THE COMMON EUROPEAN SALES LAW (CESL): A PRIVATE INTERNATIONAL LAW AND COMPARATIVE LAW ANALYSIS

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by Soterios Loizou

ABSTRACT

This research study examines the (in-)effectiveness of the latest EU Private Law initiative on the creation of a Common European Sales Law (CESL). It comprises four parts, which correspond to the most complex and important aspects of the CESL's novel legal response to the problem of creating a uniform legal instrument. These reflect the four operations at the heart of the CESL's "activation" and application: *i.* the selection of the CESL regime by the parties as the legal framework of their sales agreement, *ii.* the ascertainment of CESL's provisions by the adjudicatory authority, *iii.* the impact of overriding mandatory rules and international public policy considerations on the application of the European sales law regime, and, finally, *iv.* the interplay between the CESL and other uniform conflicts and substantive law instruments governing international sale of goods contracts. In light of this linear examination of the instrument, the analysis showcases that, contrary to the proclamations of the EU legislator, the innovative structure of the CESL as an optional parallel legal regime does anything but safeguard the interests of contracting parties. In fact, the analysis illustrates the regulatory redundancy that comes with the continuous promulgation of international uniform sales law instruments. Granted, notwithstanding the instrument's withdrawal by the EU Commission, the CESL cannot be consigned to history. Most obviously, it may be revived, or elements of it may be revived in modified form, and aspects of its approach have been, and will continue to be, copied in other instruments. More importantly, however, the CESL remains important as a case-study in legal harmonization. Hence, this thesis attempts, firstly, to expose both the advantages and disadvantages of a distinctive model of harmonization and the conceptual difficulties of such an approach, and, secondly, to anticipate legal developments in the area by delineating a new path for future European contract law initiatives.

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ABBREVIATIONS

JOURNALS

Am. J. Comp. L.	American Journal of Comparative Law
Am. Rev. Int'l Arb.	The American Review of International Arbitration
Annals Fac. L. Belgrade Int'l Ed.	Annals of the Faculty of Law in Belgrade - International Edition
Arb. Int'l	Arbitration International
ASA Bul.	ASA Bulletin
Baltic Y. B. Int'l L.	Baltic Yearbook of International Law
Brook. J. Int'l L.	Brooklyn Journal of International Law
Bus. L. Rev.	Business Law Review
Cambridge L. J.	Cambridge Law Journal
Colum. J. Eur. L.	Columbia Journal of European Law
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Colum. L. Rev.	Columbia Law Review
C. M. L. Rev.	Common Market Law Review
Cornell Int'l L. J.	Cornell International Law Journal
D. R. J.	Dispute Resolution Journal
Edinburgh L. Rev.	Edinburgh Law Review
E. B. L. R.	European Business Law Review
Eur. J. L. Econ.	European Journal of Law and Economics
Eur. J. L. Reform	European Journal of Law Reform
Eu L. F.	European Legal Forum
E. R. C. L.	European Review of Contract Law
E. R. P. L.	European Review of Private Law
Int'l A. L. R.	International Arbitration Law Review
Int'l Bus. L. J.	International Business Law Journal
I. C. C. L. R.	International Company and Commercial Law Review
I. L. M.	International Legal Materials
Int'l & Comp. L. Q.	International and Comparative Law Quarterly
Int'l L. Ass'n Rep. Conf.	International Law Association Reports of Conferences
Int'l Law.	International Lawyer
J. Dr. Int'l	Journal du Droit International

J. B. L.	Journal of Business Law
J. Int'l Arb.	Journal of International Arbitration
J. I. D. S.	Journal of International Dispute Settlement
J. I. T. L. P.	Journal of International Trade Law and Policy
J. L. & Com.	Journal of Law and Commerce
J. Priv. Int'l L.	Journal of Private International Law
Law & Contemp. Probs.	Law and Contemporary Problems
L. Q. Rev.	Law Quarterly Review
La. L. Rev.	Louisiana Law Review
Maastricht J. Eur. & Comp. L.	Maastricht Journal of European & Comparative Law
Mod. L. Rev.	Modern Law Review
N. I. L. R.	Netherlands International Law Review
Pace Int'l L. Rev.	Pace International Law Review
Penn St. Int'l L. Rev.	Penn State International Law Review
RabelsZ	Rabels Zeitschrift für Ausländisches und Internationales Privatrecht
Rev. Crit. D. I. P.	Revue Critique de Droit International Privé
R. J. T.	Revue Juridique Thémis
Riv. Dir. Int. Priv. Proc.	Rivista di Diritto Internazionale Privato e Processuale
Seton Hall L. Rev.	Seton Hall Law Review
S. Cal. L. Rev.	Southern California Law Review
S. I. A. R.	Stockholm International Arbitration Review
SUBB Jurisprudentia	Studia Universitatis Babeş-Bolyai Jurisprudentia
T. D. M.	Transnational Dispute Management
Tul. L. Rev.	Tulane Law Review
U. C. C. L. J.	Uniform Commercial Code Law Journal
Unif. L. Rev.	Uniform Law Review
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
Vt. L. Rev.	Vermont Law Review
Vill. L. Rev.	Villanova Law Review
Vindobona J.	Vindobona Journal of International Commercial Law and Arbitration
Victoria U. Wellington L. Rev.	Victoria University of Wellington Law Review
Va. J. Int'l L.	Virginia Journal of International Law
Willamette L. Rev.	Willamette Law Review

Yale L. J.	Yale Law Journal
Y. B. Comm. Arb.	Yearbook of Commercial Arbitration
Y. B. Priv. Int'l L.	Yearbook of Private International Law
Y. B. UNCITRAL	UNCITRAL Yearbook
ZEuP	Zeitschrift fur Europäisches Privatrecht

INSTRUMENTS

1955 Hague Sales Conv.	Convention on the Law Applicable to International Sales of Goods (The Hague, 1955)
1958 New York Conv.	Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)
1968 London Conv.	European Convention on Information on Foreign Law (London, 1968)
1969 Vienna Conv.	Convention on the Law of Treaties (Vienna, 1969)
1980 Rome Conv.	Convention on the Law Applicable to Contractual Obligations (Rome, 1980)
1983 Agency Conv.	Convention on Agency in the International Sale of Goods (Geneva, 1983)
1986 Hague Sales Conv.	Convention on the Law Applicable to Contracts for the International Sale of Goods (The Hague, 1986)
1994 Mexico City Conv.	Inter-American Convention on the Law Applicable to International Contracts (Mexico City, 1994)
2005 Hague Choice of Court Conv.	Convention on Choice of Court Agreements (The Hague, 2005)
2015 Hague Principles	Principles on Choice of Law in International Commercial Contracts, (The Hague, 2015)
Brussels I Reg. (*bis*)	Regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters
Bustamante Code	Convention on Private International Law (Havana, 1928)
CESL	Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law
CISG	Convention on Contracts for the International Sales of Goods (Vienna, 1980)
CMR	UNIDROIT Convention on the Contract for the International Carriage of Goods by Road (Geneva, 1956)

CTC	UNIDROIT Convention on International Interests in Mobile Equipment (Cape Town, 2001)
DCFR	Draft Common Frame of Reference
ICSID	Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965)
IFC	UNIDROIT Convention on International Factoring (Ottawa, 1988)
IFLC	UNIDROIT Convention on International Financial Leasing (Ottawa, 1988)
IIL	Institute of International Law
ILA	International Law Association
LPISG	Convention on the Limitation Period in the International Sale of Goods, as amended by the Protocol of 11 April 1980 (New York, 1974)
PECL	Principles of European Contract Law (1998, 2002)
PEICL	Principles of European Insurance Contract Law
O.J.	The Official Journal of the European Union
Rome I Reg.	Regulation 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)
Rome II Reg.	Regulation 864/2007, of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II)
Swiss PILA	Federal Act on Private International Law of Dec. 18, 1987, as amended
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
ULFC	Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (The Hague, 1964)
ULIS	Convention relating to a Uniform Law on the International Sale of Goods (The Hague, 1964)
UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rules (1976), as amended in 2010 and 2013
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), as amended in 2006
UPICC	UNIDROIT Principles of International Commercial Contracts (4th ed., 2016)

INTRODUCTION

> "My destiny is not accomplished; I must finish that which is but as yet sketched. We must have an European code, an European court of cassation, the same coins, the same weights and measures, the same laws; I must amalgamate all the people of Europe into one . . . ."[1]

The fragmentation of legal orders and the multiplicity of diversified legal regimes create major problems in international trade.[2] This legal "Tower of Babel" increases transaction costs, creates uncertainty in dealings, and dissuades new players from conducting cross-border business.[3] What is more, the domestic focus of the applicable national laws barely serves international contracts, which require special provisions dealing with the risks and contingencies of international situations.[4] Last, but not least, the globalization of the once provincial markets, which followed the technological advancements of the industrial revolution, has amplified the need for a common legal tongue and common rules in international commerce.[5] Hence, as early as the 19th century, it was envisaged that the optimal solution to legal fragmentation would be the harmonization—or, preferably, the unification—of substantive law.[6] Such uniform law would reinforce international commerce by fostering

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[1] Napoleon Bonaparte, quoted in JOSEPH FOUCHÉ, THE MEMOIRS OF JOSEPH FOUCHÉ: DUKE OF OTRANTO, MINISTER OF THE GENERAL POLICE OF FRANCE. TRANSLATED FROM THE FRENCH 316 (1825).

[2] *See* Ole Lando, *European Contract Law*, *in* INTERNATIONAL CONTRACTS AND CONFLICT OF LAWS: A COLLECTION OF ESSAYS 1, 1 (Petar Šarčević ed., 1990).

[3] IVÁN SZÁSZ, THE CMEA UNIFORM LAW FOR INTERNATIONAL SALES 4 (2nd revised ed. 1985). For the costs incurred, allegedly, due to legal diversity, see e.g. Gary Low, *The (Ir)Relevance of Harmonization and Legal Diversity to European Contract Law: A Perspective from Psychology*, 18 E. R. P. L. 285, 287 *et seq*. (2010).

[4] *See* JAN DALHUISEN, DALHUISEN ON TRANSNATIONAL COMPARATIVE, COMMERCIAL, FINANCIAL AND TRADE LAW, vol. 2 at 188 (6th ed. 2016); Maren Heidemann, *European Private Law at the Crossroads: The Proposed European Sales Law*, 20 E. R. P. L. 1119, 1124 (2012).

[5] DEAN LEWIS, THE INTERPRETATION AND UNIFORMITY OF THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: FOCUSING ON AUSTRALIA, HONG KONG AND SINGAPORE 4 (2016). *Cf.* Peter H. Schlechtriem, *25 Years of the CISG: An International Lingua Franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transactional Contracts*, *in* DRAFTING CONTRACTS UNDER THE CISG 167 (Harry M. Flechtner, Ronald A. Brand, & Mark S. Walter eds., 2008) (describing the CISG as "lingua franca" for traders, lawyers, and legislators around the world).

[6] Institute of International Law [IIL], *Conflits des Lois Commerciales*, Resolution, Session of Turin. Rapporteur: T.M.C. Asser (Sep. 12, 1882) (¶ 1: "Plusieurs parties du droit commercial devraient être réglées par une législation uniforme, le moyen le plus radical et le plus efficace de faire disparaître les conflits de droit."); FRANCO FERRARI, CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: APPLICABILITY AND APPLICATIONS OF THE 1980 UNITED NATIONS SALES CONVENTION 1–2 (2012) (with further references to legal scholarship); Kurt H. Nadelmann, *The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglio*, 74 YALE L. J. 449, 450 (1964) ("For international sales a uniform substantive law is perhaps the ideal solution. If the ideal is beyond reach, the next best solution is an agreement on conflicts rules . . . ."). For a sceptical approach to the unification and harmonization of international commercial law, see e.g. Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743 (1999). For Professor

legal certainty and predictability, and by setting a level playing field for all parties participating in international trade.

As on the global level, the regulatory differences between the various EU Member States jeopardize legal certainty and predictability, increase transactions costs, and dissuade prospective contracting parties from trading in the internal market.[7] In addressing these shortcomings of legal diversity, private law harmonization was placed at the core of the European integration project.[8] As a result, numerous private law instruments have been drafted, and several legislative proposals have been undertaken towards the establishment of a common legal framework across the EU.[9] Among these projects, the Principles of European Contract Law (PECL), the Pavia Draft of a European Contract Code, the Study Group for a European Civil Code, the Principles of the existing EC Private Law (Acquis Group), the far-reaching Draft Common Frame of Reference (DCFR), and the Feasibility Study for a Future Instrument

Rabel's report, which instigated the international sales law unification efforts in the 20th century, see Ernst M. Rabel, *Bericht von Ernst Rabel über die Nützlichkeit einer Vereinheitlichung des Kaufrechts*, 22 RABELSZ 117 (1957). *But see* JÜRGEN BASEDOW, THE LAW OF OPEN SOCIETIES - PRIVATE ORDERING AND PUBLIC REGULATION OF INTERNATIONAL RELATIONS, 360 RECUEIL DES COURS/COLLECTED COURSES 9, 41 (2012) ("The harmonization or unification of such laws would cope with this problem [of divergent legal systems governing private relations], but realism imposes the insight that it can only reduce divergences in specific areas and to a limited extent. The existence of hundreds of jurisdictions, many of them being endowed with all-embracing sovereign powers, *makes comprehensive uniform law at the universal level of utopian perspective* [emphasis added].").

[7] For insightful statistics regarding the factors impeding cross-border transactions in the EU, including the variation in legal systems and the cost of foreign legal advice, see Stefan Vogenauer & Stephen Weatherill, *The European Community's Competence to Pursue the Harmonisation of Contract Law - An Empirical Contribution to the Debate*, *in* THE HARMONISATION OF EUROPEAN CONTRACT LAW: IMPLICATIONS FOR EUROPEAN PRIVATE LAWS, BUSINESS AND LEGAL PRACTICE 105, 105 (Stefan Vogenauer & Stephen Weatherill eds., 2006). *But see* DALHUISEN, *supra* note 4 at 178 ("[L]ittle suggests that diversity of private law is an important impediment to trade in the EU. [. . .] Tax, regulation, language and other impediments such as lack of physical facilities and credit risk of distant clients are much more likely to limit [SMEs]."); Horst Eidenmüller, *What Can Be Wrong with an Option? An Optional Common European Sales Law as a Regulatory Tool*, 50 C. M. L. REV. 69, 71 (2013) ("[O]ther barriers to cross-border transactions, such as language differences, delivery problems, litigation in a foreign forum, and enforcement in a foreign jurisdiction, may be as important impediments to cross-border transactions as differences in contract law."); Pieter de Tavernier, *Le Droit Commun Européen Optionnel de la Vente: Réaction d'Un Privatiste du "Plat Pays"*, 17 CONTRATTO E IMPRESA/EUROPA 413, 416 (2012) (noting administrative barriers, differences in language and tax regimes, and the preference of consumer for local merchants, as more important obstacles compared to legal diversity).

[8] Stefan Grundmann, *The Structure of European Contract Law*, 9 E. R. P. L. 505, 510 (2001). *See* Hans-W. Micklitz, *The (Un)-Systematics of (Private) Law as an Element of European Culture*, *in* TOWARDS A EUROPEAN LEGAL CULTURE 81, 86–87 (Geneviève Helleringer & Kai Purnhagen eds., 2014) ("The process of European private law building follows the market-driven logic. [. . .] Private law is subjected to and instrumentalised for market building purposes. The driving impetus does not result from [European] nation building but from Internal Market or markets building."); Alice Piot, *Unification of the Law of International Sale*, 84 J. DR. INT'L 949, 949 (1957) ("The effective operation of a common market . . . pre-supposes . . . the unification of legislations."). *See also* Heidemann, *supra* note 4 at 1125 ("[U]niformization of law within the EU is not an accepted end in itself under the current Treaties . . . .").

[9] For a concise historical overview of the EU contract law initiatives, see Gerhard Dannemann & Stefan Vogenauer, *Introduction: The European Contract Law Initiative and the "CFR in Context" Project*, *in* THE COMMON EUROPEAN SALES LAW IN CONTEXT: INTERACTIONS WITH ENGLISH AND GERMAN LAW 1, 1–15 (Gerhard Dannemann & Stefan Vogenauer eds., 2013).

in European Contract Law, should be mentioned. Notably, one of the most recent and ambitious EU private law instruments was the proposed Regulation for a Common European Sales Law (CESL) released by the EU Commission on 11 October 2011.[10] Drawing rules from past EU projects,[11] this latter Regulation aspired to introduce a new European legal regime on international sale of goods, contracts for the supply of digital content, and related services.[12] The proposed regime would have tackled legal diversity and addressed the shortcomings of the EU conflict-of-laws instruments.

The distinguishing difference between the CESL and all other EU contract law initiatives lies in the instrument's three-part systematization[13] and its novel structure as an optional parallel legal regime. This latter description suggests two of the key applicability features of the CESL.[14] First, the new European sales law regime would have been applicable only upon a valid selection by the contracting parties.[15] Second, the CESL would not have comprised a separate and additional "European" legal order, which could be selected by virtue of a classic choice-of-law agreement. Rather, it would have formed an integral part of the respective EU Member States' legal orders,[16] remaining "dormant," and existing in parallel with their respective "ordinary" legal regimes. In essence, the agreement to "activate" the CESL would

[10] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM (2011) 635 final (Oct. 11, 2011).

[11] *See e.g.* Ulrich Magnus, *The Roots and Traces of the CISG in the Draft of a Common European Sales Law*, *in* BOUNDARIES AND INTERSECTIONS: 5TH ANNUAL MAA SCHLECHTRIEM CISG CONFERENCE, 21 MARCH 2013, VIENNA 1, 6 (Ingeborg Schwenzer & Lisa Spagnolo eds., 2015) ("The main sources of inspiration for the CESL Proposal were the DCFR, the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law, the Acquis Principles and the CISG."); Martijn W. Hesselink, *Unfair Prices in the Common European Sales Law*, *in* ENGLISH AND EUROPEAN PERSPECTIVES ON CONTRACT AND COMMERCIAL LAW: ESSAYS IN HONOUR OF HUGH BEALE 225, 227 (Louise Gullifer & Stefan Vogenauer eds., 2014) ("With regard to the control of unfair terms in consumer contracts, the European Commission's proposal for a Common European Sales Law of 2011 substantially followed the Unfair Terms Directive."); Stefan Vogenauer, *"General Principles" of Contract Law in Transnational Instruments*, *in* ENGLISH AND EUROPEAN PERSPECTIVES ON CONTRACT AND COMMERCIAL LAW: ESSAYS IN HONOUR OF HUGH BEALE 291, 310 (Louise Gullifer & Stefan Vogenauer eds., 2014) ("The CESL fully replicates the relevant provisions of the revised version of the [Feasibility Study], again with some very minor linguistic changes.").

[12] CESL Reg., arts. 1(1), 5.

[13] That is: *i*. CESL Regulation delineates the applicability requirements of the instrument, *ii*. CESL Annex I contains the substantive law rules, and *iii*. CESL Annex II comprises a Standard Information Notice (SIN), which would be required for all consumer sales transactions.
Advocating the merger of the CESL Regulation and CESL Anx. I, see Ole Lando, *CISG and CESL: Simplicity, Fairness and Social Justice*, *in* ENGLISH AND EUROPEAN PERSPECTIVES ON CONTRACT AND COMMERCIAL LAW: ESSAYS IN HONOUR OF HUGH BEALE 237, 242 (Louise Gullifer & Stefan Vogenauer eds., 2014); Hans Schulte-Nölke & Reiner Schulze, *CESL Annex I, Article 1*, *in* COMMON EUROPEAN SALES LAW (CESL): COMMENTARY 85, 88 (2012).

[14] *See* analysis in *infra* Part I(IV).

[15] CESL Reg., arts. 3, 8(1).

[16] European Parliament Legislative Resolution of 26 February 2014 on the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, P7_TA(2014)0159, Amendment 2 (CESL Recital 9).

have functioned as a railroad-switch that would enable contracting parties to change "applicable law tracks," that is, first ordinary legal regime *vs.* CESL's second parallel legal regime, within the very same legal order.[17] As one would expect, this innovative legal structure was heavily criticized for its ground-breaking and yet-to-be-tested methodology.[18]

For better or worse, the CESL will never enter into force—at least not as envisaged in the original proposal.[19] Notwithstanding the Legislative Resolution of the EU Parliament, which endorsed the instrument and proposed amendments to the draft Regulation,[20] the political developments in Europe signalled a change in the winds for European sales law. Following the EU Parliament elections and the formation of a new EU Commission in 2014, the proposed CESL was withdrawn—an easy way to avoid the "political shipwreck" of the instrument's rejection by a deeply divided and Eurosceptic Union.[21] Then again, most of the instrument's substantive law provisions were re-introduced a year later, in 2015, under two new Proposals for EU Directives,[22] which culminated into: *i*. the Directive on Certain Aspects

[17] CESL Reg., art. 11.

[18] FRANCO FERRARI & MARCO TORSELLO, INTERNATIONAL SALES LAW - CISG IN A NUTSHELL 68 (2nd ed. 2018) ("Too much criticism had been levelled against the project, even though the criticism had been levelled more against the sphere and the optional nature of the instrument than against the substantive provisions contained therein, the quality of which was not seriously disputed."). For criticism on other aspects of the instrument, see DALHUISEN, *supra* note 4 at 14.

[19] For the EU Commission's original plan to enact the CESL in 2012 on the 20th anniversary of the Single European Market, see Paula Giliker, *Pre-Contractual Good Faith and the Common European Sales Law: A Compromise Too Far?*, 21 E. R. P. L. 79, 81 (2013).

[20] EU Parliament Legislative Resolution on the CESL, *supra* note 16.

[21] Annex 2, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Commission Work Programme 2015, A New Start, COM (2014) 910 final (Dec. 16, 2014) ("Reasons for Withdrawal/Modification: Modified Proposal in order to Fully Unleash the Potential of E-Commerce in the Digital Single Market," n. 60: "Modified proposal [to be submitted] in order to fully unleash the potential of e-commerce in the Digital Single Market."); Commission Staff Working Document, Impact Assessment, Accompanying the Document Proposals for Directives of the European Parliament and of the Council (1) on Certain Aspects concerning Contracts for the Supply of Digital Content and (2) on Certain Aspects concerning Contracts for the Online and Other Distance Sales of Goods, SWD (2015) 274 final/2 (Dec. 17, 2015), at 25 ("Optional instrument: while having received strong support from the European Parliament, the proposal for a Regulation on a Common European Sales Law did not find a majority in Council. *One of the main reasons for this opposition in the Council was the optional character of the proposal* [emphasis added]. Therefore, this option has not been taken into consideration as it was not considered politically feasible."). *But see* Vogenauer and Weatherill, *supra* note 7 at 134 (offering statistical evidence that 75% of respondents noted their overall preference for an optional—including the opt-out possibility—rather than a mandatory European contract law instrument).
For a German translation of the joint letter sent by the Ministers of Justice of Austria, Finland, France, Germany, the Netherlands, and the United Kingdom, to the new Commissioner for Justice, requesting the withdrawal of the CESL, see Jürgen Basedow, *Gemeinsames Europäisches Kaufrecht - Das Ende eines Kommissionsvorschlags*, 23 ZEuP 432, 433–435 (2015).

[22] *But see* ARTHUR HARTKAMP, EUROPEAN LAW AND NATIONAL PRIVATE LAW: EFFECT OF EU LAW AND EUROPEAN HUMAN RIGHTS LAW ON LEGAL RELATIONSHIPS BETWEEN INDIVIDUALS 275 (2nd ed. 2016) ("The key aspects of these proposals are not based on the structure of the draft Regulation, but on the Consumer Sales of Goods Directive.").

concerning Contracts for the Sale of Goods;[23] and *ii*. the Directive on Certain Aspects concerning Contracts for the Supply of Digital Content and Digital Services.[24]

Notwithstanding the withdrawal of the CESL, the instrument's unique legal structure retains its importance for both legal theory and practice.[25] In particular, an in-depth examination of the CESL's regime is mandated for a number of reasons, which may be divided in three broad groups, corresponding to the significance of the CESL for European legal integration, international commercial transactions, and private international law respectively.

Firstly, it is self-explanatory that the close scrutiny of the CESL—a European contract law instrument itself—is salient for the understanding and development of the European legal integration project. The draft CESL evidences the key-role of optional instruments for the future harmonization of private law in the EU, particularly in light of the Commission's Green Paper on policy options towards a European contract law.[26] Given the quite frequent, Phoenix-like regeneration of EU projects that have been shelved,[27] a "reborn" proposal for an optional contract law instrument should not be ruled out. Interesting enough, CESL's optional nature and its parallel legal structure have been replicated in another EU project, namely the Principles of European Insurance Contract Law (PEICL).[28]

Secondly, the CESL serves as point of reference for international legal unification in the area of contract. Specifically, the Swiss *Proposal on Possible Future Work by UNCITRAL in the Area of International Contract Law* signalled that further developments are bound to take

[23] Directive 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects concerning Contracts for the Sale of Goods, Amending Regulation 2017/2394 and Directive 2009/22/EC, and Repealing Directive 1999/44/EC, 2019 O.J. (L 136) 28.
[24] Directive 2019/770 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects concerning Contracts for the Supply of Digital Content and Digital Services, 2019 O.J. (L 136) 1.
[25] Matteo Fornasier, *CESL*, 1 *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 278, 279 (Jürgen Basedow *et al*. eds., 2017).
[26] Commission Green Paper on Policy Options for Progress towards a European Contract Law for Consumers and Businesses, COM (2010) 348 final (Jul. 1, 2010), at 9–10 ("Option 4: Regulation setting up an optional instrument of European Contract Law").
[27] Prominently, the Treaty establishing a Constitution for Europe of 2004, which was salvaged and re-branded as the Treaty of Lisbon of 2009.
[28] *See* PEICL art. 1:102 ("The PEICL shall apply when the parties, notwithstanding any limitations of choice of law under private international law, have agreed that their contract shall be governed by them. [. . .]"); Jürgen Basedow, *Article 1:102 Optional Application*, *in* PRINCIPLES OF EUROPEAN INSURANCE CONTRACT LAW (PEICL) 63, 64 (Jürgen Basedow *et al*. eds., 2nd expanded ed. 2016) ("The solution implemented by Article 1:102 is a hybrid one. This provision is a substantive rule, namely it presupposes that the law of the European Union or of one of its Member States is applicable under the conflict of laws; thus, choice of law rules must determine at a first stage whether Community law [or the law of one of its Member States] or the law of a third state applies.").

place in the field of international business transactions.[29] In anticipation of a renewed, in-depth discussion of the Swiss proposal by UNCITRAL,[30] a call for a new optional instrument—even an optional second parallel legal regime—should not come as a surprise.[31] Besides, the unique legal structure of the CESL model may be used as blueprint for regulatory reforms in other jurisdictions,[32] and as an excellent case study for the examination of the interplay between various uniform sales law regimes. The timeliness and importance of this latter examination evinces, also, from the recent initiative of the three "sister" organisations, namely the Hague Conference on Private International Law, UNCITRAL, and UNIDROIT, to clarify the interplay of the sales law instruments drafted under their auspices.[33]

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[29] Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law, U.N. Doc. A/CN.9/758 (May 8, 2012). For an endorsement of the Swiss Proposal, see CISG Advisory Council [CISG AC], *Declaration No. 1, The CISG and Regional Harmonization*. Rapporteur: Michael Bridge (2012), ¶ 6.

[30] U.N. Report of the United Nations Commission on International Trade Law, Forty-Fifth Session (25 June-6 July 2012) General Assembly, Official Records, Sixty-Seventh Session, Supplement No. 17, U.N. Doc. A/67/17 (2012), ¶ 132.

[31] *See* Pilar Perales Viscasillas, *Applicable Law, the CISG, and the Future Convention on International Commercial Contracts*, 58 VILL. L. REV. 733, 736–737 (2013) ("If finally a working group within UNCITRAL were to be established one of the most important questions would be the specific form the instrument will finally take, an issue which is usually related to the degree of compromise the states are willing to accept in regard to the substance of the instrument.").

[32] Jürgen Basedow, *Supranational Codification of Private Law in Europe and Its Significance for Third States*, *in* CODIFICATION IN INTERNATIONAL PERSPECTIVE: SELECTED PAPERS FROM THE 2ND IACL THEMATIC CONFERENCE 47, 54 (Wen-Yeu Wang ed., 2014) ("Given the focus of CESL on consumer contracts it might very well be accepted as a kind of model in non-EU countries which aim at consumer protection."); Daniela Caruso, *The Baby and the Bath Water: The American Critique of European Contract Law*, 61 AM. J. COMP. L. 479, 482 (2013) ("[T]he optional CESL regime may one day serve as a blueprint for a supranational law of contract. Its content—in so far as it endorses a particular blend of autonomy and regulation—may therefore matter more than its current institutional status[,]" and 484, amplifying the importance of the CESL debate for consumer protection regulation in the USA); Fryderyk Zoll, *Searching the Optimum Way for the Unification and Approximation of the Private Law in Europe - A Discussion in the Light of the Proposal for the Common European Sales Law*, 17 CONTRATTO E IMPRESA/EUROPA 397, 411–412 (2012) ("The idea of the optional instrument may be exported beyond the borderlines of the European Union and may facilitate the international commerce and the convergence of these systems with the traditions gathered within the Union."). For the interest of non-EU scholars in the CESL and the potential influence of the latter on other legislative initiatives worldwide, see e.g. Petra Butler, *The Perversity of Contract Law Regionalization in a Globalizing World*, *in* GLOBALIZATION VERSUS REGIONALIZATION: 4TH ANNUAL MAA SCHLECHTRIEM CISG CONFERENCE, 18 MARCH 2012, HONG KONG 13, 24, 35 (Ingeborg Schwenzer & Lisa Spagnolo eds., 2013); Luanda Hawthorne, *Contract Law - A Déluge of Norms in Search of Principles: The Common European Sales Law and the South African Consumer Protection Act*, SUBB JURISPRUDENTIA 59 (2013); Lisa Spagnolo, *Law Wars: Australian Contract Law Reform vs. CISG vs. CESL*, 58 VILL. L. REV. 623, 637 *et seq*. (2013). *See also* 50 C. M. L. Rev., Issue 1/2 (2013), containing the papers delivered at the Conference "A Law and Economics Approach to European Contract Law" held at the University of Chicago, School of Law (Apr. 27-28, 2012). In like manner, see René David, *The International Unification of Private Law*, II.5 *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 1, 53 (Kurt Lipstein ed., 1969) ("[R]egional unification may be useful insofar as it may prepare, for a greater number of states, well thought out laws or conventions, which will form the basis of subsequent efforts; and this even if it does not seem possible for other states to adhere to them unconditionally.").

[33] Joint Proposal on Co-Operation in the Area of International Commercial Contract Law (with a Focus on Sales), Proposed by the Secretariats of the Hague Conference on Private International Law, the United Nations Commission on International Trade Law and the International Institute for the Unification of Private Law, Prel. Doc. No. 6 (February 2016), *available at* https://assets.hcch.net/docs/76dde3f7-1c46-4875-a06b-7c68042e7e28.pdf.

Thirdly, the unique legal structure of the CESL raises enquiries and stirs discussion on several legal topics. This doctrinal and comparative analysis of pervasive private international law issues, such as the limits of party autonomy and the permissibility of rules-selection agreements, the diversified legal treatment of foreign law and its impact on legal unification projects, the role of public policy considerations in international business transactions, and, of course, the interplay between the numerous international uniform law instruments, is valuable in itself—even outside the context of a particular instrument or legal structure.

In light of the foregoing, this research study comprises four parts, which correspond to the most complex and important aspects of the CESL's novel legal response to the problem of creating a uniform legal instrument. These reflect the four operations at the heart of the CESL's "activation" and application: *i.* the selection of the CESL regime by the parties as the legal framework of their sales agreement (Part I), *ii.* the ascertainment of CESL's provisions by the adjudicatory authority (Part II), *iii.* the impact of overriding mandatory rules and international public policy considerations on the application of the European sales law regime (Part III), and, finally, *iv.* the interplay between the CESL and other uniform conflicts and substantive law instruments governing international sale of goods contracts (Part IV).

In particular, Part I explores the private international law aspects of the CESL as a second parallel legal regime. In the first place, it attempts to systematize the extremely complex application requirements of the draft Regulation, and, at a second stage, to determine the legal nature and effects of the CESL opt-in mechanism. The quintessential question answered in this Part is whether the opt-in agreement would have fitted with the established typology and norms of private international law. Particular emphasis is placed on the interplay between the European sales law regime and the conflict-of-laws rules enshrined in the 1955 Hague Sales Convention, the 1980 Rome Convention, and the Rome I Regulation. Would substantive law and private international law have worked *in tandem*? Would the CESL have addressed the shortcomings of 1980 Rome Conv., art. 5(2) and Rome I Reg., art. 6(2)? Or would the optional regime enshrined in its provisions have had the fate of the long-forgotten ULIS 1964?

Part II delves deeper into private international law and explores the interplay between the CESL and national rules on the ascertainment of the content and the application of foreign law. The question explored in this Part is whether the applicability of the CESL would have been affected by the notorious "foreign law as facts *vs*. foreign law as legal norms" divide. Would the differentiated treatment of foreign law have impacted the application prospects of the CESL and, by extension, the legal unification achieved under it? Or would second parallel legal

regimes constitute the "antidote" to the irreconcilable differences in the application of foreign law?

Part III focuses on the "last line of defence," that is, the impact of public policy considerations on the applicability of the CESL. The analysis seeks to determine whether the "positive" function of overriding mandatory rules and the "negative" function of international public policy could have endangered the application of European sales law. At the end of the day, the question that needs to be answered is whether state interests would have prevailed over this legal unification effort, or the European uniform sales law regime would have ousted any competing legal norms only to emerge as "CESL triumphant."

Part IV explores a distinct aspect of the conflict-of-laws enquiry, namely the conflict between the numerous regimes governing international sale of goods contracts. Given the proliferation of such uniform sales law projects,[34] the analysis attempts to establish the application hierarchy of the various instruments. In this applicability "crash-test," the optional CESL is examined against the opt-out regime of the CISG, and the "soft law" enshrined in the UNIDROIT Principles for International Commercial Contracts and the ICC INCOTERMS. Essentially, the questions posed in this Part are, firstly, which regime would have been applicable first, thus setting an additional applicability requirement for the instruments that

[34] For uniform conflict-of-laws instruments governing sale of goods contracts, see e.g. Convention on the Law Applicable to International Sales of Goods (The Hague, 1955); Convention on the Law Governing Transfer of Title in International Sales of Goods (The Hague, 1958—not yet in force); Convention of 15 April 1958 on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods (The Hague, 1958—not yet in force); Convention on Agency in the International Sale of Goods (Geneva, 1983—not yet in force); Convention on the Law Applicable to Contracts for the International Sale of Goods (The Hague, 1986—not yet in force). *See also* Convention on the Law Applicable to Contractual Obligations (Rome, 1980), superseded by the Rome I Regulation; Inter-American Convention on the Law Applicable to International Contracts (Mexico City, 1994); Convention on the Law Applicable to Agency (The Hague, 1978); Principles on Choice of Law in International Commercial Contracts (The Hague, 2015).
For uniform substantive law instruments, see e.g. UNIDROIT Convention relating to a Uniform Law on the International Sale of Goods (The Hague, 1964) (ULIS); UNIDROIT Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (The Hague, 1964) (ULFC); Convention on the Limitation Period in the International Sale of Goods & Amending Protocol (New York, 1974; Vienna, 1980) (LPISG); General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance (1968) (CMEA General Conditions of Delivery); United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG); Draft Regulation for a Common European Sales Law (2011) (CESL).
For soft-law instruments governing, among others, international sale of goods contracts, see e.g. UNIDROIT Principles of International Commercial Contracts (UPICC 2016); Principles of European Contract Law (PECL); Draft Common Frame of Reference (DCFR); Principles of Asian Contract Law (PACL); Principles of Latin American Contract Law (PLACL); OHADA Uniform Act on General Commercial Law (Togo, 2010) (particularly Book VIII on commercial sales); ICC INCOTERMS Rules (2020). *Cf.* United Nations Economic Commission for Europe, General Conditions of Sale and Standard Clauses; ITC Model Contract for the International Commercial Sale of Goods (2010); ICC Model International Sale Contract (2013).

follow, and, secondly, what would have been the effects of selecting the uniform rules of the CESL.

Finally, the Conclusion summarizes the findings of Parts I through IV and attempts to anticipate legal developments in the area by briefly delineating a new path for future European contract law initiatives.

As this suggests, and as the following analysis confirms, the CESL cannot be consigned to history. Most obviously, it may be revived, or elements of it may be revived in modified form, and aspects of its approach have been, and will continue to be, copied in other instruments. More importantly, however, the CESL remains important as a case-study in legal harmonization. It exposes both the advantages and disadvantages of a distinctive model of harmonization and the conceptual difficulties of such an approach. The advanced "legal technology" it represents, and its innovative approach, render it the starting point when considering further attempts at unifying substantive law. It offers important practical lessons for the future of uniform law and, at the same time, provokes discussion of conceptual issues of wider interest and importance. It is a reference point in the study of European legal integration, the law relating to international commercial transactions, and, of particular concern, private international law. From these perspectives, if it stands as a model for the possibilities of harmonization, it also suggests its limitations.

PART I

"*QUASI* CHOICE-OF-LAW" AGREEMENT: THE NEW KID ON THE BLOCK

> "Si l'on veut faire du droit uniforme sans conflit de lois, on fait un peu comme ceux qui font de la physique sans mathématiques . . . "
>
> ["To want to practice uniform law to the exclusion of conflict-of-laws is like wanting to do physics without mathematics . . . ."][1]

I. INTRODUCTION

Part I sets the foundations for the more elaborate conflict-of-laws and comparative law analysis of the model embodied in the draft CESL Regulation which follows. The importance of successfully accomplishing this task cannot be overstated. Articulating a theory on doctrinal fallacies or on the inaccurate presentation of the law would lead, at best, to opaque conclusions or, at worst, to the collapse of the entire research project into an ensemble of inconsistent arguments and confusing legal jargon. For that reason, this Part begins with setting out all key concepts underlying the CESL model, proceeds with a delineation of a clear and structured approach to the highly complex application requirements of the instrument, and, finally, concludes with a rigorous examination of the CESL opt-in mechanism.

Specifically, Part I encompasses an overview of the contracts covered by the final version of the Regulation, the identity and characteristics of the contracting parties, and, of course, the key-obligations assumed under the sales contract.[2] Then, it delves into the "cross-border" or, more accurately, the "special internationality" requirement of the instrument,[3] which is followed, further, by an examination of the "CESL applicability criteria," namely the territorial and regulatory connections of the sales contract with the EU and, prominently, the CESL's activation instrument.[4] Because the latter criterion constitutes the crux of the instrument, due consideration is paid to the existence and validity preconditions of the opt-in agreement,[5] as

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[1] Henri Batiffol, as reported in Philippe Malaurie, *Loi Uniforme et Conflits de Lois*, 25–27 TRAVAUX DU COMITÉ FRANÇAIS DE DROIT INTERNATIONAL PRIVÉ 83, 101–102 (1964).
[2] *See* analysis in *infra* Section II.
[3] *See* analysis in *infra* Section III.
[4] *See* analysis in *infra* Section IV.
[5] *See* analysis in *infra* Section V(A).

well as to its nature and legal effects.[6] Thus, in light of the various types of rules-selection agreements and the approaches to the general principle of party autonomy, it is argued that the opt-in mechanism—a legal "chameleon"—would take colour from its surrounding conflict-of-laws environment.[7] Particularly in the context of the 1955 Hague Sales Convention, the 1980 Rome Convention, and the Rome I Regulation, it is submitted that the CESL opt-in agreement would have operated as a "*quasi* choice-of-law"—a novel concept in conflicts doctrine.[8] Further, the analysis assesses whether the innovative structure of the CESL model would have survived the rigid consumer protection provisions of the EU conflicts regimes and challenges the argument that the instrument would have fostered legal certainty in international trade, if enacted.[9] Finally, the optional CESL model is compared to its closest sales law "relative," namely the optional ULIS 1964 of art. V and Anx. I, art. 4.[10]

In a nutshell, the following paragraphs seek to elucidate the interplay between the CESL model opt-in mechanism and the EU choice-of-law rules in an attempt to offer insight into the activation and the legal effects of the European sales law instrument.

II. THE SALE OF GOODS CONTRACT UNDER THE CESL

The regulatory scope of the draft Regulation is demarcated by an intricate system of provisions, which, regrettably, renders the subject-matter of the CESL anything but readily ascertainable. Our point of departure is CESL Reg., art. 5, which provides that

> 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.[11]

[6] *See* analysis in *infra* Section V(B).
[7] *See* analysis in *infra* Section V(B)(3).
[8] *See* analysis in *infra* Section V(C)(1).
[9] *See* analysis in *infra* Section V(C)(2).
[10] *See* analysis in *infra* Section V(D).
[11] *See* European Parliament Legislative Resolution of 26 February 2014 on the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, P7_TA(2014)0159, Amendment 61

Setting aside the contracts for the supply of digital content and related service contracts, which, in the interest of brevity, are not discussed in this study, the CESL defines sales contracts as

> [A]ny 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 . . . .[12]

The enquiry into the "sale of goods contract," however, should not stop at this definition of CESL Reg., art. 2(k). Rather, three points require further analysis: who can be party to a sales contract? What qualifies as "goods?" What are the default obligations of the contracting parties?

A. The Contracting Parties

The personal scope of the instrument is delineated in CESL Reg., art. 7, which provides that "[t]he Common European Sales Law may be used only if the seller of goods . . . is a trader."[13] Depending on the status of the buyer as either trader or consumer, the CESL differentiates between "commercial"—or, more accurately, "non-consumer"[14]—and "consumer" sale of goods contracts.

Pursuant to CESL Reg., art. 7(1) *in fine*,

> 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").

Thus, the CESL sets two prerequisites for commercial transactions, namely the bilateral commerciality of the sale of goods and the qualification of at least one of the parties as Small

(restricting the scope of the instrument to "distance contracts" only). *See also id.* at Amendment 49 (introducing CESL Reg., art. 2(p): "'Distance contract' means any contract between the trader and the consumer or another trader under an organised distance sales scheme concluded without 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 the other trader, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded."). *See also* CESL Reg., art. 6.

[12] CESL Reg., art. 2(k). *See* Case C-381/08, *Car Trim GmbH* v *KeySafety Systems Srl* 2010 E.C.R. I-01255, ¶ 27–43. *Cf.* DCFR arts. IV.A. – 1:102, 1:202. For the corresponding definition under the CISG, see analysis in *infra* Part IV, note 20.

[13] CESL Reg., art. 7(1). *See* CESL Reg., art. 2(e) ("'Trader' means any natural or legal person who is acting for purposes relating to that person's trade, business, craft, or profession.").

[14] The CESL defines only "consumer sales contracts" in CESL Reg., art. 2(l).

or Medium-sized Enterprise (SME).[15] Whereas the first element is easy to ascertain, the latter restriction, which was introduced in order to amplify the "proportional" nature of the instrument,[16] requires an onerous—let alone awkward—investigation into the contracting parties' staff headcount and respective annual turnover or balance sheet.[17] Notwithstanding this limitation, the drafters of the instrument provided for the expansion of the CESL's regulatory scope by allowing Member States to make the European sales law regime available for all commercial transactions, even if neither of the parties would qualify as an SME.[18] Interestingly enough, the use of this option by any of the Member States would have limited significantly the importance of the B2SME requirement in all other Member States, as the contracting parties would have been able to select the CESL as part of the declaring Member State's laws.[19]

[15] CESL Reg., art. 7(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."). *See* CESL recital 21; Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, 2003 O.J. (L124) 36. *Cf.* DCFR art. I. – 1:105(2) (employing the term "business" rather than "trader").

[16] CESL recital 21; TEU art. 5(4). James W. Wolffe, *The Proposed Common European Sales Law - Scope and Choice of Law*, *in* THE PROPOSED COMMON EUROPEAN SALES LAW - THE LAWYER'S VIEW 93, 97 (Guido Alpa *et al*. eds., 2013). *See infra* note 97. *But see* Christiane Wenderhost, *CESL Regulation, Article 7*, *in* COMMON EUROPEAN SALES LAW (CESL): COMMENTARY 53, 57 (Reiner Schulze ed., 2012) ("The principles of subsidiarity and proportionality do not require a restriction to SMEs as this restriction would significantly reduce the suitability of the instrument to achieve the aims pursued with it.").
Oddly enough, in an attempt to foster the proportional nature of the instrument, the EU legislator allowed the free selection of national law for B2B contracts under the Rome I Regulation, but restricted party choice under the CESL.

[17] *See* Horst Eidenmüller *et al*., *The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law*, 16 EDINBURGH L. REV. 301, 304 (2012); Ole Lando, *CISG and CESL: Simplicity, Fairness and Social Justice*, *in* ENGLISH AND EUROPEAN PERSPECTIVES ON CONTRACT AND COMMERCIAL LAW: ESSAYS IN HONOUR OF HUGH BEALE 237, 242 (Louise Gullifer & Stefan Vogenauer eds., 2014). *See also* Alex Geert Castermans, *The Digital Single Market and Legal Certainty: A Critical Analysis*, *in* CONTENTS AND EFFECTS OF CONTRACTS - LESSONS TO LEARN FROM THE COMMON EUROPEAN SALES LAW 45, 53 (Aurelia Colombi Ciacchi ed., 2016); Gerhard Dannemann, *Choice of CESL and Conflict of Laws*, *in* THE COMMON EUROPEAN SALES LAW IN CONTEXT: INTERACTIONS WITH ENGLISH AND GERMAN LAW 21, 40 (Gerhard Dannemann & Stefan Vogenauer eds., 2013).

[18] CESL Reg., art. 13(b) ("A Member State may decide to make the Common European Sales Law available for: – contracts where all the parties are traders but none of them is an SME within the meaning of Article 7(2).").

[19] DIRK STAUDENMAYER, PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON A COMMON EUROPEAN SALES LAW: TEXTBOOK xvi (2012); Christiane Wenderhost, *CESL Regulation, Article 13*, *in* COMMON EUROPEAN SALES LAW (CESL): COMMENTARY 78, 80 (Reiner Schulze ed., 2012); Wolffe, *supra* note 16 at 98. *But see* Jürgen Basedow, *An EU Law for Cross-Border Sales Only - Its Meaning and Implications in Open Markets*, *in* LIBER AMICORUM OLE LANDO 27, 41 (Michael Joachim Bonell, Marie-Louise Holle, & Pieter Arnt Nielsen eds., 2012) ("[I]t appears rather questionable whether companies from other Member States would, for example, elect the law of Slovakia for the simple fact that Slovakia supposedly makes the Common European Sales Law available for all B2B transactions."). For the argument that the partial selection of the CESL could respond to the concerns expressed by Basedow, see Dannemann, *supra* note 17 at 40; Wenderhost, *supra* note at 80. *Cf.* analysis in *infra* Section III(C).

Conversely, "'consumer sales contract' means a sales contract where the seller is a trader and the buyer is a consumer."[20] The "consumer" is defined as "any natural person who is acting for purposes which are outside that person's trade, business, craft, or profession."[21] Hence, contracts concluded between legal entities—even single-person legal entities—would be classified as commercial. Should the buyer operate partly within and partly outside her trade, business, craft, or profession, the sale of goods would be deemed a consumer transaction, so long as "the trade purpose is so limited as *not to be predominant* [emphasis added] in the overall context of the contract . . . ."[22] Lastly, it should be emphasized that, since the seller needs to be a trader, consumer-to-consumer transactions would not be covered by this European sales law instrument.[23]

B. The Goods

The quintessential question in every sales law regime is what qualifies as "goods." For the purposes of the CESL,

> "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.[24]

A rule on scope rather than a definition,[25] CESL Reg., art. 2(h) replicates the concept of "goods" articulated in the CISG scholarship and case law.[26] In stark contrast to the latter,

[20] CESL Reg., art. 2(l). For a similar definition, see DCFR art. IV.A. – 1:204. *Cf.* CISG art. 2(a).
[21] CESL Reg., art. 2(f). *Cf.* Rome I Reg., art. 6(1); Brussels I Reg. (*bis*), art. 17(1); DCFR art. I. – 1:105(1). For the three principal criteria defining "consumers," see Diego P. Fernández Arroyo, *Consumer Protection in Private International Relationships*, *in* GENERAL REPORTS OF THE XVIII[TH] CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW 143, 149–150 (Karen B. Brown & David V. Snyder eds., 2012).
[22] EU Parliament Legislative Resolution on the CESL, *supra* note 11 at Amendment 5 (Proposal for a Regulation recital 11a (new)); DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, vol. 2 at 1952 (15th ed. 2012). *Cf.* Case C-464/01, *Gruber* v *Bay Wa*, 2005 E.C.R. I-00439 (applying the "negligible test"); Case C-269/95, *Benincasa* v *Dentalkit*, 1997 E.C.R. I-03767, ¶ 16–18. *Cf. also* DCFR art. I. – 1:105.
[23] Stephan Balthasar, *The Draft Common European Sales Law - Overview and Analysis*, 24 I. C. C. L. R. 43, 44 (2013); Dannemann, *supra* note 17 at 40; Bénédicte Fauvarque-Cosson & Zoe Jacquemin, *Regards sur le Droit Commun Européen de la Vente*, 17 CONTRATTO E IMPRESA/EUROPA 330, 340 (2012). *Contra* Morten M. Fogt, *Private International Law Issues in Opt-Out and Opt-In Instruments of Harmonization: The CISG and the Proposal for a Common European Sales Law*, 19 COLUM. J. EUR. L. 83, 92 (2012).
[24] CESL Reg., art. 2(h). *Cf.* CISG arts. 2(d)-(f); 1955 Hague Sales Conv., arts. 1(1), 1(2); 1986 Hague Sales Conv., arts. 2(b), 3; DCFR art. IV.A. – 1:101.
[25] Christiane Wenderhost, *CESL Regulation, Article 5*, *in* COMMON EUROPEAN SALES LAW (CESL): COMMENTARY 40, 42 (Reiner Schulze ed., 2012).
[26] *See* analysis in *infra* Part IV, note 20.

however, art. 5(b) expands the regulatory coverage of the Regulation to contracts for the supply of digital content and avoids, as a result, the hotly debated issue of whether software too should be treated as "goods."[27] In like manner, the CESL jettisons the qualitative and quantitative criteria set forth in CISG art. 3 by providing that the goods sold need not, without more, exist or be in the hands of the seller at the time of the conclusion of the contract.[28]

C. The Obligations Assumed

As one would expect, the CESL does not change fundamentally the obligations assumed by the parties under sales contracts.[29] Hence, the two key-obligations, namely the transfer of or the undertaking to transfer ownership in the goods in exchange for the payment of the agreed price, remain intact.[30] In addition to these two obligations, the seller is required to deliver conforming goods and any accompanying documents at the agreed place and time,[31] and the buyer is required to take delivery of the goods and of any accompanying documents.[32] This distinction of "key" and "secondary" obligations in the CESL is mandated by the nature of the sales contract. Whereas the instrument permits an agreement of the parties to amend or to exclude altogether any of the secondary obligations, no key obligation may be excluded without altering the type of the transaction as a "sale of goods."

