”

Appendix 2 – Model withdrawal form

(complete and return this form only if you wish to withdraw from the contract)

- To [here the trader's name, geographical address and, where available, his fax number and e-mail address are to be inserted by the trader]:
- I/We* hereby give notice that I/We* withdraw from my/our* contract of sale of the following goods*/for the supply of the following digital content*/for the provision of the following related service*
- Ordered on*/received on*
- Name of consumer(s)
- Address of consumer(s)
- Signature of consumer(s) (only if this form is notified on paper)
- Date

* Delete as appropriate.

Annex II – Standard Information Notice

The contract you are about to conclude will be governed by the Common European Sales Law, which is an alternative system of national contract law available to consumers in cross-border situations. These common rules are identical throughout the European Union, and have been designed to provide consumers with a high level of protection.

These rules only apply if you mark your agreement that the contract is governed by the Common European Sales Law.

You may also have agreed to a contract on the telephone or in any other way (such as by SMS) that did not allow you to get this notice beforehand. In this case the contract will only become valid after you have received this notice and confirmed your consent.

Your core rights are described below.

The Common European Sales Law: Summary of key consumer rights

Your rights before signing the contract

The trader has to give you the important information on the contract, for instance on the product and its price including all taxes and charges and his contact details. The information has to be more detailed when you buy something outside the trader's shop or if you do not meet the trader personally at all, for instance if you buy online or by telephone. You are entitled to damages if this information is incomplete or wrong.

Your rights after signing the contract

In most cases you have 14 days to **withdraw from the purchase if you bought the goods** outside the trader's shop or if you have not met the trader up to the time of the purchase (for instance if you bought online or by telephone). The trader must provide you with information

and a Model withdrawal **form**.²¹ If the trader has not done so, you can cancel the contract within one year.

What can you do when products are faulty or not delivered as agreed? You are entitled to choose between: 1) having the product delivered 2) replaced or 3) repaired. 4) Ask for a price reduction. 5) You can cancel the contract, return the product and get a refund, except if the defect is very small. 6) You can claim damages for your loss. You do not have to pay the price until you get the product without defects.

If the trader has not performed a related *service* as promised in the contract, you have similar rights. However, after you have complained to the trader, he normally has the right to first try to do the job correctly. Only if the trader fails again you have a choice between 1) asking the trader again to provide the related service, 2) not paying the price until you get the related service supplied correctly, 3) requesting a price reduction or 4) claiming damages. 5) You can also cancel the contract and get a refund, except if the failure in providing the related service is very small. **Period to claim your rights when products are faulty or not delivered as agreed:** You have 2 years to claim your rights after you realise or should have realised that the trader has not done something as agreed in the contract. Where such problems become apparent very late, the last possible moment for you to make such a claim is 10 years from the moment the trader had to deliver the goods, supply the digital content or provide the related service.

Unfair terms protection: Trader's standard contract terms which are unfair are not legally binding for you.

This list of rights is only a summary and therefore not exhaustive, nor does it contain all details. You can consult the full text of the Common European Sales Law **here**. Please read your contract carefully.

In case of dispute you may wish to ask for legal advice.

²¹ Insert a link here.