Focusing on the two main obligations of the parties, the requirement for the transfer of ownership in the goods is not regulated by the CESL. Instead, the Regulation sets out the obligation, but defers to the applicable national law for the materialization of the transfer.[33]

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[27] *Id.*; CESL recital 17; Christopher Schuller & Alexander Zenefels, *Obligations of Sellers and Buyers*, *in* THE COMMON EUROPEAN SALES LAW IN CONTEXT: INTERACTIONS WITH ENGLISH AND GERMAN LAW 581, 582 (Gerhard Dannemann & Stefan Vogenauer eds., 2013) ("Digital content is not regulated within a separate section of the regulation; it is integrated directly into the sale of goods provisions. The effect is to treat digital content as if it were a good except where the CESL contains a separate explicit provision . . . .").

[28] CESL Reg., art. 2(k) *in fine*; CESL recital 16; Ulrich Magnus, *CISG and CESL*, *in* LIBER AMICORUM OLE LANDO 225, 233 (Michael Joachim Bonell, Marie-Louise Holle, & Pieter Arnt Nielsen eds., 2012). For a similar rule, see DCFR arts. IV.A. – 1:102, 1:201(a). *Cf.* CISG art. 3; 1955 Hague Sales Conv., art. 1(3); 1986 Hague Sales Conv., art. 4.

[29] *See* Philippe Kahn, *La Convention de La Haye sur la Loi Applicable aux Ventes à Caractère International d'Objets Mobiliers Corporels*, 93 J. DR. INT'L 301, 307 (1966) ("La vente est une notion universelle et dans tous les pays du monde, le vendeur doit livrer une chose contre un prix.").

[30] CESL Reg., art. 2(k).

[31] CESL Anx. I, arts. 91–105. *Cf.* CISG art. 30; DCFR art. IV.A. – 2:101.

[32] CESL Anx. I, arts. 123–130. *Cf.* CISG art. 53; DCFR art. IV.A. – 3:101.

[33] CESL recital 27. The applicable property law rules are found, typically, in the national law of the country, where the goods are located—amounting to the so-called *lex loci rei sitae* rule. *See* EU Parliament Legislative Resolution on the CESL, *supra* note 11 at Amendment 179 (Retention of Title). *See also* Convention on the Law Governing Transfer of Title in International Sales of Goods (The Hague, 1958) (not yet in force), *available at* https://assets.hcch.net/docs/17ba42d1-9aab-4459-8eef-c86052d195b9.pdf.

With regard to the buyer's obligation to pay the agreed price,[34] the CESL does not set any value threshold for the activation of the instrument. As long as a price has been determined, the actual value of the goods would be irrelevant. Also, this requirement for the payment of a monetary value in exchange for the goods suggests that barter transactions, though similar to sales contracts, fall outside the regulatory scope of the instrument.[35] As a last remark, it should be emphasized that the aforementioned obligations of the parties need not be one-off in nature. Quite the opposite, both commercial and consumer instalment contracts are covered by the CESL provisions.[36]

All things considered, it is clear that, other than a handful of fine adjustments made in order to conform to fundamental EU law mandates, the CESL does not amend the classic sale of goods contract whatsoever.

III. INTERNATIONALITY OF THE SALE OF GOODS CONTRACT

A. The "General Internationality" Requirement under Private International Law

Because the draft CESL governs, primarily, cross-border sale of goods contracts,[37] it is essential to identify the criteria that would qualify a sales agreement as "cross-border" for the purposes of the instrument.

Generally speaking, a contract is considered "cross-border" or, preferably, "international,"[38] when it is linked to more than one jurisdiction.[39] This nexus with multiple jurisdictions encompasses foreign elements that pertain to either the contracting parties

[34] *Cf.* CESL recital 18; CESL Reg., art. 5(b); EU Parliament Legislative Resolution on the CESL, *supra* note 11 at Amendment 62; CESL Anx. I, art. 123(2).
[35] CESL Reg., art. 2(i). Régine Feltkamp & Frédéric Vanbossele, *The Optional Common European Sales Law: Better Buyer's Remedies for Seller's Non-Performance in Sales of Goods?*, 19 E. R. P. L. 873, 880 (2011); Wenderhost, *supra* note 25 at 43. *Cf.* analysis in Part IV, note 20. *Cf.* DCFR art. IV.A. – 1:203.
[36] CESL Reg., art. 6(2); CESL Anx. I, art. 172(3); Sixto A. Sánchez-Lorenzo, *Common European Sales Law and Private International Law: Some Critical Remarks*, 9 J. PRIV. INT'L L. 191, 196 (2013). *But see* EU Parliament Legislative Resolution on the CESL, *supra* note 11 at Amendment 69 (deleting art. 6(2)). *Contra* CESL: Explanatory Memorandum, 12 ("Article 6 excludes . . . instalment sales from the scope of application."); Balthasar, *supra* note 23 at 43–44, 46; STAUDENMAYER, *supra* note 19 at xv.
[37] CESL Reg., art. 4(1). *See* CESL Reg., art. 13(a).
[38] It is not necessary that there be crossing of borders.
[39] For an overview of both the "effects theory" and the prevailing "foreign elements theory", see Alfonso-Luis Calvo Caravaca & Javier Carrascosa González, *Article 1*, *in* ECPIL COMMENTARY: ROME I REGULATION 52, 73–76 (Ulrich Magnus & Peter Mankowski eds., 2017).

(subjective criteria) or the contract *per se* (objective criteria).[40] Since the importance of the various foreign elements may vary from state to state, an agreement that is classified as "international" for one jurisdiction may be "domestic" for another.[41] This threshold of foreign elements in each respective conflicts regime amounts to the "general internationality" or "conflicts internationality" of contractual relationships, and is required for the application of the private international law rules of the forum. The prevailing approach to general internationality is the "no-definition" approach, pursuant to which the law does not delineate the foreign elements that would bestow international character upon a contract.[42] Rather, the law provides the adjudicator with significant latitude in determining whether the contract is domestic or international.[43]

B. The "Special Internationality" Requirement under the CESL

In juxtaposition with the aforementioned general internationality, uniform law instruments usually contain more restrictive definitions in that respect.[44] This so-called "special

[40] *See* CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW, 695 (Paul Torremans & James J. Fawcett eds., 15th ed. 2017) ("With a contractual dispute, typical examples of a foreign element are as follows: one of the parties to the contract is foreign national or is habitually resident abroad; the contract is concluded abroad; the contract is to be performed by one of the parties abroad."); Paul Volken, *The Vienna Convention: Scope, Interpretation, and Gap-Filling*, *in* INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 19, 27 (Petar Šarčević & Paul Volken eds., 1986) ("In international transactions in nine out of ten cases the transnational character of a contract is determined by the place where either the parties to the transaction or the goods themselves are located.").

[41] Pierre Mayer, *Réflexions sur la Notion de Contrat International*, *in* MELANGES EN L'HONNEUR DE PIERRE TERCIER 873, 874 (Peter Gauch, Franz Werro, & Pascal Pichonnaz eds., 2008).

[42] *But see* 1994 Mexico City Conv., art. 1(2) ("It shall be understood that a contract is international if the parties thereto have their habitual residence or establishments in different States Parties or if the contract has objective ties with more than one State Party."); U.C.C. § 1-301(a)(2) (A. L. I. & Unif. L. Comm'n 2001) (withdrawn, 2008) ("'International transaction' means a transaction that bears a reasonable relation to a country other than the United States.")

[43] *See e.g.* Rome I Reg.; 1980 Rome Conv.; 1955 Hague Sales Conv.; 2015 Hague Principles. It could be argued, however, that all the aforementioned instruments define internationality in a negative manner or *a contrario* under arts. 3(3), 3(3), 1 *in fine*, and 1(2) respectively. With regard to the Rome I Regulation and the 1980 Rome Convention, see *Banco Santander Totta SA* v *Cia Carris de Ferro de Lisboa SA and Others* [2017] 1 W.L.R. 1323 [57] (Eng.). *Cf.* 1986 Hague Sales Conv., art. 1.

[44] *See e.g.* ULIS Anx., art. 1(1); ULFC Anx. I, arts. 1(1) and Anx. II, art. 1; CISG art. 1(1); 1983 Agency Conv., art. 2(1); IFC art. 2(1); IFLC art. 3(1). *See also* René David, *The International Unification of Private Law*, II.5 *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 1, 47 (Kurt Lipstein ed., 1969); Filip De Ly, *Sources of International Sales Law: An Eclectic Model*, 25 J. L. & COM. 1, 6 (2005) ("Definitional criteria [of internationality] may . . . have elements of arbitrariness . . . ."); Roy Goode, *Reflections on the Harmonisation of Commercial Law*, UNIF. L. REV. 54, 63 (1991) (listing a handful of possible internationality tests); Herbert Kronke, *Connecting Factors and Internationality in Conflict of Laws and Transnational Commercial Law*, *in* CONVERGENCE AND DIVERGENCE IN PRIVATE INTERNATIONAL LAW: LIBER AMICORUM KURT SIEHR 57, 69 (Katharina Boele-Woelki *et al*. eds., 2010) ("Internationality may either be defined in a specific provision of a convention or it may be assumed to exist or to potentially arise due to the type of transaction, the type of property or the nature of the parties involved."). *Cf.* UNCITRAL Model Law, art. 1(3).

internationality" is required for the application of the respective international uniform law instrument. Thus, a legal relationship may be international as per the broader definition of internationality, but non-international as per the more restrictive definition of the uniform law instrument.

Proving the rule, the CESL, as a regional uniform law regime, enshrines two narrow definitions of internationality—one for commercial and one for consumer sales transactions. In particular, CESL Reg., arts. 4(2) and 4(3)(a) provide that

> 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 . . . ,

and

> 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.

Hence, a commercial sale of goods would be "cross-border" for the purposes of the CESL, if the contracting parties maintained their habitual residence in different countries.[45] By the same token, a consumer sales agreements would be "cross-border," if either the address indicated by the consumer, the delivery address for the goods or the billing address were located in a country other than that of the trader's habitual residence.[46] All other elements of the contractual relationship would be irrelevant to the application of the instrument,[47] albeit they may bear on other aspects of the dispute, such as the international jurisdiction of the forum, the service of

[45] CESL Reg., art. 4(2). *See also* CESL Reg., arts. 4(4), 4(5). *But see* Christiane Wenderhost, *CESL Regulation, Article 4*, *in* COMMON EUROPEAN SALES LAW (CESL): COMMENTARY 34, 36 (Reiner Schulze ed., 2012) ("[I]t will be preferable to take a very lenient view and to allow the parties . . . to define the contract as a cross-border contract, in particular by indicating the address of a foreign branch, agency or establishment on the contract documents . . . .").

[46] CESL Reg., art. 4(3). For consumer sales transactions, the parties need not maintain their habitual residence in different states. The provision of alternative criteria was mandated by the difficulty in ascertaining the habitual residence of the consumer without crossing the line of "private matters." On this latter point, see e.g. Dannemann, *supra* note 17 at 41; Eidenmüller *et al*., *supra* note 17 at 315; Hans Schulte-Nölke, *How to Realise the "Blue Button"? - Reflections on an Optional Instrument in the Area of Contract Law*, *in* EUROPEAN PRIVATE LAW: CURRENT STATUS AND PERSPECTIVES 89, 100 (Reiner Schulze & Hans Schulte-Nölke eds., 2011); STAUDENMAYER, *supra* note 19 at xvi; Wenderhost, *supra* note 45 at 37. *But see* Maren Heidemann, *European Private Law at the Crossroads: The Proposed European Sales Law*, 20 E. R. P. L. 1119, 1132 (2012) ("For consumers . . . it is sufficient that their address is in a country other than that of the habitual residence of the trader.").

[47] *But see* Rome I Reg., arts. 6(1), 6(2) and the analysis in *infra* Section V(C)(2).

documents abroad, etc. The concept of "habitual residence" is defined in CESL Reg., art. 4(4), which, in line with Rome I Reg., art. 19(1) and Rome II Reg., art. 23, provides that

> [T]he 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.[48]

The relevant point in time for determining the sale's special internationality under the CESL would be the time of the parties' agreement to use the CESL for the regulation of their transaction.[49] Any subsequent changes in the relevant territorial aspects of CESL Reg., arts. 4(2) or (4)(3) would not affect the cross-border nature of the sale of goods.

CESL's definition of internationality for commercial sales agreements is not novel.[50] It has been replicated from the well-known CISG art. 1(1).[51] Differently from CISG art. 1(2), however, CESL Reg., art. 4 does not require that the internationality of the sale of goods be "apparent" to the parties.[52] By all means, given the focus of the CESL on distance contracts,[53] a corresponding provision in the CESL would have been redundant.

Furthermore, it is noteworthy that, notwithstanding the use of the term "cross-border," CESL Reg., art. 4 does not require any crossing of borders.[54] In this respect, the CESL differs from the special internationality delineated in the 1964 Hague Sales Conventions, which require a "double international aspect,"[55] namely both a subjective foreign element, which is

[48] *See also* CESL Reg., art. 4(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.") For inconsistencies in the use of this concept in the CESL, see Wenderhost, *supra* note 45 at 35. *Cf.* CISG arts. 1, 10; ULIS Anx., arts. 1(1), 1(2); ULFC Anx. I, arts. 1(1), 1(2).
[49] CESL Reg., art. 4(6).
[50] *Cf.* Volken, *supra* note 40 at 27.
[51] CISG art. 1(1) ("This Convention applies to contracts of sale of goods between parties whose places of business are in different States . . . ."). *See* FRANCO FERRARI, CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: APPLICABILITY AND APPLICATIONS OF THE 1980 UNITED NATIONS SALES CONVENTION 41–42 (2012).
[52] CISG art. 1(2) ("The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.").
[53] EU Parliament Legislative Resolution on the CESL, *supra* note 11 at Amendments 49, 60 and 61 (CESL Reg., art. 2(p)).
[54] For the same argument in the context of the CISG, see FERRARI, *supra* note 51 at 44.
[55] John Honnold, *The Uniform Law for the International Sale of Goods: The Hague Convention of 1964*, 30 LAW & CONTEMP. PROBS. 326, 332 (1965).

identical to the one contained in the CESL, as well as the objective element of border-crossing.[56]

C. Expanding the CESL to Non-"Cross-Border" Contracts

Be that as it may, CESL Reg., art. 13(a) allows EU Member States to extend the application of the optional instrument to sale of goods contracts that would not qualify as cross-border under CESL Reg., art. 4.[57] The inclusion of such an option should be commended, because it enables sellers to conduct business on the basis of a single sales regime for both their domestic and international transactions.[58] CESL Reg., art. 13(a) impinges on two types of contracts, namely contracts that meet the general internationality criteria of the forum but not

[56] ULIS Anx., art. 1(1) ("The present Law shall apply to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, in each of the following cases: (a) where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another; (b) where the acts constituting the offer and the acceptance have been effected in the territories of different States; (c) where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected."). With similar wording, ULFC Anx. I, art. 1(1) and Anx. II, art. 1. *Cf.* Volken, *supra* note 40 at 28 ("The solution provided by the Vienna Convention can be understood only if it is regarded as an overreaction provoked by Article 1 of ULIS. [. . .] If ULIS might have been too ambitious on this [internationality] point, the Vienna Convention's definition is clearly too one-sided."); Peter Winship, *The Scope of the Vienna Convention on International Sales Contracts*, *in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1.1, 1.20 (Nina M. Galston & Hans Smit eds., 1984) (comparing the simplicity of the internationality requirement under the CISG to the complexity of the internationality requirement under the ULIS).

[57] *See* Wolffe, *supra* note 16 at 97 ("[I]f the Member State were to extend the CESL to domestic contracts it could effectively undermine its autonomy in the field of consumer protection."). *Cf.* Franco Ferrari, *Uniform Substantive Law and Private International Law*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW, vol. 2 at 1772, 1772 (Jürgen Basedow *et al*. eds., 2017) ("Unlimited uniform substantive law is constituted by those legal rules that also govern purely domestic situations . . . . Limited uniform substantive law . . . solely governs trans-border situations . . . ."); Giesela Rühl, *Contractual Obligations (PIL)*, *in* THE MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW, vol. I at 392, 395 (Jürgen Basedow *et al*. eds., 2012) (noting the same distinction as Ferrari by referring to "true" and "false" uniform law respectively). *Cf. also* David, *supra* note 44 at 48 ("[U]nification carried out at international level will often be merely the politically necessary first stage in a general unification of the law. Of their own accord, independently of any international obligation, the various national legislatures will extend the rules adopted for international relationships to legal relations of all sorts, even those which are purely domestic (*Sogwirkung*).").

[58] *See* Jürgen Basedow, *European Contract Law - The Case for a Growing Optional Instrument*, *in* TOWARDS A EUROPEAN CONTRACT LAW 169, 170 (Reiner Schulze & Jules Stuyck eds., 2011); Christopher Busch, *Scope and Content of an Optional European Contract Law*, 17 CONTRATTO E IMPRESA/EUROPA 193, 198 (2012); Juan José Ganuza & Fernando Gomez, *Optional Law for Firms and Consumers: An Economic Analysis of Opting Into the Common European Sales Law*, 50 C. M. L. REV. 29, 45 (2013); Lando, *supra* note 17 at 243. *See also* Eidenmüller *et al*., *supra* note 17 at 304–305 ("[S]ubjecting internal and cross-border contracts to different legal regimes is in fundamental opposition to the spirit of the internal market."); Marie-José van der Heijden & Anne Keirse, *Selecting the Best Instrument for European Contract Law*, 19 E. R. P. L. 565, 575–576 (2011) ("[N]ot permitting parties to benefit from an optional instrument in cases of national agreements is contrary to the European philosophy of one internal market without discrimination based on origin between cross-border actions and similar but national transactions.").

the special internationality of the CESL, and purely domestic sales contracts, which are devoid of any "significant" foreign elements.[59]

With regard to contracts of the first category, the exercise of the art. 13(a) option by any of the Member States would have effectively overridden the internationality requirement of CESL Reg., art. 4 altogether—not exclusively in the declaring Member State.[60] Since the extended CESL would have covered non-"cross-border" transactions, the contracting parties could enter into both a CESL opt-in agreement and a choice-of-law agreement selecting the law of an EU Member State that had exercised the option of CESL Reg., art. 13(a). By virtue of these two agreements, the CESL would have been applicable to non-"cross-border" transactions too, circumnavigating, as a result, the special internationality requirement of the instrument. This showcases that the option of CESL Reg., art. 13(a) could expand significantly the regulatory scope of the CESL.

With regard to purely domestic sale of goods contracts, the analysis should bifurcate to domestic agreements in Member States that have exercised the option of art. 13(a), and domestic agreements in all other states. In the first case, the CESL opt-in agreement would have operated as a selection between the parallel regimes of the very same legal order. This straightforward scenario raises no private international law issues and warrants no further analysis. In the second case, the CESL would not have been available for those purely domestic transactions. As shown later in this study,[61] for such sales transactions, any CESL opt-in agreements would, most likely, have been salvaged as plain incorporation-by-reference clauses. Had the parties decided to select the laws of a declaring Member State together with a CESL opt-in agreement, the effects would have been, largely, the same. By virtue of Rome I Reg., art. 3(3) or any other similar rule in the conflicts regime of the forum,[62] the choice-of-law agreement would not have been invalidated, but would have been limited, instead, by the mandatory rules of the country where all the elements of the contract were

[59] *Cf.* Rome I Reg., art. 3 (creating a three-tier division of contracts: *i*. international contracts; *ii*. purely EU-international contracts; and *iii*. purely domestic contracts).
[60] Eidenmüller *et al*., *supra* note 17 at 316; Bénédicte Fauvarque-Cosson, *Vers un Droit Commun Européen de la Vente*, RECUEIL DALLOZ 34, 36 (2012).
[61] *See* analysis in *infra* Section V(B)(3).
[62] Rome I Reg., art. 3(3) ("Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.") Similarly, 1980 Rome Conv., art. 3(3). *See Banco Santander Totta SA* v *Cia Carris de Ferro de Lisboa SA and Others* [2017] 1 W.L.R. 1323 [57] (Eng.). *Cf*. 1994 Mexico City Conv., art. 1(2); 1955 Hague Sales Conv., art. 1(3); 1986 Hague Sales Conv., art. 1(b); 2015 Hague Principles, art. 1(2).

located.[63] Hence, both the choice-of-law agreement and the CESL opt-in agreement, though valid, would have been limited by the mandatory rules of the otherwise applicable law.[64]

In a nutshell, the exercise of the CESL Reg., art. 13(a) option by merely one of the Member States would have practically abrogated the special "internationality" requirement of the CESL for all sale of goods contracts, other than those purely domestic transactions, which would have been governed by the laws of non-declaring Member States.

Having demarcated the core of the instrument's subject matter, that is, the cross-border sale of goods contract, the next section explores the so-called "applicability" criteria of the CESL.

IV. THE CESL APPLICABILITY CRITERIA

The special internationality of a legal relationship would only exceptionally be sufficient to warrant the application of an international uniform law instrument.[65] The far-reaching effects of international uniform substantive law, such as the application of the uniform rules before any "classic" conflict-of-laws enquiries arise,[66] frequently mandate a series of additional application requirements, which justify the deviation from established norms of private international law. These special requirements may be described as "connecting factors"[67] or, to avoid confusion with other conflict-of-laws concepts, as "applicability criteria" of international uniform law instruments.[68] Should these criteria not be met, the instrument will

[63] Gralf-Peter Calliess, *Rome I: Article 3*, *in* ROME REGULATIONS: COMMENTARY 76, 81 (Gralf-Peter Calliess ed., 2nd ed. 2015); CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW, *supra* note 40 at 713; Simon Whittaker, *The Proposed "Common European Sales Law": Legal Framework and the Agreement of the Parties*, 75 MOD. L. REV. 578, 595 (2012).

[64] Gerhard Dannemann, *The CESL as Optional Sales Law: Interactions with English and German Law*, *in* THE COMMON EUROPEAN SALES LAW IN CONTEXT: INTERACTIONS WITH ENGLISH AND GERMAN LAW 708, 731 (Gerhard Dannemann & Stefan Vogenauer eds., 2013) (proposing an express derogation from the effects of Rome I Reg., art. 3(3)).

[65] For the notable exceptions of the 1964 Hague Sales Conventions, which adopted, in ULIS Anx. arts. 1(1), 2, and ULFC Anx. I, arts. 1(1), 1(9), the so-called "universalist approach," see FERRARI, *supra* note 51 at 38, 42, 59; FRANCO FERRARI & MARCO TORSELLO, INTERNATIONAL SALES LAW - CISG IN A NUTSHELL 75 (2nd ed. 2018). *See also* Goode, *supra* note 44 at 67 ("[Because] no organisation concerned with [legal] unification has had the temerity to repeat the [ULIS's approach] experiment . . . [a]ll subsequent Conventions have required as a condition of their applicability not only internationality of the transactions but also a connection with a Contracting State."); JOHN O. HONNOLD & HARRY M. FLECHTNER, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 16–17 (4th ed. 2009). *But see* ULIS arts. III, V; ULFC art. III.

[66] *See* analysis in *infra* Part IV(III).

[67] Kronke, *supra* note 44 at 63.

[68] ANTONIO MALINTOPPI, LES RAPPORTS ENTRE DROIT UNIFORME ET DROIT INTERNATIONAL PRIVÉ, 116 RECUEIL DES COURS/COLLECTED COURSES 1, 28 (1965) ("règle d'application").

not be "directly" applicable, although it could be called into application "indirectly" as part of the applicable foreign law. Thus, most international uniform law instruments, such as the CISG,[69] the CTC,[70] the 1983 Agency Convention,[71] the IFC,[72] the IFLC,[73] and the CMR,[74] require a nexus between either the commercial agreement or the contracting parties, and a state that has acceded to the uniform law regime.[75]

Proving the rule again, the cross-border nature of the sale of goods would not be sufficient for the application of the CESL.[76] Hence, adapting to the particularities of the EU market, the unique legal structure, and the optional nature of the instrument, the CESL contains three additional application requirements,[77] which mandate that: *i.* key-territorial aspects of the sales transaction be located in an EU Member State,[78] *ii.* the law applicable to the sale of goods contract be that of an EU Member State,[79] and *iii.* the contracting parties have selected the CESL as the regime governing their sales agreement.[80]

A. Key-Territorial Aspects of the Sale of Goods Contract Must Be Located in the EU

The first criterion requires that at least one of the territorial aspects used for the determination of the cross-border nature of the sales contract be located in an EU Member State.[81] The articulation of this criterion in the same article as the special internationality

[69] CISG art. 1(1).
[70] CTC art. 3(1).
[71] 1983 Agency Conv., art. 2(1).
[72] IFC art. 2(1).
[73] IFLC art. 3(1).
[74] CMR art. 1(1).
[75] *See* Institute of International Law [IIL], *The Scope of Application of Rules of Conflict of Law* [sic] *or of Uniform Substantive Law Contained in Treaties*, Resolution, Session of Dijon. Rapporteur: Alfred E. von Overbeck (Sep. 1, 1981) (art. 5(2)). *See also* David, *supra* note 44 at 47–48 ("Things have been complicated by the introduction of the idea of reciprocity into international conventions. Instead of seeking to know which just system of rules was the most appropriate for international legal relations, people have been concerned to apply these rules, once drawn up, to specified international relationships only to those involving states or nationals of states which are themselves prepared to apply these rules of justice. [. . .] All things considered, [this practice] simply means that the rules which are accepted as just will be applied in some cases, but not in others. It indicates deplorable atrophy of the sense of justice, and, moreover, completely fails to attain its end, since the legal relations which are unaffected very often do not in the least concern the states which it was desired to 'penalize'.").
[76] *See* CESL Reg., art. 4.
[77] *See* Ulrich Magnus, *CISG vs. CESL*, *in* CISG VS. REGIONAL SALES LAW UNIFICATION 97, 100 (Ulrich Magnus ed., 2012) ("It is somewhat surprising that a completely optional instrument sets strict requirements for its scope of application.").
[78] *See* analysis in *infra* Section IV(A).
[79] *See* analysis in *infra* Section IV(B).
[80] *See* analysis in *infra* Section IV(C).
[81] *But see* Dannemann, *supra* note 17 at 41 (arguing that this requirement applies only to B2C contracts).

requirement explains the tendency in legal theory to conflate the two concepts.[82] Nonetheless, preserving the distinction between the special internationality and the first applicability criterion of the CESL is warranted for doctrinal and practical reasons alike.[83] This evinces clearly in the option of CESL Reg., art. 13(a), which extends the application of the instrument to *non*-"cross-border" sales contracts without removing the requirement for a link between the contract and a Member State.[84]

Granted, two issues need to be explored under this first applicability criterion. First, which territorial aspects would be relevant under art. 4? Second, which countries qualify as "EU Member States" for the purposes of the CESL?

In order to answer the first question, we need to recall the distinction between commercial and consumer contracts under CESL Reg., art. 4. Thus, for commercial sales transactions, it is unambiguous that at least one of the contracting parties must maintain her habitual residence in an EU Member State.[85] Conversely, the obscure wording of CESL Reg., art. 4 complicates matters regarding consumer sales agreements. In particular, art. 4(3) provides that

> 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

[82] *See e.g.* Busch, *supra* note 58 at 197; Trevor C. Hartley, *Conflict of Laws and the Common European Sales Law*, *in* ENTRE BRUSELAS Y LA HAYA: ESTUDIOS SOBRE LA UNIFICACIÓN INTERNACIONAL Y REGIONAL DEL DERECHO INTERNACIONAL PRIVADO, LIBER AMICORUM ALEGRÍA BORRÁS 525, 526 (Joaquim-Joan Forner Delaygua, Christina González Beilfuss, & Ramón Viñas Farré eds., 2013); Robert Koch, *CISG, CESL, PICC and PECL*, *in* CISG VS. REGIONAL SALES LAW UNIFICATION 125, 131 (Ulrich Magnus ed., 2012); Ole Lando, *CESL and Its Precursors*, *in* UNIFICATION AND HARMONIZATION OF INTERNATIONAL COMMERCIAL LAW: INTERACTION OR DEHARMONIZATION? 239, 246 (Morten M. Fogt ed., 2012); Guillermo Palao Moreno, *Some Private International Law Issues*, *in* EUROPEAN PERSPECTIVES ON THE COMMON EUROPEAN SALES LAW 17, 22–23 (Javier Plaza Penadés & Luz M. Martínez Velencoso eds., 2015); Maud Piers & Cedric Vanleenhove, *The Common European Sales Law: A Critical Assessment of a Valuable Initiative*, 17 CONTRATTO E IMPRESA/EUROPA 427, 434 (2012). *See also* Wenderhost, *supra* note 45 at 35 ("It is not entirely clear whether the RegCESL (P) treats the two aspects of cross-border and territorial scope separately, as is suggested by art. 3, or whether these aspects are really inseparably linked, as is suggested by art. 4."). *Cf.* Kronke, *supra* note 44 at 69 ("In transnational commercial law instruments the requirement of internationality and connecting factors are to be kept conceptually distinct although in existing texts they are not infrequently intertwined.").

[83] *Cf.* FERRARI, *supra* note 51 at 42–43.

[84] CESL Reg., art. 13(a) ("A Member State may decide to make the Common European Sales Law available for: – 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* [emphasis added] . . . .").

[85] CESL Reg., art. 4(2).

(b) at least one of *these countries* [emphasis added] is a Member State.

Because of the indeterminate use of the pronoun "these" in element *b*, it is not clear whether locating the seller's habitual residence in the EU would be sufficient to fulfil this applicability criterion, or, in the alternative, whether "*these countries*" should be understood as referring only to consumer-related territorial aspects of the deal.[86] CESL recital 13 sheds light on this point by adopting the latter interpretation.[87] Hence, with respect to consumer sales contracts, the address indicated by the consumer, the delivery address for the goods, or the billing address, must be located in a Member State.

But which countries qualify as "EU Member States" for the purposes of CESL? One would expect a rather straightforward answer to such an "easy" question. The EU Commission's statement in the Explanatory Memorandum of the CESL that "[t]he proposed Regulation concerns an EEA matter and should therefore extend to the EEA,"[88] however, convinced commentators that the concept should be interpreted broadly, that is, as including not only all EU Member States, but also the remaining states of the European Economic Area, namely Iceland, Liechtenstein and Norway.[89] This interpretation should be rejected for a number of reasons. Firstly, it creates confusion, as it departs from the conventional understanding of the term "Member States." Secondly, it introduces unnecessary inconsistency in the internal system of the CESL and the European legislation as a whole.[90] Lastly, but most importantly, the CESL, as an EU Regulation, would not have formed part of the remaining EEA states' legal orders—an aspect that would have been essential for the fully-fledged application of the instrument as a second parallel legal regime.[91] Therefore, such an expansive interpretation of the "Member States" concept would lead to the regulatory oddity of uncoordinated applicability criteria in the very CESL; that is, the first CESL applicability criterion mandating key-territorial aspects located in an EEA state, whereas the second criterion requiring that the *lex causae* be that of an EU Member State. For all the above, this reference to the remaining EEA states should be construed merely as an iteration that the effects of the instrument could extend beyond purely EU transactions.

[86] Eidenmüller *et al*., *supra* note 17 at 315, note 72; Wenderhost, *supra* note 45 at 37.
[87] *Id.*
[88] CESL: Explanatory Memorandum, *supra* note 36 at 11.
[89] Wenderhost, *supra* note 45 at 36–37 ("As the RegCESL (P) will be an instrument with EEA relevance, 'Member State' should be read as Member State of the EU or of the EEA.").
[90] *Cf.* Rome I Reg., arts. 1(4); Rome II Reg., art. 1(4).
[91] *See* analysis in *infra* Section IV(B).

Having ascertained the elements of the first applicability criterion, it is important to assess the rationale of its inclusion into the CESL. Carrying on with the distinction between commercial and consumer sales, this enquiry is examined in two parts.

Let us, first, recall the existence of additional applicability criteria in most international uniform substantive law conventions. Because these conventions are structured as opt-out instruments, the additional criteria justify the "automatic" application of these special uniform law regimes to the exclusion of the otherwise applicable national law. In contrast to this default application of uniform law, the CESL model enshrines an optional regime. Since the otherwise applicable law would not be displaced automatically, but only by virtue of an agreement between the parties, this latter agreement to use the CESL should have been sufficient to warrant the application of the instrument as a second parallel legal regime. Besides, given the almost universal endorsement of party autonomy in international business transactions, the contracting parties could select a different national law to govern their contract, or, in a less sweeping manner, deviate from the majoritarian rules of the applicable law by virtue of an incorporation-by-reference clause.[92] Therefore, it could be argued that, at least for commercial sales contracts, there is "no plausible justification" for the inclusion of this additional application requirement.[93]

With regard to consumer sales agreements, the additional criterion of CESL Reg., art. 4(3)(b) could be justified by the need to circumvent Rome I Reg., art. 6(2).[94] Bearing in mind CESL's primary objectives "to facilitate cross-border trade and reduce transaction and opportunity costs as well as other contract-law-related obstacles to cross-border trade,"[95] the limitation of consumer protection would be allowed, only if the aforementioned objectives were served by the unequivocal application of the instrument. For the CESL regime would have been activated, typically, when the consumer maintained her habitual residence in a Member State,[96] this first applicability requirement could have served as a "red flag" regarding the legal effects of selecting the CESL.

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[92] *See* analysis in *infra* Section V(B)(2).
[93] Wenderhost, *supra* note 45 at 39.
[94] *See* analysis in *infra* Section V(C)(2).
[95] CESL recital 8. *See* Christopher Bisping, *The Common European Sales Law, Consumer Protection and Overriding Mandatory Provisions in Private International Law*, 62 INT'L & COMP. L. Q. 463, 468 (2013) ("The main objective of CESL is not consumer protection but the facilitation of cross-border trade within the EU."). *See also* Chantal Mak, *Unweaving the CESL: Legal-Economic Reason and Institutional Imagination in European Contract Law*, 50 C. M. L. REV. 277, 293 (2013) ("The European legislature . . . proposes the CESL as a means of facilitating consumer access to cross-border contracts.").
[96] *See* analysis in *infra* Section V(C)(2).

Hence, bearing in mind the illustrated ancillary and largely redundant function of the first CESL applicability criterion, the most plausible explanation for its inclusion lies in the attainment of political objectives in the legislative process. By prescribing territorial links with the EU, the Commission sought to amplify the regional—Union-bound—nature of the CESL, accentuating, in turn, the "proportional" effects of this legal harmonization project.[97]

B. EU Member State Law as the Lex Contractus

The second applicability criterion of the CESL requires that an EU Member State law be identified as the law governing the international sales agreement.[98] Although not articulated expressly in the Regulation,[99] this requirement for a "gateway law"[100] stems from the structure of the instrument as a second parallel legal regime;[101] that is, as a set of rules, which forms an integral part of each respective Member State legal order and exists in parallel to the "traditional" national law regime, and which is called into application on the basis of certain applicability criteria. This bizarre legal structure of the instrument was necessitated, firstly, by the limited legislative competence of the EU and, secondly, by the far-reaching effects of Rome I Reg., art. 6(2).

It is well-known that the EU enjoys only limited legislative competence, which is exhaustively delineated in the Founding Treaties.[102] Hence, given the lack of special

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[97] TEU art. 5(4); Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality, 2010 O.J. (C83) 206 (annexed to the Treaties).

[98] *See* Bisping, *supra* note 95 at 469; Eidenmüller *et al*., *supra* note 17 at 312; Sánchez-Lorenzo, *supra* note 36 at 193; Simon Whittaker, *Identifying the Legal Costs of Operation of the Common European Sales Law*, 50 C. M. L. REV. 85, 89 (2013). *See also* Paul Lagarde, *Instrument Optionnel International et Droit International Privé - Subordination ou Indépendance?*, *in* A COMMITMENT TO PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOUR OF HANS VAN LOON 287, 294 (The Permanent Bureau of the Hague Conference on Private International Law ed., 2013).

[99] Sánchez-Lorenzo, *supra* note 36 at 194–195. *See* Dannemann, *supra* note 17 at 32 (noting that, because it is not spelled out clearly in the CESL, this requirement "would amount to a major legislative trap for the unwary . . . ."). *See also* Gilles Cuniberti, *Common European Sales Law and Third State Sellers*, CONFLICT OF LAWS.NET (2012), http://conflictoflaws.net/2012/common-european-sales-law-and-third-state-sellers/ (last visited Apr. 27, 2020) ("For many, if not the majority, of [SMEs], it will be very hard to understand why choosing the CESL is not enough, and why the law of a member state must also be chosen. Indeed, at first sight, this does not look quite logical to choose the law of a particular member state after choosing European law.").

[100] Christiane Wenderhost, *CESL Regulation, Article 3*, *in* COMMON EUROPEAN SALES LAW (CESL): COMMENTARY 30, 32 (Reiner Schulze ed., 2012).

[101] EU Parliament Legislative Resolution on the CESL, *supra* note 11 at Amendment 2 (CESL recital 9). *See* Martijn W. Hesselink, *How to Opt Into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation*, 20 E. R. P. L. 195, 199 (2012).

[102] TEU arts. 5(1), 5(2). For a rigorous review of the possible legislative competence bases of EU contract law, see KATHLEEN GUTMAN, THE CONSTITUTIONAL FOUNDATIONS OF EUROPEAN CONTRACT LAW: A COMPARATIVE ANALYSIS (2014).

competence bases for contract law harmonization, the EU legislator had to fall back on the general competence bases of TFEU arts. 81, 114, and 352.[103] These provisions differ in both their regulatory effects and the prescribed decision-making process in the EU Council.[104] In particular, TFEU art. 81 allows the amendment of the European conflicts regimes so that they admit the selection of non-state norms, including the selection of an additional "embedded sales law regime".[105] This basis, however, comes with three major drawbacks.[106] First, embedding the EU sales law instrument into European conflict-of-laws would not be, automatically, binding on Denmark, Ireland, and the UK.[107] Second, it would have limited effects on Member States, which have enacted other uniform conflicts rules for international sale of goods contracts, such as the 1955 Hague Sales Convention.[108] And, most importantly, a choice of the instrument by the parties would be subject to all limitations envisaged in the conflicts regimes of the forum.[109] Further, TFEU art. 352 enables the creation of an additional supra-national "European" legal order for sales transactions, which would be free from any such conflicts limitations—truly, a "pan-European" instrument.[110] This basis, however, requires unanimity of the Member States in the Council.[111] Because of the "unfavourable" stance of several Member

[103] *See also* TFEU art. 169. For analysis on the appropriate legislative competence basis for an optional European contract law instrument, see Max Planck Institute for Comparative and International Private Law, *Policy Options for Progress towards a European Contract Law: Comments on the Issues Raised in the Green Paper from the Commission of 1 July 2010, COM(2010) 348 final*, 75 RABELSZ 371, 386–396, 436 (2011); GUTMAN, *supra* note 102 at 369–376; Martijn W. Hesselink, Jacobien W. Rutgers & Tim De Booys, *The Legal Basis for an Optional Instrument on European Contract Law*, CENTER FOR THE STUDY OF EUROPEAN CONTRACT LAW WORKING PAPER SERIES No. 2007/04, 38–65 (2007); Jan-Jaap Kuipers, *The Legal Basis for a European Optional Instrument*, 19 E. R. P. L. 545 (2011); Hans-W. Micklitz & Norbert Reich, *The Commission Proposal for a "Regulation on a Common European Sales Law (CESL)" - Too Broad or Not Broad Enough?*, *in* THE MAKING OF EUROPEAN PRIVATE LAW: WHY, HOW, WHAT, WHO 21, 23–32 (Luigi Moccia ed., 2013).

[104] *See* analysis in *infra* Part II(III)(A)(1).

[105] It should be noted that, in the context of European contract law, TFEU art. 81 cannot stand by itself. On the contrary, it requires the cumulative application of a substantive basis, such as TFEU art. 114. *See* Giesela Rühl, *The Common European Sales Law: 28th Regime, 2nd Regime or 1st Regime?*, 19 MAASTRICHT J. EUR. & COMP. L. 148, 148–149 (2012) (describing this structure as "28th regime-model").

[106] For the pitfalls of this solution, see e.g. *id.* at 150–156.

[107] ALEXANDER ELDER ANTON, PAUL R. BEAUMONT & PETER. E. MCELEAVY, PRIVATE INTERNATIONAL LAW 74 (3rd ed. 2011); Christian Kohler, *La Proposition de la Commission Européenne pour Un "Droit Commun Européen de la Vente" Vue sous l'Angle des Conflits de Lois*, *in* A COMMITMENT TO PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOUR OF HANS VAN LOON 259, 267 (The Permanent Bureau of the Hague Conference on Private International Law ed., 2013). *See* Markus Kotzur, *Article 81 [Judicial Cooperation in Civil matters] (Ex Article 65 TEC)*, *in* EUROPEAN UNION TREATIES: TREATY ON EUROPEAN UNION; TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION 437, 439 (Rudolf Geiger, Daniel-Erasmus Khan, & Markus Kotzur eds., 2015).

[108] Denmark, Finland, France, Italy, and Sweden. *See* Rühl, *supra* note 105 at 154.

[109] Rühl, *supra* note 105 at 154–155.

[110] For references to other names of this pan-European instrument structure, see *id.* at 161, note 44 ("1st regime-model," "uniform law solution," "uniform law approach," "2nd regime-model," "model of immediate application," "model of direct application or direct applicability," etc.).

[111] TFEU art. 352(1); Stefan Grundmann, *Costs and Benefits of an Optional European Sales Law (CESL)*, 50 C. M. L. REV. 225, 230 (2013).

States towards the CESL project, the EU Commission jettisoned TFEU art. 352 in favour of the "simple and uncontested legislative basis"[112] of TFEU art. 114.[113] Accordingly, TFEU art. 114 requires only qualified majority in the Council.[114] Hence, the Commission preferred the second parallel legal regime structure, which envisages the introduction of nearly-identical parallel sales law regimes in the clearly demarcated legal order of each EU Member State. This regulatory synchronization of the Member State sales laws together with the operation of the parallel regime within the very same legal order would, purportedly, have circumvented the conflict-of-laws limitations of the Rome Regulations and required a lower voting threshold in the legislative process.[115]

Having briefly set out the policy reasons underlying the peculiar structure of the CESL model, the analysis turns to the crux of the second applicability criterion, that is, the ascertainment of the governing law. To begin with, this criterion focuses only on the *law applicable* to the sale of goods contract. Hence, the location of the forum—be it in an EU Member State or not—would be irrelevant. That said, because the applicable law is almost invariably determined pursuant to the conflict-of-laws rules of the forum, a different conflicts regime could lead to the identification of a different *lex causae*.

In the EU, the law applicable to sales transactions is determined pursuant to either the Rome I Regulation or the 1955 Hague Sales Convention,[116] which prevail, in turn, over both the 1980 Rome Convention and the Rome I Regulation.[117] Succinctly, with regard to

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[112] Bisping, *supra* note 95 at 469.

[113] Preamble of the CESL. *See* Giuseppe Conte, *The Proposed Regulation on a Common European Sales Law - An Italian Perspective*, *in* THE PROPOSED COMMON EUROPEAN SALES LAW - THE LAWYER'S VIEW 61, 65–66 (Guido Alpa *et al*. eds., 2013); Eidenmüller *et al*., *supra* note 17 at 317–318. *See also* Stephen Weatherill, *Constitutional Issues - How Much is Best Left Unsaid?*, *in* THE HARMONISATION OF EUROPEAN CONTRACT LAW: IMPLICATIONS FOR EUROPEAN PRIVATE LAWS, BUSINESS AND LEGAL PRACTICE 89, 92 (Stefan Vogenauer & Stephen Weatherill eds., 2006) ("Harmonisation, today pursuant to Article 95 EC [now TFEU art. 114], remains the flagship of the European contract law fleet."). For an interesting comparison of TFEU art. 114 and the Commerce Clause of the US Constitution, see Robert Schütze, *Limits to the Union's "Internal Market" Competence(s)*, *in* THE QUESTION OF COMPETENCE IN THE EUROPEAN UNION 215, 216 (Loïc Azoulai ed., 2014).

[114] TFEU arts. 114, 289(1), and 294.

[115] EU Parliament Legislative Resolution on the CESL, *supra* note 11 at Amendment 2 (CESL recital 9). *See* analysis in *infra* Section V(C)(2).

[116] For Denmark, Finland, France, Italy, and Sweden.

[117] 1980 Rome Conv., art. 21. *See e.g.* Trib. di Pavia, Dec. 29, 1999 ("The conflict norms relating to international sales are not those provided by the Rome Convention; for these norms, one must instead look to the Hague Convention of 15 June 1955 . . . . By virtue of . . . Art. 21 of the Rome Convention . . . the Hague Convention takes precedence over the conflict rules of the Rome Convention. In any event, for recourse to international private law, one must prefer the relevant norms of uniform law created by international conventions which, by reason of their specialty, prevail over conflict rules."), *translation available at* http://cisgw3.law.pace.edu/cases/991229i3.html (It.). Rome I Reg., art. 25(1). *Cf*. Commission Proposal for a Regulation on the Law Applicable to Contractual Obligations (Rome I), COM (2005) 650 final (Dec. 15, 2005), art. 23(2) (providing for the prevalence of the proposed Regulation over the 1955 Hague Sales Convention).

commercial sales contracts, the second applicability criterion of the CESL would be met, if the parties explicitly or implicitly agreed on the application of a Member State law.[118] Absent such a choice-of-law agreement, the criterion would be met, if either the seller maintained her habitual residence in a Member State,[119] or the sales contract were manifestly more closely connected with a Member State.[120] Exceptionally under the 1955 Hague Sales Convention, absent a choice-of-law agreement, the criterion would, also, be met, independently of the location of the seller's habitual residence, if the buyer maintained her habitual residence in a Member State and the seller or her agent received the order in that country.[121]

With regard to consumer sales transactions, the parallel existence of the EU conflict-of-laws regimes and the 1955 Hague Sales Convention has no practical ramifications. Though the latter determines the law governing international sales agreements *in abstracto* without differentiating between commercial and consumer sale of goods contracts,[122] the Hague Conference on Private International Law issued a Declaration limiting the scope of the Convention. This Declaration, which came in response to criticism levelled against the parochial position of the instrument *vis-à-vis* consumer transactions,[123] allowed all contracting states to the 1955 Hague Sales Convention to apply special conflicts rules to international consumer sales agreements.[124] As a result, Rome I Reg., art. 6—and, for

[118] Rome I Reg., art. 3(1); 1955 Hague Sales Conv., art. 2(1). *See* Rühl, *supra* note 105 at 158; Wolffe, *supra* note 16 at 101 ("If the CESL is always a second national regime within the law of some Member State, the agreement that the contract will be governed by the CESL must implicitly be an agreement that the law of one of the Member States of the Union is the applicable law."). *See also* Cuniberti, *supra* note 99 (proposing the introduction of a presumption in favour of an implicit selection of EU law in the CESL Regulation).

[119] Rome I Reg., art. 4(1)(a); 1955 Hague Sales Conv., art. 3(1).

[120] Rome I Reg., art. 4(3). The 1955 Hague Sales Convention adopts a rigid approach as it does not provide for an "escape hatch" similar to that in art. 4(3) of the Rome I Regulation.

[121] 1955 Hague Sales Conv., art. 3(2).

[122] Michel Pelichet, *Report on the Law Applicable to International Sales of Goods (Revision of the Convention of June 15, 1955 on the Law Applicable to International Sales of Goods): Preliminary Document No. 1 of September 1982*, *in* PROCEEDINGS OF THE EXTRAORDINARY SESSION 14 TO 30 OCTOBER 1985: DIPLOMATIC CONFERENCE ON THE LAW APPLICABLE TO CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 17, 53 (Hague Conference on Private International Law, Bureau Permanent de la Conférence ed., 1987). *See* AUBREY L. DIAMOND, HARMONIZATION OF PRIVATE INTERNATIONAL LAW RELATING TO CONTRACTUAL OBLIGATIONS, 199 RECUEIL DES COURS/COLLECTED COURSES 233, 300 (1986) ("It may well be that when the 1955 Convention was negotiated – and its origins date from the 1920s – no thought was given to consumers at all. There was then no body of consumer law in many countries and the possibility of an international consumer sale, had thought been given to it, might have seemed fanciful.").

[123] *See e.g.* Fransesca Ragno, *Article 6*, *in* ROME I REGULATION: POCKET COMMENTARY 208, 248 (Franco Ferrari ed., 2015) (describing the prevalence of the 1955 Hague Convention over Rome I Reg., art. 6 as an "utterly paradoxical result"). *Cf.* 1980 Rome Conv., art. 5; Rome I Reg., art. 6; Swiss PILA, art. 120.

[124] Pelichet, *supra* note 122 at 101 (Annex III, Law Applicable to Certain Consumer Sales - Decision and Declaration adopted by the Fourteenth Session and Explanatory Report by Arthur Taylor von Mehren) ("C. Declaration and Recommendation relating to the Scope of the Convention on the Law Applicable to International Sales of Goods, Concluded June 15th, 1955": "The States present at the Fourteenth Session of the Hague Conference on Private International Law . . . [h]ereby declare that the *Convention of 15th June 1955 on the law applicable to international sales of goods* does not prevent States Parties from applying special rules on the

Denmark,[125] 1980 Rome Conv., art. 5—determines the law governing consumer sales transactions in the EU. Therefore, as in commercial transactions, the second CESL applicability criterion would be met, if the parties agreed on the application of an EU Member State law.[126] Absent such a choice-of-law agreement, the criterion would be met in two alternative scenarios. First, if the buyer maintained her habitual residence in a Member State, and the seller pursued her commercial or professional activities in, or directed such activities, to that country.[127] Second, if the seller maintained her habitual residence in a Member State, and she did not pursue her commercial or professional activities in, or direct such activities to, the country where the buyer maintained her habitual residence.[128]

Somewhat odd for a sales law instrument, the CESL also contains rules on non-contractual obligations, such as pre-contractual information duties and the restitution of performance received.[129] In the EU,[130] the conflicts rules for such matters have been enshrined in Rome II Reg.,[131] arts. 12(1) and 10(1), respectively.[132] Both provisions point to the

law applicable to consumer sales."). On the effects of the Declaration see *id.* at 107 ("At a minimum, a State whose delegation voted in favor of the Declaration is, as a matter of international morality, presumably bound not to raise objections to the use of the Declaration by a State Party to the 1955 Convention. Further, States that take advantage of the Declaration would accept it as juridically binding. The position of States Members of the Conference, which were not represented at the Fourteenth Session or whose delegations did not vote for the Declaration, is less clear; arguably they are morally bound by the Conference's corporate decision."); Johan A. Erauw, *International Advancement of Consumer Interests through Conflicts Rules*, *in* INTERNATIONAL CONTRACTS AND CONFLICTS OF LAWS: A COLLECTION OF ESSAYS 71, 81 (Petar Šarčević ed., 1990) ("The Declaration constitutes a moral obligation on the part of the signatory parties to accept new developments in the field of consumer protection. On the other hand, the Declaration could hardly be binding in international law."); RICHARD PLENDER & MICHAEL WILDERSPIN, THE EUROPEAN PRIVATE INTERNATIONAL LAW OF OBLIGATIONS 270 (4th ed. ed. 2015) ("[The] practical effect [of the Declaration] is to oust the application, in the Contracting States that are also Member States of the EU, of the 1955 Hague Convention in consumer sales disputes."); Christopher Tillman, *The Relationship between Party Autonomy and the Mandatory Rules in the Rome Convention*, J. B. L. 45, 62 (2002) ("The declaration . . . appears to give a strong reason for an update [sic] teleological interpretation of the Hague Convention and the Rome Convention: Certain consumer contracts according to Article 5 of the Rome Convention prevail and exclude these consumer contracts from free party autonomy under the Hague Convention."). For an express limitation of the 1955 Hague Sales Convention's scope of application, see Swiss PILA, arts. 118, 120.

[125] Rome I Reg., recital 46.

[126] Rome I Reg., arts. 3, 6(2), and 6(3); 1980 Rome Conv., arts. 3, 5(2). *See* Gilles Cuniberti, *Common European Sales Law, Third States and Consumers*, CONFLICT OF LAWS.NET (2012), http://conflictoflaws.net/2012/common-european-sales-law-third-states-and-consumers/ (last visited Apr. 27, 2020) (proposing the introduction of a presumption in favour of an implicit selection of EU law in the CESL Regulation).

[127] Rome I Reg., art. 6(1); 1980 Rome Conv., art. 5(2), 5(3) (with criteria somewhat different from those of the Rome I Regulation).

[128] Rome I Reg., arts. 4(1)(a), 6(3)—with the proviso of art. 4(3); 1980 Rome Conv., arts. 4(1), 4(2), and 5(3)—with the proviso of art. 4(5).

[129] CESL Anx. I, arts. 13–29 and 172–177 respectively. For the pitfalls of including rules on pre-contractual liability, see Sánchez-Lorenzo, *supra* note 36 at 193–194; Christiane Wenderhost, *CESL Regulation, Article 11*, *in* COMMON EUROPEAN SALES LAW (CESL): COMMENTARY 68, 71–72 (Reiner Schulze ed., 2012).

[130] Other than Denmark, which is not bound by the Rome II Regulation.

[131] Regulation 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L199) 40. *Cf.* Rome I Reg., art. 1(2)(i).

[132] With the proviso that the parties have not entered into a choice-of-law agreement under Rome II Reg., art. 14.

putatively applicable law, thus accumulating contractual and non-contractual obligations under the same legal "umbrella." Thus, the conflict-of-laws analysis of the foregoing paragraphs would be relevant also to all non-contractual obligations covered by the European sales law regime.

Lastly, regarding international sales disputes brought before courts of third countries or arbitral tribunals, the conflicts rules of the respective forum would determine whether the laws of an EU Member State formed the relevant *lex contractus*, and, by extension, whether the CESL governed the legal issues in dispute. Considering that, firstly, party autonomy is an almost universally accepted principle of private international law, and, secondly, most conflicts provisions point to the law of the seller, the legal framework of sales contracts would usually be the same in both EU and third countries.

C. Agreement to Use the CESL as the Governing Regime

The third applicability criterion of the CESL is the selection of the European sales law regime by the contracting parties.[133] An implementation of *Option 4* of the Commission's Green Paper on Policy Options for Progress towards a European Contract Law,[134] the optional nature of the CESL model accumulates three advantages for the harmonization of contract law in the EU. It allows for regulatory competition by preserving the national sales law regimes,[135] confines transaction costs to parties using the CESL,[136] and surpasses any hurdles arising from political concerns and legal competence challenges associated with the project.[137] Because the

[133] CESL Reg., arts. 3, 8.
[134] Commission Green Paper on Policy Options for Progress towards a European Contract Law for Consumers and Businesses, COM (2010) 348 final (Jul. 1, 2010).
[135] *See* Eidenmüller *et al*., *supra* note 17 at 347. *But see* Thomas Ackermann, *Public Supply of Optional Standardized Consumer Contracts: A Rationale for the Common European Sales Law*, 50 C. M. L. REV. 11, 26 (2013) ("By curtailing the effect and the substantive margin of national contract laws in B2C relationships and at the same time offering an EU regime that is exempt from such restrictions, the EU uses its powers to patronize its own optional law at the expense of national laws."); Mak, *supra* note 95 at 280–281 ("Introducing CESL as a '2nd regime' in national laws, and thus circumventing the consequences of the Rome I Regulation, puts the instrument in an advantageous position in respect to national sales laws."). For a critical stance to regulatory competition in the field of contract law, see Stefan Vogenauer, *Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence*, 21 E. R. P. L. 13 (2013).
[136] Dirk Staudenmayer, *The Common European Sales Law - Why Do We Need It and How Should It Be Designed?*, *in* THE PROPOSED COMMON EUROPEAN SALES LAW - THE LAWYER'S VIEW 17, 26 (Guido Alpa *et al*. eds., 2013).
[137] *See* Hugh Collins, *Why Europe Needs a Civil Code*, 21 E. R. P. L. 907, 910 (2013); Helmut Heiss & Noemí Downes, *Non-Optional Elements in an Optional European Contract Law. Reflections from a Private International Law Perspective*, 13 E. R. P. L. 693, 696 (2005). *See also* Ackermann, *supra* note 135 at 12. *But see* Jan H. Dalhuisen, *Some Realism about a Common European Sales Law*, 24 E. B. L. R. 299, 315 (2013) ("[The optional nature of the CESL] shows . . . that there is no compelling need [for the instrument]."); Fryderyk Zoll, *Searching the Optimum Way for the Unification and Approximation of the Private Law in Europe - A Discussion in the Light*

third applicability requirement forms the quintessence of the *optional* CESL model, it deserves separate in-depth examination.

V. THE CESL OPT-IN AGREEMENT

Introducing an exception to the usual default application of both international uniform law and EU instruments, the optional nature of the CESL model constitutes one of its most innovative elements.[138] It entails the conclusion of a special agreement to use the CESL as the legal framework of the sale of goods contract.[139] Hence, assuming the conclusion of a choice-of-law agreement, a dispute resolution agreement, or both, this opt-in agreement would constitute the third or even the fourth contract for merely one deal on movable tangible goods. This section is dedicated to an in-depth examination of the opt-in agreement's formation requirements,[140] its nature and legal effects,[141] and its interplay with the CESL and the conflict-of-laws rules enshrined in the Rome I Regulation.[142] The analysis concludes with a comparative review of the CESL opt-in agreement and the opt-in mechanism of the ULIS 1964.[143]

of the Proposal for the Common European Sales Law, 17 CONTRATTO E IMPRESA/EUROPA 397, 409 (2012) ("The requirement to 'opt-in' symbolizes the lack of sufficient reliance of the Member States, of the Union to the Union itself and to the *acquis communautaire*.").

[138] Dannemann, *supra* note 17 at 21 ("[T]he rules on choice of CESL are without any true predecessor."). *See* Stefan Vogenauer & Stephen Weatherill, *The European Community's Competence to Pursue the Harmonisation of Contract Law - An Empirical Contribution to the Debate*, *in* THE HARMONISATION OF EUROPEAN CONTRACT LAW: IMPLICATIONS FOR EUROPEAN PRIVATE LAWS, BUSINESS AND LEGAL PRACTICE 105, 134 (Stefan Vogenauer & Stephen Weatherill eds., 2006) (offering statistical evidence that 75% of respondents noted their overall preference for an optional—including the opt-out possibility—rather than a mandatory European contract law instrument). *But see* Commission Staff Working Document, Impact Assessment, Accompanying the Document Proposals for Directives of the European Parliament and of the Council (1) on Certain Aspects concerning Contracts for the Supply of Digital Content and (2) on Certain Aspects concerning Contracts for the Online and Other Distance Sales of Goods, SWD (2015) 274 final/2 (Dec. 17, 2015), at 25 ("Optional instrument: while having received strong support from the European Parliament, the proposal for a Regulation on a Common European Sales Law did not find a majority in Council. *One of the main reasons for this opposition in the Council was the optional character of the proposal* [emphasis added]. Therefore, this option has not been taken into consideration as it was not considered politically feasible.").

[139] Hesselink, *supra* note 101 at 207; Olaf Meyer, *Promoting Uniform Sales Law*, 24 E. B. L. R. 389, 391 (2013). *See* Heiss and Downes, *supra* note 137 at 695 ("An instrument on European contract law may be characterized as optional *if its application depends on a choice of law made by the parties* [emphasis added].").

[140] *See* analysis in *infra* Section V(A).

[141] *See* analysis in *infra* Section V(B).

[142] *See* analysis in *infra* Section V(C).

[143] *See* analysis in *infra* Section V(D).

A. Existence & Validity of the CESL Opt-In Agreement

In a "boot-strapping" manner that echoes Rome I Reg., art. 3(5) and 1980 Rome Conv., art. 3(4),[144] CESL Reg., art. 8(1) acknowledges the "separability" of the sale of goods from the opt-in agreement, and provides that the existence and validity of the latter be determined pursuant to the pertinent provisions in the CESL.[145] All relevant issues falling outside the scope of the instrument were to be determined pursuant to the applicable Member State law. Setting aside the meeting-of-the-minds process, which extends beyond the scope of this thesis, this section explores the requirements for the conclusion of a CESL opt-in agreement for commercial and consumer sale of goods contracts.

1. Commercial Sale of Goods Contracts

For commercial sale of goods contracts, CESL Reg., art. 8 enshrines two general principles, namely party autonomy and freedom from form requirements.[146] With the exception of certain provisions of CESL Anx. I, which cannot be excluded, varied or derogated from by virtue of an agreement between the parties,[147] traders are allowed to select either the entire or only part of the CESL to regulate their transaction.[148] This partial selection of the CESL could take two forms. By virtue of art. 8 and thanks to the *dépeçage* facility of the forum's conflicts regime,[149] the applicable Member State law, together with the CESL, would govern selected

[144] *Cf.* Institute of International Law [IIL], *The Autonomy of the Parties in International Contracts between Private Persons or Entities*, Resolution, Session of Basel. Rapporteur: Eric Jayme (Aug. 31, 1991) (art. 4(1)).
[145] *See* CESL Reg., arts. 8(2), 8(3), and 9, and CESL Anx. I, arts. 1–12 and 30–39. *See also* JAMES J. FAWCETT, JONATHAN M. HARRIS & MICHAEL BRIDGE, INTERNATIONAL SALE OF GOODS IN THE CONFLICT OF LAWS 890 (2005) (arguing that boot-strapping rules "represent a clear triumph of pragmatism over principle").
[146] CESL Reg., art. 8(1), and CESL Anx. I, art. 6; Sonja A. Kruisinga, *Incorporation of Standard Terms according to the CISG and the CESL: Will These Competing Instruments Enhance Legal Certainty in Cross-Border Sales Transactions?*, 24 E. B. L. R. 341, 347 (2013).
[147] CESL Reg., art. 8(3) (*a contrario*), and CESL Anx. I, arts. 1(2), 2, 49–51, 56(1), 70, 74, 79–86, 168–171. *But see* Hugh Beale, *A Common European Sales Law (CESL) for Business-to-Business Contracts*, *in* THE MAKING OF EUROPEAN PRIVATE LAW: WHY, HOW, WHAT, WHO 65, 75 (Luigi Moccia ed., 2013).
[148] CESL Reg., art. 8(3) (*a contrario*); EU Parliament Legislative Resolution on the CESL, *supra* note 11 at Amendment 72 (CESL Reg., art. 8(3)) ("In relations between traders, the Common European Sales Law may be chosen partially, provided that exclusion of the respective provisions is not prohibited therein."); Fogt, *supra* note 23 at 125–126; Hesselink, *supra* note 101 at 207; Magnus, *supra* note 28 at 231; Palao Moreno, *supra* note 82 at 25; Christiane Wenderhost, *CESL Regulation, Article 8*, *in* COMMON EUROPEAN SALES LAW (CESL): COMMENTARY 57, 60 (Reiner Schulze ed., 2012). *See* Whittaker, *supra* note 63 at 598. *Contra* Lisa Spagnolo, *Law Wars: Australian Contract Law Reform vs. CISG vs. CESL*, 58 VILL. L. REV. 623, 638 (2013) ("[T]he CESL cannot be opted into in part, even for non-consumer transactions.").
[149] *See* Rome I Reg., art. 3(1); 1980 Rome Conv., art. 3(1); 2015 Hague Principles, art. 2(1). *See also* Institute of International Law [IIL], *The Autonomy of the Parties in International Contracts between Private Persons or Entities*, Resolution, Session of Basel. Rapporteur: Eric Jayme (Aug. 31, 1991) (art. 7). Regarding the 1955 Hague Sales Convention, the topic is opaque, as there is no provision allowing or precluding *dépeçage*. Pursuant to one

topics under the sales agreement, while the remaining issues would be regulated by a third legal regime. Alternatively, the CESL could be "activated" for specific matters under the contract, the rest being governed by the applicable Member State law. Further, the opt-in agreement could be either express or implicit, albeit unequivocal.[150] If express, the opt-in agreement need not be in writing. If reduced to writing, it may feature as an instrument that is physically distinct from the sales transaction, a relevant clause in the commercial agreement, or, most likely, as a boilerplate clause in the standard contract terms integrated in the sales transaction.[151] All in all, traders would have enjoyed almost absolute freedom with respect to both the CESL opt-in agreement's form and the extent of the CESL's selection.

2. Consumer Sale of Goods Contracts

In juxtaposition with commercial sales, the CESL delineates two-plus-one steps for the valid conclusion of opt-in agreements in consumer sales transactions:[152] *i.* the provision of a Standard Information Notice (SIN) to the consumer, *ii.* the conclusion of the opt-in agreement *per se*, and *iii.* the dispatch of a notice confirming the conclusion of the agreement to use the CESL. Whereas failure to fulfil the first two requirements would impact the formation of the opt-in instrument, missing the last step would not, without more, have any such effects.[153] In any case, the Member States were to have laid down "effective, proportionate, and dissuasive" penalties for breaches pertaining to any of the aforementioned steps.[154]

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interpretation, *dépeçage* is precluded. Notably, Pelichet, *supra* note 122 at 65 ("The various national and international codifications do not recognize this possibility [of *dépeçage*] for the parties, except for the Rome Convention of 1980."). Nonetheless, pursuant to a more persuasive interpretation, which is aligned with the general principle of party autonomy and the dynamic interpretation of international uniform law, *dépeçage* is allowed under the 1955 Hague Sales Convention. *Cf.* 1986 Hague Sales Conv., art. 7(1); ARTHUR TAYLOR VON MEHREN, *Convention on the Law Applicable to Contracts for the International Sale of Goods: Text adopted by the Diplomatic Conference of October 1985 - Explanatory Report* 27 (1986) (offering a succinct restatement of the relevant negotiations on *dépeçage*).

[150] Conte, *supra* note 113 at 77; Fogt, *supra* note 23 at 123; Hesselink, *supra* note 101 at 207. *But see* CESL recital 9 ("[U]pon an *express* [emphasis added] agreement of the parties."); Michael Schillig & Caroline Harvey, *Consequences of an Ineffective Agreement to Use the Common European Sales Law*, 9 E. R. C. L. 143, 146, 154 (2013) (rejecting the implicit conclusion of CESL opt-in agreements).

[151] CESL Reg., arts. 8(1) and 8(2) (*a contrario*). *See* Kruisinga, *supra* note 146 at 346. *See also* Meyer, *supra* note 139 at 402 ("It would be a huge success for the CESL, if the industry would widely adopt the practice of stipulating to its application in standard terms and conditions and in model contracts."). The integration of CESL opt-in agreements in the standard terms of traders could lead to "battle of the forms" situations. For analysis on conflicting standard terms and the applicability of the CESL, see Evelyne Terryn, *CESL Anx. I, Article 39*, *in* COMMON EUROPEAN SALES LAW (CESL): COMMENTARY 204, 206–208 (Reiner Schulze ed., 2012).

[152] CESL Reg., art. 8(1), with further references to arts. 8(2), 8(3), and 9.

[153] CESL Reg., arts. 8(2), 9(1).

[154] CESL Reg., art. 10.

i. Standard Information Notice (SIN)

The first step is to supply the consumer with a Standard Information Notice (SIN). The SIN must be given before the conclusion of the CESL opt-in agreement,[155] so that the consumer be advised of her rights and the remedies available under the CESL.[156] Failure of the seller to effect the SIN would preclude the conclusion of the opt-in agreement,[157] but not the conclusion of the sales contract,[158] which would be governed by the otherwise applicable law—presumably, an EU Member State law.[159] By the same token, absent a different agreement of the parties, the belated provision of the SIN would operate *ex nunc*, that is, without retrospective effects on the regime governing the sales transaction. Hence, in the event of a dispute arising from the consumer sales transaction, the consumer, alone, would be able, by confirming or rejecting the late SIN, to unilaterally select *ex post* the legal framework of the dispute, that is, the CESL or the otherwise applicable law.[160]

With regard to the content of the notice, the wording of both CESL Reg., art. 9(1) and Anx. II attest that the SIN of Anx. II were not to have been a model notice, but rather a "rigid" form that could not be amended by merchants. In other words, all traders intending to sell their products to consumers under the EU sales regime would have had no option but to provide their customers with the SIN of Anx. II. Lastly, if the SIN were given in electronic form, for example in the context of e-commerce, it would be required to contain a hyperlink leading directly to a free copy of the CESL.[161] In all other cases, the SIN would have to contain a webpage address where consumers could retrieve the CESL free of charge.[162]

The stiff content of the CESL Anx. II and the unconventional requirement to advise consumers about the change in the contract's legal framework stirred criticism for introducing

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[155] CESL Reg., art. 9(1). *See* CESL Anx. I, art. 10.
[156] CESL recital 23; CESL Anx. II; Paula Giliker, *Pre-Contractual Good Faith and the Common European Sales Law: A Compromise Too Far?*, 21 E. R. P. L. 79, 96 (2013). *See* Christiane Wenderhost, *CESL Regulation, Article 9*, *in* COMMON EUROPEAN SALES LAW (CESL): COMMENTARY 62, 63 (Reiner Schulze ed., 2012).
[157] CESL Reg., art. 9(1). Dannemann, *supra* note 17 at 53–54; STAUDENMAYER, *supra* note 19 at xvii; Wenderhost, *supra* note 156 at 64; STEFAN WRBKA, EUROPEAN CONSUMER ACCESS TO JUSTICE REVISITED 210 (2014).
[158] *See* CESL recital 32. *But see* CESL Anx. II, para 3; Heidemann, *supra* note 46 at 1137.
[159] EU Parliament Legislative Resolution on the CESL, *supra* note 11 at Amendment 13 (CESL recital 23(a) (new)); Hesselink, *supra* note 101 at 210. *See* analysis in *supra* Section IV(B).
[160] Hesselink, *supra* note 101 at 210; WRBKA, *supra* note 157 at 210. *See* Schillig and Harvey, *supra* note 150 at 160 (arguing that CJEU case law requires national courts to advise the consumer on their own motion about her right to select the legal framework of the dispute); Wenderhost, *supra* note 156 at 64 ("[T]he consumer will often have insufficient information as to which legal regime is more favourable in the particular situation."). *Cf.* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 8 (9th ed. 2014) ("If a party for whom a contract to which he freely agreed turns out badly is allowed to revise the terms of the contract ex post, few contracts will be made.").
[161] CESL Reg., art. 9(2).
[162] *Id*.

behavioural risks of rejection by consumers. In particular, consumers would, only exceptionally, have read and understood either the CESL or the SIN.[163] Inertia would have limited the application of the European sales regime that "comes with a health warning."[164] In any case, it can hardly be disputed that the provision of the SIN would have raised awareness regarding both the CESL and consumer protection in the EU.

ii. Agreement of the parties

The second step is the conclusion of the opt-in agreement *per se*. In addition to the requirements set forth in CESL Reg., art. 8(1) and CESL Anx. I, art. 30 *et seq.*, the consumer's consent to enter into the opt-in agreement must be given by a statement that is "explicit" and "separate" from the consent to conclude the sale of goods contract.[165] Whereas it is clear that the requirement for an "explicit" statement precludes contract formation by consumer's conduct,[166] it is not clear what a "separate" statement requirement entails. CESL recital 22 elucidates CESL Reg., art. 8(2), providing that

> It should . . . 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.

[163] *See* THE GALLUP ORGANISATION, EUROPE *ET AL.*, *Testing of a Standardised Information Notice for Consumers on the Common European Sales Law: Final Report for the European Commission, Directorate-General Justice* 44 (2013), https://ec.europa.eu/info/sites/info/files/standardised_notice_on_the_common_european_sales_law_2013_en_1.pdf ("Half of consumers spend less than 7 seconds reading the Draft Notice and fewer than 15% view the Notice more than once. Only 32% of consumers scroll all the way to the end of the Draft Notice. Fewer than one in five respondents claim to have read the Draft Notice in full."). *See also id.* at 62 ("When online shoppers are not forced to view the Notice, the majority of consumers (59%) will choose not to view the Notice at all . . . ."). With regard to the perception of the draft SIN by consumers, see *id.* at 48 ("76% of respondents said that the Draft Notice was informative and useful; 70% considered that it was in a logical order and clearly structured; 64% considered that it was clearly written and easy to understand; 63% found it clearly laid out and easy to follow; and 60% said that it contained everything they needed to know . . . .").

[164] Christopher Bisping, *Consumer Protection: The Simple New World of the Common European Sales Law*, 34 BUS. L. REV. 66, 67 (2013). In like manner, Eidenmüller *et al.*, *supra* note 17 at 321. *But see* THE GALLUP ORGANISATION, EUROPE *ET AL.*, *supra* note 163 at 44 ("The Draft Notice and consent procedure for the choice of CESL does not raise the rate of purchase cancellation. Only 8% of consumers cancel their purchases when presented the Draft Notice under CESL . . . .").

[165] CESL Reg., art. 8(2).

[166] CESL Reg., art. 8(2) (*a contrario*).

Hence, the "separate" requirement of CESL Reg., art. 8(2) comprises a prohibition of selecting the CESL through the sale's boilerplate terms.[167]

Regarding the content of the opt-in instrument, CESL Reg., art. 8(3) does not allow the partial selection of the regime.[168] As a result, sellers would not have been able to cherry-pick the CESL provisions,[169] or to create a patchwork of low-burden national and CESL rules to their benefit,[170] but to the consumer's expense. This limitation of party autonomy is buttressed by the extensive limits to contractual freedom under CESL Anx. I, art. 1(2).[171] As a result, subjecting the contract to the high level of consumer protection under the CESL could have rendered the latter a mark of quality goods and trustworthy sellers.[172] In terms of e-commerce, the CESL could have become a "clickable Europe flag,"[173] or, in the words of Schulte-Nölke, a "Blue Button"[174] signalling the confidence of the trader in the quality of her products.[175]

This consumer protection euphoria under the CESL, however, should last only momentarily. Considering, firstly, that the instrument was promulgated to foster cross-border trade in the Single Market, rather than to enhance consumer protection, and, secondly, that the "separate" requirement of CESL Reg., art. 8(2) deviates from established practices in repetitive consumer transactions, it is important to closely examine the provision's rationale, and, perhaps, revisit the prevailing interpretation of art. 8(2). In this endeavour, two fundamental

[167] *See* Horst Eidenmüller, *What Can Be Wrong with an Option? An Optional Common European Sales Law as a Regulatory Tool*, 50 C. M. L. REV. 69, 79 (2013) ("This represents bad news for businesses because they face the prospect of a split market with CESL customers and non-CESL customers.").
[168] CESL Reg., art. 8(3) ("In relations between a trader and a consumer the Common European Sales Law may not be chosen partially, but only in its entirety."); CESL recital 24.
[169] Ackermann, *supra* note 135 at 18; Beale, *supra* note 147 at 75; Hesselink, *supra* note 101 at 207.
[170] *See* Hesselink, *supra* note 101 at 208.
[171] *See* CESL Anx. I, arts. 2, 10, 13–22, 24–27, 28, 29, 40–47, 56, 64, 69, 70, 71, 72, 74, 75, 77, 79–86, 92, 99, 101, 102, 105, 106-122, 135, 142, 148, 150, 158, 167, 168–171, 172–177, and 186. *See also* Richard A. Epstein, *Harmonization, Heterogeneity and Regulation: CESL, The Lost Opportunity for Constructive Harmonization*, 50 C. M. L. REV. 207, 223 (2013) ("CESL made the right decision to keep its regime optional. But its heavy dose of mandatory terms makes it unlikely that many firms will rush to use it.").
[172] Beale, *supra* note 147 at 74; Palao Moreno, *supra* note 82 at 26. *See* TFEU arts. 114(3), 169; CESL recital 11. *See also* Busch, *supra* note 58 at 205.
[173] Meyer, *supra* note 139 at 393.
[174] Hans Schulte-Nölke, *EC Law on the Formation of Contract – From the Common Frame of Reference to the "Blue Button"*, 3 E. R. C. L. 332, 349 (2007) ("When buying goods in an e-shop the client could easily choose the application of the Optional Instrument by clicking on a 'Blue Button' on the screen showing his or her acceptance of the optional European Law. The 'Blue Button' could be designed as the European blue flag with the twelve stars, possibly with an inscription like 'Sale under EU Law'.").
[175] Eidenmüller *et al*., *supra* note 17 at 350–351 ("Traders proposing to contract under the CESL would signal size, stability and reliability on the one hand; on the other hand, they would use the European legal instrument as a quality seal."). *See also* Staudenmayer, *supra* note 136 at 20 ("[I]f [businesses] do not have confidence in their products and they think they will face a lot of consumer claims because of frequently defective products and those potential risks outweigh the transaction cost savings, they will not choose [the CESL]."). *But see* Collins, *supra* note 137 at 913 ("Traders selling excellent and reliable products may decide that the legal risks of diversity in national consumer laws are worth running . . . and therefore will not bother with a blue button.").

aspects of standard contract terms should be contemplated, namely the practice of "burying" unusual provisions in the fine print of standard contract terms, and the "take-it-or-leave-it" basis on which such contracts of adhesion are offered to consumers.

Firstly, it is frequent phenomenon for sellers to "bury" unusual terms in densely drafted standard contract terms. As consumers seldom read and understand the technical terms they consent to,[176] sellers often include unusual clauses in their standard terms in an attempt to maximize their gains and, of course, to minimize their exposure from the transaction.[177] Secondly, the rationale of using standard contract terms is to enhance commercial efficiency by expediting dealings, reducing transaction costs, facilitating the contracting process, and harmonizing the rights and obligations of the merchant from contracts of the same kind.[178] This efficiency presupposes that there be no negotiations on the content of the standard terms.[179] Should that happen, the negotiated and amended provisions would cease to be "standard terms." Hence, in light of the foregoing, the CESL opt-in agreement were to have been neither "buried" in the merchant's standard terms and conditions, nor structured as a non-negotiable prerequisite for the formation of the sales agreement.

Granted, the provision of the Standard Information Notice under CESL Reg., art. 9 ensures that the consumer had been informed that, by assenting to the opt-in agreement, the sales contract would be governed by the CESL—not the otherwise applicable law. Therefore, the "separate" requirement appears to be redundant, at least, with regard to the first fundamental aspect of standard terms examined herein.

A practical viewpoint should be adopted also when assessing the second fundamental aspect of standard contract terms. In particular, if consumers were given the opportunity to decide whether to conclude or to avoid a CESL opt-in agreement, sellers would not only continue to bear the legal risk of more burdensome regulations under Rome I Reg., art. 6(2), but also would incur additional transaction costs and legal risks stemming from the proposed use of the EU sales law regime.[180] Essentially, the risks and exposure of the seller's business

[176] Lando, *supra* note 17 at 244; Staudenmayer, *supra* note 136 at 29. This reminds us of the famous quote by Lord Denning in *Thornton* v *Shoe Lane Parking Ltd* [1971] 2 Q.B. 163, 169 ("[T]he customer, on being handed the ticket, could refuse it and decline to enter into a contract on those [standardized] terms. He could ask for his money back. That theory was, of course, a fiction. No customer in a thousand ever read the conditions.") (Eng.).
[177] Typical examples are exclusion and limitation of liability clauses.
[178] Nicole Kornet, *The Interpretation and Fairness of Standardized Terms: Certainty and Predictability under the CESL and the CISG Compared*, 24 E. B. L. R. 319, 320 (2013). For converging definitions of "standard contract terms," see e.g. CESL Reg., art. 2(d); UPICC 2016, art. 2.1.19(2).
[179] *See* CESL Reg., art. 2(d); UPICC 2016, art. 2.1.19(2).
[180] Eidenmüller *et al*., *supra* note 17 at 350; Staudenmayer, *supra* note 136 at 29; Whittaker, *supra* note 63 at 601.

would be put into the hands of the consumer, who, other than purely moral inhibitions, would have no reason to contemplate the "externalities" of her decision on the seller.[181] Evidently, this interpretation of CESL Reg., art. 8(2) stands in conflict with the cardinal purpose of the CESL, that is, to allow merchants to conduct business under a single set of rules across the EU.

For that reason, and in line with the principle of effectiveness (*effet utile*) of EU law, a restrictive interpretation of both CESL Reg., art. 8(2) and CESL recital 22 should be preferred.[182] The requirement for a "separate" consumer's consent should be limited to a—superfluous—prohibition of "hiding" the CESL opt-in agreement in the sale's standard terms and conditions. Further, the parties should not be precluded from entering into interdependent sale of goods and CESL opt-in agreements. Rather, sellers should be free to structure the conclusion of the CESL opt-in agreement as a suspensive condition to the formation of the sales agreement.[183] Thus, the sale of goods contract would not be concluded and the parties would not be contractually bound, unless and until the CESL were validly selected. This would result in the simultaneous conclusion of both the sale of goods and the CESL opt-in agreement, effectively, as a single contract of adhesion.[184] Accordingly, the dilemma for the consumer changes from "CESL or no-CESL" to "CESL or no-contract."[185] Hence, similarly to the first CESL applicability criterion, the requirements of CESL Reg., art. 8(2) add nothing to the CESL other than unnecessary complexity and dubious formalities.[186]

This conclusion begs the question of whether the opt-in instrument of the CESL model would be subject to judicial review of its "fairness" under the Directive 13/93 on Unfair Terms in Consumer Contracts.[187] On the eve of the CESL, insightful—yet diverging—scholarship was published on this topic.[188] Part of this debate was rendered moot by the *Amazon* case, where the CJEU ruled that

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[181] *See* POSNER, *supra* note 160 at 72.
[182] *See* CESL recital 29.
[183] *Cf.* DCFR art. III. – 1:106(1); PECL art. 16:101; UPICC 2016, arts. 5.3.1, 5.3.2(a).
[184] Staudenmayer, *supra* note 136 at 29.
[185] *See* Hesselink, *supra* note 101 at 208. *See also* Staudenmayer, *supra* note 136 at 29 (arguing that this practice "responds to . . . the *raison d'être* of the Common European Sales Law."). Even if consumers had a choice, see Jürgen Basedow, *An Optional Instrument and the Disincentives to Opt In*, 17 CONTRATTO E IMPRESA/EUROPA 37, 38 (2012) (arguing that consumers would not be in position to decide whether to contract under the optional regime or national law); Eidenmüller, *supra* note 167 at 74 ("Factors such as the quality of goods/services, price, reputation of the contract partner, and trust are much more important with respect to how a particular transaction influences the welfare of consumers than the position under the applicable law.").
[186] Piers and Vanleenhove, *supra* note 82 at 452.
[187] Council Directive 93/13/EEC of Apr. 5, 1993, on Unfair Terms in Consumer Contracts, 1993 O.J. (L95) 29.
[188] *See e.g.* GUIDO ALPA, COMPETITION OF LEGAL SYSTEMS AND HARMONIZATION OF EUROPEAN PRIVATE LAW: NEW PATHS IN A COMPARATIVE PERSPECTIVE 134–135 (2013); Jürgen Basedow, *The Optional Instrument of European Contract Law: Opting-In through Standard Terms - A Reply to Simon Whittaker*, 8 E. R. C. L. 82–87

> [A choice of law clause, which is not individually negotiated] is unfair in so far as it leads the consumer into error by giving him the impression that only the law of that Member State applies to the contract, without informing him that under Article 6(2) of Regulation No 593/2008 he also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term . . . .[189]

Since the *Amazon* case focuses on choice-of-law agreements, the question of whether the optional facility of the CESL model should conform to the mandates of the Directive remains open. In this author's opinion, the opt-in agreement should not be subject to judicial review of its "fairness." Any such scrutiny would be self-defeating as it would represent a vote of "no-confidence" in the instrument and an admission by the EU that the provisions of the instrument fail to attain a high level of consumer protection. In any case, bearing in mind the *quasi* choice-of-law nature of the opt-in agreement,[190] the requirements set forth in the *Amazon* decision could be dispensed with by providing the consumer with the SIN of CESL Anx. II.

iii. Confirmation notice

The third—additional—step is to provide the consumer with a notice confirming the conclusion of the opt-in agreement.[191] This confirmation notice was to have been made on a durable medium,[192] which, for the purposes of e-commerce, could take the form of electronic communication, such as e-mail or any other electronic messaging form. As already noted, the breach of this obligation would not, necessarily, have invalidated the opt-in agreement. Rather,

(2012); Florian Möslein, *Optional Regulation of Standard Contract Terms*, *in* VARIETIES OF EUROPEAN ECONOMIC LAW AND REGULATION: LIBER AMICORUM FOR HANS MICKLITZ 71 (Kai Purnhagen & Peter Rott eds., 2014); Simon Whittaker, *The Optional Instrument of European Contract Law and Freedom of Contract*, 7 E. R. C. L. 371, 388–392 (2011).

[189] Case C-191/15, *Verein für Konsumenteninformation* v *Amazon EU Sàrl*, ECLI:EU:C:2016:612 (2016). For analysis on the inconsistencies incurred as a result of this judgment, see Peter Mankowski, *Just How Free Is a Choice of Law in Contract in the EU?*, 13 J. PRIV. INT'L L. 231–258 (2017); Giesela Rühl, *The Unfairness of Choice-of-Law Clauses, or: The (Unclear) Relationship between Article 6 Rome I Regulation and the Unfair Terms in Consumer Contracts Directive: VKI v. Amazon*, 55 C. M. L. REV. 201 (2018).

[190] *See* analysis in *infra* Section V(B)(3).

[191] CESL Reg., art. 8(2) *in fine*; and CESL Anx. I, art. 10.

[192] CESL Reg., art. 8(2) *in fine*. *See* CESL Reg., art. 2(t) ("'[D]urable 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.").

the consequences of such a breach and the associated penalties were to have been determined independently by the respective Member States.[193]

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Having identified the formation requirements of the CESL opt-in agreement, the analysis turns to the agreement's nature and its effects on the law governing the international sale of goods contract.

B. Nature & Effects of the CESL Opt-In Agreement

This section explores the features and effects of the CESL opt-in agreement in an attempt to, firstly, demystify its nature, and, secondly, set the basis for better understanding of optional uniform law instruments. Particular emphasis is paid to a comparative review of the "classic" types of rules-selection agreements, namely choice-of-law agreements, choice-of-rules agreements, and incorporation-by-reference clauses.[194] Considering that the permissibility and, by extension, the legal effectiveness of the first two types depend entirely on the private international law rules of the forum or arbitral tribunal, a comparative review of the major approaches to party autonomy is also conducted.[195] The synthesis of these two enquiries showcases the "Protean" nature of the CESL opt-in agreement,[196] and substantiates the formulation of a new fourth type of rules-selection agreements, namely the "*quasi* choice-of-law" agreement.[197]

1. Rules-Selection Agreements

An overview of rules-selection agreements cannot but start with the oft-cited passage from the seminal *Scherk* v *Alberto-Culver Co* judgment of the US Supreme Court

> [U]ncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance . . . the law to be applied

[193] CESL Reg., arts. 8(2) (*a contrario*), 10.
[194] *See* analysis in *infra* Section V(B)(1).
[195] *See* analysis in *infra* Section V(B)(2).
[196] For the myth of Proteus, the multiform God of the Ocean, see XXV THOMAS HOBBES, TRANSLATIONS OF HOMER: ODYSSEY 53, Book IV:405 (Eric Nelson ed., 2008).
[197] *See* analysis in *infra* Section V(B)(3).

> is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.[198]

In this pursuit of legal certainty and predictability, the greater part of international business transactions contain provisions on the regime governing the underlying business relationship. Depending on the subject matter and the regulatory effects of the parties' selection, these arrangements may be classified into three broad categories, namely "choice-of-law" agreements, "choice-of-rules" agreements, and "incorporation-by-reference" clauses.

i. Choice-of-law agreements

The first and most well-known category of rules-selection agreements is the so-called "choice-of-law agreement." A manifestation of the party autonomy principle, it enables parties to select the national legal framework governing their transaction. Generally speaking, the "law," the subject matter of a choice-of-law agreement, is distinguished by three features: *i.* it constitutes a selection of statist law;[199] *ii.* it is "universal" and "systematic," in that it has been designed to cover and regulate all relationships that could possibly develop in a legal order;[200] and *iii.* it is "hard" law, that is, it has come and remains in force at the time of the conclusion of the choice-of-law agreement.[201] A choice-of-law agreement has two effects on the legal framework of a relationship. It identifies, in a positive manner, the law applicable to that relationship between the parties, and, simultaneously, it negates the application of both the dispositive (*jus dispositivum*) and the mandatory (*jus cogens*) rules of the otherwise applicable law.

The selection of the legal regime governing a contractual relationship that is distinguished by sufficient elements of internationality has become, without a doubt, the norm in international trade. Although empirical findings on the selection of national law by contracting parties are rather scarce and limited in their temporal and material scope, the

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[198] *Scherk* v *Alberto-Culver Co*, 417 U.S. 506, 516 (1974) (USA). *See The Bremen et al.* v *Zapata Off-Shore Co*, 407 U.S. 1, 9 (1971) ("We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.") (USA).

[199] This feature was fostered as a result of the new world order that followed the Peace of Westphalia in 1648. *See* ALEX MILLS, PARTY AUTONOMY IN PRIVATE INTERNATIONAL LAW 494–497 (2018). *See also id.* at 496, note 16 ("'State' for [conflict-of-laws] purposes should be understood as meaning 'territorial legal order' . . . .").

[200] *See* JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS, vol. 1 at 45, 48 (1935); PETER NYGH, AUTONOMY IN INTERNATIONAL CONTRACTS 61 (1999).

[201] Calliess, *supra* note 63 at 96; FAWCETT, HARRIS, AND BRIDGE, *supra* note 145 at 678. *See e.g.* Rome I Reg., art. 20; 1980 Rome Conv., art. 15; 1994 Mexico City Conv., art. 17; 1986 Hague Sales Conv., art. 15.

published statistics of the International Chamber of Commerce indicate that, over the past fifteen years, approximately 83.6% of contracts underlying disputes submitted with the ICC contained a choice of statist law for the regulation of the agreement.[202] With regard to the legal system selected, the picture remains opaque, albeit clear enough to note that English, Swiss, French, German, New York, and California laws dominate international business transactions.[203]

ii. Choice-of-rules agreements

The second type of rules-selection agreements is the so-called "choice-of-rules" agreement. As insinuated from its designation, it closely resembles choice-of-law agreements. The subject matter of the parties' selection comprises their main difference, as the contracting parties are not limited to the selection of national *law*, but may choose any kind of *rules* to govern their relationship. These rules may be articulated in either "soft law" or "hard law" instruments,[204] comprise secular rules or a religious creed,[205] or even a collection of principles common to various legal orders.[206] Furthermore, they need neither provide for all possible relationships nor be in force at the time of the conclusion of the contract. Defined in a negative

[202] ICC Annual Statistical Reports published in the ICC International Court of Arbitration Bulletin, vols. 12–25, and vols. 2015, 2016, 2017. In like manner, Feasibility Study on the Choice of Law in International Contracts: Report on Work Carried Out and Conclusions (Follow-Up Note), Note Prepared by the Permanent Bureau - Preliminary Document No. 5 of February 2008 for the Attention of the Council of April 2008 on General Affairs and Policy of the Conference, 4, 8, https://assets.hcch.net/docs/cb1ca59e-5e69-4a86-b9f1-e929075fdef2.pdf (80% of the responding Hague Conference Member States noted that half or more of the international contracts concluded in their territory contained a choice-of-law provision [not distinguishing, however, choice-of-law from choice-of-rules agreements]. Furthermore, 75% of responding arbitration centres noted that more than half of the international contracts contemplated before their panels contained a choice-of-law agreement.).

[203] ICC Annual Statistical Reports published in the ICC International Court of Arbitration Bulletin, vols. 12–25, and vols. 2015, 2016, 2017. *See also* Vogenauer and Weatherill, *supra* note 138 at 123 (offering statistical evidence that choice-of-law agreements in favour of English, French, and German laws, dominate cross-border transactions in the EU).

[204] *See e.g.* UNIDROIT Principles of International Commercial Contracts (UPICC), Principles of European Contract Law (PECL), Principles of Asian Contract Law (PACL), Principles of Latin American Contract Law (PLACL), etc. Under the second scenario of selecting "hard law" instruments, the latter would be selected as self-standing sets of rules rather than as part of a national legal regime. Whether the parties intended the selection of a particular set of rules—*ergo* a choice-of-rules agreement—or the entirety of that national law—*ergo* a choice-of-law agreement—is an issue of contractual interpretation and should be examined on a case-by-case basis.

[205] *See e.g.* Islamic laws (Shariʿa), Jewish laws (Halacha), Hindu laws, Canon Law of the Catholic Church.

[206] Classic example of such rules-selection agreements is that enshrined in clause 68 of the construction contract in the seminal *Channel Tunnel Group Ltd* v *Balfour Beatty Construction Ltd* [1993] A.C. 334 (Eng.), which read as follows: "The construction, validity and performance of the contract shall in all respects be governed by and interpreted in accordance with *the principles common to both English law and French law* [emphasis added], and in the absence of such common principles by such general principles of international trade law as have been applied by national and international tribunals." Unsurprisingly, clause 68 was paired with an arbitration agreement.

manner, choice-of-rules agreements encompass any provisions that do not meet the three-pronged concept of "law" delineated above. Notwithstanding this key-difference between choice-of-law and choice-of-rules agreements, their effects are identical: the selected rules will govern the contract and, simultaneously, exclude the application of both the dispositive and the mandatory rules of the otherwise applicable law in matters that the former cover. It is safe to argue that the practice of concluding choice-of-rules agreements is uncommon, at least compared to the choice of statist law. In fact, sets of rules are more likely to be cited as comparative law elements in judgments or arbitral awards, rather than be applied as the *lex causae*.[207]

iii. Incorporation-by-reference clauses

The last type of rules-selection agreements is, actually, a *clause*, namely the "incorporation-by-reference" clause. Not a separate agreement itself,[208] but rather an add-on facility, an "incorporation-by-reference" clause serves as a shorthand for the integration of terms into a contract.[209] Since any term may be included in a contract, there are no restrictions with regard to the source of the incorporated rules.[210] Hence, similarly to choice-of-rules agreements, virtually anything could form the subject matter of an incorporation-by-reference clause, provided that the incorporated rules be readily ascertainable.[211]

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[207] For a wealth of judgments and arbitral awards applying or citing the CISG and the UPICC as persuasive authorities, see www.unilex.info.

[208] In contradistinction to choice-of-law and choice-of-rules agreements, all issues pertaining to the formation, validity, and interpretation of incorporation-by-reference clauses are governed by the law applicable to the main contract.

[209] *But see* RICHARD FENTIMAN, INTERNATIONAL COMMERCIAL LITIGATION 193 (2nd ed. 2015) ("[N]on-state law may supply not the terms of a contract, but canons of construction. A reference to non-state law . . . may indicate not the rules governing the contract, but the sense in which its terms are to be interpreted, and the objective of the transaction.").

[210] *See* Ole Lando, *Contracts*, III.2 *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 1, 14 (Kurt Lipstein ed., 1976).

[211] *See Shamil Bank of Bahrain EC* v *Beximco Pharmaceuticals Ltd* [2004] 1 W.L.R. 1784, 1799 ("The doctrine of incorporation can only sensibly operate where the parties have by the terms of their contract sufficiently identified specific 'black letter' provisions of a foreign law or an international code or set of rules apt to be incorporated *as terms of the relevant contract* [emphasis in the original] such as a particular article or articles of the French Civil Code or the Hague Rules.") (Eng.); *Halpern* v *Halpern* [2007] 3 W.L.R. 849, 865 ("It may be that for actual incorporation it is necessary to identify 'black letter' provisions, but that seems to me to be another way of saying that there must be certainty about what is being incorporated. [. . .] I cannot for my part see why . . . compromising disputes between Orthodox Jews under Jewish law, where it seems to be common ground there is a distinct body of law, Jewish law may not be relied on as part of the contractual framework.") (Eng.). *See also* DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, *supra* note 22 at 1808; FENTIMAN, *supra* note 209 at 193.

The distinguishing characteristic of incorporation clauses is that they operate on the contractual level without affecting the legal framework of the transaction. The latter will be determined pursuant to the conflict-of-laws rules of the forum or arbitral tribunal. Precisely because incorporation clauses operate on the contractual level, their "incorporability," effects, and interpretation, depend on the relevant rules of the applicable law.[212] Granted, because the greater part of national contract law comprises dispositive rules,[213] parties are, largely, free to deviate from the latter.[214] Thus, the legal framework of a contractual relationship would be, essentially, the same, irrespective of the rules-selection agreement used—be it a choice-of-law/rules agreement or an incorporation-by-reference clause.[215]

In practice, the use of incorporation-by-reference clauses is quite frequent, encompassing both the agreed integration of rules by the parties, as well as the salvage of ineffective choice-of-law/rules agreements as incorporation clauses.[216]

2. Fora & Party Autonomy

Notwithstanding the type of rules-selection agreement used by the contracting parties, the admissibility,[217] classification, and effects of their selection depends entirely on the conflict-of-laws regime of the forum, and, specifically, on the low or high threshold of party autonomy enshrined therein.[218] Setting aside scenarios pertaining to the protection of the weaker contracting party, and risking oversimplification, three main approaches to party autonomy in contractual obligations may be identified: *i.* legal orders that disregard choice-of-law/rules agreements between the parties, *ii.* legal orders that give effect to

[212] David St. Leger Kelly, *Reference, Choice, Restriction and Prohibition*, *in* CONTEMPORARY PROBLEMS IN THE CONFLICT OF LAWS: ESSAYS IN HONOUR OF JOHN HUMPHREY CARLILE MORRIS 157, 157, 182 (BIICL ed., 1978); Lando, *supra* note 210 at 46.
[213] *But see* consumer protection legislation, which, more often than not, comprises mandatory rules.
[214] *See* Kornet, *supra* note 178 at 321.
[215] *See* DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, *supra* note 22 at 1808–1809. Similarly, Kelly, *supra* note 212 at 158.
[216] An incorporation-by-reference clause cannot be, axiomatically, deduced from an ineffective—albeit not invalid—choice-of-law agreement. Since the incorporated terms would be limited by the mandatory rules of the *lex causae*, the bargain struck *vis-à-vis* the rights and obligations of the contracting parties, as envisaged in the choice-of-law agreement, could be jeopardised. For that reason, if the mandatory rules of the *lex causae* would upset the equilibrium of the contract, such general propositions should be approached with ultimate caution. *Accord* Kelly, *supra* note 212 at 167–168; Lando, *supra* note 210 at 46 (positing that the manner in which an ineffective choice of law is to be treated should be determined under the *lex causae*).
[217] Also referred to as "permissibility," "enforceability," or "effectiveness" of the rules-selection agreement.
[218] NYGH, *supra* note 200 at 72, 86–87. *See* MILLS, *supra* note 199 at 314. For the historical origins of party autonomy in choice-of-law, see e.g. *id.* at 44–64.

choice-of-law agreements only, and *iii*. legal orders that honour all agreements pertaining to the legal framework of the dispute.

i. Legal orders rejecting party autonomy

Given the nearly universal recognition of party autonomy,[219] this first disavowing approach to the principle constitutes a notable exception to contemporary private international law theory. In legal orders of this kind, the public policies advanced through their respective conflict-of-laws rules prevail over any law-related agreements between the parties.[220] The latter's intention has no impact on the determination of the applicable law. Granted, should there be any choice-of-law/rules agreement, it will be pronounced ineffective, albeit not invalid. As a direct result of preserving its validity, the adjudicator will not be able to completely disregard that an actual agreement has been reached. Hence, this rules-selection agreement will, more often than not, be salvaged as a plain incorporation-by-reference clause, bearing, of course, no effects on the mandatory rules of the *lex causae*.

The practice of admitting neither choice-of-law nor choice-of-rules agreements is so exceptional that courts rejecting party autonomy have been frequently—and justifiably—selected by forum shopping plaintiffs, who seek to limit the effects of already concluded rules-selection agreements.[221] Classic examples of such conflicts regimes are art. 968 of the Iranian Civil Code,[222] the virtually always disregarded art. 19 of the United Arab Emirates

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[219] NYGH, *supra* note 200 at 13. *See* Institute of International Law [IIL], *The Autonomy of the Parties in International Contracts between Private Persons or Entities*, Resolution, Session of Basel. Rapporteur: Eric Jayme (Aug. 31, 1991) (noting that party autonomy constitutes a fundamental principle of private international law). *See also* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS: ESSAYS IN PRIVATE INTERNATIONAL LAW 200 (1996) ("The support of party autonomy is so widespread that it can fairly be called a rule of customary law."); MILLS, *supra* note 199 at 2, 313 (with further references to legal scholarship).

[220] *See* JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS, vol. 2 at 1079–1080 (1935) ("The fundamental objection to [party autonomy] is that it involves permission to the parties to do a legislative act. [. . .] The adoption of a rule to determine which of several systems of law shall govern a given transaction is in itself an act of the law. [. . .] [S]ince the parties can adopt any foreign law at their pleasure to govern their act, [. . .] they can free themselves from the power of the law which would otherwise apply to their acts. So extraordinary a power in the hands of any two individuals is absolutely anomalous . . . ."). *See also* Ingeborg Schwenzer & Christopher Kee, *International Sales Law-The Actual Practice*, 29 PENN ST. INT'L L. REV. 425, 440 (2010) ("The fear of giving Western trade corporations too many advantages still leads developing and transitioning countries to deny validity to choice-of-law clauses.").

[221] *But see* ADRIAN BRIGGS, AGREEMENTS ON JURISDICTION AND CHOICE OF LAW 450 (2008) (noting that there is no decision in common law jurisdictions on such forum shopping practices), and at 451 *et seq*. (arguing that an infringement of a choice-of-law agreement should be treated as a contractual breach).

[222] Civil Code of the Islamic Republic of Iran, art. 968.

(UAE) Civil Code,[223] art. 2403 of the Appendix to the Uruguayan Civil Code,[224] art. 9 of the Introductory Law to the Civil Code of Brazil,[225] which constitutes "the EU's main trading partner in Latin America,"[226] and, of course, the "Bustamante Code",[227] the Treaties of Montevideo (1989-1940),[228] and the Restatement [First] of the Law of Conflict of Laws (1934),[229] which negate by omission party autonomy.[230] As a last remark, it is important to distinguish fora rejecting party autonomy and fora—primarily, if not exclusively, US fora—

[223] United Arab Emirates, *in* TRANSNATIONAL LITIGATION: A PRACTITIONER'S GUIDE, vol. 3 at 28–1, 28.17 (John Fellas & Alex Patchen eds., 2011) (notwithstanding the limited admission of choice-of-law agreements under art. 19 of the UAE Civil Code, such provisions will be disregarded in favour of UAE law).

[224] Appendix to the Civil Code of Uruguay, art. 2403. Interestingly, Uruguay has signed, but has not ratified yet, the 1994 Mexico City Convention.

[225] Law Decree No. 4,657 of 1942, as amended—particularly if juxtaposed with art. 13 of the abrogated Law of Introduction to the Civil Code of 1916. *See* María Mercedes Albornoz, *Choice of Law in International Contracts in Latin American Legal Systems*, 6 J. PRIV. INT'L L. 23, 44 (2010); Lauro da Gama e Souza Jr., *The UNIDROIT Principles of International Commercial Contracts and Their Applicability in the MERCOSUR Countries*, 36 R. J. T. 375, 394 (2002); João Grandino Rodas, *Choice of Law Rules and the Major Principles of Brazilian Private International Law*, *in* A PANORAMA OF BRAZILIAN LAW 309, 330 (Jacob Dolinger & Keith S. Rosenn eds., 1992). *See also* PAUL GRIFFITH GARLAND, AMERICAN-BRAZILIAN PRIVATE INTERNATIONAL LAW 54–55 (1959); Manoel Vargas *et al*., *Brazil*, *in* TRANSNATIONAL LITIGATION: A PRACTITIONER'S GUIDE, vol. 1 at 5–1, 5.27–5.30 (John Fellas & Alex Patchen eds., 2013). For a compilation of diverging opinions on party autonomy in Brazilian legal theory, see Grandino Rodas, *supra* note at 323–331. *But see* JACOB DOLINGER, PRIVATE INTERNATIONAL LAW IN BRAZIL 239 (2012) ("[In light of Brazilian arbitration law,] it is strange that some Brazilian scholars still have doubts about the right of parties to choose the law to be applied to their international litigation."). For the most recent—yet unsuccessful—attempt to introduce party autonomy in Brazil, see art. 48 in the Federal Senate of Brazil, Proposal for a Law of the Senate No. 269 of 2004, *available at* https://www25.senado.leg.br/web/atividade/materias/-/materia/70201. Lastly, Brazil has singed, but has not ratified yet, the 1994 Mexico City Convention. *Cf.* Adriana Zapata Giraldo, *Colombia*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW, vol. 3 at 1981, 1986–1987 (Jürgen Basedow *et al*. eds., 2017).

[226] RAFAEL LEAL-ARCAS, INTERNATIONAL TRADE AND INVESTMENT LAW: MULTILATERAL, REGIONAL AND BILATERAL GOVERNANCE 87 (2010).

[227] Convention on Private International Law—Bustamante Code (Havana, 1928), O.A.S.T.S. 23. *But see* Albornoz, *supra* note 225 at 29 ("Despite the fact that the Bustamante Code has no general rule expressly accepting party autonomy for international contracts, the interpretation pro-autonomy is the one that prevails.").

[228] *See* Additional Protocol to Treaties on Private International Law of 19 March 1940, art. 5 ("The jurisdiction and the applicable law as regulated in the respective Treaties [of Montevideo,] may not be modified by virtue of an agreement of the parties, except to the extent authorized in the law."). *See also* Albornoz, *supra* note 225 at 32 ("As for the 1940 Montevideo Civil International Law Treaty and the Additional Protocol, party autonomy rejection or reception depends on whether we see the glass as half empty (rejection) or half full (restricted reception)."); Da Gama e Souza Jr., *supra* note 225 at 387; Friedrich K. Juenger, *Contract Choice of Law in the Americas*, 45 AM. J. COMP. L. 195, 197 (1997).

[229] RESTATEMENT OF THE LAW OF CONFLICT OF LAWS § 311–376 (A. L. I. 1934). *See* BEALE, *supra* note 220 at 1079–1086. *But see* Symeon C. Symeonides, *Party Autonomy in Rome I and II from a Comparative Perspective*, *in* CONVERGENCE AND DIVERGENCE IN PRIVATE INTERNATIONAL LAW: LIBER AMICORUM KURT SIEHR 513, 516 (Katharina Boele-Woelki *et al*. eds., 2010) ("[M]ost American courts – including most of the courts in the twelve states that continue to follow the First Restatement – have ignored the Restatement's proscription of party autonomy.").

[230] An additional example to this latter category of negation by omission is Saudi conflicts laws, which together with an inflexible Shari'a preclude the application of foreign law altogether. On this point, see JÜRGEN BASEDOW, THE LAW OF OPEN SOCIETIES - PRIVATE ORDERING AND PUBLIC REGULATION OF INTERNATIONAL RELATIONS, 360 RECUEIL DES COURS/COLLECTED COURSES 9, 169 (2012) (with further references to legal scholarship); Hilmar Krüger, *Saudi Arabia*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW, vol. 3 at 2462, 2462–2463 (Jürgen Basedow *et al*. eds., 2017); SAMIR SALEH, COMMERCIAL ARBITRATION IN THE ARAB MIDDLE EAST: JORDAN, KUWAIT, BAHRAIN, SAUDI ARABIA 397 *et seq*. (2nd ed. 2012).

that have enacted foreign law bans.[231] The latter, promulgated as either procedural rules or amendments to the Constitutions of the respective states, proscribe the application of foreign law in general—albeit their aim was to ban the application of Islamic law. Largely redundant, particularly in light of the international public policy limitation, these regulations hardly have any effects on party autonomy in international business transactions.

ii. Legal orders with limited endorsement of party autonomy

In juxtaposition with the uncommon practice of rejecting party autonomy altogether, the great majority of legal orders honours choice-of-law agreements only. All other rules-selection agreements will, usually, be salvaged as plain incorporation-by-reference clauses. Typical examples of such private international law regimes are the Rome I Regulation,[232] the 1994 Mexico City Convention,[233] the 1986 Hague Sales Convention,[234] the

[231] Alabama (Ala. Const. Art. I, §13.50), Arizona (Ariz. Rev. Stat. §12-3103), Arkansas (Act 980, 2017 Ark. Laws (HB1041) 1-1-103), Kansas (Kan. Stat. §60-5103), Louisiana (La. Rev. Stat. §9:6001), Mississippi (2015 HB 177, s. 4), North Carolina (N.C. Gen. Stat. §1-87.13), Oklahoma (Okla. Stat. Tit. 12, §20), South Dakota (S.D. Cod. Laws §19-8-7), Tennessee (Tenn. Code §20-15-103), Washington (Wash. Rev. Code §4.24.820).

[232] Rome I Reg., arts. 2, 3, 20, and 21. *See* Rome I Reg., recitals 13, 14. *See also* analysis in *infra* Section V(C)(1).

[233] 1994 Mexico City Conv., arts. 2, 7, 8, and 17. *But see* 1994 Mexico City Conv., art. 10 ("In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case.").

Arguing that non-statist law could be applicable under the 1994 Mexico City Convention, see KATHARINA BOELE-WOELKI, UNIFYING AND HARMONIZING SUBSTANTIVE LAW AND THE ROLE OF CONFLICT OF LAWS, 340 RECUEIL DES COURS/COLLECTED COURSES 271, 407 (2009); Michael Joachim Bonell, *Towards a Legislative Codification of the UNIDROIT Principles?*, *in* SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: FESTSCHRIFT FOR ALBERT H. KRITZER ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY 62, 72 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008); MICHAEL G. BRIDGE, THE INTERNATIONAL SALE OF GOODS 596 (4th ed. 2018); Jack M. Graves, *Party Autonomy in Choice of Commercial Law: The Failure of Revised U.C.C. § 1-301 and a Proposal for Broader Reform*, 36 SETON HALL L. REV. 59, 102 (2005); Juenger, *supra* note 228 at 204; José Antonio Moreno Rodríguez, *The New Paraguayan Law on International Contracts: Back to the Past?*, 2 *in* EPPUR SI MUOVE: THE AGE OF UNIFORM LAW. ESSAYS IN HONOUR OF MICHAEL JOACHIM BONELL TO CELEBRATE HIS 70TH BIRTHDAY 1146, 1151 (UNIDROIT ed., 2016); NYGH, *supra* note 200 at 188; Gonzalo Parra-Aranguren, *Conflict of Law Aspects of the UNIDROIT Principles of International Commercial Contracts*, 69 TUL. L. REV. 1239, 1250–1251 (1994).

Rejecting—correctly, in this author's opinion—the direct applicability of a-national law under arts. 9 or 10, see e.g. Antonio Boggiano, *La Convention Interaméricaine sur la Loi Applicable aux Contrats Internationaux et les Principes d'UNIDROIT*, 1 UNIF. L. REV. 219, 226 (1996); Da Gama e Souza Jr., *supra* note 225 at 397; José Antonio Moreno Rodríguez & María Mercedes Albornoz, *Reflections on the Mexico Convention in the Context of the Preparation of the Future Hague Instrument on International Contracts*, 7 J. PRIV. INT'L L. 491, 504–505 (2011); Diego P. Fernández Arroyo, *La Convention Interaméricaine sur la Loi Applicable aux Contrats Internationaux: Certains Chemins Conduisent au-delà de Rome*, 84 REV. CRIT. D. I. P. 178, 182–183 (1995).

For national legislation adopting arts. 9 and 10, see Law No. 5393 of Jan. 15, 2015 on the Law Applicable to International Contracts, art. 12 (*verbatim* adoption of art. 10) (Para.); Private International Law Act, arts. 30, 31 (nearly *verbatim* adoption of arts. 9, 10) (Venez.).

[234] 1986 Hague Sales Conv., arts. 6, 7, and 15. *But see* VON MEHREN, *supra* note 149 at 47–49.

1980 Rome Convention,[235] the 1955 Hague Sales Convention,[236] and art. 41 of the Chinese Law on the Application of Laws to Civil Relationships Involving a Foreign Element,[237] all of which allow for the selection even of "neutral" laws, that is, the law of a state that bears no or insignificant connections with the particular transaction.[238] In juxtaposition with these regimes, a good number of jurisdictions set further limitations to party autonomy, most frequently, by requiring a nexus between the state of the selected law and the international agreement or the contracting parties or both.[239] Absent the required link, the choice-of-law agreement will have only limited negative effects. Art. 18(1) of the Algerian Civil Code,[240] s. 187(2)(a) of the Restatement (Second) of Conflict of Laws,[241] and the Uniform Commercial Code s. 1-105 (now s. 1-301),[242] may serve as illustrative examples of such fora. Notably, it was held in the seminal *Vita Food Products* v *Unus Shipping Co*,[243] which is good law in most Common Law jurisdictions, that

[235] 1980 Rome Conv., arts. 2, 3, 15, and 16. *See Dubai Islamic Bank PJSC* v *PSI Energy Holding Company BSC and Others* [2013] EWHC (Comm) 3186 [11] (Eng.); *Halpern* v *Halpern* [2007] 3 W.L.R. 849, 862 (Eng.); *Sayyed Mohammed Musawi* v *R.E. International (UK) Ltd and Others* [2007] EWHC (Ch) 2981 [23]; *Shamil Bank of Bahrain EC* v *Beximco Pharmaceuticals Ltd* [2004] 1 W.L.R. 1784, 1798 (Eng.); BRIGGS, *supra* note 221 at 390–391.

[236] 1955 Hague Sales Conv., art. 2(1).

[237] Law on the Application of Laws to Civil Relationships involving a Foreign Element, art. 41 (China).

[238] *See* Christiana Fountoulakis, *The Parties' Choice of "Neutral Law" in International Sales Contracts*, 7 EUR. J. L. REFORM 303, 306 (2005) ("Parties often mix up two things: they confuse the need for a law that fairly represents both contractual positions with the political neutrality of the state whose law has been chosen to govern the contract."). *See also* MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION LAW AND PRACTICE 420 (2nd Revised ed. 2001) ("The choice of the law of a neutral state may at first appear to be the result of a well-balanced compromise. However, when it has not been preceded by careful scrutiny, it is a *leap in the dark* [emphasis in the original], which might produce unpleasant surprises."). *But see* Rome I Reg., arts. 5(2), 7(3).

[239] This practice amounts to the so-called "localization" of choice-of-law agreements. *See* MILLS, *supra* note 199 at 360–370. *But see* Ole Lando, *The 1955 and 1985 Hague Conventions on the Law Applicable to the International Sale of Goods*, 57 RABELSZ 155, 161 (1993) ("To restrict the parties' choice would force the parties to be preoccupied with the validity of their choice and would become an impediment to international commerce."); Pelichet, *supra* note 122 at 61 ("[M]odern forms of trade are varied and variable, and . . . therefore any enumeration [of prescribed connecting factors] might be incomplete . . . . [A]ny restriction might harm considerably the activity of the parties to the contract.").

[240] Algerian Civil Code, art. 18(1).

[241] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) (A. L. I. 1971) ("The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . , unless . . . (a) the chosen state has no *substantial relationship* [emphasis added] to the parties or the transaction and there is no *other reasonable basis* [emphasis added] for the parties' choice . . . .").

[242] U.C.C. § 1-105(1) (A. L. I. & UNIF. L. COMM'N 1972) ("[W]hen a transaction bears a *reasonable relation* [emphasis added] to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties."). With identical wording, U.C.C. § 1-301(a) (A. L. I. & UNIF. L. COMM'N 2008). *See Seeman* v *Philadelpia Warehouse Co*, 274 US 403, 408 (1927) (USA). *See also* the relaxation of this requirement, among other states, in the leading fora of New York (N.Y. Gen. Oblig. Law § 5-1401(1) and California (Cal. Civ. Code § 1646.5(1)). *But see* U.C.C. § 1-301(b) (A. L. I. & UNIF. L. COMM'N 2001) (withdrawn, 2008) (jettisoning the requirement for a reasonable relation link).

[243] [1939] A.C. 277.

> [W]here there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided *the intention expressed is bona fide and legal* [emphasis added] . . . .[244]

The key difference between the latter regimes and fora rejecting party autonomy altogether lies in their respective point of departure. Whereas courts rejecting party autonomy do not admit agreements on the applicable law, courts restricting party autonomy allow such a choice unless that is abusive. Considering that contracting parties hardly indulge into "legal experimentation," their choice will, more often than not, be supported by a business rationale.[245]

iii. Legal orders with complete endorsement of party autonomy

Lastly, before fora of the third category, party autonomy is elevated to a principle of utmost importance. Contracting parties enjoy almost absolute freedom in selecting the regime governing their legal relationships. Whereas the limited endorsement of party autonomy currently stands as the prevailing approach worldwide, the complete endorsement of the principle appears to be gaining momentum. This is clearly evinced in art. 3 of the 2015 Hague Principles on Choice of Law in International Commercial Contracts,[246] which provides that

> *The law chosen by the parties may be rules of law* [emphasis added] that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.

Of course, the legitimacy qualifications of the selected "set of rules" being "generally accepted," "neutral and balanced" limits somewhat party autonomy.[247] It is undisputable, however, that the Principles break away from established conventions in contemporary

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[244] *Id.* at 290.
[245] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (A. L. I. 1971) 561, 567 cmt. f.
[246] Commentary on the Principles on Choice of Law in International Commercial Contracts, ¶ 1.15 ("[The 2015 Hague Principles] may be considered to be an international code of current best practice with respect to the recognition of party autonomy in choice of law in international commercial contracts, with certain innovative provisions as appropriate [e.g. art. 3]."). For the endorsement of the 2015 Hague Principles by UNCITRAL, with an express note on the importance of art. 3, see U.N. Report of the United Nations Commission on International Trade Law, Forty-Eighth Session (29 June-16 July 2015), U.N. Doc. A/70/17 (2015), at 45–46.
[247] These limitations were not included in the draft of the Working Group, where a broad admission of choice of "rules of law" was enshrined in art. 2(1). The limitations were introduced by the Special Commission in 2012. For an overview of these limitations, see Commentary on the 2015 Hague Principles, *supra* note 246, ¶ 3.4–3.12.

conflicts theory.[248] It is interesting that the Hague Principles have already been used as blueprint for Law No. 5393 on the Law Applicable to International Contracts of Paraguay, which provides in art. 5 that

> In this Law, any reference to law includes anational rules of law, which are generally accepted as a set of neutral and balanced rules.

Furthermore, steps have been taken in Australia for the implementation of the 2015 Hague Principles together with the accession to the 2005 Hague Convention on Choice of Court Agreements.[249] Other notable examples of states standing at the forefront of private international law by fully endorsing party autonomy are the States of Oregon[250] and Louisiana[251] in the USA.[252]

Any examination of party autonomy would remain incomplete without reference to the influence of international arbitration practices on the principle, and, more specifically, on the admissibility of choice-of-law and choice-of-rules agreements alike. In this endeavour, our focal point should be the notorious art. 28 of the UNCITRAL Model Law, which provides that

> The arbitral tribunal shall decide the dispute in accordance with such *rules of law* [emphasis added] as are chosen by the parties as applicable to the substance of the dispute. [. . .][253]

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[248] For the drafting history and the underpinnings of art. 3, see generally Geneviève Saumier, *The Hague Principles and the Choice of Non-State "Rules of Law" to Govern an International Commercial Contract*, 40 BROOK. J. INT'L L. 1 (2014).

[249] Parliament of the Commonwealth of Australia, Report 166: Implementation Procedure for Airworthiness-USA; Convention on Choice of Courts–Accession; GATT Schedule of Concessions–Amendment; Radio Regulations–Practical Revision, Joint Standing Committee on Treaties, November 2016, Canberra.

[250] Or. Rev. Stat. § 15.300(1) [formerly 81.120(1)], 15.350(1) [formerly 81.100(1)] (2015); James A.R. Nafziger, *Oregon's Conflicts Law Applicable to Contracts*, 38 WILLAMETTE L. REV. 397, 421 (2002) (Reporter's Comment No. 3 on draft Section 7); Symeon C. Symeonides, *Oregon's Choice-of-Law Codification for Contract Conflicts: An Exegesis*, 44 WILLAMETTE L. REV. 205, 228 (2007). *But see* MILLS, *supra* note 199 at 500.

[251] La. Civ. Code art. 3540, particularly if juxtaposed with the different wording ("law *of the state* [emphasis added]") of art. 3537(1). This argument, however, "cuts both ways." *See* Symeon C. Symeonides, *Contracts Subject to Non-State Norms*, 54 AM. J. COMP. L. 209, 221–222 (2006).

[252] *Cf.* Private International Law Code, art. 79 (allowing judges and arbitral tribunals to fall back on the UNIDROIT Principles for either the supplementation or the interpretation of the applicable law) (Panama); Civil Code, art. 2047(2) (providing for the application of the principles and doctrine of private international law) (Peru).

[253] UNCITRAL Model Law, art. 28(1). The original proposal did not feature the innovative concept of "rules of law," but allowed, instead, for the choice of either "law" or "even if not yet in force, a pertinent international convention or uniform law" [Sixteenth Session of UNCITRAL (Vienna, 24 May-3 June 1983), Report of the Working Group on International Contract Practices on the Work of its Fourth Session (A/CN.9/232) (Nov. 10, 1982), ¶ 158)]. Two years later, the Working Group discarded the elaborate rule of the earlier sessions, and adopted the all-encompassing wording "rules of law" [Seventh Session of the Working Group on International Contract Practices (New York, 6-17 February 1984), Report of the Working Group on the Work of its Seventh Session (A/CN.9/246) (Mar. 6, 1984), ¶ 102]. Alas, the rule was still not set in stone. During the 326th and 327th meetings, further disagreements between the delegations left the Commission split. The debate resulted in the

In juxtaposition with the traditional approach adopted in art. 28(2), which requires arbitral tribunals to embark on a conflict-of-laws enquiry to determine the "[national] law" governing the issue in dispute,[254] the wording of art. 28(1) accentuates the wide admission of party autonomy under the concept "rules of law,"[255] which encompasses, also, non-statist provisions.[256] First articulated in art. 42(1) of the 1965 Washington Convention (ICSID),[257] the ability of the parties to select rules of law for the regulation of their transactions has become the norm in national laws and international instruments governing arbitral proceedings,[258] as well as in various—redundant and self-affirming[259]—arbitration rules.[260] So much so that legal doctrine focuses not on the regimes endorsing the selection of rules of law, but, instead, on the outlier regimes that allow for the selection of statist law only.[261] In any case, the application of

substitution of "rules of law" by the familiar "law," only for the former to be reinstated five hours later. For a concise presentation of the *travaux préparatoires* of art. 28, see Summary Records of Meetings on the UNCITRAL Model Law on International Commercial Arbitration, *available at* https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/travaux.

[254] UNCITRAL Mode Law, art. 28(2) ("Failing any designation by the parties, the arbitral tribunal shall apply the *law* [emphasis added] determined by the conflict of laws rules which it considers applicable.").

[255] *See* SYMEON C. SYMEONIDES, CHOICE OF LAW 488, note 336 (2016) (arguing that the concept "rules of law" is neither accurate nor neutral).

[256] FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, 802, 803 (Emmanuel Gaillard & John Savage eds., 1999); JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 591 (Stephen V. Berti & Annette Ponti trans., 2nd ed. 2007); JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 1003 (2012).

[257] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) (ICSID; Washington 1965), 575 U.N.T.S. 159. For a continuously updated list of the ICSID States, see https://treaties.un.org/Pages/showDetails.aspx?objid=080000028012a925&clang=_en.

[258] *See e.g.* Swiss PILA, art. 187; Code of Civil Procedure, art. 1511 (Fr.); Arbitration Ordinance (2013), cap. 609 § 64 (H.K.); International Arbitration Act (2002), c. 143(A) § 3(1) and First Schedule, art. 28 (Sing.). *See also* Arbitration (England & Wales) Act (1996), c. 23 § 46(1)(b) ("The arbitral tribunal shall decide the dispute—if the parties so agree, *in accordance with such other considerations* [emphasis added] as are agreed by them or determined by the tribunal.") (Eng.). It is noteworthy that neither the US Federal Arbitration Act of 1925, as amended, nor the Swedish Arbitration Act of 1999 contain any rules on the regime governing the merits of the dispute. Nonetheless, the wide admission of party autonomy in arbitrations seated in the USA—with the caveat of special restrictive state rules—and in Sweden is hardly disputed.

[259] FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 256 at 786.

[260] *See e.g.* UNCITRAL Arbitration Rules, art. 35 (1976; as amended in 2010 and 2013); ICC Rules of Arbitration, art. 21(1) (2017); LCIA Arbitration Rules, art. 22(3) (2014); ICDR International Arbitration Rules, art. 31(1) (2014); SIAC Arbitration Rules, art. 31(1) (2016); SCC Arbitration Rules, art. 27(1) (2017); HKIAC Administered Arbitration Rules, art. 35(1) (2013); Swiss Rules of International Arbitration, art. 33(1) (2012); PCA Arbitration Rules, art. 35(1) (2012). *But see* CIETAC Arbitration Rules, art. 49(2) (2014).

[261] Referring to an agreement between the parties on the applicable "law," see e.g. Law on Arbitration Courts and Arbitration Procedures of 1999, art. 32(2) (Arm.); Law No. 279-Z/1999, art. 36(1) (Belr.); Alternative Dispute Resolution Act of 2013, art. 127(2) (Bhutan); Law on International Commercial Arbitration of 1988, art. 38(1) (Bulg.); Law on the Application of Laws to Civil Relationships involving a Foreign Element, art. 41 (China); Arbitration Act of 1994, art. 37(1) (Czech); Law of Arbitration and Mediation of 1997, art. 3(1) (Ecuador); Code of Civil Procedure, art. 742(1) (Est.); Law No. 30/1999 concerning Arbitration and Alternative Dispute Resolution, art. 56(2) (Indon.); Law on Commercial Arbitration of 2012, art. 39(1) (Lith.); Arbitration Act of 2005, art. 30(2) (Malay.); Law No. 63/2011 on Voluntary Arbitration, art. 39 (Port.); Arbitration Act of 2010, art. 47(1)(a) (Scot.); Arbitration Code of 1993, art. 73(1) (Tunis.); Law on Commercial Arbitration of 2010, art. 14(2) (Viet.). *See also* Arab Convention on Commercial Arbitration (Amman, 1987), art. 21(1); European Convention on International Commercial Arbitration (Geneva, 1961), 484 U.N.T.S. 349, art. VII(1).

soft-law in arbitral proceedings appears to constitute, mainly, an academic exercise, rather than actual legal practice. Statistics published by the International Chamber of Commerce indicate that, over the past fifteen years, only 1.7% of the contracts underlying disputes filed with the ICC included a rules-selection agreement in favour of a-national law.[262] This amounts to a non-negligible—albeit comparatively trivial—180-210 cases to be decided on a basis other than statist law, the most frequent selection being the CISG and the UNIDROIT Principles in that order, followed by occasional choices of the general principles of law and international trade, equity, public international law, international commercial law, the *lex mercatoria*, *ex aequo et bono* adjudication, adjudication by *amiable compositeur*, etc.

3. The CESL Opt-In Agreement as a "Quasi Choice-of-Law" Agreement

On the basis of this comparative analysis of, firstly, the three main types of rules-selection agreements and, secondly, the three main approaches to the principle of party autonomy in private international law, the following paragraphs attempt to determine the nature and effects of the CESL opt-in instrument.

First off, the direct choice of the CESL as a self-standing instrument would meet only two of the three characteristics of "law" required for a choice-of-law agreement.[263] It would have constituted a selection of statist law, entered into force at the time of the conclusion of the opt-in agreement, but not broad enough to regulate all disputes that could possibly arise within a legal order. Therefore, the selection of the CESL cannot be classified as a choice-of-law agreement.[264]

Conversely, because the concept of "rules" encompasses all provisions that do not meet the three-pronged concept of "law," an agreement to use the CESL could be perceived as a choice-of-rules agreement. That would be the case, if the CESL were selected as a self-standing

But see Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts: Why? What? How?*, 69 TUL. L. REV. 1121, 1144–1145 (1995); Luca G. Radicati di Brozolo, *Non-National Rules and Conflicts of Laws: Reflections in Light of the UNIDROIT and Hague Principles*, 48 RIV. DIR. INT. PRIV. PROC. 841, 847–848 (2012) ("Even where such laws or rules refer only to the application of 'law', as opposed to non-national rules and principles, the prevailing view is that that expression allows arbitrators to apply them when they are referred to by the parties.").

[262] ICC Annual Statistical Reports published in the ICC International Court of Arbitration Bulletin, vols. 12–25, and vols. 2015, 2016, 2017.

[263] *See* analysis in *supra* Section V(B)(1)(i).

[264] Piers and Vanleenhove, *supra* note 82 at 442. *Contra* Lando, *supra* note 82 at 241 ("The CESL is meant to be adopted as a Regulation. If the parties choose the CESL, it will replace the national laws. The choice of the CESL will be a genuine choice of law under the Rome I Regulation. CESL will therefore not be soft law.").

instrument—not as a parallel legal regime.[265] Thus, in fora and arbitral tribunals endorsing fully the principle of party autonomy,[266] the opt-in agreement would have triggered the standard positive and negative effects of fully-fledged choice-of-rules agreements, that is, it would have identified the applicable regime and simultaneously excluded the dispositive and mandatory rules of the otherwise applicable law. In all other cases, the selection of the CESL as a self-standing instrument would have been salvaged as a plain incorporation-by-reference clause.

If the CESL were to apply as a second parallel legal regime, the classification of the opt-in instrument as choice-of-law/rules agreement would have to be rejected *a priori*, because the legal conflicts would take place within the same legal order and not between the various jurisdictions or territorial units of a state.[267] Thus, the question of the CESL opt-in agreement's nature and effects remains. In addressing this issue, a closer look to the characteristics of the opt-in instrument may be of assistance. In particular, it has already been suggested that the existence and validity of the CESL opt-in agreement would be independent of the existence and validity of the underlying sales transaction. This application of the separability doctrine in the context of opt-in instruments brings the latter closer to choice-of-law agreements.[268] In the same spirit, it has, also, been noted that the existence and validity of the opt-in agreement would be governed by the pertinent provisions in the CESL.[269] This reference to the putative applicable law is frequently found in conflicts rules determining the existence and validity of choice-of-law agreements.[270] Bearing these two features in mind, CESL opt-in agreements

[265] Evidently, under this scenario, the second applicability criterion of applying the CESL as a second parallel legal regime would be abrogated. This point underscores that the CESL applicability criteria were drafted with the EU conflict-of-laws regimes in mind.
[266] *See* analysis in *supra* Section V(B)(2)(iii).
[267] CESL recital 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 . . . . 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 . . . ."); EU Parliament Legislative Resolution on the CESL, *supra* note 11 at Amendment 3, (CESL recital 10) ("That choice . . . does not amount to, and should not be confused with, a choice *between two national legal orders* [emphasis added] within the meaning of the conflict-of-law rules and should be without prejudice to them.").
[268] *See e.g.* 2015 Hague Principles, art. 7. For the implicit adoption of the separability doctrine, see e.g. Rome I Reg., art. 3(5); 1980 Rome Conv., art. 3(4); 1955 Hague Sales Conv., art. 2(3); 1994 Mexico City Conv., arts. 12(1); 1986 Hague Sales Conv., art. 10(1); Swiss PILA, art. 116(2); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 201 (A. L. I. 1971) 641, 642 cmt. c. *See also* BRIGGS, *supra* note 221 at 70 (positing that there is an element of commercial practicality underlying the separability doctrine).
[269] *See* analysis in *supra* Section V(A). It is noteworthy that all issues pertaining to the capacity of the parties to enter into contractual arrangements fall outside the regulatory scope of the CESL.
[270] *See e.g.* Rome I Reg., art. 3(5); 1980 Rome Conv., art. 3(4); 1955 Hague Sales Conv., arts. 2(3); 1994 Mexico City Conv., arts. 12(1), 13; 1986 Hague Sales Conv., arts. 10(1), 11(1), and 11(2); Swiss PILA, art. 116(2); 2015 Hague Principles, art. 6(1)(a). *See also* Lando, *supra* note 210 at 44 ("The solution [of referring to the selected law] has the advantage of simplicity. It concentrates all questions concerning the validity of the agreement on one law and that law will often be known at the stage when the negotiations are proceeding."); MILLS, *supra*

should be distinguished from incorporation-by-reference clauses, whose formation and validity are determined by the relevant rules of the applicable law. Furthermore, as in choice-of-law/rules agreements, the opt-in instruments would have both the positive effect of identifying the rules governing the sale of goods contract and the negative effect of excluding the dispositive and mandatory rules of the applicable Member State law.[271] The lack of negative effects of incorporation clauses distinguishes them further from agreements to use the CESL.

In light of the foregoing, if the CESL were to apply as a second parallel legal regime, the *sui generis* selection of the CESL would emulate choice-of-law/rules agreements. Hence, considering the great similarities between these two rules-selection agreements, as well as their main difference of operating on different regulatory levels (internal *vs.* international), the CESL opt-in agreement could be classified, if a term need be coined here, as a "*quasi* choice-of-law" agreement.

Justifying the informational complexity that comes with the addition of a new category of rules-selection agreements is not an easy endeavour. Nonetheless, this new designation does not only denote that the selection takes effect within the same legal order, but also offers clarity *vis-à-vis* a number of issues, such as the regime governing key aspects of the opt-in instrument, the separability of the latter from the underlying transaction, the positive and negative applicable law-related effects that it entails—all features distinguishing the CESL, and second parallel regimes in general, from other optional uniform law projects.[272]

Granted, assuming that the parties had concluded a valid agreement selecting the CESL for their sale of goods contract, what would the status of that opt-in agreement have been, if the application requirements of the instrument had not been met, as in, for example, contracts falling outside the scope of the instrument, non-"cross-border" contracts under CESL Reg., art. 4, no EU Member State law identified as the *lex causae*, etc.? Just like ineffective choice-of-law/rules agreements, defective CESL opt-in agreements would, presumably, have been salvaged as plain incorporation-by-reference clauses.[273] Under such scenarios, the

note 199 at 379–387. *But see* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (A. L. I. 1971) 561, 562 cmt. b; La. Civ. Code art. 3537 cmt. a, and art. 3540 cmts. c, d; Or. Rev. Stat. Ann. § 15.325, 15.335.

[271] CESL Reg., art. 11. *See* Magnus, *supra* note 77 at 100 ("[CESL Reg., art. 11] sounds as if the choice of CESL should have the effect like a regular choice of law in conflict of laws.").

[272] *See* analysis in *infra* Section V(D).

[273] Castermans, *supra* note 17 at 49; Fauvarque-Cosson and Jacquemin, *supra* note 23 at 341–342; Hartley, *supra* note 82 at 527, 529; Wenderhost, *supra* note 25 at 41; Wenderhost, *supra* note 129 at 69. *See* Balthasar, *supra* note 23 at 44; Dannemann, *supra* note 17 at 43, 44; Lagarde, *supra* note 98 at 294; Schillig and Harvey, *supra* note 150 at 155. *But see* Wenderhost, *supra* note 148 at 61–62 (amplifying that it all boils down to whether the parties would have been willing to enter into an agreement without the regulatory coverage of the CESL). *Cf.* Rome I Reg., recital 13.

lex contractus would have regulated all legal issues, including whether a sales agreement had been concluded altogether, the interpretation of the agreement, the filling of any regulatory gaps, and the effects of the mandatory rules on the incorporated provisions.[274] Hence, it is debatable whether the CESL rules, as plain contractual terms this time, were to have been interpreted "autonomously" under CESL Anx. I, art. 4(1) or in line with familiar concepts of the applicable law. By the same token, it is unclear whether the gaps of the CESL were to have been filled pursuant to the principles of the EU sales law regime under CESL Anx. I, art. 4(2) rather than pursuant to the default rules of the *lex contractus*,[275] and, most importantly, whether the entirety of the CESL rules were to have applied, particularly if incongruent with mandatory rules of the applicable law.

C. The CESL and Rome I Regulation

Following this *in abstracto* analysis of the opt-in agreement's nature and effects, it is important to explore the same enquiry in the EU conflict-of-laws regimes and to delve into the interplay between the draft CESL Regulation and Rome I Regulation provisions.[276] In particular, two issues need to be addressed: *i.* the standing of CESL opt-in agreements before EU fora, and *ii.* the impact—if any at all—of the CESL on Rome I Reg., arts. 3 and 6.

[274] EU Parliament Legislative Resolution on the CESL, *supra* note 11 at Amendment 13 (recital 23(a) (new) – recital 23(a) (new)) ("Where the agreement of the parties to the use of the Common European Sales Law is invalid or where the requirements to provide the standard information notice are not fulfilled, questions as to whether a contract is concluded and on what terms should be determined by the respective national law which is applicable pursuant to the relevant conflict-of-law rules.").

[275] *See* EU Parliament Legislative Resolution on the CESL, *supra* note 11 at Amendment 76 (art. 11a(2)) ("Matters not addressed in the Common European Sales law are governed by the relevant rules of the national law applicable under Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict-of-law rule. Such matters include: (a) legal personality; (b) the invalidity of a contract arising from lack of capacity, illegality or immorality, except where the grounds giving rise to illegality or immorality are addressed in the Common European Sales Law; (c) determination of the language of the contract; (d) matters of non-discrimination; (e) representation; (f) plurality of debtors and creditors and change of parties, including assignment; (g) set-off and merger; (h) the creation, acquisition or transfer of immovable property or of rights in immovable property; (i) intellectual property law; and (j) the law of torts, including the issue of whether concurrent contractual and non-contractual liability claims can be pursued together."); Eidenmüller *et al*., *supra* note 17 at 309 ("There are no provisions concerning conventional penalties, avoidance as a result of a defect of consent induced by a third party, or suspension of prescription in the case of an impediment beyond a creditor's control.").

[276] Because the 1980 Rome Convention enshrines rules that are almost identical to the Rome I Regulation provisions examined herein, the following analysis is *mutatis mutandis* applicable to the conflicts regime of the former instrument.

1. Nature & Effects of the CESL Opt-In Agreement before EU Member State Courts

As already suggested, the Rome I Regulation constitutes a classic example of a conflict-of-laws regime allowing only choice-of-law agreements. Notwithstanding the rather clear wording of arts. 2, 3 and 20 of the Regulation, it has been argued that, by virtue of Rome I Reg., recital 14, contracting parties are free to select also a-national rules for their contractual obligations. Thus, pursuant to this opinion, the CESL Regulation introduced a European contract law instrument, which fell within the "exception" of Rome I Reg., recital 14, and, therefore, it could be selected by the contracting parties as a self-standing set of rules.[277] This position, however, is not tenable. As aptly evidenced in the drafting history of Rome I Regulation, the ability of the parties to select a-national rules was originally proposed by the Commission,[278] but did not find its way into the final text of the instrument. This is reflected in Rome I Reg., recital 13, which preserves the ability of contracting parties to "[incorporate] by reference into their contract a non-State body of law or an international convention."[279] Furthermore, Rome I Reg., recital 14 defers the issue of selecting non-state law to the future EU contract law instruments. Specifically, it provides that

> Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument *may provide that the parties may choose to apply those rules* [emphasis added].[280]

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[277] Fogt, *supra* note 23 at 109, 110; Mel Kenny, Lorna Gillies & James Devenney, *The EU Optional Instrument: Absorbing the Private International Law Implications of a Common European Sales Law*, 13 Y. B. PRIV. INT'L L. 315, 338 (2011); Ubaldo Perfetti, *Draft Optional Regulation on a Common European Sales Law - First Considerations*, *in* THE PROPOSED COMMON EUROPEAN SALES LAW - THE LAWYER'S VIEW 49, 54 (Guido Alpa *et al*. eds., 2013). *Cf*. Rome I Reg., art. 23.

[278] Rome I Regulation Proposal, *supra* note 117 at art. 3(2) ("The parties may also choose as the applicable law *the principles and rules of the substantive law of contract* [emphasis added] recognised internationally or in the Community. However, questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed by the general principles underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation.").

[279] Rome I Reg., recital 13. *See* Pieter De Tavernier, *Le Droit Commun Européen Optionnel de la Vente: Réaction d'Un Privatiste du "Plat Pays"*, 17 CONTRATTO E IMPRESA/EUROPA 413, 421–422, 423 (2012) (arguing that the selection of the CESL would amount to an incorporation-by-reference under Rome I Reg., recital 13). Similarly, Palao Moreno, *supra* note 82 at 28 ("As emphasized in the Recital [(10)] of the Draft CESL, the agreement in favour of the future instrument has to be understood as a 'material choice' . . . .").

[280] *See* Piers and Vanleenhove, *supra* note 82 at 446 (arguing that, in promulgating the CESL, the EU legislator exercised the option of Rome I Reg., recital 14). For a model rule expanding the ambit of Rome I Reg., art. 3, see Helmut Heiss, *Party Autonomy*, *in* ROME I REGULATION: THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS IN EUROPE 1, 14 (Franco Ferrari & Stefan Leible eds., 2009). *See also* Aurelia Colombi Ciacchi, *An Optional Instrument for Consumer Contracts in the EU: Conflict of Laws and Conflict of Policies*, *in* THE POLITICS OF THE DRAFT COMMON FRAME OF REFERENCE 3, 13 (Alessandro Somma ed., 2009) ("If a future optional instrument contained conflict of law [sic] rules relating to its application, these as *lex specialis* would prevail over the Rome I provisions [by virtue of Rome I Reg., art. 23]."). *Cf.* Rome I Regulation Proposal, *supra* note 117 at art. 22(b)

On this point, CESL recital 10 reads as follows:

> The agreement to use the Common European Sales Law results from a choice between two different regimes within the same national legal order. That choice, therefore, does not amount to, and should not be confused with, a choice between two national legal orders 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 such as those contained in Regulation (EC) No 593/2008* [emphasis added].[281]

Therefore, before Member State courts applying the Rome I Regulation for international sales disputes, a fully-fledged CESL opt-in agreement would not have operated as a choice-of-rules, but, rather, as a *quasi* choice-of-law agreement within the very same legal order of a Member State.[282] The same result would have been reached also in Denmark,[283] Finland, France, Italy, and Sweden,[284] where the 1955 Hague Sales Convention determines the law governing international sale of goods contracts.

2. Escaping the Quicksand of Rome I Regulation, Art. 6(2)

One of the most troubling private international law issues would arise from the interplay between the CESL model and the conflicts rules on consumer transactions enshrined in Rome I Reg., art. 6. As illustrated in the following paragraphs, the proclamation of the EU Commission that the Rome I Regulation—including art. 6—would have remained intact should not be taken at face value.[285]

To begin with, Rome I Reg., arts. 6(1) and 6(2) read as follows:

> 1. [. . .] a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall

("This Regulation shall not prejudice the application or adoption of acts of the institutions of the European Communities which: – govern contractual obligations and which, by virtue of the will of the parties, apply in conflict-of-law [sic] situations . . . .").

[281] EU Parliament Legislative Resolution on the CESL, *supra* note 11 at Amendment 3 (CESL recital 10).

[282] *See* Piers and Vanleenhove, *supra* note 82 at 446 ("[T]he parties' agreement on the application of the CESL is neither a choice of law, nor an incorporation by reference. It should rather be regarded as a *sui generis* mechanism that has no equal in European private international law.").

[283] 1980 Rome Conv., art. 21.

[284] Rome I Reg., art. 25.

[285] CESL recitals 10, 12.

> be governed by the law of the country where the consumer has his habitual residence, provided that the professional:
>
> (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
>
> (b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.
>
> 2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. *Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1* [emphasis added].[286]

Succinctly, the two paragraphs provide that in the event of a choice-of-law agreement between a "professional" seller and a—natural person—consumer, the latter will not be deprived of the level of protection afforded under the mandatory rules in the country of her habitual residence at the time of the conclusion of the contract,[287] if the seller conducts business in or has "targeted" commercially the consumer's country.[288] The rationale of this so-called "preferential-law approach" is to protect consumers from the choice-of-law practices of merchants, who select the least burdensome consumer protection regimes for the regulation of their transactions.[289] This limitation of the negative effects of choice-of-law agreements, however, raises transaction costs, amplifies legal uncertainty, and discourages merchants and consumers alike from conducting business or getting their supplies from other Member States.[290]

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[286] *Cf.* 1980 Rome Conv., arts. 5(1), 5(2).
[287] MICHAEL BOGDAN, CONCISE INTRODUCTION TO EU PRIVATE INTERNATIONAL LAW 128 (3rd ed. 2016).
[288] Rome I Reg., recitals 24, 25. *Cf.* Case C-218/12, *Emrek* v *Sabranovic*, ECLI:EU:C:2013:666 (2013); Joint Cases C-585/08 & 144/09, *Pammer and Hotel Alpenhof*, 2010 E.C.R. I-12527.
[289] Wolffe, *supra* note 16 at 102. Although Rome I Reg., art. 6(2) might be considered a strict rule, other conflict-of-laws regimes, such as the Swiss PILA, art. 120, La. Stat. Ann. § 51:1418(c)(1), and Or. Rev. Stat. § 15.320(4)(a) [formerly 81.105] (2015), preclude choice-of-law agreements in consumer transactions. *Cf.* Rome I Regulation Proposal, *supra* note 117 at arts. 3(1), 5; U.C.C. § 1-301(a) (A. L. I. & UNIF. L. COMM'N 2001) (withdrawn, 2008).
[290] *See* CESL recital 3.

Two points need to be examined further regarding Rome I Reg., art. 6: first, who qualifies as a "consumer" for the purposes of art. 6? Second, would the selection of the CESL have been sufficient to trigger the application of art. 6?

Noted earlier in this Part, the definitions of consumer in Rome I Reg., art. 6(1) and the CESL Reg., art. 2(f) have been aligned in that the tag of "consumer" is limited to "natural person[s] for a purpose which can be regarded as being outside [their] trade or profession."[291] Hence, business conducted between legal entities—even single-person or non-profit legal entities—falls outside the scope of art. 6. So does business conducted between a trader and a natural person, when the latter is acting in her trade or profession, unless the trade or professional purpose was negligible and the trader, acting in good faith, was not unreasonably unaware of this private purpose.[292] Essentially, the protection of art. 6 is available only to individuals acting as non-business end users of either the goods sold or the services provided. The onus of proving the relevance of art. 6 falls on the person alleging the consumer nature of the transaction—presumably, the consumer.[293]

Regarding the second enquiry, it was shown that, in the context of Rome I Regulation, the CESL opt-in agreement would have represented a *quasi* choice-of-law agreement between the parties.[294] Since art. 6(2) requires a choice of statist law, the selection of the CESL alone would not have been sufficient to trigger the protective regime of the Regulation.[295] Importantly, as stated in CESL recital 12 that, even if art. 6(2) had been applicable *in casu*, the selected EU sales law regime would, again, have prevailed.[296] This is premised on an "as if" argument: the legal comparison under art. 6(2) would have been between the CESL as part of

[291] *Cf.* Brussels I Reg. (*bis*), art. 17(1).
[292] Gralf-Peter Calliess, *Rome I: Article 6*, *in* ROME REGULATIONS: COMMENTARY 154, 169 (Gralf-Peter Calliess ed., 2nd ed. 2015) ("[T]he negligible business purpose test rather than the predominance test is most consistent with the requirements of predictability and certainty as to the applicable law, which constitute the foundation of the Regulation . . . ."). *Cf.* Case C-464/01, *Gruber* v *Bay Wa*, 2005 E.C.R. I-00439; Case C-269/95, *Benincasa* v *Dentalkit*, 1997 E.C.R. I-03767, ¶ 16–18. *Cf. also* CISG art. 2(a).
[293] Ragno, *supra* note 123 at 212.
[294] *See* analysis in *supra* Section V(C)(1).
[295] Gary Low, *Unitas via Diversitas: Can the Common European Sales Law Harmonize through Diversity?*, 19 MAASTRICHT J. EUR. & COMP. L. 132, 145 (2012) ("Cloaking the CESL as a second national regime cleverly avoids [all Rome I Reg., art. 6 issues]—since Article 3 of the Rome I Regulation is not triggered."). *Contra* Rühl, *supra* note 105 at 158–160.
[296] EU Parliament Legislative Resolution on the CESL, *supra* note 11 at Amendment 6 (recital 12) ("Since the Common European Sales Law contains a comprehensive set of uniform 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 relevance to the issues covered by the Common European Sales Law, as it would amount to a comparison between the mandatory provisions of two identical second contract-law regimes.").

the selected Member State law and the CESL as part of the otherwise applicable law—the latter being determined *as if* the facts of the case, including the conclusion of the CESL opt-in agreement, had been examined in reference to the otherwise applicable law.[297]

Bearing in mind the minimum harmonization character of consumer protection Directives and the "gold-plating" that ensued,[298] which culminated, in turn, into a mosaic of diversified regimes across the Single Market,[299] the possibility of using a single set of contract law rules that would address the shortcomings of art. 6(2) emerges as a prospect of paramount importance for traders conducting or intending to conduct business in the Single Market. Thus, the question that naturally arises is whether the Regulation for a CESL would have achieved that goal.

In order to fully explore this enquiry, a series of possible scenarios should be delineated. Setting litigation proceedings in an EU Member State as our fixed point of reference,[300] the following variables need to be contemplated: whether an express or implicit choice-of-law agreement in favour of an EU Member State law had been concluded, whether the seller had conducted business or targeted commercially the country of the consumer's habitual residence, and whether the contracting parties had maintained their habitual residence in a Member State. Evidently, these variables correspond with the requirements of Rome I Reg., arts. 3, 4 and 6. The existence of a CESL opt-in agreement, as well as the fulfilment of the CESL application requirements, shall be presumed. On that basis, the combination of these variables generates ten possible scenarios regarding the (in-)applicability of the CESL to consumer sales transactions. In particular, scenarios no. 1–4 address the situation whereby a choice-of-law had

[297] *See* Heiss and Downes, *supra* note 137 at 708; Staudenmayer, *supra* note 136 at 24; Wenderhost, *supra* note 100 at 33. For sceptical reviews of this solution, see Conte, *supra* note 113 at 70; Eidenmüller, *supra* note 167 at 79–80; Eidenmüller *et al*., *supra* note 17 at 314; Fogt, *supra* note 23 at 115; Matteo Fornasier, *CESL*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW, vol. 1 at 278, 284–285 (Jürgen Basedow *et al*. eds., 2017); WRBKA, *supra* note 157 at 248. *See also* Hartley, *supra* note 82 at 530 (arguing that, because of the optional nature of the CESL, all Member State law provisions covered by the instrument's regulatory scope would become "non-mandatory," thus avoiding the troublesome limitations of Rome I Reg., art. 6(2)).

[298] Bénédicte Fauvarque-Cosson, *European Contract Law Through and Beyond Pluralism: The Case of an Optional Instrument*, *in* PLURALISM AND EUROPEAN PRIVATE LAW 95, 102 (Leone Niglia ed., 2013).

[299] Van der Heijden and Keirse, *supra* note 58 at 566; Gary Low, *Will Firms Consider a European Optional Instrument in Contract Law?*, 33 EUR. J. L. ECON. 521, 525 (2012); Martijn W. Hesselink, *Towards a Sharp Distinction between b2b and b2c? On Consumer, Commercial and General Contract Law after the Consumer Rights Directive*, 18 E. R. P. L. 57, 67 (2010). *See* Luisa Antoniolli, *Consumer Law as an Instance of the Law of Diversity*, 30 VT. L. REV. 855, 870–871 (2005); Christian Twigg-Flesner, *EU Law and Consumer Transactions without an Internal Market Dimension*, *in* THE INVOLVEMENT OF EU LAW IN PRIVATE LAW RELATIONSHIPS 317, 321 (Dorota Leczykiewicz & Stephen Weatherill eds., 2013). *See also* Collins, *supra* note 137 at 911 ("[T]he problem is caused not by divergence in national contract laws but by the Rome I Regulation of the EU itself, which protects reliance by consumers on that divergence.").

[300] Brussels I Reg. *bis*, arts. 4–7, 17–19, and 25–26.

been concluded between the parties; scenarios no. 5–10 explore the applicability of the CESL, absent such a choice-of-law agreement:

1. If the consumer had maintained her habitual residence in a Member State, and the seller had conducted business in or directed her activities to that state, the court would have been required to compare the chosen Member State law with the corresponding consumer protection regime in the consumer's habitual residence. Since the CESL opt-in agreement would have triggered the application of the EU sales law regime as part of either law, Rome I Reg., art. 6(2) would have remained "dormant," and the CESL would have been applicable as an integral part of the chosen Member State law.[301]

2. If the consumer had maintained her habitual residence in a Member State, and the seller had neither conducted business in nor directed her activities to the state of the consumer's habitual residence, Rome I Reg., art. 6(2) would not have been triggered, and the CESL would have been applicable as an integral part of the chosen Member State law.[302]

3. If the consumer had maintained her habitual residence in a third non-EU Member State, and the seller had conducted business in or directed her activities to that state, the court would have been required to compare the chosen Member State law with the corresponding consumer protection regime in the consumer's habitual residence. Thus, the CESL would have been applicable as an integral part of the chosen law, but its regulatory effects would have been limited by the third country's mandatory rules.[303]

4. If the consumer had maintained her habitual residence in a third non-EU Member State, and the seller had neither conducted business in nor directed her activities to the state of the consumer's habitual residence, Rome I Reg., art. 6(2) would not have been triggered, and the CESL would have been applicable as an integral part of the chosen Member State law.[304]

[301] Rome I Reg., arts. 3(1), 6(1), 6(2); CESL Reg., art. 11.
[302] Rome I Reg., arts. 3(1), 6(1), 6(2), 6(3); CESL Reg., art. 11.
[303] Rome I Reg., arts. 3(1), 6(1), 6(2); CESL Reg., art. 11. Note that, under this scenario, the first CESL applicability sub-requirement alternatives would be limited to either the delivery address for the goods or the billing address in the EU.
[304] Rome I Reg., arts. 3(1), 6(1), 6(2), 6(3); CESL Reg., art. 11. Note that, under this scenario, the first CESL applicability sub-requirement alternatives would be limited to either the delivery address for the goods or the billing address in the EU.

5. If the consumer had maintained her habitual residence in a Member State, and the seller had conducted business in or directed her activities to that state, absent a choice-of-law agreement, the CESL would have been applicable as an integral part of the consumer's Member State law.[305]

6. If both parties had maintained their respective habitual residence in Member States, and the seller had neither conducted business in nor directed her activities to the state of the consumer's habitual residence, the CESL would have been applicable as an integral part of the seller's Member State law.[306]

7. If the seller had maintained her habitual residence in a third non-EU Member State, and she had neither conducted business in nor directed her activities to the state of the consumer's habitual residence, the laws of the seller's habitual residence would have governed the international sale of goods contract. Under this scenario, the CESL application requirements would not have been met, and, as a result, the CESL opt-in agreement would, most likely, have been salvaged as a plain incorporation-by-reference clause—the CESL rules would have been integrated as contractual terms into the sales agreement to the extent that they would not conflict with the mandatory rules of the applicable law.[307]

8. If the consumer had maintained her habitual residence in a third non-EU Member State, and the seller had conducted business in or directed her activities to that state, the laws of the consumer's habitual residence would have governed the international sale of goods contract. Under this scenario, the CESL application requirements would not have been met, and, as a result, the CESL opt-in agreement would, most likely, have been salvaged as a plain incorporation-by-reference clause—the CESL rules would have been integrated as contractual terms into the sales agreement to the extent that they would not conflict with the mandatory rules of the applicable law.[308]

9. If the seller only had maintained her respective habitual residence in a Member State, and she had neither conducted business in nor directed her activities to the state of the

[305] Rome I Reg., arts. 6(1); CESL Reg., art. 11.
[306] Rome I Reg., arts. 4(1)(a), 6(1), 6(3), subject to the caveat of the "manifestly" closer connection of art. 4(3); CESL Reg., art. 11.
[307] Rome I Reg., arts. 4(1)(a), 6(1), 6(3), subject to the caveat of the "manifestly" closer connection of art. 4(3).
[308] Rome I Reg., art. 6(1).

consumer's habitual residence, the CESL would have been applicable as an integral part of the seller's Member State law.[309]

10. If both the seller and the consumer had maintained their habitual residence in a third country and the seller had neither conducted business in nor directed her activities to the country of the consumer's habitual residence, the laws of the seller's habitual residence would have governed the international sale of goods contract. Under this scenario, the CESL application requirements would not have been met, and, as a result, the CESL opt-in agreement would, most likely, have been salvaged as a plain incorporation-by-reference clause—the CESL rules would have been integrated as contractual terms into the sales agreement to the extent that they would not conflict with the mandatory rules of the applicable law.[310]

[309] Rome I Reg., arts. 4(1)(a), 6(1), 6(3), subject to the caveat of the "manifestly" closer connection of art. 4(3); CESL Reg., art. 11.
[310] Rome I Reg., arts. 4(1)(a), 6(1), 6(3), subject to the caveat of the "manifestly" closer connection of art. 4(3).

TABLE I – CESL & ROME I REG. ART. 6(2)				
CHOICE-OF-LAW AGREEMENT & CESL OPT-IN AGREEMENT				
SCENARIO	**ACTIVITIES DIRECTED**	**BUYER'S HABITUAL RESIDENCE**	**SELLER'S HABITUAL RESIDENCE**	**LEGAL REGIME**
1.	Yes	EU	N/A	CESL – As an integral part of the chosen law
2.	No	EU	N/A	CESL – As an integral part of the chosen law
3.	Yes	Non-EU	N/A	CESL – As an integral part of the chosen law (limited by the third country's mandatory law rules)
4.	No	Non-EU	N/A	CESL – As an integral part of the chosen law
CESL OPT-IN AGREEMENT ONLY				
SCENARIO	**ACTIVITIES DIRECTED**	**BUYER'S HABITUAL RESIDENCE**	**SELLER'S HABITUAL RESIDENCE**	**LEGAL REGIME**
5.	Yes	EU	N/A	CESL – As an integral part of Consumer's law
6.	No	EU	EU	CESL – As an integral part of Seller's law
7.	No	EU	Non-EU	Seller's law (CESL amending only the dispositive rules of the applicable law)
8.	Yes	Non-EU	N/A	Buyer's law (CESL amending only the dispositive rules of the applicable law)
9.	No	Non-EU	EU	CESL – As an integral part of Seller's law
10.	No	Non-EU	Non-EU	Seller's law (CESL amending only the dispositive rules of the applicable law)

CHART I - CESL & ROME I REG., ART. 6(2)

Sales Agreement & Rules-Selection Agreements

✓ Choice-of-Law Agreement
(EU Member State law)

✓ CESL Opt-In Agreement

The Consumer had maintained her habitual residence in an EU Member State

Scenario 1

The Seller had conducted business in or directed her activities to the state of the Consumer's habitual residence

- The Rome I Reg., art. 6(2) comparison would have been "neutralized" by the CESL
- The CESL would have been applicable as integral part of the chosen law

Scenario 2

The Seller had neither conducted business in nor directed her activities to the state of the Consumer's habitual residence

- The Rome I Reg., art. 6(2) comparison would not have been triggered
- The CESL would have been applicable as integral part of the chosen law

The Consumer had NOT maintained her habitual residence in an EU Member State

Scenario 3

The Seller had conducted business in or directed her activities to the state of the Consumer's habitual residence

- Rome I Reg., art. 6(2) would have triggered a comparison between the CESL and the respective laws of the Consumer's habitual residence
- The application of the CESL provisions would have been limited by the mandatory rules of the Consumer's habitual residence

Scenario 4

The Seller had neither conducted business in nor directed her activities to the state of the Consumer's habitual residence

- The Rome I Reg., art. 6(2) comparison would not have been triggered
- The CESL would have been applicable as integral part of the chosen law

CHART II - CESL & ROME I REG., ART. 6(2)

Sales Agreement & Rules-Selection Agreements

× Choice-of-Law Agreement

✓ CESL Opt-In Agreement

The Consumer had maintained her habitual residence in an EU Member State

Scenario 5

The Seller had conducted business in or directed her activities to the state of the Consumer's habitual residence

- The Rome I Reg., art. 6(2) comparison would not have been triggered
- The CESL would have been applicable as integral part of the Consumer's Member State law

The Seller had neither conducted business in nor directed her activities to the state of the Consumer's habitual residence

- The Rome I Reg., art. 6(2) comparison would not have been triggered

Scenario 6

The Seller had maintained her habitual residence in an EU Member State

- The CESL would have been applicable as integral part of the Seller's Member State law

Scenario 7

The Seller had NOT maintained her habitual residence in an EU Member State

- Seller's law would have been applicable
- The CESL Opt-In agreement would have operated as an incorporation-by-reference clause

The Consumer had NOT maintained her habitual residence in an EU Member State

Scenario 8

The Seller had conducted business in or directed her activities to the state of the Consumer's habitual residence

- Rome I Reg., art. 6(2) would have triggered a comparison between the CESL and the respective laws of the Consumer's habitual residence
- The application of the CESL provisions would have been limited by the mandatory rules of the Consumer's habitual residence

The Seller had neither conducted business in nor directed her activities to the state of the Consumer's habitual residence

- The Rome I Reg., art. 6(2) comparison would not have been triggered

Scenario 9

The Seller had maintained her habitual residence in an EU Member State

- The CESL would have been applicable as integral part of the Seller's Member State law

Scenario 10

The Selller had NOT maintained her habitual residence in an EU Member State

- Seller's law would have been applicable
- The CESL Opt-In agreement would have operated as an incorporation-by-reference clause

This delineation of the possible consumer sales scenarios illustrates that, in six scenarios, the CESL would have been fully applied as a second parallel legal regime; in one scenario, the CESL would have been applicable, but its effects would have been limited by the domestic mandatory rules in the country of consumer's habitual residence; finally, in three scenarios, the CESL rules would have been incorporated by reference as plain contractual terms into the sale of goods agreement.

Importantly, this outline shows that, *ceteris paribus*, a change in the consumer's habitual residence could affect the applicability of the CESL model.[311] In particular, when the consumer had maintained her habitual residence in a Member State, the CESL would have been fully applicable covering intra-EU trade and consumer imports from third countries alike.[312] The sole exception to such consumer import transactions would be the unlikely scenario no. 7 whereby the seller had neither resided in the EU nor conducted business in or directed her activities to the country of the consumer's habitual residence, but the parties, against all odds, had concluded only a CESL opt-in agreement.[313] Under this exceptional scenario, the CESL rules would have been incorporated as plain contractual terms into the sales contract, which would have been governed, in turn, by the seller's law. Conversely, when the consumer had maintained her habitual residence in a third country, the benefits from the CESL's innovative structure would not have been available.[314] Under such scenarios, the CESL would have been fully applicable, only if the seller had neither conducted business in nor directed her activities to the consumer's state of habitual residence, and an EU Member State law had been identified as the *lex causae*. In all other cases, the application of the CESL would have been limited by the mandatory rules of the applicable non-EU Member State law.[315]

In light of the foregoing analysis, the proclamations that the CESL would have successfully harmonized international consumer sales transactions should be taken with a grain of salt. Although in a Member State setting the instrument would have circumvented the Rome I Reg., art. 6(2) hurdle,[316] if the consumer had maintained her habitual residence outside the EU, the CESL would have been fully applicable in exceptional circumstances only. In addition, the full applicability of the CESL would have been ensured only when the seller had directed

[311] *See* Fogt, *supra* note 23 at 129 (highlighting the "unequal treatment" of EU and third-country consumers).
[312] Heiss and Downes, *supra* note 137 at 704.
[313] CESL Reg., arts. 4(2) and 4(3)(b) would limit significantly the likelihood of such cases.
[314] *See* Basedow, *supra* note 19 at 38–39. *See* CESL recital 14.
[315] *See* Lagarde, *supra* note 98 at 296.
[316] Hesselink, *supra* note 101 at 200 ("In practical terms . . . the categorization of the CESL as a second regime neutralizes the operation of Article 6 Rome I."). Similarly, Ackermann, *supra* note 135 at 26.

her commercial activities in the Single Market, and the parties had concluded both a choice-of-law and a CESL opt-in agreement. Hence, it appears that CESL's innovative structure would largely have worked *in tandem* with the Rome I Regulation conflicts regime—at least regarding intra-EU commerce. The price of fostering trade in the Single Market, however, would have come in the form of unprecedented legal complexity and an ably covered—yet de facto and Treaty-wise impermissible—amendment of Rome I Reg., art. 6(2).[317] Granted, the CESL would have constituted anything but a "select-and-forget" optional instrument. The ingenious second parallel legal regime solution not only requires the alignment of an inordinate number of variables in order to unlock its potential, but also fails to harmonize the regulatory framework *vis-à-vis* consumer exports to non-EU countries. All things considered, EU contract law harmonization might need to take a different form after all.

D. CESL vs. ULIS 1964 Opt-In Agreements: Identical Twins or Distant Cousins?

Having explored the nature and effects of the CESL opt-in agreement, it is apposite to compare the latter with its most relevant counterpart, namely the opt-in agreement envisaged in the ULIS 1964. The two interrelated ULIS provisions, namely art. V and Anx. I, art. 4, read as follows

> Any State may, at the time of the deposit of its instrument of ratification of or accession to the present Convention declare . . . that it will apply the Uniform Law only to contracts in which the parties thereto have, by virtue of Article 4 of the Uniform Law, chosen that Law as the law of the contract.[318]

And

> The present Law shall also apply where it has been chosen as the law of the contract by the parties, whether or not their places of business or their habitual residences are in different States and whether or not such States are Parties to

[317] *See* JAN DALHUISEN, DALHUISEN ON TRANSNATIONAL COMPARATIVE, COMMERCIAL, FINANCIAL AND TRADE LAW, vol. 2 at 180–181 (6th ed. 2016); Dalhuisen, *supra* note 137 at 317. *See also* Dannemann, *supra* note 64 at 731 (proposing an express derogation from the effects of Rome I Reg., art. 6(2)); Magnus, *supra* note 28 at 241 ("The only way to resolve [the legal issues arising under art. 6(2)] is to understand Article 11 Proposal as an exception to Article 6(2) Rome I Regulation. Whenever CESL is validly chosen Article 6(2) is suspended.").

[318] The reservation of ULIS art. V was introduced at the request of the United Kingdom. RONALD H. GRAVESON, ERNEST J. COHN & DIANA GRAVESON, THE UNIFORM LAWS ON INTERNATIONAL SALES ACT 1967: A COMMENTARY 20 (1968).

> the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods, *to the extent that it does not affect the application of any mandatory provisions of law which would have been applicable if the parties had not chosen the Uniform Law* [emphasis added].

This "declaration"—essentially a reservation—of ULIS art. V qualifies the application of the instrument, which, before UK and Gambian courts, is applicable only upon selection by the contracting parties. Furthermore, pursuant to ULIS Anx., art. 4, this selection of the ULIS sales law regime does not prejudice the application of the mandatory rules of the otherwise applicable law. Hence, save for scenarios where the ULIS is applicable as part of the *lex causae*, ULIS opt-in agreements operate as plain incorporation-by-reference clauses.[319] In this regard, the agreement to apply the ULIS differs significantly from the agreement to use the CESL, which, typically as a *quasi* choice-of-law agreement, would preclude the application of both the dispositive and the mandatory rules of the otherwise applicable law. It can hardly be disputed, of course, that the deference of both the CESL and the ULIS to an opt-in agreement reduces their potential applicability.[320] This has clearly been the case of the ULIS, which enjoyed relative success in continental Europe, but constituted a remarkable failure in both Gambia and the UK,[321] where the Convention was ratified subject to the reservations of arts. III and V.[322] Nevertheless, the significant differences in the positive/negative legal effects of the

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[319] ALINA KACZOROWSKA, INTERNATIONAL TRADE CONVENTIONS AND THEIR EFFECTIVENESS: PRESENT AND FUTURE 23 (1995) (stressing the incompatibility of art. V with the objectives of the ULIS); Lagarde, *supra* note 98 at 288; Paul Lagarde, *Le Champ d'Application dans l'Espace des Règles Uniformes de Droit Privé Matériel*, *in* ÉTUDES DE DROIT CONTEMPORAIN: VIII[E] CONGRÈS INTERNATIONAL DE DROIT COMPARÉ, PESCARA 1970 149, 158 (1970); Lando, *supra* note 210 at 127; MICHEL PELICHET, LA VENTE INTERNATIONALE DE MARCHANDISES ET LE CONFLIT DE LOIS, 201 RECUEIL DES COURS/COLLECTED COURSES 9, 31 (1987) ("[L]a convention est réduite au rang de simple loi modèle."). *Contra* HR, May 26, 1989, NJ 1992, 105 m.nt. J.C. Schultsz (*Zerstegen-Van der Harst* v. *Norfolk Line*) (Neth.); GRAVESON, COHN, AND GRAVESON, *supra* note 318 at 20 ("[Under ULIS art. V and Anx. I, art. 4,] the Uniform Law is in a position of the chosen proper law of the contract. It is considered that it has this character rather than that of the incorporation of law . . . .").

[320] Ole Lando, *Comments and Questions Relating to the European Commission's Proposal for a Regulation on a Common European Sales Law*, 19 E. R. P. L. 717, 720 (2011) ("An opt-out model, where CESL applies, unless both parties choose a national law, would have a better chance of being applied."). *See* Larry A. DiMatteo, *The Curious Case of Transborder Sales Law: A Comparative Analysis of CESL, CISG, and the UCC*, *in* CISG VS. REGIONAL SALES LAW UNIFICATION 25, 52 (Ulrich Magnus ed., 2012); J.S. Hobhouse, *International Conventions and Commercial Law: The Pursuit of Uniformity*, 106 L. Q. REV. 530, 532 (1990).

[321] Gambia and the UK are the only states, where the ULIS remains in force.

[322] That there is not a single reported case, where the ULIS was selected by the parties, see BOELE-WOELKI, *supra* note 233 at 376; DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, *supra* note 22 at 1889; Ulrich Magnus, *Article 4*, *in* ECPIL COMMENTARY: ROME I REGULATION 263, 340 (Ulrich Magnus & Peter Mankowski eds., 2017); Ulrich G. Schroeter, *Reservations and the CISG: The Borderland of Uniform International Sales Law and Treaty Law After 35 Years*, *in* 35 YEARS CISG AND BEYOND 29, 51–52 (Ingeborg Schwenzer ed., 2016); LEN S. SEALY & RICHARD J. A. HOOLEY, COMMERCIAL LAW - TEXT, CASES, AND MATERIALS 489 (4th ed. 2009).
For plain references to the Uniform Sales Act of 1967 as *obiter dicta*, see *Air Transworld Ltd* v *Bombardier Inc* [2012] 1 C.L.C. 145, 174–175 and 177 (Eng.); *Amiri Flight Authority* v *BAE Systems plc* [2003] 2 C.L.C. 662, 701 *et seq.* (Eng.); *Butler Machine Tool Co Ltd* v *Ex-Cell-O Corporation (England) Ltd* [1979] 1 W.L.R. 401,

two instruments and the addressees of each respective project—namely businesses in general for the ULIS *vs.* consumers and SMEs conducting business in the Single Market for the CESL—refute the *a priori* dismissal of the CESL on the ground of its optional character.[323]

Lastly, it would be an omission not to discuss the possibility of opting into the CISG when the latter is not triggered by virtue of its applicability provisions. Though contemplated during the drafting of the instrument, both the Working Group and the Vienna Conference decided against the inclusion of an additional CISG opt-in facility.[324] Because the Convention is "softened" outside its regulatory scope, the legal effects of a CISG opt-in agreement depend on the forum's approach to party autonomy.[325] Succinctly, a selection of the CISG as a self-standing instrument normally operates as a plain incorporation-by-reference clause,[326]

406–407 (Eng.). *See also* KACZOROWSKA, *supra* note 319 at 23 ("[Art. V is] the most deceptive, indeed, the most hypocritical reservation . . . . Businessmen are not kamikazes. Can they be expected to designate an unfamiliar law which has no established case law and which in addition may appear to be strongly disfavored by their own government? The answer is obvious."); BOELE-WOELKI, *supra* note 233 at 376 ("The United Kingdom . . . made the opt-in reservation when ratifying the Hague Uniform Sales Law since they did not want it to influence the work of London lawyers, courts and arbitrators who jointly had, and still have, an enormous interest – legal as well as commercial – in applying English law."); David, *supra* note 44 at 139 ("The United Kingdom made a goodwill gesture by ratifying the Hague Convention, but the obligations it undertook have scarcely any significance other than that of encouraging English merchants to take the Uniform Law into consideration and decide whether it suits them, the government having stated that it can see neither danger nor drawback in the Uniform Law."); Magnus, *supra* note 28 at 228 ("The British ratification of the Hague Law under the opt-in reservation has to be considered a mere alibi for the intention to avoid the application of the Uniform Sales law in practice.").

[323] *But see* Lando, *supra* note 82 at 249; Magnus, *supra* note 77 at 123; Rafael Illescas Ortiz & Pilar Perales Viscasillas, *The Scope of the Common European Sales Law: B2B, Goods, Digital Content and Services*, 11 J. I. T. L. P. 241, 243 (2012).

[324] *Working Group on the International Sale of Goods: Report on the Work of the Second Session 7-18 December 1970, Document A/CN.9/52)*, II Y. B. UNCITRAL 50, 55 (1971); Report of the First Committee, Document A/CONF.97.11 {Original: English} {7 April 1980}, in *United Nations Conference on Contracts for the International Sale of Goods (Vienna, 10 March – 11 March 1980): Official Records* (United Nations, 1991) 82, 86; Summary Records of the First Committee: 4th Meeting (13 March 1980), Document A/CONF.97/C.1/SR.4, in *United Nations Conference on Contracts for the International Sale of Goods (Vienna, 10 March – 11 March 1980): Official Records* (United Nations, 1991) 248, 252–253.

[325] PETER HUBER & ALASTAIR MULLIS, THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS 65–66 (2007); NYGH, *supra* note 200 at 190 (noting, also, that "only a doctrinaire insistence on the application of the law of a State would deny effectiveness to such a choice [of the CISG]."); INGEBORG SCHWENZER, CHRISTIANA FOUNTOULAKIS & MARIEL DIMSEY, INTERNATIONAL SALES LAW 15 (2nd ed. 2012); Ingeborg Schwenzer & Pascal Hachem, *Article 6*, *in* SCHLECHTRIEM & SCHWENZER COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 101, 117 (Ingeborg Schwenzer ed., 4th ed. 2016); Lisa Spagnolo, *The CISG as Soft Law and Choice of Law: Gōjū Ryū?*, *in* INTERNATIONAL SALES LAW: A GLOBAL CHALLENGE 154, 164 (Larry A. DiMatteo ed., 2014). *See* Fogt, *supra* note 23 at 119–120; CLAYTON P. GILLETTE & STEVEN D. WALT, THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: THEORY AND PRACTICE 74 (2nd ed. 2016).

[326] *See e.g.* Trib. di Padova, Jan. 11, 2005, *translation available at* http://cisgw3.law.pace.edu/cases/050111i3.html (It.); Michael Bridge, *Choice of Law and the CISG: Opting In and Opting Out*, *in* DRAFTING CONTRACTS UNDER THE CISG 65, 72, 75 (Harry M. Flechtner, Ronald A. Brand, & Mark S. Walter eds., 2008); Fogt, *supra* note 23 at 120; PETER SCHLECHTRIEM, UNIFORM SALES LAW: THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 36 (1986). *But see* HR, May 26, 1989, NJ 1992, 105 m.nt. J.C. Schultsz (*Zerstegen-Van der Harst* v. *Norfolk Line*) (on the applicability of the CMR by virtue of an agreement between the parties) (Neth.).

save for fora and arbitral tribunals endorsing fully party autonomy whereby the opt-in facility takes the form of a permissible choice-of-rules agreement.[327]

VI. CONCLUSION

This Part sought to establish legal certainty in both the application of the model embodied in the CESL and its interplay with the private international law rules of the respective forum. In particular, it explored the scope and the maze-like applicability rules of the draft Regulation, systematized in a clear manner its application requirements, and, finally, situated the second parallel legal regime vehicle in the private international law doctrine. Against this background, it was submitted that the nature and the effects of the CESL opt-in agreement would not be fixed and unmalleable. Quite the opposite, they would depend on the forum's approach to the principle of party autonomy. Especially with regard to EU Member State courts, it was shown that the opt-in mechanism would have operated similarly to a choice-of-law agreement, albeit within the contours of a single legal order—thus giving birth to a new concept, namely the "*quasi* choice-of-law" agreement. Furthermore, it was shown that the CESL model would operate seamlessly in a Member State setting and would circumvent the Rome I Reg., art. 6(2) hurdle. The instrument would reach, however, its effective application limits *vis-à-vis* transactions linked to third countries. Hence, notwithstanding the attempt of the analysis in Part I to systematize the intricacies of second parallel legal regimes, it becomes apparent that the applicability shortcomings of the CESL model are anything but trivial technical difficulties. On the contrary, they pertain to and stem from fundamental policy questions under EU law. Any ingenious constructions and legal sophistries would prove inadequate to overcome the obstacles raised by the truly "Gordian" EU legal integration project. "Cutting through" legal complexity might be the answer after all.

[327] GILLETTE AND WALT, *supra* note 325 at 74–75.

PART II
ASCERTAINING THE CONTENT OF THE CESL: THE ENEMY WITHIN

"To plead or not to plead—that is the question . . . ."[1]

I. INTRODUCTION

Having examined the application requirements set forth in the proposed CESL, Part II focuses on the interplay between the draft instrument and national rules on the legal treatment of foreign law. This enquiry stems from the special internationality precondition of CESL Reg., art. 4, the legislative basis of the instrument, and its structure as a second parallel legal regime. Specifically, these three points warrant that the very same CESL could have been treated, *in casu*, as either domestic or foreign law even by EU Member State courts. Thus, the following paragraphs explore whether the differentiated legal treatment of foreign law across the Single Market could have affected the applicability of the instrument by introducing an additional de facto application requirement, that is, the pleading and proof of the CESL rules—an application requirement that has been neither delineated in the draft Regulation nor contemplated during the drafting process.

In paving the way for the analysis, two pivotal questions need to be answered. Firstly, what was to have been the intended legal status of the CESL in the EU? Would it have been applicable as "domestic" or as "foreign" law by Member State courts?[2] Secondly, are there any significant differences between the EU Member States regarding the ascertainment of the content and the application of foreign law?[3] Starting from the premise that national rules treat—to a greater or lesser extent—foreign law as either "facts" or "legal norms," a handful of possible scenarios are examined so as to assess the impact of the respective approaches to the so-called "content-of-laws"[4] enquiry on the application of the proposed CESL.[5] In addition,

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[1] Paraphrasing Hamlet's well-known line in Act 3, Scene 1, "To be, or not to be—that is the question." THE OXFORD SHAKESPEARE: HAMLET, 239 (George Richard Hibbard ed., 1987).
[2] *See* analysis in *infra* Section III.
[3] *See* analysis in *infra* Section IV.
[4] Note the distinction between "*conflict*-of-laws" enquiries whereby the adjudicator explores *which law is applicable*, and "*content*-of-laws" enquiries whereby the adjudicatory authority strives to ascertain *what the identified applicable law provides for*.
[5] *See* analysis in *infra* Section V(A).

the very same "CESL as facts *vs*. CESL as legal norms" enquiry is explored in light of the consumer protection considerations of the 1980 Rome Convention and the Rome I Regulation,[6] as well as in the *sui generis* cosmos of international arbitration.[7] Surprisingly, the analysis illustrates that, notwithstanding the extensive unification of both conflict-of-laws and substantive sales law rules, the applicability of the instrument could have been qualified by a series of not readily ascertainable factors at the time of the conclusion of the sale of goods contract. Hence, on the basis of this three-tier comparative review, that is, *i*. fora endorsing the *ex officio* ascertainment of foreign law *vs*. fora that depend on party initiative, *ii*. commercial *vs*. consumer disputes, and *iii*. litigation *vs*. arbitration proceedings, it is argued that the diversified treatment of foreign law jeopardizes the uniformity achieved by the European conflicts and substantive law instruments, and nullifies the prospect of legal harmonization under second parallel legal regimes, such as the CESL.

II. MEETING THE LATINS: *JURA NOVIT CURIA*, *LEX FORI*, AND *LEX ALIENA*

It is important to begin by briefly examining two points that will set the foundations for the analysis that follows: the *jura novit curia* principle and the crucial distinction between "domestic" and "foreign" laws.

Pursuant to the general principle of *jura novit curia* (also referred to as "*iura novit curia*"),[8] the court knows—or, at least, is presumed to know—the law.[9] Hence, the laws of the respective forum are put on par with the laws of other legal orders in that the judge is, firstly, presumed to be cognizant of their content, and, secondly, required to apply the law without assistance from the litigating parties. However, in juxtaposition with Savigny's idea of equality of domestic and foreign laws,[10] the adage of *jura novit curia* has not risen yet to the status of a universal principle. Accordingly, the various fora may be classified into two broad groups, namely fora that are presumed to know equally domestic and foreign laws, and fora adhering

[6] *See* analysis in *infra* Section V(B).
[7] *See* analysis in *infra* Section VI.
[8] "The court knows the law."
[9] SOFIE GEEROMS, FOREIGN LAW IN CIVIL LITIGATION: A COMPARATIVE AND FUNCTIONAL ANALYSIS 34 (2004) ("Today . . . [t]he judge can no longer know all the rules in force within a legal system. The maxim's meaning now lies . . . in the judge's duty to ascertain the applicable law in a given case.").
[10] FRIEDRICH CARL VON SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS AND THE LIMITS OF THEIR OPERATION IN RESPECT OF PLACE AND TIME 69–70, 76 (William Guthrie tran., 2nd ed. 1880).

to a limited *jura novit curia* principle, which requires that only domestic law be ascertained and applied *ex officio* by the judge.[11]

This distinction accentuates the importance of the second point examined herein, namely the classification of rules into "domestic" and "foreign" laws. The two concepts may be demarcated only *in concreto*, that is, in reference to a particular state, and may be defined in a positive and a negative manner respectively. "Domestic" law comprises the entirety of the regulations enacted by the national legislator, the international treaties, and other legal documents ratified by the respective state, the primary and secondary legislation of international organizations that the state is member of, as well as the application of such national or international rules by the judiciary of the state or by other competent international bodies and tribunals. Conversely, "foreign" law comprises all national and international rules that do not form part of "domestic" law. What is more, "foreign law" should not be perceived as a barren set of rules. Rather,

> [It] must be understood widely [as including] all information relating to the legal problems that must be resolved for deciding the pending case, such as applicable statutes, their interpretation by the courts and the application of the law of the state outside the forum.[12]

Having clarified the meaning of these fundamental concepts of international civil procedure and conflict-of-laws, we can delve into the interplay between the CESL and the various approaches on the legal treatment of foreign law.

III. CESL: *LEX FORI* OR *LEX ALIENA*?

This section enquires whether the CESL was to have been applied as domestic or as foreign law, and, if such distinction needs to be made, whether the respective classification of

[11] *See* Hans Ulrich Jessurun D' Oliveira, *Foreign Law and International Legal Cooperation*, *in* HAGUE-ZAGREB ESSAYS 2: PRODUCT LIABILITY, ROAD TRANSPORT, FOREIGN LAW 216, 222 (T.M.C. Asser Institute ed., 1978) ("There can naturally be no question of the judge being familiar with the whole world's rules of law. [. . .] [T]herefore, the maxim [*jura novit curia*] is obviously a pious fiction. Hence the disagreement is really about the operative norm: should the judge, *ex officio*, immerse himself so deeply in foreign law that he is at all times capable of deli- [sic] delivering a judgment based upon it?"). *See also* Masanori Kawano, *Court Responsibilities for Determining Foreign Law*, *in* INTERNATIONAL CONTRACT LITIGATION, ARBITRATION AND JUDICIAL RESPONSIBILITY IN TRANSNATIONAL DISPUTES 221, 222 (Rolf Stürner & Masanori Kawano eds., 2011) ("As far as the *domestic cases are concerned* [emphasis in the original] investigating and determining the appropriate legal rule, which applies to the particular case is commonly regarded as one of the most important responsibilities of the court. They are investigated *ex officio*.").

[12] Kawano, *supra* note 11 at 221.

the CESL as such would have affected the applicability of the instrument. In this pursuit, the following paragraphs explore the legislative basis of the CESL and the uniform content of its provisions.[13] These preliminary findings are then compared to the legal treatment of other relevant instruments, namely the conflict-of-laws rules enshrined in the Rome Regulations and the uniform sales law regime of the CISG.[14]

A. The Nature of the CESL as EU Law

As already noted, when the private international law rules of the forum point to the laws of another state, the identified foreign law must be applied in its entirety, irrespective of the source of its rules—be it a statute or binding case law, rules of a regional or international organization, or international law and customs. Therefore, when private international law points to the law of an EU Member State, EU law is called into application as part of the applicable state law. The complication under such scenarios is that EU law is not "foreign" for other Member State fora. This observation begs the question of whether national legislation based on or implementing EU law should be treated as domestic or foreign law by courts located in other Member States. In answering this question, it is critical to examine the nature and effects of the two key-legal instruments of the European Union, namely Directives and Regulations.[15]

Through Directives, the EU legislator identifies the result that must be achieved, but allows EU Member States to choose the form and method of transposing the Directive into their respective legal orders.[16] As a consequence, this piece of EU law is, necessarily, reformulated into national legal acts, having been "baptized," in the first place, in national legislative procedures. This leeway enjoyed by Member States in selecting the means of integrating EU law into national law, together with the minimum harmonization of numerous Directives, have resulted in legal diversity across the Single Market. Hence, the regulatory differences that ensued between the various Member States justify any "domestic *vs*. foreign law" enquiries.

[13] *See* analysis in *infra* Section III(A).
[14] *See* analysis in *infra* Section III(B).
[15] TFEU art. 288.
[16] TFEU art. 288(3) ("A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.").

In stark contrast to Directives, the identical text of Regulations—albeit drafted in 24 authoritative versions[17]—and the requirement for autonomous interpretation of the rules enshrined therein negate *prima facie* this "domestic law *vs.* foreign law" conundrum.[18] Specifically, since the court is presumed to know the content of the *lex fori*, including Regulations, it follows logically that the court knows also that part of foreign law, which has been unified under the Regulations.[19] Besides, TFEU art. 288 refers to *one directly applicable* Regulation across the EU.[20] Therefore, in the context of this study, since EU Member State courts would have been presumed to know the content of the CESL as it would have formed part of their *lex fori*, they were to have been presumed to be cognizant also of any "foreign" CESL—when the instrument would have been applicable as part of another Member State legal order. Notwithstanding the superficial accordance of this argument with the letter of TFEU art. 288, and the practical advantages of adopting this interpretation, this position is doctrinally flawed and has to be rejected on two grounds, namely: *i*. the legislative basis of the CESL, and *ii*. the introduction of non-uniform rules in the . . . uniform law instrument.

1. The legislative basis of the CESL

The decision of the EU Commission to enact the CESL on the competence basis of TFEU art. 114 alone, instead of TFEU art. 352 or together with TFEU art. 81,[21] is directly relevant to the "content-of-laws" enquiry examined herein. Whereas TFEU art. 81 is the sole legal basis for conflict-of-laws matters and TFEU art. 352 for the creation of a pan-European legal regime,[22] TFEU art. 114 allows only for the approximation of national legislations.[23] As

[17] As many as the official languages of the EU. *See generally* TRANSLATING THE DCFR AND DRAFTING THE CESL: A PRAGMATIC PERSPECTIVE, (Barbara Pasa & Lucia Morra eds., 2014).
[18] CESL Anx. I, art. 4 ("The Common European Sales Law is to be interpreted autonomously and in accordance with its objectives and the principles underlying it.").
[19] *Cf.* EU Directives, which do not unify, but merely harmonize legal regimes.
[20] TFEU art. 288(2) ("A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."). *See* DAMIAN CHALMERS, GARETH DAVIES & GIORGIO MONTI, EUROPEAN UNION LAW: TEXT AND MATERIALS 112 (3rd ed. 2014); AIDAN O'NEILL, EU LAW FOR UK LAWYERS 36 (2011) ("The 'direct applicability' of EU regulations means that no national legislation is required to implement the regulations to give them legal effect in the domestic legal systems of the Member States.").
[21] Note that, in the context of EU contract law initiatives, TFEU art. 81 requires the cumulative application of a substantive competence basis.
[22] *See e.g.* Case C-436/03, *Parliament* v *Council*, 2006 E.C.R. I-03733, ¶ 37; Case C-377/98, *Netherlands* v *Parliament and Commission*, 2001 E.C.R. I-07079, ¶ 25.
[23] *See* Daniel-Erasmus Khan & Dominik Eisenhut, *Article 114 [Approximation of Laws in the Internal Market]*, *in* EUROPEAN UNION TREATIES: TREATY ON EUROPEAN UNION; TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION 554, 557–558 (Rudolf Geiger, Daniel-Erasmus Khan, & Markus Kotzur eds., 2015) ("[A]pproximation measures can comprise everything from measures merely ending individual outliers in national legislation[s] compared to the average member State's standard, to full blown harmonisation of the respective field of law.").

a result, the enactment of the CESL under TFEU art. 114 would have brought closer the sales law regimes of the Member States, but would not have accumulated all 28 legal orders under a common sales law umbrella. Let us look closer at the different legal effects of the three EU competence bases.

Although forming an integral part of all Member State legal orders, an instrument promulgated under either TFEU art. 352 or TFEU arts. 114 *plus* 81 is "elevated" on a separate supra-national European level that exists in addition to the 28 national laws.[24] Hence, any reference to a pan-European regime or to an additional EU regime embedded in the EU conflicts rules should be made to *one* set of rules, constituting *one* supra-national legal order, which lies over and above the distinct legal orders of the Member States. As a result, when EU Member State courts are called to apply the rules of such overarching regimes, they should do so *ex officio*, because they will be applying a truly European instrument that may be described as neither domestic nor foreign law.[25]

Conversely, the approximation of national legislations under TFEU art. 114 alone preserves the dividing lines between the various legal orders. A TFEU art. 114 instrument merely co-ordinates national legal systems by introducing 28 identical, albeit distinct, national

[24] This should not be confused with the constitutional or public international law characterization of the EU as a separate "legal order." On this point, see e.g. Joint Cases 6 & 9/90, *Francovich and Others* v *Italian Republic*, 1991 E.C.R. I-05357, ¶ 31; Case 6/64, *Costa* v *E.N.E.L.*, 1964 E.C.R. 585, 593; Case 26-62, *Van Gend en Loos* v *Nederlandse Administratis der Belastingen*, 1963 E.C.R. 1, 12; Case 13/61, *Bosch* v *van Rijn*, 1962 E.C.R. 45, 49–50. *See also* C.W.A. Timmermans, *General Aspects of the European Union and the European Communities*, *in* THE LAW OF THE EUROPEAN UNION AND THE EUROPEAN COMMUNITIES: WITH REFERENCE TO CHANGES TO BE MADE BY THE LISBON TREATY 53, 73–75 (P.J.G. Kapteyn *et al*. eds., 4th revised ed. 2008).
Referring to TFEU art. 352, see e.g. European Foundation (Proposal for a Council Regulation on the Statute for a European Foundation (*Fundatio Europaea*) COM (2012) 35 final (Feb. 8, 2012).
Referring to EC Treaty art. 308 (now TFEU art. 352), see e.g. European Private Company (Proposal for a Council Regulation on the Statute for a European Private Company (*Societas Privata Europaea*) COM (2008) 396 final (Jun. 25, 2008); European Cooperative Society (Council Regulation 1435/2003 of 22 Jul. 2003 on the Statute for a European Cooperative Society (*Societas Cooperativa Europaea*) 2003 O.J. (L207) 1; European Company (Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European Company (*Societas Europaea*) 2001 O.J. (L294) 1; Community Trade Mark (Council Regulation 207/2009 of Feb. 26, 2009, on the Community Trade Mark (Codified Version), 2009 O.J. (L78) 1; Community Designs (Council Regulation 6/2002 of Dec. 12, 2001, on Community Designs 2002 O.J. (L003) 1; Proposal for a Community Patent (Proposal for a Council Regulation on the Community Patent, COM (2000) 412 final (Aug. 1, 2000).
Referring to EEC Treaty art. 235 (now TFEU art. 352), see e.g. Community Plant Variety Rights (Council Regulation 2100/94 of Jul. 27, 1994, on Community Plant Variety Rights, 1994 O.J. (L227) 1; European Economic Interest Grouping (Council Regulation 2137/85 of Jul. 25, 1985, on the European Economic Interest Grouping (EEIG) 1985 O.J. (L199) 1.

[25] *See* ERIC GASTINEL & MARK MILFORD, THE LEGAL ASPECTS OF THE COMMUNITY TRADE MARK 5 (2001) ("[A] CTM is not an instrument of the domestic law of any Member State."); Gordian N. Hasselblatt, *Article 1: Community Trade Mark*, *in* COMMUNITY TRADE MARK REGULATION (EC) NO 207/2009: A COMMENTARY 4, 28 (Gordian N. Hasselblatt ed., 2015) ("The CTMR . . . applies independently of any national system.").

sales law regimes.[26] Thus, the CESL Regulation, as envisaged in the EU Commission's proposal, would merely have introduced, *singulo actu*, uniform substantive sales law rules in all Member States.[27] That would have amounted to the creation of 28 CESL.[MS], such as CESL.Fr, CESL.Gr, CESL.Cy, CESL.It., etc.[28] Since the conflict-of-laws rules of the forum would point to one of the 28 approximated laws, but not to a pan-European regime, depending on the state of the *lex causae*, the rules of the applicable CESL would have been coloured as either domestic or foreign law. Thus, EU Member State courts might not have taken judicial notice of the European sales law instrument, albeit the latter would stem from an EU Regulation.

Granted, distinguishing the legal effects of TFEU art. 114 on the one hand and TFEU arts. 352 or 114 plus 81 on the other might be discredited as "legal fiction," because the uniform sales law rules of CESL Anx. I would have remained the same irrespective of the legislative basis adopted. In addition, thanks to the identical content of the parallel sales regimes, the CESL rules would have been readily ascertainable by all courts located in the EU. Besides, the instrument would have been translated in all 24 official languages of the EU, and the Member States would have been required to communicate their respective "open" terms to the EU Commission,[29] which would have made them accessible to the public on official and other academic legal databases.[30] Still, the national procedures of ascertaining and applying foreign law would have remained unaffected by the enactment of the CESL. Prescribing different effects to the instrument would, firstly, have compromised the doctrinal integrity of TFEU art. 114 as legal competence basis of the EU, and, secondly, would have extended the effects of the instrument to conflict-of-laws, that is, to the scope of the *iura novit curia*

[26] *See* Gary Low, *Unitas via Diversitas: Can the Common European Sales Law Harmonize through Diversity?*, 19 MAASTRICHT J. EUR. & COMP. L. 132, 145 (2012) ("The CESL as a second national regime means that it would, as it were, simply be English or German law *plus*.").
[27] Simon Whittaker, *The Proposed 'Common European Sales Law': Legal Framework and the Agreement of the Parties*, 75 MOD. L. REV. 578, 588 (2012). *See* LUCINDA MILLER, THE EMERGENCE OF EU CONTRACT LAW: EXPLORING EUROPEANIZATION 144 (2011).
[28] *Accord* Maren Heidemann, *European Private Law at the Crossroads: The Proposed European Sales Law*, 20 E. R. P. L. 1119, 1127 (2012).
[29] For the CESL "open" terms, see analysis in *infra* Section III(A)(2).
[30] CESL recital 34, and CESL Reg., arts. 10, 14. European Parliament Legislative Resolution of 26 February 2014 on the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, P7_TA(2014)0159, Amendments 254–256 (introducing art. 186a). *See also* Council Decision 2001/470/EC of 28 May 2001, Establishing a European Judicial Network in Civil and Commercial Matters, 2001 O.J. (L174) 25, and Decision 568/2009/EC of the European Parliament and of the Council of 18 June 2009, Amending Council Decision 2001/470/EC, Establishing a European Judicial Network in Civil and Commercial Matters, 2009 O.J. (L168) 35; European E-Justice portal, *accessible at* https://e-justice.europa.eu/ home.do?plang=en&action=home.

principle, which lies clearly beyond the matters contemplated by the EU legislator.[31] For these reasons, the unique structure of the CESL as a TFEU art. 114 parallel legal regime that is triggered by virtue of an opt-in agreement between the parties necessitates a rigid step-by-step approach to the application of the instrument.

TABLE I – EU LEGISLATIVE BASES FOR THE CESL					
CESL & TFEU ART. 114					
CESL UK version	CESL German version	CESL Italian version	CESL Spanish version	CESL French version	CESL [MS] version
EU MS legal order (UK)	EU MS legal order (Germany)	EU MS legal order (Italy)	EU MS legal order (Spain)	EU MS legal order (France)	EU MS legal order (…)
CESL & TFEU ARTS. 352 / 114 & 81					
		Supra-national CESL			
EU MS legal order (UK)	EU MS legal order (Germany)	EU MS legal order (Italy)	EU MS legal order (Spain)	EU MS legal order (France)	EU MS legal order (…)

2. A non-uniform . . . uniform sales law regime?

Notwithstanding the high degree of uniformity achieved under the CESL, a series of important issues fall outside the scope of the instrument. What is more, a good number of CESL provisions were, deliberately, left "open," as the EU legislator decided to provide the Member States with the latitude to adapt the CESL to their own legal system.[32] Depending on the extent of freedom enjoyed by the national legislator, these "open" rules may be distinguished further in "limited" and "unlimited" rules.

"Limited" open rules provide Member States with a number of alternative regulatory options. States may deviate from the default position under the instrument, albeit only in the fashion prescribed in the CESL. In this respect, "limited" open rules are comparable to reservations under multilateral international treaties.[33] Such rules are enshrined in

[31] *Cf.* TFEU art. 81.
[32] The CESL "open" provisions should not be confused with "open terms," such as reasonableness, good faith and fair dealing, etc., which must be interpreted by the adjudicatory authority on a case-by-case basis. For the latter type of terms, see Gerhard Dannemann, *The CESL as Optional Sales Law: Interactions with English and German Law*, *in* THE COMMON EUROPEAN SALES LAW IN CONTEXT: INTERACTIONS WITH ENGLISH AND GERMAN LAW 708, 718–721 (Gerhard Dannemann & Stefan Vogenauer eds., 2013).
[33] 1969 Vienna Conv., art. 19(b).

CESL Reg., arts. 13(a) and 13(b), which allow the expansion of the instrument's application to non-cross-border sale of goods and to B2B contracts respectively.[34] "Unlimited" open rules either allow or require Member States to enact legislation on certain issues, without delineating the content of the national rules.[35] These national provisions were to have been communicated to the EU Commission. Such an "unlimited" open rule is enshrined in CESL Reg., art. 10, which requires Member States to "lay down penalties for breaches by traders in relations with consumers of the requirements set out in [CESL Reg.,] Articles 8 and 9 . . . ."

It follows from the above analysis that, although the origins of the individual parallel legal regimes would have been traced in a single Regulation, the content of the CESL would, inevitably, have differed from state to state. Put differently, there could be as many a version of the CESL as the EU Member States. Therefore, since the enactment of the CESL would have unified neither the ordinary nor the parallel sales law regimes of the Member States, it would have been crucial to determine which state's regime would govern the particular contract in dispute.

3. CESL: Alien at home

The foregoing paragraphs have shown that the selection of TFEU art. 114 as the legislative basis of the CESL, together with the inclusion of limited and unlimited "open" terms in the instrument, preserved the "domestic *vs*. foreign law" enquiry in the context of CESL's application. Thus, depending on the applicable law and the forum of the dispute, the CESL could have been triggered as foreign law before courts of a Member State—truly an alien at home.[36] In light of this surprising result, it is apposite to explore the reasons that this "domestic *vs*. foreign law" enquiry does not arise in the context of other EU Regulations or international uniform law instruments governing cross-border situations, such as the Rome Regulations and the renowned 1980 Vienna Sales Convention (CISG). A closer look at

[34] For the legal effects of CESL Reg., art. 13, see analysis in *supra* Parts I(II)(A) and I(III)(C).
[35] *See* Christiane Wenderhost, *CESL Regulation, Article 10*, *in* COMMON EUROPEAN SALES LAW (CESL): COMMENTARY 65, 65 (Reiner Schulze ed., 2012) ("There is no sufficient justification for leaving open the important question of what follows when a trader fails to comply with arts 8 and 9 to the Member States. It will cause the Member States additional costs and administrative burden and increase divergence across the EU as well as complexity of the legal situation. The EU legislator should have dealt with the matter in the RegCESL (P) itself.").
[36] Whittaker, *supra* note 27 at 591–592; Simon Whittaker, *The Internal Relationships of EU Consumer Contract Laws: Unfair Contract Terms, Unfair Commercial Practices and CESL*, *in* THE MAKING OF EUROPEAN PRIVATE LAW: WHY, HOW, WHAT, WHO 117, 123 (Luigi Moccia ed., 2013).

the *rationae materiae* and the application methodology of these instruments elucidates this matter.

B. Any Lessons to Be Learned from the Rome Regulations or the CISG?

The Rome Regulations introduce, *singulo actu*, conflict-of-laws rules into the legal orders of the Member States. Since the applicable conflicts provisions are always found in the *lex fori*, and considering that any "domestic *vs.* foreign law" enquiries arise only *after* the application of the conflicts rules, it is clear that no such enquiry can arise *before* or *in* the application of the Rome Regulations. Conversely, the CESL comprises substantive law rules, which were to have been triggered after the determination of the law applicable to the international sale of goods contract. Hence, this latent difference of the CESL and the Rome Regulations explains the relevance of the enquiry to the application of the former, but not to the application of the latter instruments.

In like manner, no "foreign law" enquiry arises—at least, as a general proposition—under the CISG 1980. Although the Vienna Sales Convention sets forth substantive law provisions, the unique application methodology of international uniform substantive law instruments mandates a deviation from the general rule. As shown later in this study, when the forum of the dispute is located in a CISG contracting state, the applicability of the Vienna Sales Convention should be explored *before* the application of the conflict-of-laws rules of the forum.[37] Hence, so long as the conflicts regime has not been triggered, the Vienna Sales Convention applies as an integral part of the forum's domestic law.[38] That would be the case

[37] *See* analysis in *infra* Part IV(III)(B).

[38] Oberster Gerichtshof [OGH] [Supreme Court] Nov. 8, 2005, Docket No. 4 Ob 179/05k, *translation available at* http://cisgw3.law.pace.edu/cases/051108a3.html (Austria); Trib. di Padova, Jan. 11, 2005, *translation available at* http://cisgw3.law.pace.edu/cases/050111i3.html (It.). *See also Roder Zelt- und Hallenkonstruktionen GmbH* v *Rosedown Park Pty Ltd* (1995) 57 FCR 216, 222 ("The Convention is not to be treated as a foreign law which requires proof as a fact.") (Austl.). *Accord*—at least with regard to the Convention's applicability under CISG art. 1(1)(a): MICHAEL G. BRIDGE, THE INTERNATIONAL SALE OF GOODS 564 (4th ed. 2018); JAN DALHUISEN, DALHUISEN ON TRANSNATIONAL COMPARATIVE, COMMERCIAL, FINANCIAL AND TRADE LAW, vol. 2 at 234 (6th ed. 2016); Peter Schlechtriem, *Article 1*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 23, 34 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2nd (English) ed. 2005); Ingeborg Schwenzer & Pascal Hachem, *Introduction to Article 1-6*, *in* SCHLECHTRIEM & SCHWENZER COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 17, 18–19 (Ingeborg Schwenzer ed., 4th ed. 2016); Ingeborg Schwenzer & Pascal Hachem, *Article 1*, *in* SCHLECHTRIEM & SCHWENZER COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 27, 41 (Ingeborg Schwenzer ed., 4th ed. 2016). *See also* BRIDGE, *supra* note at 565–566 ("In . . . acknowledging that the CISG is not foreign law to be proved as fact in the forum, but may instead be the subject of judicial notice, this approach has the merit of promoting the application of the CISG even if counsel are reluctant to plead it."). For an overview of the diverging positions in jurisprudence and case law on the effects of (non-)pleading the CISG, see LISA SPAGNOLO, CISG EXCLUSION AND LEGAL EFFICIENCY 273 *et seq*. (2014). *Cf.* Malcolm Clarke, *Transport by Rail and by Road*,

under CISG art. 1(1)(a), as well as under art. 1(1)(b),[39] which merely requires a theoretical conflict-of-laws exercise—not a fully-fledged application of private international law.[40]

Granted, a "foreign law" enquiry would be relevant, when the CISG has been identified as the regime governing the international sale of goods contract *after* the application of the conflicts rules of the forum. That would be the case when either the forum state has not ratified, acceded to, or approved the CISG,[41] or the forum is located in a CISG Contracting State that has made the reservation of CISG art. 95.[42] Under either scenario, if private international law points to the laws of a CISG Contracting State, the CISG applies as part of the foreign *lex contractus* by virtue of the principle *lex specialis derogat lege generali*—not CISG art. 1(1)(b).[43] Besides, the criteria of CISG arts. 1(1)(a) and 1(1)(b) do not bind

III.25 *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 1, 2 (Kurt Lipstein ed., 1994) ("If a contract of carriage falls within the scope of one of the uniform regimes to which the forum is party, the forum commonly applies the regime as part of the *lex fori*.").

[39] Franco Ferrari, *The CISG's Sphere of Application: Articles 1-3 and 10*, *in* THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 21, 40–43 (Franco Ferrari, Harry Flechtner, & Ronald A. Brand eds., 2004); ROY GOODE, HERBERT KRONKE & EWAN MCKENDRICK, TRANSNATIONAL COMMERCIAL LAW: TEXTS, CASES AND MATERIALS 225 (2nd ed. 2015). *Accord* CISG Advisory Council [CISG AC], *Opinion No. 15, Reservations under Articles 95 and 96 CISG*. Rapporteur: Ulrich G. Schroeter 14 (2013). *But see* MICHEL PELICHET, LA VENTE INTERNATIONALE DE MARCHANDISES ET LE CONFLIT DE LOIS, 201 RECUEIL DES COURS/COLLECTED COURSES 9, 36 (1987) (arguing that under CISG art. 1(1)(a), the Convention applies as a codified version of the *lex mercatoria*, rather than as part of national law). For the nature and function of CISG arts. 1(1)(a) and 1(1(b), see analysis in *infra* Part IV(III)(A).

[40] JAMES J. FAWCETT, JONATHAN M. HARRIS & MICHAEL BRIDGE, INTERNATIONAL SALE OF GOODS IN THE CONFLICT OF LAWS 916–917 (2005); Thomas Kadner Graziano, *The CISG Before the Courts of Non-Contracting States? Take Foreign Sales Law as You Find It*, 13 Y. B. PRIV. INT'L L. 165, 167 (2011) ("When applied according to Art. 1(1)(b) of the CISG, the forum's PIL rules do not fulfil their traditional role to make a choice between different national laws but are applied as part of the rules determining whether the case falls within the *scope of application* [emphasis in the original] of the CISG.").

[41] DALHUISEN, *supra* note 38 at 235; Filip De Ly, *Opting Out: Some Observations on the Occasion of the CISG's 25th Anniversary*, *in* QUO VADIS CISG? CELEBRATING THE 25TH ANNIVERSARY OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 25, 26 (Franco Ferrari ed., 2005); FRANCO FERRARI, CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: APPLICABILITY AND APPLICATIONS OF THE 1980 UNITED NATIONS SALES CONVENTION 91–92 (2012); Harry M. Flechtner, *The CISG's Impact on International Unification Efforts: The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law*, *in* THE 1980 UNIFORM SALES LAW: OLD ISSUES REVISITED IN THE LIGHT OF RECENT EXPERIENCES (VERONA CONFERENCE 2003) 169, 170 (Franco Ferrari ed., 2003); Schlechtriem, *supra* note 38 at 34; Schwenzer and Hachem, *supra* note 38 at 39.

[42] CISG art. 95 ("Any State may declare . . . that it will not be bound by subparagraph (1)(b) of article 1 of this Convention."). Six states have made the art. 95 reservation, among which Slovakia. With regard to the CISG art. 95 reservation and the (in-)applicability of the CISG, a handful of different scenarios need to be distinguished. For correct and elucidating analyses, see FERRARI, *supra* note 41 at 87–92; Marco Torsello, *Reservations to International Uniform Commercial Law Conventions*, 5 UNIF. L. REV. 85, 108–110 (2000). *See also* CISG Advisory Council, *supra* note 39 (exploring a handful of possible scenarios). *Cf.* LPISG art. 36 *bis*.

[43] FERRARI, *supra* note 41 at 91–92 (with further references to legal literature and case law); Graziano, *supra* note 40 at 176. *See e.g. Kingspan Environmental Ltd* v *Borealis A/S* [2012] EWHC 1147 (Comm), ¶ 617 (Eng.); Rechtbank van Koophandel [Kh.] [Commercial Court] Kortrijk, Oct. 6, 1997, *translation available at* http://cisgw3.law.pace.edu/cases/971006b1.html (Belg.); Rechtbank van Koophandel [Kh.] [Commercial Court] Kortrijk, Jun. 27, 1997, *available at* http://unilex.info/cisg/case/331 (Belg.); Rechtbank van Koophandel [Kh.] [Commercial Court] Kortrijk, Jan. 6, 1997, *available at* http://unilex.info/cisg/case/334 (Belg.); Rechtbank van Koophandel [Kh.] [Commercial Court] Hasselt, Oct. 9, 1996, *available at* http://unilex.info/cisg/case/264 (Belg.);

non-Contracting States.[44] Hence, stripped of its international uniform law application methodology, the instrument yields to the conflicts provisions of the forum, which, in turn, may apply domestic and foreign laws differently.

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Having showcased the relevance of the "domestic *vs*. foreign law" enquiry to the application of the proposed CESL, the following paragraphs focus on the differentiated legal treatment of foreign law in the EU and explore the effects of the various approaches to the content-of-laws enquiry on the applicability of the EU sales law instrument.

IV. THE LEGAL TREATMENT OF FOREIGN LAW IN THE EU

Given the extensive unification of both private international law and substantive sales law in the EU, one would expect that, *ceteris paribus*, the very same rules would govern all

Rechtbank van Koophandel [Kh.] [Commercial Court] Hasselt, Nov. 8, 1995, *available at* http://unilex.info/cisg/case/265 (Belg.); Rechtbank van Koophandel [Kh.] [Commercial Court] Hasselt, Oct. 18, 1995, *available at* http://unilex.info/cisg/case/266 (Belg.); Tribunal de Commerce [Comm.] [Commercial Court] Nivelles, Sep. 19, 1995, *translation available at* http://cisgw3.law.pace.edu/cases/950919b1.html (Belg.); Rechtbank van Koophandel [Kh.] [Commercial Court] Hasselt, Mar. 1, 1995, *available at* http://unilex.info/cisg/case/269 (Belg.); Rechtbank van Koophandel [Kh.] [Commercial Court] Hasselt, Jan. 24, 1995, *available at* http://unilex.info/cisg/case/261 (Belg.); Rechtbank van Koophandel [Kh.] [Commercial Court] Hasselt, Mar. 16, 1994, *available at* http://unilex.info/cisg/case/267 (Belg.); Rechtbank van Koophandel [Kh.] [Commercial Court] Hasselt, Feb. 23, 1994, *available at* http://unilex.info/cisg/case/268 (Belg.); Tribunal de Commerce [Comm.] [Commercial Court] Bruxelles, 11e ch., Nov. 13, 1992, *translation available at* http://cisgw3.law.pace.edu/cases/921113b1.html (Belg.); Rb. Alkmaar, Feb. 8, 1990 (*Cofacrédit S.A.* v. *Import- en Exportmaatschappij Renza BV*), *available at* http://unilex.info/cisg/case/31 (Neth.).

With reference—erroneously, in this author's opinion—to CISG art. 1(1)(b), presumably, as allocation/demarcating rule of the applicable foreign law, see e.g. Rb. Amsterdam, Dec. 7, 1994, NIPR 1995, 196 m.nt. Orobio de Castro (*Hans Hagemann GmbH & Co* v. *Bell Rain Regenkleding Industrie Bv*) (Neth.); Tribunal de Commerce [Comm.] [Commercial Court] Bruxelles, 7e ch., Oct. 5, 1994, *translation available at* http://cisgw3.law.pace.edu/cases/941005b1.html (Belg.); Rb. Amsterdam, Oct. 5, 1994, NIPR 1995, 195 m.nt. Van den Bergh (*Tuzzi Trend Tex Fashion GmbH* v. *W.J.M. Keijzer-Somers*) (Neth.); Rb. Roermond, Dec. 19, 1991 (*Fallini Stefano & Co. s.n.c.* v. *Foodik BV*), *available at* http://unilex.info/cisg/case/34 (Neth.); Amtsgericht Ludwigsburg [AG] [Local Court] Dec. 21, 1990, *translation available at* http://cisgw3.law.pace.edu/cases/901221g1.html (Ger.); Rb. Dordrecht, Nov. 21, 1990 (*E.I.F. S.A.* v. *Factron BV*), *available at* http://unilex.info/cisg/case/32 (Neth.); Landgericht [LG] [Regional Court] Sep. 26, 1990, *translation available at* http://cisgw3.law.pace.edu/cases/900926g1.html (Ger.); Landgeircht [LG] [Regional Court] Jul. 20, 1990, *available at* http://www.cisg-online.ch/content/api/cisg/display.cfm?test=241 (Ger.); Amtsgericht Oldenburg in Holstein [AG] [Local Court] Apr. 24, 1990, *translation available at* http://cisgw3.law.pace.edu/cases/900424g1.html (Ger.); Landgericht [LG] [Regional Court] Apr. 3, 1990, *available at* http://unilex.info/cisg/case/24 (Ger.); Oberlandesgericht [OLG] [Higher Regional Court] Feb. 23, 1990, *available at* http://unilex.info/cisg/case/22 (Ger.); Landgericht [LG] [Regional Court] Aug. 31, 1989, *translation available at* http://cisgw3.law.pace.edu/cases/890831g1.html (Ger.); Landgericht München [LG] [Regional Court] Jun. 3, 1989, *translation available at* http://cisgw3.law.pace.edu/cases/890703g1.html (Ger.). *See also* Richeramt Laufen des Kantons Berne [District Court of Laufen, Canton Berne] May 7, 1993, *translation available at* http://cisgw3.law.pace.edu/cases/930507s1.html (Switz.).

[44] *See* analysis in *infra* Part IV(VII).

international sales contracts across the Single Market. This section showcases, however, that, contrary to such expectations, the drafting of the CESL as a second parallel legal regime and the shattered approach of the EU Member States to the application of foreign law could affect the legal framework of the dispute, thus opening the back-door to forum shopping.

To begin with, the initiatives for the unification of the various EU Member States' regimes on the application of foreign law have been rather anaemic.[45] Following the attempts of the European Parliament to introduce the *iura novit curia* principle into the Rome II Regulation,[46] no other initiatives have been undertaken towards the unification or, at least, the

[45] This paucity of initiatives pertaining to the application of foreign law is in stark contrast to the momentum built with regard to projects on the *facilitation of access to* the content of foreign law. Notable examples of special instruments on the access to foreign law are the Convention on Legal Assistance and Legal Relations in Civil, Family, and Criminal Matters (Minsk, 1993), *available at* https://www.unhcr.org/en-us/protection/migration/4de4edc69/convention-legal-aid-legal-relations-civil-family-criminal-cases-adopted.html; Inter-American Convention on Proof of and Information on Foreign Law (Montevideo, 1979), O.A.S.T.S. 53; European Convention on Information on Foreign Law (London, 1968), E.T.S. 62, together with the Additional Protocol to the European Convention on Information on Foreign Law (London, 1978), E.T.S. 97. *See also* Institute of International Law [IIL], *Connaissance des Lois Étrangères*, Resolution, Session of Heidelberg (Sep. 8, 1887). For recommendations and means of accessing the content of foreign law, see Philippe Lortie & Maja Groff, *The Missing Link between Determining the Law Applicable and the Application of Foreign Law: Building on the Results of the Joint Conference on Access to Foreign Law in Civil and Commercial Matters (Brussels, 15-17 February 2012)*, *in* A COMMITMENT TO PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOUR OF HANS VAN LOON 325 (The Permanent Bureau of the Hague Conference on Private International Law ed., 2013). In the EU, *see* Council Regulation 1259/2010 of Dec. 20, 2010, Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation (Rome III), 2010 O.J. (L343) 10, 11, recital 14 ("Where the law of another Member State is designated, the network created by Council Decision 2001/470/EC of May 28, 2001 (EU) establishing a European Judicial Network in civil and commercial matters, could play a part in assisting the courts with regard to the content of foreign law."). Note also European Commission and the Hague Conference on Private International Law, *Access to Foreign Law in Civil and Commercial Matters: Conclusions and Recommendations* (2012), *available at* https://assets.hcch.net/docs/b093f152-a4b3-4530-949e-65c1bfc9cda1.pdf ("The conference confirms that any global instrument in this field should focus on the facilitation of access to foreign law and should not attempt to harmonise the status of foreign law in national procedures."). Lastly, due consideration should be given to the Memorandum of Understanding Between the Chief Justice of New South Wales and the Chief Judge of the State of New York on References of Questions of Law (Dec. 20, 2010), *available at* http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/pages/538, and the Memorandum of Understanding Between the Supreme Court of Singapore and the Supreme Court of New South Wales on References of Questions of Law (Sept. 14, 2010), *available at* http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/pages/529. *Cf.* Uniform Certifications of Questions of Law Act, 95 U. L. A. (1995) (particularly § 2–3, which allow requests of information on U.S. State law from Canadian and Mexican courts).

[46] Position of the European Parliament adopted at First Reading on 6 Jul. 2005 with a view to the Adoption of Regulation (EC) No .../2005 of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations ("Rome II"), 2006 O.J. (C157E) 371 (Amendment 43, introducing art. 13); Position of the European Parliament adopted at Second Reading on 18 January 2007 with a view to the Adoption of Regulation (EC) No .../2007 of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations ("ROME II"), 2007 O.J. (CE244) 194 (Amendment 13, introducing recital 37). It should be noted that the effects of recital 37 ("*As in the Rome Convention* [emphasis added], the principle of '*iura novit curia*' applies") would extend to the 1980 Rome Convention, and, presumably, to all other EU conflict-of-laws instruments as well. For the rejection of the proposal by the EU Commission, see Amended Proposal for a European Parliament and Council Regulation on the Law Applicable to Non-Contractual Obligations ("Rome II"), COM (2006) 83 final (Feb. 21, 2006), at 7; Commission Opinion on the European Parliament's Amendments to the Council Common Position on the Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("ROME II") amending the

harmonization of the legal treatment of foreign law in the EU. Sole exceptions were the Valencia report,[47] which merely restates the approaches adopted by the EU Member States, and the accompanying Madrid Principles.[48]

Similarly, on the global level, all initiatives have been discontinued—at least for the foreseeable future. The *Report on the Meeting: Feasibility Study on the Treatment of Foreign Law of the Hague Conference on Private International Law* demonstrates this stalemate:

> [The] experts concluded that *there should be no attempt* [emphasis added] to comprehensively harmonise the different approaches to the treatment of foreign law, *as there is no likelihood of success for harmonisation* [emphasis added].[49]

As a consequence, the ascertainment of the content and the application of foreign law remains largely inconsistent in the Member States. Such inconsistencies nullify the legal certainty and predictability achieved under the EU conflicts rules,[50] and, as shown later in this Part, could also jeopardize the uniform application of European private law instruments that have been promulgated as second parallel legal regimes. In light of the foregoing, it is clear that this niche topic in private international law and international civil procedure arises as a factor of paramount importance in levelling the playing field in the Single Market.

Proposal of the Commission, COM (2007) 126 final (Mar. 14, 2007), at 5 ("[The legal treatment of foreign law] is a horizontal issue that should be addressed in a broader context."). Moreover, it is noteworthy that the very same reasoning, *i.e*. lack of "requisite structures" in the EU Member States for the *ex officio* application of foreign law, was used for the justification of both rejections. For the rejection of the proposal by the EU Council, see Common Position (EC) No 22/2006 of 25 September 2006 adopted by the Council with a view to Adopting Regulation of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations (ROME II), 2006 O.J. (C289E) 68, 80 ("The council rejects these amendments [(Amendments 42, 43)] since this question [(*ex officio* application of foreign law)] should be tackled in a different context.").

[47] General Report on the Application of Foreign Law by Judicial and Non-Judicial Authorities in Europe (Project JLS/CJ/2007-1/03), Rapporteur-General: Carlos Esplugues, Drafting Team: José Luis Iglesias, Guillermo Palao, Rosario Espinosa, Carmen Azcárraga, in Esplugues C. *et al*. (eds), *Application of Foreign Law* (Sellier European Law Publishers 2011). *Cf.* Rome II Reg., art. 30(1)(i).

[48] Principles for a Future EU Regulation on the Application of Foreign Law ("The Madrid Principles"), Prepared by the Members of the Team "European Union Action Grant Project - Civil Justice JLS/CJ/2007-1/03" (Madrid, Colegio Nacional de Registradores de España, February 2010), in Esplugues C. *et al*. (eds), *Application of Foreign Law* (Sellier European Law Publishers 2011).

[49] Hague Conference on Private International Law, Feasibility Study on the Treatment of Foreign Law: Report on the Meeting of 23-24 February 2007, prepared by the Permanent Bureau, Preliminary Document No. 21 A of March 2007 for the attention of the Council of April 2007 on General Affairs and Policy of the Conference, at 3, *available at* https://www.hcch.net/upload/wop/genaff_pd21ae2007.pdf.

[50] *See* Commission Staff Working Document accompanying the Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Authentic Instruments in Matters of Successions and on the Introduction of a European Certificate of Inheritance: Impact Assessment, (COM (2009) 154 final, SEC (2009) 411), SEC (2009) 410 final (Sept. 14, 2009), at 32 ("[Notwithstanding the unification of the conflict-of-laws rules] different law may still be applied to a succession due to different requirements to pleading and proof of foreign law."); The Valencia Report, *supra* note 47 at 6. For the potential effects of uniform conflicts regulation on the legal treatment of foreign law, see analysis in *infra* Section V(B).

Before examining the impact of the content-of-laws problematic on the application of the CESL, it is important to present an overview of the prevailing systems on the legal treatment of foreign law in the EU. Succinctly, it may be argued that there is a wide spectrum of approaches to the ascertainment of the content and the application of foreign law by national courts. As eloquently put in the *ILA Report & Recommendations on "Ascertaining the Contents of the Applicable Law in International Commercial Arbitration,"*[51] at the two extremes of the spectrum, one may find

> [Fora whereby] the court has considerable powers to apply foreign law and to ascertain its contents on its own motion . . . [and fora whereby] the court is required essentially to rely on the initiative of the parties to plead and prove foreign law as if it were a factual matter.[52]

This distinction corresponds with the legal treatment of foreign law as "law" and foreign law as "facts" respectively.[53] In-between these two positions, there is a "*tertium genus*," namely,

> Intermediate systems . . . where pleading foreign law primarily rests with the parties and where responsibility with regard to ascertaining its contents is divided between the court and the parties.[54]

Granted, national legal orders only seldom adopt one of the two extreme positions.[55] Rather, special rules water down the "doctrinal purity" of the extreme approaches,[56] or, most frequently, legal practice—as evidenced in case law—blurs the picture so that the classification

[51] International Law Association [ILA], International Commercial Arbitration Committee's Report and Recommendations on "Ascertaining the Contents of the Applicable Law in International Commercial Arbitration," 73 INT'L L. ASS'N REP. CONF. 850 (2008) [hereinafter ILA Report & Recommendations]. For a similar grouping, see MAARIT JÄNTERÄ-JAREBORG, FOREIGN LAW IN NATIONAL COURTS: A COMPARATIVE PERSPECTIVE, 304 RECUEIL DES COURS/COLLECTED COURSES 181, 286–288 (2003).
[52] ILA Report & Recommendations, *supra* note 51 at 861.
[53] The Valencia Report, *supra* note 47 at 8.
[54] ILA Report & Recommendations, *supra* note 51 at 861.
[55] *See* The Valencia Report, *supra* note 47 at 9; Clemens Trautmann, *Foreign Law (Application)*, *in* THE MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW, vol. I at 711, 711 (Jürgen Basedow *et al*. eds., 2012) ("The relevance of [the 'law vs. facts'] classification is . . . limited as no jurisdiction consistently follows the dichotomy of law and fact with regard to the treatment of foreign rules. [. . .] Therefore, classification as question of law or fact is increasingly considered a fiction necessary to render a hybrid matter manageable in civil proceedings.").
[56] Typical examples of such special rules are those allowing only limited appellate review of judgments for incorrect interpretation and application of the applicable foreign law, as well as rules expanding the limited *jura novit curia* principle to laws of certain foreign jurisdictions. For these two examples, see e.g. RICHARD FENTIMAN, FOREIGN LAW IN ENGLISH COURTS: PLEADING, PROOF AND CHOICE OF LAW 219–264 (1998); GEEROMS, *supra* note 9 at 251 *et seq*.

of the particular legal system becomes nearly impossible.[57] Let us, now, examine how each respective approach could impact the applicability of the CESL model.

V. ASCERTAINING THE CONTENT OF THE CESL IN INTERNATIONAL LITIGATION

Having explained the pertinence of the "domestic *vs*. foreign law" enquiry to the applicability of the CESL,[58] the analysis turns to the ramifications of the differentiated legal treatment of foreign law in the EU. In particular, this section groups EU Member State courts in two broad categories,[59] namely courts applying foreign law *ex officio* and courts depending on party initiative respectively.[60] On this basis, the following paragraphs delineate a handful of scenarios regarding the applicability of the CESL as part of foreign law. In addition, due consideration is paid to the unique features of conflict-of-laws rules for consumer transactions and their bearing on the regulatory framework of consumer sales disputes.[61] The synthesis of the findings shows that sellers and buyers, who were to have selected the CESL as the legal framework of their transaction, could have fallen into the "booby trap" of applying this EU Sales Law instrument as foreign law.[62]

A. The "Foreign" CESL and Commercial Transactions

1. The CESL before courts treating foreign law as legal norms

Reflecting Savigny's universalistic conflict-of-laws theory,[63] courts of the first group do not distinguish between domestic and foreign rules. Rather, they treat both as legal norms of the same stature independently of the latter's source. Followed, typically, by Member States of

[57] The Valencia Report, *supra* note 47 at 9; Rainer Hausmann, *Pleading and Proof of Foreign Law - A Comparative Analysis*, 8 EU L. F. I(1), I(3) (2008).
[58] *See* analysis in *supra* Section III(A).
[59] EU Member States following the intermediate approach, such as Latvia, Lithuania, and the Netherlands, would follow, *in casu*, one of these two approaches. *See* The Valencia Report, *supra* note 47 at 16–17. Prominent examples of non-EU Member States following this intermediate approach are China and the USA.
[60] *See* analysis in *infra* Sections V(A)(1) and V(A)(2) respectively. For national reports on the ascertainment and application of foreign law by judicial and non-judicial authorities in the EU, see CARLOS ESPLUGUES, JOSÉ LUIS IGLESIAS & GUILLERMO PALAO, APPLICATION OF FOREIGN LAW (2011).
[61] *See* analysis in *infra* Section V(B).
[62] *See* analysis in *infra* Section V(C).
[63] VON SAVIGNY, *supra* note 10 at 69–70, 76.

the civil law tradition,[64] this approach sets forth a broader *iura novit curia* principle.[65] Hence, so long as either of the litigants has illustrated the internationality of the dispute,[66] courts are required to apply their respective conflict-of-laws provisions, to ascertain the content of the applicable legal regime, and, ultimately, to resolve the dispute on the basis of the relevant substantive law rules.[67] This description corresponds with the Roman procedural maxim *da mihi factum, dabo tibi jus*.[68] The conflicts rules are applied *sua sponte* by the court without either party requesting the application of foreign law.[69] In establishing the content of the applicable foreign law, however, the court may request legal assistance from the litigating

[64] The Valencia Report, *supra* note 47 at 10 (noting Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Poland, Portugal, Romania, Slovakia, Slovenia, and Sweden, as EU Member States of this category); Davor Babić, *Private International Law*, *in* INTRODUCTION TO THE LAW OF CROATIA 439, 443 (Tatjana Josipović ed., 2014) (adding Croatia to the list); Urs Peter Gruber & Ivo Bach, *The Application of Foreign Law: A Progress Report on a New European Project*, 11 Y. B. PRIV. INT'L L. 157, 161 (2009); Kawano, *supra* note 11 at 227; Trautmann, *supra* note 55 at 711. Prominent examples of non-EU Member States following this approach are Brazil, Russia, Switzerland, and Turkey.

[65] *See* JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 1063 (2012) ("It was noted that in the civilian tradition, the notion that judges are expected to know the law goes so far as to imply that they are expected to know foreign law as well as their own domestic law. This does not mean that they actually must know it, but that they have an obligation to make appropriate inquiries and the parties are not obliged to prove its contents.").

[66] Litigants need to introduce sufficient evidence of the dispute's international character. Should they fail to offer such evidence, the court is bound by the parties' submissions as to the factual basis of the dispute and has to treat the case as a purely domestic dispute. The parties, of course, can "hide" the international nature of their dispute by not introducing the relevant links to foreign legal orders. *But see* Axel Flessner, *Optional (Facultative) Choice of Law*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW, vol. 1 at 1324, 1329 (Jürgen Basedow *et al*. eds., 2017) ("[T]he dressing 'option' seems to be largely theoretical. In practice the parties will rarely be able to conceal from the court the international elements of their case.").

[67] *Cf*. The Madrid Principles, *supra* note 48, Principle IV ("Application of foreign law should be made *ex officio* by the national authority, which must use its best endeavours to ascertain the content of foreign law."); ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE, AS ADOPTED AND PROMULGATED BY THE AMERICAN LAW INSTITUTE, AND BY UNIDROIT, (2006), Principle 22(1) ("The court is responsible for considering all relevant facts and evidence and for determining the correct legal basis for its decisions, including matters determined on the basis of foreign law."), and Principle 22(2)(3) ("The court may, while affording the parties opportunity to respond: Rely upon a legal theory or an interpretation of the facts or of the evidence that has not been advanced by a party."). *Cf. also* Inter-American Convention on General Rules of Private International Law (Montevideo, 1979), O.A.S.T.S. 54, art. 2; Bustamante Code, art. 408; Institute of International Law [IIL], *Equality of Treatment of the Law of the Forum and of Foreign Law*, Resolution, Session of Santiago de Compostela. Rapporteur: Pierre Gannagé (Sep. 12, 1989).

[68] "Give me the facts, I will give you the law."

[69] Unless the omission of such a request could be attributed to an implicit *ex post* choice-of-law agreement between the parties.

parties,[70] competent state authorities,[71] and universities or other academic institutions.[72] Should the judge, notwithstanding her efforts, fail to ascertain the content of the applicable foreign rules, she will, generally, be allowed to apply the laws of another country—typically those found in the *lex fori*.[73]

On that basis, the court would have been required to examine, on its own motion, whether the application requirements of the CESL had been met,[74] and, at a second stage, to resolve the dispute pursuant to the applicable version of the CESL—had it been part of the *lex fori* or of any other EU Member State law. Hence, unlike courts of the second group,[75] the (non-)pleading and (non-)proof of the foreign CESL would have been irrelevant to the applicability of the European sales law instrument. Put differently, before courts that establish *ex officio* the content of the applicable law, there would have been no additional requirements for the activation of the CESL's parallel legal regime.

[70] Classic example of such rules are art. 293 of the German Code of Civil Procedure and art. 16(1) of the Swiss PILA.

[71] Federal Statute of 15 June 1978 on Private International Law, § 4(1) (Austria); Private International Law Code, art. 43(1) (Bulg.); Act concerning the Resolution of Conflicts of Laws with Provisions of other States in Certain Matters of 1991, art. 13(2) (Croat.); Act No. 91/2012 on Private International Law, § 23(3) (Czech); Law-Decree No. 13 of 1979 on Private International Law, § 5(2) (Hung.); The Civil Law, § 655(2) (Lat.); Private International Law and Procedure Act of 1999, art. 12(2) (Slovn.). *See also* 1968 London Conv.; Council Decision 2001/470/EC of 28 May 2001, Establishing a European Judicial Network in Civil and Commercial Matters, 2001 O.J. (L174) 25; Decision 568/2009/EC of the European Parliament and of the Council of 18 June 2009, Amending Council Decision 2001/470/EC, Establishing a European Judicial Network in Civil and Commercial Matters, 2009 O.J. (L168) 35; European E-Justice portal, *accessible at* https://e-justice.europa.eu/ home.do?plang=en&action=home; Bustamante Code, arts. 410–411; Additional Protocol to Treaties on Private International Law of 19 March 1940, art. 2.

[72] *E.g*. The Max Planck Institute of Foreign and International Law in Hamburg; the Internationaal Juridisch Instituut (IJI); the T.M.C. Asser Institute in the Hague; the Swiss Institute of Comparative Law (SICL) in Lausanne; the Hellenic Institute for International and Foreign Law in Athens. Gruber and Bach, *supra* note 64 at 168–169; Kawano, *supra* note 11 at 224.

[73] Gruber and Bach, *supra* note 64 at 163. *But see* art. 14(2) of Law No. 218 of May 31, 1995 in Italy and art. 23(2) of the Portuguese Civil Code, which, in case of failure to ascertain the content of the applicable foreign law, provide for an additional round of choice-of-law analysis, rather than the automatic application of the *lex fori*; Yuko Nishitani, *Proof of and Information about Foreign Law*, *in* GENERAL REPORTS OF THE XIX[TH] CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW 165, 181–182 (Martin Schauer & Bea Verschraegen eds., 2017). *Cf*. The Madrid Principles, *supra* note 48, Principle IX ("If in the view of the national authority, a) there has been no adequate ascertainment of the content of foreign law in a reasonable time, or b) it is found that upon ascertainment of foreign law it is inadequate to address the issue in question, the *lex fori* shall be applied.").

[74] *See* analysis in *supra* Part I.

[75] *See* analysis in *infra* Section V(A)(2).

TABLE II – CESL & FOREIGN LAW AS LEGAL NORMS APPROACH			
SCENARIO NO.	PLEADING OF	PROOF OF	LEGAL REGIME*
1.	~~N/A~~	~~N/A~~	CESL (MS version)†
2.	~~EU MS law~~	~~No proof~~	CESL (MS version)†
3.	~~EU MS law~~	~~EU MS law~~	CESL (MS version)†
4.	~~EU MS law & CESL~~	~~No proof~~	CESL (MS version)†
5.	~~EU MS law & CESL~~	~~EU MS law only~~	CESL (MS version)†
6.	~~EU MS law & CESL~~	~~EU MS law & CESL~~	CESL (MS version)†

* For issues falling within the regulatory scope of the CESL

† Unless an implicit *ex post* choice-of-law agreement has been concluded between the litigants

That being said, the legal arguments of the parties, as articulated in their written and oral submissions, could affect the legal framework of the dispute. Although party pleadings on legal points do not bind the court, concerted pleadings that refer exclusively to a particular legal regime—not infrequently, to the *lex fori*—could evince an implicit choice-of-law agreement,[76] which, of course, the court must take into consideration. This would be the case under both the 1980 Rome Convention and the Rome I Regulation, which allow *ex post* and implicit choice-of-law agreements between the parties.[77]

The situation, however, is not straightforward under the 1955 Hague Sales Convention, which prevails over the EU conflict-of-laws regimes in Denmark, Finland, France, Italy and

[76] PETER NYGH, AUTONOMY IN INTERNATIONAL CONTRACTS 119 and 120–121 (1999) (noting that the subsequent reliance on the law of the forum is, essentially, a stratagem to avoid the *ex officio* application of foreign law). *See* Rome I Reg., art. 3(1); 1980 Rome Conv., art. 3(1); Rome II Reg., art. 14(1) *in fine*; Mario Giuliano & Paul Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations* 17 ("The choice of law by the parties will often be express but the Convention recognizes the possibility that the Court may, in the light of all the facts, find that the parties have made *a real choice of law* [emphasis added] although this is not expressly stated in the contract."). *But see* Gruber and Bach, *supra* note 64 at 167 ("A simple failure to plead foreign law—or the inability to prove it—is not equivalent to such an *intentional choice* [emphasis in the original]. This is especially true when procedural oversights can often be attributed to forgetfulness or negligent pleading by the parties or their lawyers."). For the differences between choice-of-law agreements and the concurrent procedural selection of the *lex fori* by the litigants, see Flessner, *supra* note 66 at 1328–1329.

[77] Rome I Reg., arts. 3(1), 3(2); 1980 Rome Conv., arts. 3(1), 3(2). *Cf.* 2015 Hague Principles, arts. 2(3), 4; Institute of International Law [IIL], *The Autonomy of the Parties in International Contracts between Private Persons or Entities*, Resolution, Session of Basel. Rapporteur: Eric Jayme (Aug. 31, 1991) (art. 6(1)).

Sweden.[78] In particular, whereas art. 2 of the Convention allows for implicit choice-of-law agreements,[79] there is no provision on the admissibility of subsequent choice-of-law agreements.[80] This omission can be interpreted in three different ways,[81] each leading to one of two diametrically opposed results, namely either to the affirmation of the originally applicable law or to the admission of unrestricted—time-wise—selection of the *lex contractus* by the parties. A purposive interpretation that limits forum shopping, empowers contracting parties, and protects business expectations from the sales transaction, prefers a broader understanding of the party autonomy principle. Thus, it is submitted that *ex post* choice-of-law agreements are admissible also under the 1955 Hague Sales Convention.[82]

In a nutshell, before courts ascertaining foreign law on their own motion, the legal arguments of the parties would have been largely, albeit not completely, irrelevant to the applicability of the CESL. Provided that the parties had not excluded *ex post* the applicability of the instrument, the CESL would have governed the issues in dispute, exactly as envisaged in the sale of goods contract.

2. The CESL before courts treating foreign law as factual representations

In contradistinction to the *ex officio* ascertainment and application of foreign law by courts of the first category, in courts of the second group, the litigants must establish both the factual and the legal basis of their dispute. This duty includes pleading the relevant facts of the

[78] Rome I Reg., art. 25(1); 1980 Rome Conv., art. 21.
[79] With the caveat that "[c]ette désignation doit . . . résulter indubitablement *des dispositions du contrat* [emphasis added]."
[80] CONFÉRENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ, ACTES DE LA SEPTIÈME SESSION TENUE DU 9 AU 31 OCTOBRE 1951 78 (1952) (whereas the supervening change of the content of the substantive law was discussed, the possibility of *ex post* choice-of-law agreements was not considered at all during the negotiations of the 1955 Hague Convention. In any case, the position of Professor M. Niboyet [France] on the topic is illustrative of the relevant legislative spirit: "[O]n ne peut tolérer que les parties, après avoir choisi une loi, puissent se soustraire à son empire, même si elle est modifiée après la conclusion du contrat. Ce serait accorder un trop grand pouvoir à la volonté des parties."); Željko Matić, *The Hague Convention on the Law Applicable to Contracts for the International Sale of Goods - Rules on the Applicable Law*, *in* INTERNATIONAL CONTRACTS AND CONFLICTS OF LAWS: A COLLECTION OF ESSAYS 51, 61 (Petar Šarčević ed., 1990).
Cf. 1986 Hague Sales Conv., art. 7(2).
[81] Pursuant to the first interpretation, it may be argued that there is no regulatory gap in the Convention. The drafters intended to augment party autonomy by providing the contracting parties with almost absolute freedom in the selection of the applicable law—including freedom with respect to the timing of such selection. The second interpretation holds that there is, indeed, a gap, which must be filled by falling-back on the next conflict-of-laws level of the forum state. Finally, the third interpretation rejects, *a contrario*, the ability of the parties to alter *ex post* the law governing their sales transaction.
[82] For interesting case law of the French Cour de Cassation on the interplay between the 1955 Hague Sales Convention and the absence of party request for the application of foreign law, see JÄNTERÄ-JAREBORG, *supra* note 51 at 342.

case, requesting the application of a foreign legal regime, and proving the content of the relevant foreign rules. Followed, typically, by Member States of the common law tradition,[83] this approach amounts, essentially, to the treatment of foreign law as factual representations or, as often quoted, as "facts of a peculiar kind."[84]

The application of foreign law by courts of this group is divided in two major stages. At the first stage, either litigant must request the application of foreign rules on the ground of the general internationality of the dispute.[85] This so-called "pleading" of foreign law is required irrespective of how conspicuous the links with multiple jurisdictions are.[86] Hence, the parties may avoid the application of foreign law, if they find no tactical benefit in pleading it.[87] At the second stage, either litigant must offer sufficient evidence on the content of the applicable foreign rules. This so-called "proof" of foreign law is required irrespective of the judge's familiarity with the applicable legal regime.[88] The court is presumed to be unaware of all foreign rules; its foreign law expertise is limited to the evidence introduced by the parties. Only the latter can "prove" the content of the foreign applicable law.[89] Should the parties fail to establish the content of the foreign rules,[90] the court will—typically—not dismiss the

[83] The Valencia Report, *supra* note 47 at 13–14 (noting the United Kingdom, Cyprus, Ireland, and Malta, as Member States following the "foreign law as facts" approach, as well as Luxemburg and Spain, albeit the last two are classified as "civil law" jurisdictions); Gruber and Bach, *supra* note 64 at 161; Kawano, *supra* note 11 at 225; Trautmann, *supra* note 55 at 711. Prominent examples of non-EU Member States following this approach are Argentina, Australia, Canada, India, Israel, and South Africa—albeit not the USA.

[84] *Parkasho* v *Singh* [1967] 2 W.L.R. 946 (Eng.).

[85] *See* FENTIMAN, *supra* note 56 at 61–62 ("[T]o plead foreign law is to allege that the content of foreign law is to a certain effect, which involves giving appropriate particulars of the relevant foreign rules in the statement of claim or defence. What is pleaded is not that foreign law governs a given issue, but the fact that the legal system in question contains a particular rule."). *See also* GEEROMS, *supra* note 9 at 75; ALEXANDER LAYTON & HUGH MERCER, EUROPEAN CIVIL PRACTICE, vol. 1 at 214 (2nd ed. 2004); JAMES MCLEOD, THE CONFLICT OF LAWS 34 (1983); PIPPA ROGERSON, COLLIER'S CONFLICT OF LAWS 47 (4th ed. 2013).

[86] *See e.g. Aluminium Industrie Vaassen BV* v *Romalpa Aluminium Ltd* [1976] 1 W.L.R. 676 (though the contract contained a choice-of-law clause in favour of Dutch law, the court applied English law instead) (Eng.). *See also* GEEROMS, *supra* note 9 at 74; MICHAEL TILBURY, GARY DAVIS & BRIAN OPESKIN, CONFLICT OF LAWS IN AUSTRALIA 315 (2002). This requirement illustrates the so-called "voluntary *vs*. mandatory" divide in the application of the conflict-of-laws rules.

[87] RICHARD GARNETT, SUBSTANCE AND PROCEDURE IN PRIVATE INTERNATIONAL LAW 66 (2012).

[88] *See* ADRIAN BRIGGS, THE CONFLICT OF LAWS 11 (3rd ed. 2013).

[89] *See e.g. Harley* v *Smith* [2010] EWCA Civ. 78 [50] ("[The judge] went beyond what he could properly do . . . . He purported to construe foreign legislation by applying principles of interpretation which had not been established by evidence.") (Eng.).

[90] *See* RICHARD FENTIMAN, INTERNATIONAL COMMERCIAL LITIGATION 690 (2nd ed. 2015) ("In practice, at least in complex cases, a party's evidence will contain several allegations as to different points of foreign law. For this reason it is rare that a party's case under foreign law will fail entirely.").

case,[91] but will cut the "Gordian knot" by applying, instead, the *lex fori* by virtue of either a "default rule"[92] or a series of legal presumptions[93].[94] Because of this default rule and the various

[91] *See e.g Global Multimedia International Ltd* v *Ara Media Services* [2006] EWHC 3612 (Ch) [38] (Eng.); *Damberg* v *Damberg* (2001) 52 NSWLR 492 [163–164] (Austl.); *Walton* v *Arabian American Oil Co*, 233 F.2d 541, 546 (2d Cir. (NY) 1956), *cert. denied*, 352 U.S. 872 (1956) (USA); *Cuba R.R. Co* v *Crosby*, 222 U.S. 473, 479 (1912) (USA). *See also* ADRIAN BRIGGS, PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS 103–104 (2014); FENTIMAN, *supra* note 90 at 690–691 ("[W]here [the default rule] does not apply, the implication is that a claim or defence advanced in reliance on foreign law will fail."); GARNETT, *supra* note 87 at 66. For the exceptions to the default rule, see *infra* note 92.
The non-dismissal of the case for failure to prove the content of the applicable foreign law corroborates the maxim that foreign law is "facts of a peculiar kind." Importantly, dismissal of the case for not establishing the content of the applicable foreign law could, possibly, amount to denial of justice.
Instead of dismissing the case for failure to prove the content of the applicable foreign law, common law courts tend to resort to the *forum non conveniens* doctrine, which could offer an easy "way out" of the foreign law problematic. On the *forum non conveniens* doctrine and the application of foreign law, see e.g. *Gulf Oil Corp* v *Gilbert* 330 U.S. 501, 509 (1947) (USA); Richard Fentiman, *Foreign Law and the Forum Conveniens*, *in* LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 275 (James A.R. Nafziger & Symeon C. Symeonides eds., 2002). *Cf.* Case C-281/02, *Andrew Owusu* v *NB Jackson*, 2005 E.C.R. I-01383, ¶ 37–46.

[92] *See* FENTIMAN, *supra* note 90 at 690–691; JONATHAN HILL & ADELINE CHONG, INTERNATIONAL COMMERCIAL DISPUTES. COMMERCIAL CONFLICT OF LAWS IN ENGLISH COURTS 647 (2010); FRANCIS WHARTON & GEORGE H. PARMELE, A TREATISE ON THE CONFLICT OF LAWS OR PRIVATE INTERNATIONAL LAW, vol. II at 1560–1561 (3rd ed. 1905) (noting, already in 1905, that "[t]his theory [of directly applying the *lex fori*], besides avoiding a presumption that is frequently contrary to truth, enjoys the advantage of prescribing a general and nearly universal rule which is subject only to [those special cases whereby, unless the applicable foreign law has been proven, the case would be dismissed]. [. . .] [I]n view of its intrinsic soundness and the many practical advantages which it affords, it does not seem improbable that [this theory] will eventually prevail over [any] presumption."). For scholarly writings in favour of the default rule and against the use of presumptions, see e.g. BRIGGS, *supra* note 91 at 103; JEAN-GABRIEL CASTEL, CANADIAN CONFLICT OF LAWS 155 (3rd ed. 1994); FENTIMAN, *supra* note 56 at 184; JONATHAN HILL & MÁIRE NÍ SHÚILLEABHÁIN, CLARKSON & HILL'S CONFLICT OF LAWS 45 (5th ed. 2016); MCLEOD, *supra* note 85 at 40; ARTHUR NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW 262 (1943).
For the limits of the default rule, see *Belhaj* v *Straw* [2015] W.L.R. 1105, 1166 (Eng.); *Seven Arts Entertainment Ltd* v *Content Media Corporation plc, Paramount Pictures Co Viacom International (Netherlands) BV* [2013] EWHC 588 (Ch) [87] (Eng.); *MA (Ethiopia)* v *Secretary of State for the Home Department* [2009] EWCA Civ. 289 [63] (Eng.); *National Auto Glass Supplies (Australia) Pty Ltd* v *Nielsen & Moller Autoglass (NSW) Pty Ltd*, [2007] FCA 1625 [41] (Austl.); *Damberg* v *Damberg* (2001) 52 NSWLR 492 (encompassing a very interesting comparative review of the topic) (Austl.); *Shaker v Al-Bedrawi and Others* [2003] B.C.C. 465, 480–481 (Eng.); *Mother Bertha Music Ltd* v *Bourne Music Ltd* [1997] E.M.L.R. 457, 493 (Eng.); *Fernandez* v *"Mercury Bell"* (*The*) [1986] CarswellNat 70 [10] (Can.); *Österreichische Länderbank* v *S' Elite Ltd* [1981] Q.B. 565, 569 (Eng.); FENTIMAN, *supra* note 90 at 699–700 ("Where the applicable law is manifestly foreign, a court may regard reliance on the default rule as evasive, and the pleadings as incomplete, with the consequence is that the claim or defence will be struck out unless the pleadings are amended. [. . .] There are three situations in which reliance on the default rule may be regarded as evasive. First, a party who contends that foreign law applies cannot rely upon the default rule, but must plead and prove the relevant rules of foreign law. Only the other party may benefit from the default rule. [. . .] Second, at least insofar as the default rule is expressed as a presumption of identity, it may be an abuse of process, or at least evasive, to rely upon the default rule where it is unreal to suggest that English law and foreign law are the same. [. . .] Third, it is evasive to rely on the default rule when the applicable law, although not identified, is likely to be foreign, at least where the claimant concedes that this is so."). *See also BP Exploration Co (Libya)* v *Hunt* [1980] 47 F.L.R. 317, 325–326 ("[T]he application of the presumption is intended to operate against, not in favour of, the party whose obligation it is to prove the foreign law, so that he is deprived of the benefit of a right or, exemption given by that foreign law . . . , if he does not establish that foreign law in the proper way.") (Austl.); FENTIMAN, *supra* note 90 at 700 ("It appears . . . that a party who alone relies upon foreign law cannot benefit from the default rule by declining to prove foreign law."); ROGERSON, *supra* note 85 at 50 ("[T]he party who pleads the foreign rule must prove it and only the other party can rely on the default rule."). *But see Royal Boskalis Westminster N.V.* v *Mountain* [1999] 2 Q.B. 674, 724 (Eng.).

presumptions, it is the party that would benefit from—and for that reason has pleaded for—the application of the foreign law, who bears the onus of establishing the content of the applicable foreign law.[95] Interestingly, this onus is limited to the applicable substantive law. Since the applicable private international law rules are always found in the *lex fori*, there is no need to establish the content of the relevant conflicts rules.[96] Quite the contrary, the court is presumed to know and, upon a motion of the parties, is required to apply *ex officio* its very own conflict-of-laws rules for the determination of the governing law.[97] Simply put, if private

Cf. Position of the European Parliament adopted at First Reading on 6 July 2005 with a view to the Adoption of Regulation (EC) No .../2005 of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations ("Rome II"), 2006 O.J. (C157E) 371, art. 13(2) ("If it is impossible to establish the content of the foreign law and the parties agree, the law of the court seized shall be applied."); The Madrid Principles, *supra* note 48, Principle IX ("If in the view of the national authority, a) there has been no adequate ascertainment of the content of foreign law in a reasonable time, or b) it is found that upon ascertainment of foreign law it is inadequate to address the issue in question, the *lex fori* shall be applied.").

[93] *See e.g. Leary* v *Gledhill*, 8 N.J. 260, 266–67, 84 A.2d 725, 728 (1951) ("The courts . . . were reluctant to dismiss an action for a failure to plead and prove the applicable foreign law . . . . Accordingly the courts frequently indulged in one or another of several presumptions: that the common law prevails in the foreign jurisdiction; that the law of the foreign jurisdiction is the same as the law of the forum, be it common law or statute; or that certain fundamental principles of the law exist on all civilized countries. As a fourth alternative, instead of indulging in any presumption as to the law of the foreign jurisdiction, the courts would merely apply the law of the forum as the only law before the court, on the assumption that by failing to prove the foreign law the parties acquiesce in having their controversy determined by reference to the law of the forum, be it statutory or common law.") (USA); PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 610–611 (5th ed. 2010) (with further references to relevant US case law).

[94] GARNETT, *supra* note 87 at 66. *See* LAYTON AND MERCER, *supra* note 85 at 214–215 ("[I]n a suitable case [the court] may re-open the matter to allow foreign law to be proved."). *Cf.* UPICC 2016, Preamble, cmt. 8 ("The Principles may also be used as a substitute for the domestic law otherwise applicable. This is the case whenever it proves impossible or extremely difficult to establish the relevant rule of that particular domestic law with respect to a specific issue, i.e. it would entail disproportionate efforts and/or costs. The reasons for this generally lie in the special character of the legal sources of the domestic law in question and/or the cost of accessing them."); E. Jayme, *Article 1*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 27, 33 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987) ("Uniform law may not be applicable only by means of private international law. It has been suggested that uniform law supplies a subsidiary solution for cases in which the applicable foreign law cannot be ascertained . . . .").

[95] *See* ALEXANDER ELDER ANTON, PAUL R. BEAUMONT & PETER. E. MCELEAVY, PRIVATE INTERNATIONAL LAW 1228 (3rd ed. 2011) (Scotland); MARTIN DAVIES, SAM RICKETSON & GEOFFREY LINDELL, CONFLICT OF LAWS: COMMENTARY AND MATERIALS 410 (1997) (Australia); P.R.H. WEBB & D.J.L. BROWN, A CASEBOOK ON THE CONFLICT OF LAWS 58 (1960) (England and Wales). *See also* CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW, 106 (Paul Torremans & James J. Fawcett eds., 15th ed. 2017); MARTIN DAVIES, ANDREW BELL & PAUL LE GAY BRERETON, NYGH'S CONFLICT OF LAWS IN AUSTRALIA 362 (8th ed. ed. 2010); DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, vol. 1 at 332 (15th ed. 2012); FENTIMAN, *supra* note 90 at 690; GARNETT, *supra* note 87 at 66; HILL AND SHÚILLEABHÁIN, *supra* note 92 at 45; HILL AND CHONG, *supra* note 92 at 647; Kawano, *supra* note 11 at 226; LAYTON AND MERCER, *supra* note 85 at 215; ROGERSON, *supra* note 85 at 47.

[96] *See* FENTIMAN, *supra* note 56 at 64; KIRSTY J. HOOD, CONFLICT OF LAWS WITHIN THE UK 139, note 60 (2007); LAYTON AND MERCER, *supra* note 85 at 212; Nishitani, *supra* note 73 at 172. This knowledge of the court should not be confused, however, with the optional or mandatory application of the conflict-of-laws rules. On this latter point, see analysis in *infra* Section V(B).

[97] *See* FENTIMAN, *supra* note 56 at 64; HOOD, *supra* note 96 at 139, n. 60; LAYTON AND MERCER, *supra* note 85 at 212; Nishitani, *supra* note 73 at 172.

international law be triggered, the court will know which regime is applicable, but it will be unaware of what that regime provides for, unless evidence be introduced by the litigants.

Focusing on the applicability of the CESL, it appears that the aforementioned pleading and proof requirements would have rendered the identification and ascertainment of the applicable sales law a very complex and onerous undertaking. Specifically, because of the legal pluralism that would have come with the proposed sales Regulation, and given the *quasi* choice-of-law nature of the opt-in agreement, the rationale of the two-step pleading and proof would have been present also in the application of the optional CESL. Therefore, in light of the party initiative principle, which transcends the civil procedure of courts treating foreign law as facts, an additional level of "foreign law" enquiries consisting of the separate pleading and proof of the very CESL would have been required.[98] This requirement would have been accentuated by the CESL open provisions and, of course, by the regulatory gaps of the instrument. Thus, the legal regime governing international sales disputes would have been directly linked to the pleading and proof stance of the parties, even when the latter had opted into the CESL instrument.

In order to fully explore the content-of-laws enquiry, a series of possible scenarios must be delineated. Specifically, the following variables need to be contemplated: whether either of the litigants had pleaded for the application of an EU Member State law or of the CESL or both, and whether either of the parties had proved the content of the applicable EU Member State law or of the CESL or both.[99] The combination of these variables generates six possible scenarios regarding the (in-)applicability of the CESL to the legal issues in dispute:

1. Notwithstanding the international character of the sales agreement, if the litigants had refrained from requesting the application of foreign law, the court would have treated the dispute as purely domestic and would have applied the most relevant domestic rules on sale of goods contracts.

2. If either of the parties had pleaded for the application of a foreign EU Member State law—albeit not the CESL—but failed to prove the content of that foreign law, the court would have applied, by virtue of either a default rule or a legal presumption, the most relevant domestic rules on sale of goods contracts.

[98] This pleading of CESL's application should not be confused with the necessary pleading and proof of the existence of a CESL opt-in agreement, which pertains to the factual—rather than the legal—basis of the dispute.
[99] It should be assumed that the application requirements of the instrument have been met and the parties have shrouded neither the international nature of the transaction nor the conclusion of a CESL opt-in agreement.

3. If either of the parties had pleaded for the application of a foreign EU Member State law—albeit not the CESL—and proved the content of that foreign law, the court would have applied the "ordinary" sales rules of the pleaded and proved Member State law.

4. If either of the parties had pleaded for the application of both a foreign EU Member State law and the CESL, but failed to offer sufficient evidence of their content, the court would have applied, by virtue of either a default rule or a legal presumption, the domestic version of the CESL together with domestic law for the regulatory gaps of the instrument.

5. If either of the parties had pleaded for the application of both a foreign EU Member State law and the CESL, but offered, against all odds, sufficient evidence of the EU Member State law's content only, the court would have applied, by virtue of either a default rule or a legal presumption, the domestic version of the CESL to all issues falling within the regulatory scope of the instrument and foreign law to all other issues.

6. If either of the parties had pleaded for the application of both a foreign EU Member State law and the CESL, and, also, offered sufficient evidence of both the foreign law and the CESL, the court would have applied the foreign version of the CESL as a second parallel legal regime and foreign law to all remaining issues.

TABLE III – CESL & FOREIGN LAW AS FACTS APPROACH			
SCENARIO NO.	**PLEADING OF**	**PROOF OF**	**LEGAL REGIME***
1.	N/A	N/A	Forum's sales law
2.	EU MS law	No proof	Forum's sales law
3.	EU MS law	EU MS law	EU MS law (no CESL)
4.	EU MS law & CESL	No proof	CESL (forum's version)
5.	EU MS law & CESL	EU MS law only	CESL (forum's version)
6.	EU MS law & CESL	EU MS law & CESL	CESL (MS version)
* For issues falling within the regulatory scope of the CESL			

The above analysis suggests a number of interesting conclusions. First and foremost, it illustrates that the application of the CESL before courts of this category would have depended on the pleading and proof of the instrument. Absent a request to the court for the activation of the CESL, the regime would have remained dormant, even if the special internationality and

the applicability criteria of the instrument had been met. This implies the existence of an additional de facto application requirement of the CESL, which has not been delineated in the CESL Regulation. Furthermore, between the two stages of pleading and proof, the request for the application of the CESL would have been the most important. Setting aside the "open" terms of the instrument, the failure of the parties to prove the content of the foreign CESL provisions would have triggered the default rule, which would, in turn, have led to the application of the identical *domestic* CESL.[100] Hence, so long as either party had requested the application of the CESL, the uniform provisions of the instrument would have governed the international sales dispute, irrespective of whether evidence had been offered on the content of the CESL provisions. This hypothetical resembles a "false conflict" scenario whereby the two "conflicting" regimes provide for the application of the very same rule leading to the very same outcome.[101] Hence, given that the domestic and foreign CESL rules would have been identical,[102] the availability of the instrument in all the official languages of the EU, and the uniform interpretation of its provisions as safeguarded by the CJEU, it becomes apparent that any pleading and proof initiatives of the parties would have formed part of a legal strategy to either enhance the efficiency of the proceedings or to unilaterally alter the legal framework of the dispute. Also, any concerted pleadings on the legal basis of the dispute could be interpreted as an implicit *ex post* choice-of-law agreement and/or a de-selection of the CESL regime, rather than an oversight of the parties and their counsel.[103] Lastly, for the sake of completeness, it

[100] *But see supra* note 92.

[101] *See* DAVID F. CAVERS, THE CHOICE-OF-LAW PROCESS 89 (1965) ("[A false conflict arises, if,] when the laws involved in such a case are scrutinized, the purpose of only one of them would be advanced by its application in the case. The conflict may be found false in other cases because both laws are the same or would yield the same result.").

[102] *But see* analysis in *supra* Section III(A)(2).

[103] Rome I Reg., arts. 3(1), 3(2); 1980 Rome Conv., arts. 3(1), 3(2). *See* BENJAMIN'S SALE OF GOODS, 26–029 (Michael G. Bridge ed., 10th ed. 2017); FENTIMAN, *supra* note 90 at 206–207; PETER NORTH, ESSAYS IN PRIVATE INTERNATIONAL LAW 180 (1993). *See also* Horst Eidenmüller *et al*., *The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law*, 16 EDINBURGH L. REV. 301, 321 (2012) ("Since the present text [of the CESL] does not include third party relationships [with the exception of art. 78, where however, only rights can be conferred upon a third party], there is no danger that a subsequent change of the applicable law might adversely affect third parties."). For diverging opinions on whether the failure to plead and prove foreign law would be sufficient to vary the applicable law, see CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW, *supra* note 95 at 711 ("[T]he parties' choice of the applicable law (whether an original or a later choice) must be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. A mere omission to plead and prove foreign law would not appear to satisfy this requirement."); FENTIMAN, *supra* note 90 at 207 ("At common law the omission of any reference to the contractual law is sufficient, but the European regime requires either an express choice, or a clear implication. No doubt the inference to be drawn from such an omission is clear, but it is apparent in any event that the manner in which a procedural choice of English law may be effected is a matter for English law—in which an omission to plead any other law seems decisive. The official report on the Convention states that the effectiveness of a procedural choice of law is a matter for the law of the forum."). *See also* Arthur Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L. J. 1018, 1040 (1941) ("The important factor from the viewpoint of substantial justice is not a question of [an *ex post* choice-of-law] agreement but the reliance of the parties on the law of the forum. By placing

appears that the doctrine of notoriety, that is, the *sua sponte* ascertainment of foreign law as notorious facts, would have been too "uncertain" to facilitate the application of the "foreign" CESL rules.[104] So would have been the doctrine of "universal" rules.[105]

Succinctly, before courts that depend on the parties for the identification of the applicable law and the ascertainment of its content, the CESL would not have been applicable, unless properly pleaded and proven by either of the litigants. In a nutshell, whereas the application of the European sales law regime would have been the norm in courts of the first group, the application of the CESL would have been the exception in courts of the second group.

B. The "Foreign" CESL and Consumer Transactions

Unlike both the 1980 Rome Convention and the Rome I Regulation, which contain special conflicts rules for consumer contracts, no distinction between consumer and non-consumer disputes is made in the application of foreign law. Hence, the question that arises is whether consumer protection considerations, as enshrined in articles 5 and 6 respectively, modify the national rules on the legal treatment of foreign law. Naturally, this enquiry would be irrelevant with regard to courts that have a duty to ascertain *ex officio* the content of the applicable foreign law. In such fora, the court must ascertain *all* applicable foreign rules. The very same enquiry would, however, be of particular importance with regard to courts that require the pleading and proof of foreign law by either of the litigants. Thus, in the context of the CESL, the question may be formulated as follows: if neither party had pleaded or proved the content of the foreign CESL, would the forum's default rule have "kicked-in" or would the judge have been required to examine the applicability and ascertain the content of the CESL *sua sponte*? Obviously, the following analysis pertains only to consumers that are deemed "weak" parties under arts. 5(2) and 6(2). All other transactions—consumer or not—are devoid of special protection elements and are, therefore, subject to the general analysis of section V(A) above.

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themselves upon the parties' common ground, courts will satisfy both parties—a rare opportunity—and at the same time simplify the proceeding through eliminating the trouble of proving foreign law."). *Cf.* 2015 Hague Principles, arts. 2(3), 4.

[104] FENTIMAN, *supra* note 56 at 248–251. For diverging case-law, see e.g. *Saxby* v *Fulton* [1909] 2 K.B. 208, 211 (Eng.); *El Ajou* v *Dollar Land Holdings plc* [1993] 3 All E.R. 717, 736 (Eng.).

[105] *See e.g. United Africa Co Ltd* v *Owners of MV Tolten ("The Tolten")* [1946] 2 All E.R. 372, 378 (Eng.).

To begin with, it has been argued that the legal treatment of foreign law constitutes a procedural issue, which falls outside the scope of the EU conflicts regimes.[106] As a result, the differentiated legal treatment of foreign law has remained unaffected and the parties can "switch off" the private international law rules of the forum by failing to plead or prove the applicable foreign rules. In other words, both the 1980 Rome Convention and the Rome I Regulation enshrine "voluntary" conflict-of-laws systems that are subject to the conduct of the parties. This conclusion, however, is inconsistent with the language used by the European legislator,[107] the purpose of unifying private international law,[108] and the *ratio legis* of arts. 5(2) and 6(2), namely to protect the weaker party of the transaction, who might, unknowingly, waive her rights by virtue of a choice-of-law agreement.[109] Although arts. 5(2) and 6(2) limit the effects of party autonomy to the benefit of the consumer, by preserving the pleading and proof of foreign law requirement, parties would be allowed to, essentially, exercise a more far-reaching choice of the governing law, thus overriding the mandate of the conflicts rules and rendering the latter dead letter.[110]

Importantly, Member States have an obligation to ensure that their national laws do not hinder the application of or otherwise limit the effects of EU legislation. In attaining this goal, prevalence should be given to EU law over any conflicting national law provisions, irrespective of the latter's classification as private international law or procedural rules. This is mandated

[106] For the argument that the exclusion of "evidence and procedure" from the EU conflict-of-laws regimes has preserved the diverging approaches to the ascertainment and application of foreign law in the EU, see BENJAMIN'S SALE OF GOODS, *supra* note 103 at 26–029; DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, *supra* note 95 at 322–323; Trevor C. Hartley, *Pleading and Proof of Foreign Law: The Major European Systems Compared*, 45 INT'L & COMP. L. Q. 271, 290–291 (1996); HILL AND CHONG, *supra* note 92 at 648; Jan D. Lüttringhaus, *Article 1*, *in* ROME I REGULATION: POCKET COMMENTARY 23, 68 (Franco Ferrari ed., 2015). *But see* ADRIAN BRIGGS, AGREEMENTS ON JURISDICTION AND CHOICE OF LAW 35 (2008); FENTIMAN, *supra* note 90 at 206–207 ("How foreign law is pleaded is no doubt procedural, but whether foreign law must be pleaded, and thus whether English law may be substituted as the applicable law, is a choice-of-law issue, and as such is governed by the choice-of-law rules of the Regulation.").

[107] Hausmann, *supra* note 57 at I(6).

[108] *See id.* at I(13); ALINA KACZOROWSKA, INTERNATIONAL TRADE CONVENTIONS AND THEIR EFFECTIVENESS: PRESENT AND FUTURE 81 (1995); Harry Duintjer Tebbens, *New Impulses for the Ascertainment of Foreign Law in Civil Proceedings: A Question of (Inter)Networking?*, *in* CONVERGENCE AND DIVERGENCE IN PRIVATE INTERNATIONAL LAW: LIBER AMICORUM KURT SIEHR 635, 644 (Katharina Boele-Woelki *et al*. eds., 2010).

[109] *See* Trautmann, *supra* note 55 at 714; KACZOROWSKA, *supra* note 108 at 81. *But see* Hartley, *supra* note 106 at 291 ("[O]nce litigation has begun, [the consumer's] economically weak position would hardly prevent him from pleading foreign law; so there is no reason why the court should be required to apply foreign law *ex officio*.").

[110] Hausmann, *supra* note 57 at I(7). *Cf.* Rome I Reg., art. 9(3); 1980 Rome Conv., art. 7(1); Jessurun D' Oliveira, *supra* note 11 at 229 ("It is . . . incompatible with the nature of [overriding mandatory rules] that . . . parties have to show that the foreign law is not identical with the *lex fori* in order to induce the judge to apply the applicable foreign law in accordance with its proper sense. Such disingenuous presumptions of identity take foreign law too lightly to be consistent with the ultra-mandatory nature of the rules under consideration.").

by the so-called "primacy" of EU law principle.[111] On that basis, it is submitted that, as of the enactment of the 1980 Rome Convention, all Member State courts have the duty to apply their respective consumer conflict-of-laws rules and to ascertain the content of the applicable foreign law on their own motion.[112] Should the consumer protection rules of either art. 5(2) or 6(2) be triggered, the requirement of pleading and proving foreign law is set aside,[113] and the onus of identifying, establishing, and applying the law falls entirely on the judicial authority.[114] Great as this burden may seem, it should not be treated as a tectonic shift in private international law for two reasons. Firstly, this legal development may be viewed as a further stage in the "*Owusu*-nization" of European conflict-of-laws, that is, the gradual unification of the Member

[111] Declaration No. 17 concerning Primacy, 2012 O.J. (C326) 346. *See e.g.* Case C-284/16, *Slowakische Republik* v *Achmea* BV, ECLI:EU:C:2018:158, ¶ 33 (2018); Joined Cases C-154/15, C-307/15 and C-308/15, *Francisco Gutiérrez Naranjo* v *Cajasur Banco SAU*, *Ana María Palacios Martínez* v *Banco Bilbao Vizcaya Argentaria SA (BBVA)*, *Banco Popular Español SA* v *Emilio Irles López and Teresa Torres Andreu*, ECLI:EU:C:2016:980, ¶ 72–74 (2016); Case C-614/14, *Criminal Proceedings against Atanas Ognyanov*, ECLI:EU:C:2016:514, ¶ 34 (2016); Case C-173/09, *Georgi Ivanov Elchinov* v *Natsionalna Zdravnoosiguritelna Kasa*, 2010 E.C.R. I-08889, ¶ 31; Case C-409/06, *Winner Wetten GmbH* v *Bürgermeisterin der Stadt Bergheim*, 2010 E.C.R. I-08015, ¶ 56; Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi* v *Lloyd Adriatico Assicurazioni SpA*, 2006 E.C.R. I-06619, ¶ 39; Case C-198/01, *Consorzio Industrie Flammiferi (CIF)* v *Autorità Garante della Concorrenza e del Mercato*, 2003 E.C.R. I-08055, ¶ 48; Joined Cases C-369/96 and C-376/96, *Criminal Proceedings against Jean-Claude Arblade and Others*, 1999 E.C.R. I-08453, ¶ 31; Joined Cases C-10/97 to C-22/97, *Ministero delle Finanze* v *IN.CO.GE. '90 Srl and Others*, 1998 E.C.R. I-06307, ¶ 21; Case C-184/89, *Helga Nimz* v *Freie und Hansestadt Hamburg*, 1991 E.C.R. I-00297, ¶ 19; Case C-213/89, *The Queen* v *Secretary of State for Transport, ex parte: Factortame Ltd and Others*, 1990 E.C.R. I-02433, ¶ 20; Case 249/85, *Albako* v *BALMundesanstalt für Landwirtschaftliche Marktordnung*, 1987 E.C.R. -02345, ¶ 14; Case 106/77, *Amministrazione delle Finanze dello Stato* v *Simmenthal SpA*, 1978 E.C.R. -00629, ¶ 22; Case 48/71, *Commission* v *Italy*, ECLI:EU:C:1972:65, ¶ 9 (1972); Case 93/71, *Leonesio* v *Ministero dell' Agricolture e Foreste*, ECLI:EU:C:1972:39, ¶ 22 (1972); Case 11/70, *Internationale Handelsgesellschaft* v *Einfuhr- und Vorratsstelle Getreide*, ECLI:EU:C:1970:114, ¶ 3 (1970); Case 6/64, *Costa* v *E.N.E.L.*, 1964 E.C.R. 585, 594 (1964). *Cf.* 1969 Vienna Conv., art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.").

[112] *See* MICHAEL BOGDAN, CONCISE INTRODUCTION TO EU PRIVATE INTERNATIONAL LAW 118–119 (3rd ed. 2016).

[113] *See* Monica Claes, *The Primacy of EU Law in European and National Law*, *in* THE OXFORD HANDBOOK OF EUROPEAN UNION LAW 178, 182 (Anthony Arnull & Damian Chalmers eds., 2015) ("The EU principle of primacy is a conflict rule, indicating which norm should be applied where two inconsistent norms collide. [. . .] The EU principle of primacy affects only the *applicability* of the conflicting national provision, not its *validity*, on which the EU has no direct say."); Bruno De Witte, *Direct Effect, Primacy, and the Nature of the Legal Order*, *in* THE EVOLUTION OF EU LAW 323, 341 (Paul Craig & Gráinne De Búrca eds., 2nd ed. 2011) ("For national courts, . . . respecting the principle of primacy means that, when an EU rule applies in a given case, any conflicting national norm should be *set aside*. This is often called a duty to *disapply* national law. [. . .] As the operation of setting aside conflicting national law has to be repeated by the same court, and by other courts, in all similar individual cases, the result in practical terms is close to the invalidation of the rule. [. . .] A national rule, which is set aside for being inconsistent with Union law, is inoperative only to the extent of this inconsistency; the rule may continue to be applied to cases where it is not inconsistent, or to cases which are not covered by the EU norm, and it may fully apply again if and when the EU norm ceases to exist.").

[114] *See* Fransesca Ragno, *Article 6*, *in* ROME I REGULATION: POCKET COMMENTARY 208, 236 (Franco Ferrari ed., 2015) ("The judge . . . must (*ex officio*) verify that the law chosen by the parties does not strip the consumer of the protection afforded to him by the mandatory rules of his country of habitual residence, and of that country only. For that purpose, the judge has to identify that legal system's (internally) mandatory provisions, regardless of their source, and compare them with the provisions of the law chosen by the parties to see whether they provide the consumer with higher or lower protection . . . ."). *See also* KACZOROWSKA, *supra* note 108 at 81; Giesela Rühl, *Consumer Protection in Choice of Law*, 44 CORNELL INT'L L. J. 569, 592 (2011). *Cf.* FENTIMAN, *supra* note 56 at 94 (arguing that, when the supplier is the plaintiff, the failure of the latter to prove the content of the applicable foreign law should result in the dismissal of the claim).

States conflicts regimes through the jurisprudence of the CJEU.[115] Secondly, bearing in mind that the party initiating legal proceedings is almost invariably the consumer, for non-delivery, late delivery, or delivery of defective goods by the seller, and given the special jurisdictions rules of the Brussels regimes, courts are, typically, required to apply their respective *lex fori*.[116]

Hence, if the conclusion of a CESL opt-in agreement had been successfully introduced as part of the factual basis of the dispute, the court would have been required to look at the CESL's applicability on its own motion. It should be noted, at this point, that this *ex officio* application of consumer protection rules would not have constituted a first in European private law. Far from that, the active stance of national courts for the protection of weak contracting parties, as required by the principle of effectiveness, has consistently found its way into the judgments of the Court of Justice in Luxemburg.[117] Of course, the parties would have been able

[115] Case C-281/02, *Andrew Owusu* v *NB Jackson*, 2005 E.C.R. I-01383.

[116] *See* FENTIMAN, *supra* note 56 at 95–96; Hausmann, *supra* note 57 at I(7). *See also* TH. M. DE BOER, FACULTATIVE CHOICE OF LAW: THE PROCEDURAL STATUS OF CHOICE-OF-LAW RULES AND FOREIGN LAW, 257 RECUEIL DES COURS/COLLECTED COURSES 223, 368–371 (1996).

[117] *See e.g.* Joined Cases C-154/15, C-307/15 and C-308/15, *Francisco Gutiérrez Naranjo* v *Cajasur Banco SAU*, *Ana María Palacios Martínez* v *Banco Bilbao Vizcaya Argentaria SA (BBVA)*, *Banco Popular Español SA* v *Emilio Irles López and Teresa Torres Andreu*, ECLI:EU:C:2016:980, ¶ 58–59 (2016); Case C-377/14, *Ernst Georg Radlinger and Helena Radlingerová* v *Finway a.s.*, ECLI:EU:C:2016:283 ¶ 52–53 (2016); Case C-497/13, *Froukje Faber* v *Autobedrijf Hazet Ochten BV*, ECLI:EU:C:2015:357, ¶ 42, 56 (2015); Case C-169/14, *Juan Carlos Sánchez Morcillo and María del Carmen Abril García* v *Banco Bilbao Vizcaya Argentaria SA*, ECLI:EU:C:2014:2099, ¶ 22–24 (2014); Case C-280/13, *Barclays Bank SA* v *Sara Sánchez García and Alejandro Chacón Barrera*, ECLI:EU:C:2014:279, ¶ 32–34 (2014); Case C-470/12, *Pohotovosť s.r.o.* v *Miroslav Vašuta*, ECLI:EU:C:2014:101, ¶ 39–41 (2014); Case C-32/12, *Soledad Duarte Hueros* v *Autociba SA and Automóviles Citroën España SA*, ECLI:EU:C:2013:637, ¶ 42 (2013); Case C-488/11, *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito* v *Jahani BV*, ECLI:EU:C:2013:341, ¶ 20–23 (2013); Case C-397/11, *Erika Jőrös* v *Aegon Magyarország Hitel Zrt.*, ECLI:EU:C:2013:340, ¶ 25–28 (2013); Case C-415/11, *Mohamed Aziz* v *Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, ECLI:EU:C:2013:164, ¶ 44–47 (2013); Case C-472/11, *Banif Plus Bank Zrt* v *Csaba Csipai and Viktória Csipai*, ECLI:EU:C:2013:88, ¶ 20–23 (2013); Case C-618/10, *Banco Español de Crédito, SA* v *Joaquín Calderón Camino*, ECLI:EU:C:2012:349, ¶ 39–43 (2012); Case C-472/10, *Nemzeti Fogyasztóvédelmi Hatóság* v *Invitel Távközlési Zrt.*, ECLI:EU:C:2012:242, ¶ 41–43 (2012); Case C-453/10, *Jana Pereničová and Vladislav Perenič* v *SOS financ spol. s.r.o.*, ECLI:EU:C:2012:144, ¶ 27–30 (2012); Case C-76/10, *Pohotovosť s.r.o.* v *Iveta Korčkovská*, 2010 E.C.R. I-11557, ¶ 37–43, 49–51; Case C-137/08, *VB Pénzügyi Lízing Zrt.* v *Ferenc Schneider*, 2010 E.C.R. I-10847, ¶ 46–49; Case C-227/08, *Eva Martín Martín* v *EDP Editores SL*, 2009 I-11939, ¶ 19–20; Case C-40/08, *Asturcom Telecomunicaciones SL* v *Cristina Rodríguez Nogueira*, 2009 E.C.R. I-09579, ¶ 29–32, 51–54; Case C-243/08, *Pannon GSM Zrt.* v *Erzsébet Sustikné Győrfi*, 2009 E.C.R. I-04713, ¶ 30–32; Case C-8/08, *T-Mobile Netherlands BV and Others* v *Raad van bestuur van de Nederlandse Mededingingsautoriteit*, 2009 E.C.R. I-04529, ¶ 49; Case C-429/05, *Max Rampion and Marie-Jeanne Godard* v *Franfinance SA and K par K SAS*, 2007 E.C.R. I-08017, ¶ 64–65; Joined Cases C-222/05 to C-225/05, *J. van der Weerd and Others* v *Minister van Landbouw, Natuur en Voedselkwaliteit*, 2007 E.C.R. I-04233, ¶ 35; Case C-168/05, *Elisa María Mostaza Claro* v *Centro Móvil Milenium SL*, 2006 E.C.R. I-10421, ¶ 25–29, 36–38; Case C-473/00, *Cofidis SA* v *Jean-Louis Fredout*, 2002 E.C.R. I-10875, ¶ 32–34; Joined Case C-240/98 to C-244/98, *Océano Grupo Editorial and Salvat Editores*, 2000 E.C.R. I-04941, ¶ 25–29; Joined Cases C-430/93 and C-431/93, *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen* v *Stichting Pensioenfonds voor Fysiotherapeuten*, 1995 E.C.R. I-04705, ¶ 13, 21. *See also* TIM CORTHAUT, EU ORDRE PUBLIC 200–218 (2012); Fernanda Nicola & Evelyne Tichadou, *Océano Grupo: A Transatlantic Victory for the Consumer and a Missed Opportunity for European Law*, *in* EU LAW STORIES: CONTEXTUAL AND CRITICAL HISTORIES OF EUROPEAN JURISPRUDENCE 369, 387 (Fernanda Nicola & Bill Davies eds., 2017) (noting the importance of the "*audi alteram partem*" principle, when the court proceeds on its own motion).

to opt out of the CESL,[118] but hardly would an informed consumer agree to a change of the applicable rules to her detriment. In short, for consumer sales contracts falling within the regulatory scope of arts. 5(2) and 6(2) of the 1980 Rome Convention and the Rome I Regulation respectively, courts would have been required to apply the CESL on their own motion to the benefit, always, of the consumer.

C. The "Booby Trap" of Applying CESL as Foreign Law

This brief overview of the two representative approaches to the application of foreign law and their interplay with the CESL regime highlights a very important oversight by the European legislator. Notwithstanding their common point of departure *vis-à-vis* the establishment of the factual basis of the dispute, the two approaches differ significantly. Whereas courts of the first group apply their conflict-of-laws rules on their own motion, courts of the second group refrain from resorting to private international law, unless either of the litigants has requested the application of foreign law. This divergence persists despite the legal unification achieved under the 1980 Rome Convention and the Rome I Regulation. Most importantly, the above analysis illustrates that the legal unification purportedly achieved under the CESL model should be taken with a grain of salt. Assuming that the uniform rules of the CESL had been called into application, the legal regime governing the dispute would have been the same before courts located in the EU only in three out of the six possible scenarios, namely scenarios 4, 5, and 6. If the issue in dispute had pertained to any of the CESL "open" terms, the European sales law regime would have achieved legal uniformity only in one out of the six possible scenarios, namely scenario 6. The two approaches come, of course, closer to each other under the argument of an implicit *ex post* choice-of-law agreement. Then again, whereas courts treating foreign law as legal norms would have been required to examine the existence of such an agreement against the relevant rules in the Rome I Regulation or the 1955 Hague Sales Convention, courts treating foreign law as facts would have been required to adhere to the pleading and proof requirement, which essentially sets forth a presumption of an implicit agreement in favour of the *lex fori*.

[118] *See* Christiane Wenderhost, *CESL Regulation, Article 8*, *in* COMMON EUROPEAN SALES LAW (CESL): COMMENTARY 57, 61 (Reiner Schulze ed., 2012).

TABLE III – CESL & FOREIGN LAW: SYNTHESIS				
SCENARIO NO.	**PLEADING OF**	**PROOF OF**	**LEGAL REGIME* (FL AS LEGAL NORMS)**	**LEGAL REGIME* (FL AS FACTS)**
1.	N/A	N/A	CESL (MS version)†	Forum's sales law
2.	EU MS law	No proof	CESL (MS version)†	Forum's sales law
3.	EU MS law	EU MS law	CESL (MS version)†	EU MS law (no CESL)
4.	EU MS law & CESL	No proof	CESL (MS version)†	CESL (forum's version)
5.	EU MS law & CESL	EU MS law only	CESL (MS version)†	CESL (forum's version)
6.	EU MS law & CESL	EU MS law & CESL	CESL (MS version)†	CESL (MS version)

* For issues covered by the *ratione materiae* of the CESL

† Unless an implicit choice-of-law agreement has been entered into between the litigating parties

For consumer transactions, the principles of primacy and effectiveness point towards the setting aside of any national provisions that could impede the consumer protection devised in the European conflict-of-laws and private law instruments. Thus, an "*Owusu No. 2*" judgment, this time pertaining to the legal treatment of foreign law, should come as a surprise to neither legal academics nor practitioners. That being said, the careful alignment of the Brussels and the Rome Regulations' rules on consumer transactions reduces the practicality of any further legal enquiries, as most consumer disputes would trigger the application of domestic, rather than foreign, law.

It might be argued, of course, that the concerns expressed in the preceding paragraphs are of doctrinal value only, as the parties can adapt their litigation strategies accordingly. Reality, however, is different. Since the primary user of the CESL were to have been SMEs, which, more often than not, lack premium legal representation, it should be almost certain that

such complex conflict-of-laws issues would have eluded their consideration when conducting business in the Single Market. Thus, a litigation strategy, carefully devised to take advantage of the instrument's shortcomings, could have disturbed the equilibrium of the contract to the detriment of the unsuspecting counter-contracting SME. The latter, lured by the possibility of streamlining her contractual obligations under the umbrella of a single European sales law regime, would have fallen for a "Trojan horse"[119] or into the "booby trap" of the differentiated legal treatment of foreign law. But this time, the shortcoming of the CESL would not have come from its unique legal structure,[120] from certain mandatory rules,[121] or from other legal instruments,[122] but from "within," that is, from the limitations of the very EU legislation. These harmonization failings—hidden in plain sight—could have jeopardized the uniform application of the instrument and damage the reliability of the European sales law regime.[123] Added to the already narrow scope of the CESL and its complex structure as second parallel legal regime, this foreign law enquiry would have reduced further the practicality of the proposed instrument.

Following this overview of the CESL's application as foreign law in international litigation proceedings, the next section explores the ascertainment and applicability of the CESL in a different dispute resolution setting, namely, in international arbitral proceedings.

VI. ASCERTAINING THE CONTENT OF THE CESL IN INTERNATIONAL ARBITRATION

Unlike court proceedings, in international arbitration, no such distinction exists between domestic and foreign law.[124] Other than the indirect selection of the basic procedural

[119] Carlos Esplugues Mota, *Harmonization of Private International Law in Europe and Application of Foreign Law: The "Madrid Principles" of 2010*, 13 Y. B. PRIV. INT'L L. 273, 276 (2011).
[120] *See* analysis in *supra* Part I.
[121] *See* analysis in *infra* Part III.
[122] *See* analysis in *infra* Part IV.
[123] For that reason, it has been proposed that a special content-of-laws rule should be included in the CESL. *See e.g.* Gerhard Dannemann, *Choice of CESL and Conflict of Laws*, *in* THE COMMON EUROPEAN SALES LAW IN CONTEXT: INTERACTIONS WITH ENGLISH AND GERMAN LAW 21, 77 (Gerhard Dannemann & Stefan Vogenauer eds., 2013) ("A provision which obliges courts to apply the CESL whenever this is invoked by the conflict of law rules of the forum and the choice rules of the Regulation giving effect to the proposed CESL could usefully be added to the Regulation. The same result could also be reached by an extension of the ECJ decision in *Océano Grupo*.").
[124] ILA Report & Recommendations, *supra* note 51 at 866; Christian P. Alberti, *Iura Novit Curia in International Commercial Arbitration*, *in* LIBER AMICORUM ERIC BERGSTEN: INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW. SYNERGY, CONVERGENCE AND EVOLUTION 3, 14 (Stefan Kröll *et al*. eds., 2011); CLYDE CROFT, CHRISTOPHER KEE & JEFFREY WAINCYMER, A GUIDE TO THE UNCITRAL ARBITRATION RULES 403 (2013); Gisela Knuts, *Jura Novit Curia and the Right to Be Heard - An Analysis of Recent Case Law*, 28 ARB. INT'L 669, 672 (2012); JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 444 (2003); WAINCYMER, *supra* note 65 at 1059. *See also* Teresa Isele, *The Principle Iura Novit Curia in International Commercial Arbitration*, 13 INT'L A. L. R. 14, 16 (2010)

framework—as determined by the *lex arbitri*[125]—that is effected by locating the seat of the tribunal in a particular country[126]—thus, *lex loci arbitri*,[127]—it cannot be sensibly argued that an arbitral tribunal has its own substantive law regime.[128] Hence, the comparison between "foreign law as facts" and "foreign law as law" is irrelevant in arbitral proceedings,[129] because

("[In international arbitration,] it is dogmatically already quite difficult to say that any law is 'foreign' at all."); Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313, 1331 (2003) ("An arbitral tribunal has no *lex fori* and hence no 'foreign' law. Or differently put, it has only foreign law."). *Contra* Rolf A. Schütze, *Die Bestimmung des Anwendbaren Rechts im Schiedsverfahren und die Feststellung Seines Inhalts*, *in* LAW OF INTERNATIONAL BUSINESS AND DISPUTE SETTLEMENT IN THE 21ST CENTURY: LIBER AMICORUM KARL-HEINZ BÖCKSTIEGEL 715, 722 (Robert Briner *et al*. eds., 2001) ("Ausländisches Recht ist damit das Recht, das nicht mit dem Recht am Schiedsort übereinstimmt." ["Foreign law is, therefore, the law that does not correspond with the law at the seat of the arbitral tribunal."]); Tibor Varady, *Application of Foreign Law by Non-Judicial Authorities*, *in* HAGUE-ZAGREB ESSAYS 2: PRODUCT LIABILITY, ROAD TRANSPORT, FOREIGN LAW 204, 212 (T.M.C. Asser Institute ed., 1978) ("The first specific dilemma with regard to the application of *foreign law* in international commercial arbitration, is, which law can be regarded as foreign.").

[125] JOSEPH LOOKOFSKY & KETILBJØRN HERTZ, TRANSNATIONAL LITIGATION AND COMMERCIAL ARBITRATION: AN ANALYSIS OF AMERICAN, EUROPEAN, AND INTERNATIONAL LAW 824 (3rd ed. 2011) ("[T]he *lex arbitri* serves as a kind of public-law 'umbrella' which the State concerned holes over the [otherwise private] arbitral process.").

[126] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, vol. II at 1602 (2nd ed. 2014) ("While the procedural law of the arbitration will very often be the arbitration law of the arbitral seat, some national arbitration legislation (e.g., Swiss, French) allows parties to an arbitration seated locally to agree to a foreign procedural law, which will then replace or supplement most aspects of the arbitration law of the seat."); Kaufmann-Kohler, *supra* note 124 at 1319; WILLIAM W. PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE 327 (2nd ed. 2012); JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 84–85, 458 (Stephen V. Berti & Annette Ponti trans., 2nd ed. 2007); WAINCYMER, *supra* note 65 at 1072. For a critical stance on this proposition, see FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, 635 (Emmanuel Gaillard & John Savage eds., 1999). For a critical review of the theories identifying the law of the seat as the procedural law of the arbitral proceedings, see GEORGIOS PETROCHILOS, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION 16–17, 19–46 (2003). For a third "no-choice" view, see NIGEL BLACKABY & CONSTANTINE PARTASIDES, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 171–172, 176 (6th ed. 2015).

[127] LOOKOFSKY AND HERTZ, *supra* note 125 at 834. *See* UNCITRAL Model Law, art. 1(2).

[128] *See* PIERRE A. KARRER, INTRODUCTION TO INTERNATIONAL ARBITRATION PRACTICE: 1001 QUESTIONS AND ANSWERS 161 (2014) ("[*Lex*] *arbitri* is often a *genitivus objectivus*, so one should translate as, 'the law concerning the arbitrator.' This is a law at the seat dealing with the relationship between the Arbitral Tribunal and the State Courts at the seat."). *Cf.* Linda Silberman & Franco Ferrari, *Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting It Wrong*, *in* CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION 371, 415 (Franco Ferrari & Stefan Kröll eds., 2nd ed. 2019) (disapproving Restatement [Second] of Conflict of Laws § 218, comment b, which cites two cases as examples whereby the selection of a particular state as *situs* of the arbitral tribunal "should be read as calling for application of that state's local law to govern the rights of the parties under the contract . . . .").

[129] *See* BLACKABY AND PARTASIDES, *supra* note 126 at 398 ("[I]t takes only a brief moment of reflection to appreciate that the convenient fiction that 'foreign law is fact' does not work in the context of an international arbitration. [. . .] Nowadays, in almost all international arbitrations, 'law' is treated as 'law'."); Gillis J. Wetter, *The Conduct of the Arbitration*, 2 J. INT'L ARB. 7, 25 (1985) ("[G]eneral international arbitral practice does not accept the English rule that the determination of foreign law is a question of fact. International arbitrators do apply any law as if it were their own.").

It is, precisely, this "legal" or "non-factual" nature of the applicable law in arbitration that places the latter outside the ambit of the International Bar Association (IBA), Rules on the Taking of Evidence in International Arbitration (2010), *available at* https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx. *Contra* DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, *supra* note 95 at 318 ("[A] finding upon foreign law made by arbitrators is a finding of fact which may not form the basis of an appeal on a point of law under s. 69 of the Arbitration Act 1996."); FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 126 at 692 ("As an arbitral tribunal has no forum, it should consider all laws to be foreign laws, the content of which should be established as though it were an element of fact. The idea that foreign laws should be treated as issues of fact is well established in both common law and civil law systems and should

there can be only "*applicable* law."[130] By the same token, the distinction between national "hard" law and "soft" law instruments is, also, irrelevant,[131] as national laws and "rules of law" are, generally, put on par under the various *leges arbitri*.[132] Nonetheless, these observations do not address the issue of who bears the burden of establishing the content of the applicable regime. Does it fall on the arbitral tribunal or on the parties? Is there any such concept as "*jura novit arbiter*"[133] or "*jura novit tribunus*"[134]? Is the arbitral tribunal empowered to resolve the dispute on unpleaded legal grounds?[135] All these enquiries have seldom been examined in the framework of international arbitration.[136]

This thorny issue should be addressed in accordance with the two-tier regulatory framework of arbitral proceedings.[137] Specifically, it should be approached with reference to, firstly, the procedural agreements of the parties, including any arbitration rules incorporated by reference into the arbitration agreement,[138] and secondly, the national law governing the arbitral proceedings.[139]

apply in international arbitral practice."); MICHAEL J. MUSTILL & STEWART C. BOYD, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND 73 (2nd ed. 1989).

[130] ILA Report & Recommendations, *supra* note 51 at 866 ("Unlike before national courts where there is a distinction between national and foreign law, in arbitration one can only speak of applicable law.").

[131] *See* LEW, MISTELIS, AND KRÖLL, *supra* note 124 at 441.

[132] Classic example of a rule enshrining this proposition is UNCITRAL Model Law, art. 28(1).

[133] Gabrielle Kaufmann-Kohler, *"Iura Novit Arbiter" - Est-Ce Bien Raisonnable? Réflexions sur le Statut du Droit de Font devant l'Arbitre International*, *in* DE LEGE FERENDA: RÉFLEXIONS SUR LE DROIT DESIRABLE EN L' HONNEUR DU PROFESSEUR ALAIN HIRSCH 71 (2004).

[134] Christian P. Alberti & David M. Bigge, *Ascertaining the Content of the Applicable Law and Iura Novit Tribunus: Approaches in Commercial and Investment Arbitration*, 70 D. R. J. 1 (2015).

[135] *Cf.* PETROCHILOS, *supra* note 126 at 146 ("The relevant case law is less than clear-cut, no doubt because of the varying conceptions on the corresponding duty of a judge in national court proceedings.").

[136] As uniquely put by Prof. Park in William W. Park, *Arbitrators and Accuracy*, 1 J. I. D. S. 25, 42 (2010) ("Many trees have been felled to make paper for articles on how to find facts, [but] . . . [l]ess attention has been paid to the arbitrator's truth-seeking function with respect to legal norms"). For informative publications on the ascertainment of the content of the applicable law in international arbitration, see e.g. IURA NOVIT CURIA IN INTERNATIONAL ARBITRATION, (Franco Ferrari & Giuditta Cordero-Moss eds., 2018); Soterios Loizou, *Revisiting the "Content-of-Laws" Enquiry in International Arbitration*, 78 LA. L. REV. 811 (2018).

[137] *See* BLACKABY AND PARTASIDES, *supra* note 126 at 156 ("[A]n arbitration does not exist in a legal vacuum. It is regulated, first, by the rules of procedure that have been agreed or adopted by the parties and the arbitral tribunal; secondly, it is regulated by the law of the place of arbitration. It is important to recognise . . . that this dualism exists.").

[138] *See* analysis in *infra* Section VI(A).

[139] *See* analysis in *infra* Section VI(B).

A. Party Autonomy

It is well established that party autonomy is the cornerstone of international arbitration. The parties may structure their respective arbitral proceedings as they see fit,[140] to the extent, of course, that the law governing the arbitral procedure allows.[141] Because most—if not all—*leges arbitri* impose no limitations on the parties' freedom to enter into special agreements on the content-of-laws enquiry, the latter are allowed to allocate the onus of establishing the content of the applicable law as they deem appropriate. Specifically, such an agreement may be concluded at any stage before or after the proceedings have been initiated, but, certainly, before the closing of the hearings by the tribunal.[142] It may take the form of a clause in the arbitration or submission agreement,[143] a special procedural agreement between the parties,[144] or even an express procedural understanding of the parties and the tribunal, as documented in the Terms of Reference of the dispute.[145] This practice of contractually establishing clear-cut procedural rules raises no serious problems in the theory and practice of international arbitration. The arbitrators are obliged to adhere to the directions of the parties.[146] Should they

[140] *See* PETROCHILOS, *supra* note 126 at 170 ("The parties' instructions to the arbitrators are always binding on them, subject of course to common sense and decency, professional ethics, and criminal law.").
[141] *See* 1958 New York Conv., art. V(1)(d); UNCITRAL Model Law, art. 19(1). *See also* NIGEL BLACKABY & CONSTANTINE PARTASIDES, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 180 (5th ed. 2009); Gabrielle Kaufmann-Kohler, *Qui Contrôle l' Arbitrage? Autonomie des Parties, Pouvoirs des Arbitres et Principe d' Efficacité*, *in* LIBER AMICORUM CLAUDE REYMOND: AUTOUR DE L' ARBITRAGE 153, 161 (2004); POUDRET AND BESSON, *supra* note 126 at 470; WAINCYMER, *supra* note 65 at 52, 109, 192. *But see* PETROCHILOS, *supra* note 126 at 170 ("[T]he parties may obligate the arbitrators to derogate from the law of the arbitral seat, or from any national law for that matter. [. . .] [N]either the arbitral institution nor the arbitrators are at liberty to [act] against the parties' agreement. At most, the arbitral institution may decline to administer the proceedings, and the controlling courts set the award aside.").
[142] *See* Seventh session of the Working Group on International Contract Practices (New York, 6-17 February 1984), Report of the Working Group on the Work of its Seventh Session (A/CN.9/246) (Mar. 6, 1984), at 196, [63] ("[T]he freedom of the parties to agree on the procedure should be a continuing one throughout the arbitral proceedings . . . and should not be limited . . . to the time before the first arbitrator was appointed."). *See also* BLACKABY AND PARTASIDES, *supra* note 126 at 171; GABRIELLE KAUFMANN-KOHLER & ANTONIO RIGOZZI, INTERNATIONAL ARBITRATION: LAW AND PRACTICE IN SWITZERLAND 376 (2015).
[143] That the content of the applicable law issue is rarely addressed in the parties' agreements, see Alberti and Bigge, *supra* note 134 at 1; Ieva Kalniņa, *Iura Novit Curia: Scylla and Charybdis of International Arbitration?*, 8 BALTIC Y. B. INT'L L. 89, 92 (2008).
[144] *See also* POUDRET AND BESSON, *supra* note 126 at 459 ("In practice it will be rare that [the parties] develop a complete procedural code solely intended to apply to a particular case. Only certain sensitive questions (language, exchange of briefs, confidentiality or information divulged during the course of the proceedings, discovery, etc.) will generally be the object of a specific agreement.").
[145] ICC Rules of Arbitration, art. 23 (2017) (rule on the "Terms of Reference"); Tribunal federal [TF] [Federal Supreme Court] Feb. 5, 2014, 4A_446/2013 (Switz.) (where such an agreement was entered into with the Terms of Reference). *Cf.* UNCITRAL Notes on Organizing Arbitral Proceedings (2016), *available at* www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-2016-e.pdf.
[146] *See* POUDRET AND BESSON, *supra* note 126 at 462–463 ("The majority opinion submits that the arbitrator or arbitrators may not veto a procedural agreement which has been properly concluded by the parties, but may only resign if they feel unable to accomplish their task. *De lege lata*, we feel that this majority opinion is correct in view of the principle of party autonomy. *De lege ferenda*, we are of the opinion that . . . the arbitrators should by law have the power to set aside the agreements which are an obstacle to the smooth conduct of the proceedings.").

deviate, the arbitral award will, most likely, be set aside[147] or pronounced unenforceable[148] by the courts at the tribunal's seat or in any other country, where enforcement is sought. Most frequently, however, procedural agreements between the parties take the form of a clause incorporating by reference institutional or other model arbitration rules into the arbitration agreement.[149] That being said, most institutional and other model arbitration rules are silent on the content-of-laws enquiry.[150]

B. Lex Arbitri

In the absence of a special procedural agreement between the parties, the arbitral tribunal will have to adhere to the mandates of the *lex arbitri*. Most national laws on international arbitration, however, lack any rules—let alone any mandatory rules—on the ascertainment of the content of the governing law.[151] Instead, they, usually, provide for a procedural catch-all

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Similarly, SIMON GREENBERG, CHRISTOPHER KEE & ROMESH J. WEERAMANTRY, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE 307–308 (2011); THOMAS H. WEBSTER, HANDBOOK OF UNCITRAL ARBITRATION: COMMENTARY, PRECEDENTS AND MATERIALS FOR UNCITRAL BASED ARBITRATION RULES 269–270 (2010).

[147] *See* UNCITRAL Model Law, arts. 34(1), 34(2)(a)(iv).

[148] *See* 1958 New York Conv., art. V(1)(d); UNCITRAL Model Law, art. 36(1)(a)(iv).

[149] *See* U.N. Secretary-General, *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, U.N. Doc. A.CN.9/264 (Mar. 25, 1985). *See also* GARY B. BORN, INTERNATIONAL ARBITRATION: CASES AND MATERIALS 778 (2nd ed. 2015).

[150] Alberti, *supra* note 124 at 16, and 17 ("One reason for the silence on [how the applicable law and its content should be ascertained] may be that institutions need to keep their rules flexible enough to allow parties from all jurisdictions to 'feel comfortable' with their rules without cutting too far into procedural maxims."); Knuts, *supra* note 124 at 672; LEW, MISTELIS, AND KRÖLL, *supra* note 124 at 443. *See also* CROFT, KEE, AND WAINCYMER, *supra* note 124 at 402 ("This [lack of special rules in the UNCITRAL Model Rules] is largely because different legal families have taken fundamentally different approaches to this question."); Teresa Giovannini, *Ex Officio Powers to Investigate: When Do Arbitrators Cross the Line?*, *in* STORIES FROM THE HEARING ROOM: EXPERIENCE FROM ARBITRAL PRACTICE: ESSAYS IN HONOUR OF MICHAEL E. SCHNEIDER 59, 66, and 66, note 38 (Bernd Ehle & Domitille Bazieau eds., 2014) (noting, as exceptions to this general observation, the LCIA Arbitration Rules of 1998, art. 22(1)(c) [LCIA Arbitration Rules of 2014, art. 22(1)(iii)], CIETAC Arbitration Rules, arts. 29(3) and 27 [sic] [arts. 35(1) and 35(3) being more relevant to the issue], and SIAC Rules of 2013, art. 24(1)(d) [SIAC Rules or 2016, art. 27(c)]. For other notable examples, see JAMS International Arbitration Rules, art. 21(4) (2016); Polish Chamber of Commerce – PCC Arbitration Rules, art. 6(2) (2015); Kuala Lumpur Regional Centre for Arbitration – KLRCA Fast Track Rules, § 13(9) (2010); Belarusian Chamber of Commerce and Industry – BCCI Arbitration Rules, art. 38(2) (2008); CPR Rules for Expedited Arbitration of Construction Disputes, art. 12(6) (2006). For arbitration rules that are nearly identical with the LCIA Arbitration Rules, art. 22(1)(iii) (2014), see Dubai International Financial Centre, Arbitration Centre – DIFC-LCIA Arbitration Rules, art. 22(1)(iii) (2016); LCIA India Arbitration Rules, art. 22(1)(b) (2010); Bangladesh Council for Arbitration of the Federation of Bangladesh Chambers of Commerce and Industry – BCA Arbitration Rules, art. 14(3)(1)(b) (2004). It is surprising that no negotiations on the content-of-laws issue can be traced in the preparatory works of the UNCITRAL Arbitration Rules – in neither the 1976 nor the 2010 versions.

[151] Teresa Giovannini, *International Arbitration and Jura Novit Curia - Towards Harmonization*, 9 T. D. M. 1, 5 (2012); Isele, *supra* note 124 at 14, 17; Kalniņa, *supra* note 143 at 92; Knuts, *supra* note 124 at 672; WAINCYMER, *supra* note 65 at 1068. *See also* ILA Report & Recommendations, *supra* note 51 at 867–868 (noting three exceptions to this general proposition, namely the Dutch Code of Civil Procedure, art. 1044, the Danish Arbitration Act § 27(2) (2005), and the English Arbitration Act, §§ 34(1), 34(2)(g) (1996).

rule that empowers the tribunal to conduct the arbitration in an "appropriate manner,"[152] "unimpeded by local peculiarities and traditional standards which may be found in the existing domestic law of the place [of arbitration],"[153] albeit always within the mandatory rules of the *lex arbitri* and the fundamental principles of arbitration.[154] Although this latter rule delineates, in very broad terms, what the arbitrators *can* do, it gives no guidance as to what the arbitrators *should* do with respect to establishing the content of the applicable law. It is precisely this regulatory vacuum that allowed for the articulation of various legal theories, such as the "fall-back [on civil procedure]," the inquisitorial, the adversarial, and the "hybrid" approaches, augmenting, thus, legal uncertainty on the topic.[155]

That being said, one cannot fail to observe the legal convergence taking place on the content-of-laws enquiry in international arbitration. Contrary to conventional wisdom,[156] a trend is being established towards the rejection of both "pure" inquisitorial and adversarial approaches, and the adoption of a more facultative-discretionary approach to the issue.[157] This may be described as a "dormant" or "potentially inquisitorial" approach. Whereas the principle *jura novit curia* signals both *a right and duty* of the court to establish the legal basis of the dispute,[158] pursuant to this emerging approach, the arbitrators are merely *allowed* to look

For national law provisions that are nearly identical with section 34(2)(g) of the English Arbitration Act of 1996, see Arbitration Act (2013), § 54(7) (Virgin Is.); Arbitration Ordinance (2013), cap. 609, § 56(7) (H.K.); International Arbitration Act (2008), § 24(3)(g) (Mauritius); International Arbitration Act (2002), c. 143(A) § 12(3) (Sing.); Arbitration Act (2001), § 25(3)(g) (Bangl.). For other national law provisions on the content-of-laws enquiry, see Law on the International Arbitral Court (1999) (as amended in 2014), art. 37 (Belr.); Arbitration Act (2009), art. 45(2)(g) (Bah.); Arbitration Act (2004), art. 32 (Nor.). Similarly to the UNCITRAL Arbitration Rules, it is quite surprising that the content-of-laws issue was not discussed during the drafting of neither the 1985 nor the 2006 versions of the UNCITRAL Model Law.

[152] *See e.g*. UNCITRAL Model Law, art. 19(2); Analytical Commentary, *supra* note 149, at 45 ("This enables the arbitral tribunal to meet the needs of the particular case and to select the most suitable procedure when organizing the arbitration, conducting individual hearings or other meetings and determining the important specifics of taking and evaluating evidence."). *See also* BORN, *supra* note 149 at 778 ("This authority [of the arbitrators] has enormous practical importance because it is rare case where the parties to an arbitration will find common ground on all of the procedural issues that confront them.").

[153] Analytical Commentary, *supra* note 149, at 44, and 46 ("In practical terms, the arbitrators would be able to adopt the procedural features familiar, or at least acceptable, to the parties (and to them) . . . . Above all, where the parties are from different legal systems, the arbitral tribunal may use a liberal 'mixed' procedure, adopting suitable features from different legal systems and relying on techniques proven in international practice . . . Such procedural discretion . . . seems conducive to facilitating international commercial arbitration, while being forced to apply the 'law of the land' where the arbitration happens to take place would present a major disadvantage to any party not used to that particular and possibly peculiar system of procedure and evidence.").

[154] *See* HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 583 (1989).

[155] For analysis of all four theories, see Loizou, *supra* note 136 at 830–839.

[156] ILA Report & Recommendations, *supra* note 51 at 872 ("The Committee has not been able to discern any uniform practice [as to how arbitral tribunals determine the content of the *lex causae*].").

[157] The *ILA Report & Recommendations* have been instrumental in delineating a method of establishing the content of the governing law in arbitral proceedings.

[158] *See* analysis in *supra* Section II.

beyond the arguments advanced by the parties.[159] This amounts to the application of a *facultative jura novit arbiter* principle. This prerogative of the tribunal, however, must be paired, to a greater or lesser extent, with the opportunity of the parties to express their opinion on the legal issues raised by the tribunal *propriu motu*. By allowing the parties to be, essentially, in control of the legal basis of the dispute, the arbitrators ensure that the threshold set by the fundamental principles of international arbitration has been met,[160] due process and public policy have been duly considered, the arbitral proceedings have been conducted in a fair and unbiased manner, and the award has been rendered within the mandate of the tribunal.[161] This observation testifies to the quiet, but powerful, effect that the fundamental principles of arbitration have on the structure of international arbitral proceedings, and explains the gradual convergence of national laws on international arbitration.

C. CESL as the Applicable Law in International Arbitration

Pursuant to the "dormant" or "potentially inquisitorial" approach noted above, the arbitrators should begin their legal analysis from the submissions of the parties. Assuming that the CESL had been validly selected for the regulation of the sale of goods contract, if the parties had requested the arbitral tribunal to disregard the opt-in mechanism, an enquiry into the applicability of the CESL would have constituted a superfluous theoretical exercise that could expose the final award to the risks of annulment or limited enforceability. When, however, the applicability of the CESL had been neither excluded by the parties nor raised in their pleadings, the tribunal would have been *allowed*, but not required, to explore that possibility with the parties. If the parties had reverted again without any comments on the applicability of the CESL, this stance ought to have been understood as a subsequent agreement to de-select the instrument. Furthermore, if the arbitrators had found the parties' submissions unpersuasive compared to the legal basis identified *proprio motu*, they would have been required to advise the parties accordingly and solicit further submissions before rendering the arbitral award. Lastly, in light of the arbitrators' duty to render an enforceable award, the tribunal would have

[159] *Cf.* Alberti, *supra* note 124 at 26 ("In absence of any specific rules or trends to the contrary one may argue that the *iura novit curia* principle should then be treated as a tribunal's right—and not as a duty—to ascertain the contents of the law.").
[160] Antonias Dimolitsa, *The Equivocal Power of the Arbitrators to Introduce Ex Officio New Issues of Law*, 27 ASA BUL. 426, 432–433 (2009).
[161] *See* ILA Report & Recommendations, *supra* note 51 at 881, Recommendation No. 2. *See also e.g.* UNCITRAL Model Law, art. 18; UNCITRAL Arbitration Rules, art. 17(1). *Cf.* 1958 New York Conv., art. V(2)(b); UNCITRAL Model Law, arts. 34(1), 34(2)(b)(ii), and 36(1)(b)(ii).

been required to explore *sua sponte* the applicability of any relevant overriding mandatory rules, and to consider any legal issues pertaining to the international public policy of either the *situs* or any other country of potential enforcement of the award.[162] This practice would have been particularly appropriate for consumer sales arbitrations.[163] For consumer protection rules are, frequently, treated as public policy rules in either the country of the seat or the country of enforcement, arbitral tribunals would have assumed an active role in ascertaining and applying the relevant consumer protection provisions of the CESL. This is also corroborated by art. 11 of the Directive on Consumer ADR, where the EU legislator maintained the protection afforded to consumers under the Rome I Regulation and the 1980 Rome Convention.[164] Nonetheless, even under these scenarios, the tribunal should revert to the parties and solicit further legal submissions on the pertinent mandatory rules or international public policy considerations.

Therefore, it may be safely asserted that the failure of the parties to request the application of the CESL would not, without more, have excluded the application of the instrument. Put differently, the pleading and proof of the CESL would not have constituted a *conditio sine qua non* of the instrument's application, a de facto application requirement of the CESL.[165] If the arbitral tribunal had contemplated rendering an award on a legal basis not articulated in the submissions of the parties, for instance, on the basis of the non-pleaded CESL, it ought to have provided the parties with the opportunity to be heard on the new points. By the same token, the application of the CESL would not have been excluded, if the parties had failed to submit proof of the instrument's content, as the arbitrators could—but would not have been required to—have ascertained *ex officio* the content of the relevant CESL rules. It would have been precisely the *post contractum* intention of the parties, as expressed in either their memorials or their supplemental pleadings upon the tribunal's request, which would have determined whether the arbitrators ought to have applied the CESL or another sales law regime for the resolution of the issues in dispute.

[162] *See* analysis in *infra* Part III.
[163] Provided that, firstly, consumer disputes are arbitrable in the country of the tribunal's seat and, secondly, the arbitration agreement be valid and enforceable.
[164] Directive 2013/11/EU, of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC, 2013 O.J. (L165) 63, 67–68, recital no. 44, art. 11(1).
[165] *Cf.* analysis in *supra* Section V(A)(2).

VII. CONCLUSION

This Part explored whether the fragmentation of national rules on foreign law would be detrimental to the unification of sales law using the second parallel legal regime vehicle. In this endeavour, it was shown that the selected legislative basis of the CESL, namely TFEU art. 114, would have preserved the territorial nature of the CESL and created a bundle of CESL regimes, rather than a single uniform legal framework for sales contracts. This regulatory choice, together with a number of CESL provisions that were deliberately left "open" by the drafters of the instrument, would have allowed for the formulation of as many different versions of the CESL as the EU Member States. Furthermore, it was illustrated that, notwithstanding the extensive unification of EU private international law, the legal treatment of foreign law has remained diverse, and, when combined with the unique legal structure of the CESL, it would have introduced an additional de facto application requirement in all states adhering to the "foreign law as facts" doctrine. As to consumer transactions, it was submitted that the facultative nature of conflicts rules, as perceived by states that require the pleading and proof of foreign law by the litigants, is inconsistent with the consumer protection mandates of art. 5 of the 1980 Rome Convention and art. 6 of the Rome I Regulation. As a result, EU Member State courts would have been required to examine the applicability and to ascertain the content of the CESL *ex officio*. Also, given the legal activism of the EU legislator and the CJEU *vis-à-vis* consumer protection, it was argued that the *Owusu*-nization of the legal treatment of foreign law is anything but far-fetched. Transposing the "facts *vs*. legal norms" problematic into international arbitration, it became apparent that the selection of the CESL alone would not have been sufficient for the application of the instrument. Whereas no additional de facto application requirement would have been implied in arbitral proceedings, it is the *post contractum* intention of the parties, as expressed in their pleadings, that would have determined the applicability of the European sales law rules to the issues in dispute. Hence, it is submitted that the added complexity of ascertaining and applying the CESL as foreign law would have barely contributed to the establishment of legal certainty in the Single Market.

PART III
CESL & INTERNATIONAL PUBLIC POLICY CONSIDERATIONS: THE ENEMY THAT NEVER WAS

> "The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[1]

I. INTRODUCTION

Any research project that relates to multiple jurisdictions would remain incomplete without an analysis of public policy considerations and fundamental state interests. The latter manifest, typically, in the so-called "overriding mandatory rules" and the "public policy" defence. Having covered the activation mechanism of the CESL and the instrument's interplay with the national rules on the legal treatment of foreign laws,[2] the analysis continues with an examination of the effects that national interests might have had on the applicability of European sales law. Specifically, the question tackled in Part III is whether fundamental state interests could interfere with the application of the optional sales law instrument.

In exploring this topic, Part III encompasses a theoretical review of overriding mandatory rules and substantive public policy,[3] and a focused examination of the effects—if any at all—of the two conflicts devices on the applicability of the CESL model.[4] On that basis, the analysis seeks to answer whether overriding mandatory provisions could have prevailed over the corresponding CESL rules and whether the public policy defence could have bared the *in casu* application of certain CESL provisions. In answering these questions, particular emphasis is placed on the European "origins" of the instrument and the influence that the latter might have had on the enquiry examined herein. Further, this Part looks at the applicability prospects of the CESL before courts of non-EU Member States and arbitral tribunals. Should the latter be distinguished from Member State courts? Succinctly, the following paragraphs illustrate that

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[1] *Loucks* v *Standard Oil Co of New York*, 224 N.Y. 99, 111 (1918) (USA).
[2] *See* analysis in *supra* Parts I and II respectively.
[3] *See* analysis in *infra* Section II.
[4] *See* analysis in *infra* Section III.

the European nature of the proposed CESL would have "neutralized" any public policy considerations that could endanger the application of the instrument in Member State courts. Conversely, before arbitral tribunals and third country fora, fundamental state interests could have interfered with the application of the instrument, albeit in exceptional situations only.

II. OVERRIDING MANDATORY RULES & PUBLIC POLICY

Overriding mandatory provisions and international public policy are key-elements for the preservation of the good order, constant progress, and peaceful symbiosis of societies in a globalized world. These conflicts devices require or bar respectively the application of certain rules to the issues in dispute. Their common denominator is the protection of important state interests through the introduction of far-reaching exceptions to the comity of nations and conflicts multilateralism. For that reason, the overriding mandatory rules and the public policy defence have been described as two sides of the same coin, which correspond to the positive and the negative functions of a broader public policy.[5] Mirroring their order of appearance in the choice-of-law process,[6] the following paragraphs begin with an overview of overriding mandatory provisions and conclude with the examination of the public policy defence.

A. Overriding Mandatory Provisions

Going by a number of names, such as internationally or overriding mandatory provisions, overriding statutes,[7] directly applicable rules, rules of immediate application, *lois de police*, etc.,[8] this type of rules is anything but new to the private international law doctrine. Articulated in mid-19th century in Savigny's grand conflict-of-laws design and Mancini's conflicts theory,[9]

[5] Commentary on the Principles on Choice of Law in International Commercial Contracts, 73; JAMES J. FAWCETT, JONATHAN M. HARRIS & MICHAEL BRIDGE, INTERNATIONAL SALE OF GOODS IN THE CONFLICT OF LAWS 760 (2005). *See* JONATHAN HILL & MÁIRE NÍ SHÚILLEABHÁIN, CLARKSON & HILL'S CONFLICT OF LAWS 247 (5th ed. 2016); Moritz Renner, *Rome I: Article 9*, *in* ROME REGULATIONS: COMMENTARY 242, 245 (Gralf-Peter Calliess ed., 2nd ed. 2015). *See also* Frank Vischer, *Connecting Factors*, III.4 *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 1, 5 (Kurt Lipstein ed., 1998).

[6] Whereas overriding mandatory provisions are applied before the ordinary conflicts rules, public policy is triggered after the identification of the *lex causae*. Andrea Bonomi, *Mandatory Rules in Private International Law: The Quest for Uniformity of Decisions in a Global Environment*, 1 Y. B. PRIV. INT'L L. 215, 229 (1999).

[7] DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, vol. 1 at 24–30 (15th ed. 2012).

[8] *See e.g.* Andrea Bonomi, *Article 9*, *in* ECPIL COMMENTARY: ROME I REGULATION 599, 605 (Ulrich Magnus & Peter Mankowski eds., 2017).

[9] FRIEDRICH CARL VON SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS AND THE LIMITS OF THEIR OPERATION IN RESPECT OF PLACE AND TIME 76–81 (William Guthrie tran., 2nd ed. 1880); Paul Lagarde, *Public Policy*, III.1 *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 1, 3–4 (Kurt Lipstein ed., 1991).

and redefined a century later thanks to the seminal work of Franceskakis,[10] these rules have attracted much attention in legal scholarship—perhaps quite disproportionately to their significance in case law. Pursuant to Rome I Reg. art. 9(1), which sets forth the only legislative definition of such rules,[11]

> Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract . . . .[12]

This definition amplifies the two fundamental features of these rules: *i*. their compulsory application, which translates into the setting aside of the choice-of-law process—*ergo* "overriding" rules—and *ii*. their close link to important public policy interests—*ergo* "mandatory" rules.[13] The following paragraphs look closely at these two features.

1. The "overriding" nature of the rules

As vividly put in legal theory, overriding mandatory provisions constitute the "sword" of the adjudicator.[14] They bear unilateral effects in that they prescribe, without more, the application of certain substantive rules. They do not contribute to the identification of the *lex causae* and, certainly, do not invalidate any rules-selection agreements between the parties.[15] Rather, the unilateral effects of such overriding mandatory provisions are limited to their regulatory scope. To the extent that they are applicable, these provisions *override* all conflicts rules and render redundant any other choice-of-law enquiries.[16] All matters falling

[10] Phocion Francescakis, *Quelques Précisions sur les "Lois d'Application Immédiate" et Leurs Rapports avec les Règles de Conflits de Lois*, 55 REV. CRIT. D. I. P. 1 (1966). For a different account of legal history, see Michael Hellner, *Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles?*, 5 J. PRIV. INT'L L. 447, 449 (2009).
[11] Bonomi, *supra* note 8 at 617.
[12] Definition inspired by Joined Cases C-369/96 and 376/96, *Criminal Proceedings against Jean-Claude Arblade and Others*, 1999 E.C.R. I-08453, ¶ 30. *See* Mario Giuliano & Paul Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations* 26. For a concise legislative history of Rome I Reg., art. 9(1), see MICHAEL MCPARLAND, THE ROME I REGULATION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS 689–692 (2015).
[13] For a similar proposition, see 2015 Hague Principles: Commentary, *supra* note 5 at 74.
[14] Bonomi, *supra* note 8 at 614; SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS 311–312 (2014).
[15] *See* 2015 Hague Principles: Commentary, *supra* note 5 at 71.
[16] Bonomi, *supra* note 8 at 626; PETER NYGH, AUTONOMY IN INTERNATIONAL CONTRACTS 202 (1999) ("It is unilateralism triumphant.").

outside the ambit of the provisions are governed by the applicable law as identified by the multilateral conflicts rules of the forum.[17] Thus, overriding mandatory provisions do not exclude multilateral conflicts rules altogether. On the contrary, they operate alongside the latter and only exceptionally limit their application.[18]

Disregarding completely the relevance of foreign rules, however, negates both the globalization of international relations and the inherently multilateral character of modern conflict-of-laws.[19] The direct application of substantive rules without consideration of either international comity or the principle of party autonomy represents a heresy to private international law orthodoxy. For that reason, adjudicatory authorities should be very cautious when attributing the overriding mandatory status to substantive rules.[20]

Hence, it is important to distinguish *overriding* mandatory provisions from *simple* or *ordinary* mandatory rules.[21] Whereas the latter can be set aside by virtue of a rules-selection agreement that bears negative effects,[22] overriding mandatory provisions prevail over all rules of the applicable law—both dispositive and mandatory—even if the *lex causae* has been identified by virtue of a choice-of-law agreement.[23] Furthermore, whereas both types of mandatory rules have been enacted in pursuit of public policy objectives, it is precisely the higher policy interests attained in the overriding mandatory provisions that distinguish them from any other rules.[24] Thus, forming concentric circles, all mandatory provisions prevail over substantive agreements between the parties, but only a handful of mandatory rules "survive" contractual arrangements on the conflict-of-laws level.[25]

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[17] NYGH, *supra* note 16 at 203; SYMEONIDES, *supra* note 14 at 301 (calling this limitation "partial unilateralism"). *See* Bonomi, *supra* note 8 at 631.

[18] Bonomi, *supra* note 6 at 226, 227; Fransesca Ragno, *Are EU Overriding Mandatory Provisions an Impediment to Arbitral Justice?*, *in* THE IMPACT OF EU LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 139, 147–148 (Franco Ferrari ed., 2017).

[19] *See* Reinhard Ellger, *Overriding Mandatory Provisions*, *in* THE MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW, vol. II at 1228, 1231 (Jürgen Basedow *et al*. eds., 2012).

[20] *See* Rome I Reg., recital 37; Case C-135/15, *Republik Griechenland* v *Grigorios Nikiforidis*, ECLI:EU:C:2016:774, ¶ 44 (2016); Case C-184/12, *United Antwerp Maritime Agencies (Unamar) NV* v *Navigation Maritime Bulgare*, ECLI:EU:C:2013:663, ¶ 49 (2013); GEERT VAN CALSTER, EUROPEAN PRIVATE INTERNATIONAL LAW 232 (2nd ed. 2016).

[21] *See* Rome I Reg., recital 37, and compare arts. 3(3)–(4), 6(2), 8(1) with art. 9. *See also* 1980 Rome Conv., arts. 3(3), 5(2), 6(1), and 7.

[22] *See* analysis in *supra* Part I(V)(B)(1).

[23] SYMEONIDES, *supra* note 14 at 307.

[24] *Id.* at 307–308.

[25] *But see* ADRIAN BRIGGS, AGREEMENTS ON JURISDICTION AND CHOICE OF LAW 383 (2008) ("If the parties choose the forum for dispute resolution, they also define the mandatory rules of law which operate as part of it. In this sense, mandatory rules of law are susceptible of choice by the parties to a contract or other legal relationship.").

2. The "mandatory" nature of the rules

The aforementioned far-reaching effects of overriding mandatory provisions require strong grounds justifying the deviation from the beaten path of multilateralism. These grounds are found in public policy interests,[26] which are so important to a particular state that the non-application of certain norms could endanger the identity of the state.[27] If the norm expressly stipulates its overriding mandatory nature, no further enquiry is required by the adjudicator. But, in the absence of such an express stipulation in the norm itself, how can these interests be ascertained and, by extension, how can overriding mandatory rules be identified? The situation is as nebulous as it was two hundred years ago, when Savigny wrote that "[i]f it were possible satisfactorily to establish and ascertain the extent of these exceptions, many disputes as to the rules themselves would be prevented or brought to an end."[28] Since there is no list of fundamental public policy interests,[29] there can be no clear answer as to which norms should be classified as overriding mandatory provisions.[30] Nevertheless, it is well-established that most private international law codifications, in classifying overriding mandatory rules, require courts to focus on the "purpose" of the examined provision and the "consequences of its application or nonapplication [sic]."[31]

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[26] This consideration of competing public interests brings continental private international law closer to the governmental interest analysis theory of US conflict-of-laws. *See* Thomas G. Guedj, *The Theory of the Lois de Police, A Functional Trend in Continental Private International Law - A Comparative Analysis with Modern American Theories*, 39 AM. J. COMP. L. 661, 681–696 (1991); Bernard Audit, *Le Droit International Privé Français à la Fin du Vingtième Siècle : Progrès ou Recul?*, *in* PRIVATE INTERNATIONAL LAW AT THE END OF THE 20TH CENTURY: PROGRESS OR REGRESS? - XVTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW 191, 212–215 (Symeon C. Symeonides ed., 2000). *See also* GILLES CUNIBERTI, CONFLICT OF LAWS: A COMPARATIVE APPROACH. TEXT AND CASES 33 (2017) ("[Following the American conflicts revolution], a doctrine of international mandatory rules would be largely redundant."); Vischer, *supra* note 5 at 6 (noting that, in the USA, overriding mandatory rules are, essentially, absorbed under the interest analysis theory and the public policy limitation). *Cf*. Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958).

[27] SYMEONIDES, *supra* note 14 at 301.

[28] VON SAVIGNY, *supra* note 9 at 77.

[29] Even if there be such a governmental interests list, it would constitute only a snapshot of the ever-changing interests of the respective state. *But see* Supreme People's Court, Interpretation No. 1 on the Private International Law Act, art. 10 (2013) (listing five areas that are so important to the state that relevant rules could be considered by courts as overriding mandatory provisions: *i*. protection of the rights and interests of workers; *ii*. food or public health security; *iii*. environmental safety; *iv*. financial security, such as foreign exchange controls; and *v*. anti-monopoly and anti-dumping regulations) (China).

[30] Giesela Rühl, *Unilateralism (PIL)*, *in* THE MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW, vol. II at 1735, 1738 (Jürgen Basedow *et al*. eds., 2012).

[31] SYMEONIDES, *supra* note 14 at 310. *See also* GIUDITTA CORDERO-MOSS, INTERNATIONAL COMMERCIAL CONTRACTS: APPLICABLE SOURCES AND ENFORCEABILITY 192 (2014) ("The decision [whether a mandatory rule has an overriding character] will have to be based on the function of the rule and the policy that underlies the regulation, as well as on the balancing of the various interests that are involved in the specific case."); Renner, *supra* note 5 at 246–247 ("In lack of a conclusive legislatorial statement, the mandatory character of a norm has to be established by the accepted methods of statutory construction and with due regard to its purpose. Specifically, the mandatory character of a provision should be assumed if the norm serves third-party interests or the protection of weaker parties, such as through the prevention of information asymmetries."). *Cf*. Rome I Reg., art. 9(3) *in fine*.

In an attempt to elucidate the concept of overriding mandatory provisions, Rome I Reg., art. 9(1) refers to rules safeguarding public interests, "such as [the] political, social or economic organisation" of the state. This non-exhaustive list of art. 9(1) amplifies that the public or private law character of the respective rules would be irrelevant,[32] provided that *public interests* be served.[33] This observation, however, begs the question of whether rules attaining both private and public interests, such as consumer protection and employment rules, could qualify as overriding mandatory provisions under Rome I Reg., art. 9(1).[34] Though legal scholarship remains divided on this point,[35] a broad non-literal interpretation of the provision should be adopted for a number of reasons.[36] Firstly, all state laws pursue, to a greater or lesser extent, public interest objectives.[37] Secondly, the *Arblade* judgment, which inspired the definition of art. 9(1), dealt with labour regulations—predominantly private interest norms.[38] Thirdly, the Court of Justice has ruled, already in 2000, that the goodwill indemnity regime of Directive 86/653/EEC is mandatory in nature.[39] If the definition of art. 9(1) were limited to

[32] *See* Institute of International Law [IIL], *The Application of Foreign Public Law*, Resolution, Session of Wiesbaden. Rapporteur: Pierre Lalive (Aug. 11, 1975).
[33] Ellger, *supra* note 19 at 1231.
[34] For the prevailing—and, in this author's opinion, correct—view that, under the Rome I Regulation, consumer protection rules may be applied under both arts. 6 and 9, rather than under art. 6 only, see ALEXANDER ELDER ANTON, PAUL R. BEAUMONT & PETER. E. MCELEAVY, PRIVATE INTERNATIONAL LAW 514 (3rd ed. 2011); BENJAMIN'S SALE OF GOODS, 26–060 (Michael G. Bridge ed., 10th ed. 2017); Bonomi, *supra* note 8 at 609–612; ADRIAN BRIGGS, PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS 590 (2014); CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW, 750–751 (Paul Torremans & James J. Fawcett eds., 15th ed. 2017); DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, vol. 2 at 1963 (15th ed. 2012); Renner, *supra* note 5 at 244–245; Martin Schmidt-Kessel, *Article 9*, *in* ROME I REGULATION: POCKET COMMENTARY 320, 332–334, 345 (Franco Ferrari ed., 2015). *See also* Susanne Knöfel, *Mandatory Rules and Choice of Law: A Comparative Approach to Article 7(2) of the Rome Convention*, 43 J. B. L. 239, 256–257 (1999); Christopher Tillman, *The Relationship between Party Autonomy and the Mandatory Rules in the Rome Convention*, J. B. L. 45, 73–75 (2002). *Contra* Christopher Bisping, *Consumer Protection and Overriding Mandatory Rules in the Rome I Regulation*, *in* EUROPEAN CONSUMER PROTECTION 239, 251–252 (James Devenney & Mel B. Kenny eds., 2012); Gralf-Peter Calliess, *Rome I: Article 6*, *in* ROME REGULATIONS: COMMENTARY 154, 160 (Gralf-Peter Calliess ed., 2nd ed. 2015); PETER STONE, EU PRIVATE INTERNATIONAL LAW 348–349 (3rd ed. 2014).
[35] In favour of a broad interpretation of art. 9(1), see e.g. Bonomi, *supra* note 8 at 625; Renner, *supra* note 5 at 252–253; Michael Wilderspin, *Overriding Mandatory Provisions*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW, vol. 2 at 1330, 1333 (Jürgen Basedow *et al*. eds., 2017). In favour of a narrow interpretation of art. 9(1), see e.g. Ellger, *supra* note 19 at 1230 (distinguishing provisions pursuing societal interests from rules preserving justice between contracting parties); Francisco J. Garcimartín Alférez, *The Rome I Regulation: Much Ado about Nothing?*, 8 EU L. F. I(61), I(76)–I(77) (2008).
[36] For persuasive arguments, see Bonomi, *supra* note 8 at 623–626.
[37] *See* Jonathan Harris, *Mandatory Rules and Public Policy under the Rome I Regulation*, *in* ROME I REGULATION: THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS IN EUROPE 269, 296 (Franco Ferrari & Stefan Leible eds., 2009) ("[I]t may be better to ask . . . whether the protection of a small group of persons is in the interests of the public at large, rather than whether a sufficient section of the public is directly affected by the legislation.").
[38] Joined Cases C-369/96 and 376/96, *Criminal Proceedings against Jean-Claude Arblade and Others*, 1999 E.C.R. I-08453, ¶ 30.
[39] Case C-381/98, *Ingmar GB Ltd* v *Eaton Leonard Technologies Inc*, 2000 E.C.R. I-09305, ¶ 24–25.

public interests only, the CJEU had the opportunity to change course in the three commercial agency cases that followed the enactment of the Rome I Regulation in 2008.[40]

Abstract as the above analysis may seem, a handful of examples could, perhaps, shed light on the subject matter of this section. In particular, a broad spectrum of overriding mandatory rules have been identified in legal theory and jurisprudence alike, such as market and securities regulations, antitrust and competition laws, international sanctions (trade embargoes, financial restrictions, etc.),[41] import and export prohibitions,[42] tax regulations, currency and foreign exchange regulations, legislation protecting weak contracting parties (employment and social protection regulations, [43] consumer protection laws,[44] commercial agents and distributors regimes,[45] unfair contract terms regulations,[46] etc.), regulations on war, terrorism and other hostile events,[47] etc.[48]

[40] Case C-338/14, *Quenon K. SPRL* v *Beobank SA and Metlife Insurance SA*, ECLI:EU:C:2015:795, ¶ 26 (2015); Case C-184/12, *United Antwerp Maritime Agencies (Unamar) NV* v *Navigation Maritime Bulgare*, ECLI:EU:C:2013:663, ¶ 40 (2013); Case C-348/07, *Turgay Semen* v *Deutsche Tamoil GmbH*, ECLI:EU:C:2009:195, ¶ 17 (2009).

[41] For lists of the EU sanctions currently in force, see http://ec.europa.eu/dgs/fpi/what-we-do/sanctions_en.htm (last visited Apr. 24, 2020). *See also* TFEU art. 36.

[42] *See e.g.* Ole Lando, *Mandatory Rules and Ordre Public*, *in* HARMONISATION OF SUBSTANTIVE AND INTERNATIONAL PRIVATE LAW 99, 99 (Ole Lando, Ulrich Magnus, & Monika Novak-Stief eds., 2003) (noting as examples "[r]ules, which prohibit the import of narcotics or the export of cultural goods . . . .").

[43] *See* Rome I Reg., recital 34.

[44] *See e.g*. BENJAMIN'S SALE OF GOODS, *supra* note 34 at 26–060, note 441 (listing consumer protection legislation that might be considered as mandatory for the purposes of Rome I Reg., art. 9).

[45] Case C-338/14, *Quenon K. SPRL* v *Beobank SA and Metlife Insurance SA*, ECLI:EU:C:2015:795, ¶ 26 (2015); Case C-184/12, *United Antwerp Maritime Agencies (Unamar) NV* v *Navigation Maritime Bulgare*, ECLI:EU:C:2013:663, ¶ 40 (2013); Case C-348/07, *Turgay Semen* v *Deutsche Tamoil GmbH*, ECLI:EU:C:2009:195, ¶ 17 (2009); Case C-465/04, *Honyvem Informazioni Commerciali Srl* v *Mariella De Zotti*, 2006 E.C.R. I-02879, ¶ 22–23; Case C-381/98, *Ingmar GB Ltd* v *Eaton Leonard Technologies Inc*, 2000 E.C.R. I-09305, ¶ 24–25.

[46] *See e.g.* Council Directive 93/13/EEC of Apr. 5, 1993, on Unfair Terms in Consumer Contracts, 1993 O.J. (L95) 29, art. 6(2); Case C-421/14, *Banco Primus SA* v *Jesús Gutiérrez García*, ECLI:EU:C:2017:60, ¶ 41 (2017); Joined Cases C-154/15, C-307/15 and C-308/15, *Francisco Gutiérrez Naranjo* v *Cajasur Banco SAU*, *Ana María Palacios Martínez* v *Banco Bilbao Vizcaya Argentaria SA (BBVA)*, *Banco Popular Español SA* v *Emilio Irles López and Teresa Torres Andreu*, ECLI:EU:C:2016:980, ¶ 53, 55 (2016); Case C-169/14, *Juan Carlos Sánchez Morcillo and María del Carmen Abril García* v *Banco Bilbao Vizcaya Argentaria SA*, ECLI:EU:C:2014:2099, ¶ 23 (2014).

[47] *Boissevain* v *Weil* [1950] A.C. 327 (Defence (Finance) Regulations prevailing over law and party autonomy alike) (Eng.).

[48] *See e.g.* Giuliano and Lagarde, *supra* note 12 at 28; ANTON, BEAUMONT, AND MCELEAVY, *supra* note 34 at 510–511 (listing specific examples of overriding mandatory provisions under English law); CORDERO-MOSS, *supra* note 31 at 193–194; James J. Fawcett, *Evasion of Law and Mandatory Rules in Private International Law*, 49 CAMBRIDGE L. J. 44, 60 (1990); Richard Garnett, *Uniformity of Outcome in Australian Choice of Law*, *in* AUSTRALIAN PRIVATE INTERNATIONAL LAW FOR THE 21ST CENTURY: FACING OUTWARDS 85, 89 (Andrew Dickinson, Mary Keyes, & Thomas John eds., 2014) (listing specific examples of overriding mandatory provisions under Australian federal law); Ole Lando, *Contracts*, III.2 *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 1, 38 (Kurt Lipstein ed., 1976); Rühl, *supra* note 30 at 1738; Audley Sheppard, *Applicable Substantive Law*, *in* ARBITRATION IN ENGLAND: WITH CHAPTERS ON SCOTLAND AND IRELAND 225, 235–236 (Julian D.M. Lew *et al*. eds., 2013) (listing specific examples of overriding mandatory provisions under English law).

But, even if pertinent interests and overriding mandatory rules were readily identifiable, the examiner stumbles upon another important question. Which state's public interests are pertinent to the applicable law enquiry? The interests of the forum state? Those of the state of the otherwise applicable law? Those of a third country? The approaches to this hotly debated issue have been quite diverging.[49] Whereas all fora endorsing the device of overriding rules require the application of domestic overriding provisions,[50] not all conflicts regimes allow—let alone require—the application of overriding rules of third countries.[51] In fact, most conflicts regimes, reinstating somewhat international comity,[52] defer to the discretion of the adjudicator *vis-à-vis* the application of overriding mandatory provisions of third states.[53] Interestingly, in the EU, the drafter of the 1980 Rome Convention adopted a hybrid solution, pursuant to which the signatory states could limit the overriding mandatory provisions device to domestic rules only.[54] The drafters of the Rome I Regulation jettisoned this hybrid solution; Rome I now refers exhaustively to a narrow category of rules found in the *lex loci solutionis*.[55] What about

[49] For a positive view on third state overriding mandatory rules, see e.g. Ulrich Drobnig, *Comments on Art. 7 of the Draft Convention*, *in* EUROPEAN PRIVATE INTERNATIONAL LAW OF OBLIGATIONS 82 (Ole Lando, Bernd Von Hoffmann, & Kurt Siehr eds., 1975). For a powerful piece deprecating third state overriding rules, see F. A. Mann, *Contracts: Effect of Mandatory Rules*, *in* HARMONIZATION OF PRIVATE INTERNATIONAL LAW BY THE E.E.C. 31 (Kurt Lipstein ed., 1978). *See also* Adeline Chong, *The Public Policy and Mandatory Rules of Third Countries in International Contracts*, 2 J. PRIV. INT'L L. 27 (2006); Andrew Dickinson, *Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu?*, 3 J. PRIV. INT'L L. 53 (2007).

[50] *See e.g.* Rome I Reg., art. 9(2); 1994 Mexico City Conv., art. 11(1); Swiss PILA, art. 18; 2015 Hague Principles, art. 11(1); Institute of International Law [IIL], *The Autonomy of the Parties in International Contracts between Private Persons or Entities*, Resolution, Session of Basel. Rapporteur: Eric Jayme (Aug. 31, 1991) (Art. 9(1)).

[51] *See e.g.* SYMEONIDES, *supra* note 14 at 305–306 (Table 7.1). Allowing the overriding mandatory provisions of the forum state only, see e.g. Rome II Reg., art. 16—*but see* art. 17; 1986 Hague Sales Conv., art. 17. *See also* Hellner, *supra* note 10 at 451–452 ("Article 16 of the Rome II Regulation does not contain any rule on third country mandatory rules. The Commission's original proposal contained such a provision but it was deleted during negotiations. Those delegations that had entered a reservation against Article 7(1) of the Rome Convention saw the opportunity to set a precedent before the expected negotiations for a Rome I Regulation.").

[52] *But see* Dickinson, *supra* note 49 at 76–77 ("[E]ven as a policy argument, comity has its limits. Although it may explain a desire of legislators and courts to please (or not to offend) foreign states, it does not explain why the policies and objectives of one legal system (the third country whose mandatory rule it is sought to apply) should be preferred over the policies and objectives, express or tacit, of another (whether the *lex fori*, the *lex contractus* or another third country)."); Harris, *supra* note 37 at 279 ("[I]t does not seem that comity provides a compelling basis for application of third state mandatory rules. [. . .] It seems, however, that the ultimate justification for this is self-interest; the interest of the forum in preserving good relations with other allied states.").

[53] *See e.g.* Rome I Reg., art. 9(3) (encompassing further subject-matter restrictions); Swiss PILA, art. 19. Deferring to the respective forum for the determination of this point, see e.g. 1994 Mexico City Conv., art. 11(2); 2015 Hague Principles, art. 11(2). *Cf.* Institute of International Law [IIL], *The Autonomy of the Parties in International Contracts between Private Persons or Entities*, Resolution, Session of Basel. Rapporteur: Eric Jayme (Aug. 31, 1991) (Art. 9(2)).

[54] 1980 Rome Conv., arts. 7(1), 22(1)(a). Germany, Ireland, Latvia, Luxembourg, Portugal, Slovenia, and the UK declared the reservation of art. 22(1)(a).

[55] Rome I Reg., art. 9(3) ("Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful."). Case C-135/15, *Republik Griechenland* v *Grigorios Nikiforidis*, ECLI:EU:C:2016:774, ¶ 49 (2016). *Cf. Lemenda Trading Co Ltd* v *African Middle East Petroleum C Ltd* [1988] Q.B. 448 (Eng.); *Regazzoni* v *KC Sethia Ltd* [1957] 3 W.L.R. 752 (Eng.); *Foster* v

EU overriding mandatory rules? How should they be classified for the purposes of this enquiry? Since EU law forms an integral part of all EU Member State legal orders, it is submitted that any EU overriding mandatory provisions would be applicable as *lex fori*.[56] This observation testifies to the creeping "Europeanization" of state interests and public policy considerations, a topic that is explored further in the next section.

B. The Public Policy Defence

If overriding mandatory rules are the "sword" of the adjudicator, public policy is the "shield."[57] Nascent in both Savigny's and Story's scholarship,[58] the public policy device has become an indispensable part of modern multilateral conflict-of-laws.[59] In stark contrast to *domestic* public policy, which restricts the parties' freedom of contract, *international* public policy operates as a defence mechanism to the application of certain foreign rules that could jeopardize important governmental goals and interests. Public policy neither invalidates a choice-of-law agreement nor indicates which solutions would be acceptable.[60] It merely rejects, in a negative manner, judicial outcomes that are, *in casu*, repugnant to fundamental societal values. In particular, the applicable foreign rules,[61] which in the instant case lead to unacceptable results,[62] will be set aside, and the adjudicator will have to go through a new conflict-of-laws analysis in order to identify different substantive rules, whose application would not be "manifestly incompatible" with the pertinent public policy considerations. These "fall-back" substantive rules will, usually, be found in the *lex fori*,[63] thus streamlining the

Driscoll and Others [1929] 1 K.B. 470 (Eng.); *Ralli Bros* v *Compañia Naviera Sota y Aznar* [1920] 2 K.B. 287 (Eng.).

[56] Schmidt-Kessel, *supra* note 34 at 329.

[57] Bonomi, *supra* note 8 at 614; HILL AND SHÚILLEABHÁIN, *supra* note 5 at 49; SYMEONIDES, *supra* note 14 at 311.

[58] VON SAVIGNY, *supra* note 9 at 76–81; JOSEPH STORY & ISAAC F. REDFIELD, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC 26 (6th ed. 1865). *Cf.* BARTOLUS ON THE CONFLICT OF LAWS, 32 (Joseph H. Beale tran., 1914) (§ 33).

[59] *See* Dieter Martiny, *Public Policy*, *in* THE MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW, vol. II at 1395, 1395 (Jürgen Basedow *et al*. eds., 2012).

[60] 2015 Hague Principles: Commentary, *supra* note 5 at 71. *Cf.* analysis in *supra* Section II(A).

[61] Not the entire *lex causae*. Giuliano and Lagarde, *supra* note 12 at 38; Pietro Franzina, *Article 21*, *in* ECPIL COMMENTARY: ROME I REGULATION 820, 834–835 (Ulrich Magnus & Peter Mankowski eds., 2017); Lagarde, *supra* note 9 at 21, 54. *See* PIPPA ROGERSON, COLLIER'S CONFLICT OF LAWS 328, 425 (4th ed. 2013).

[62] CUNIBERTI, *supra* note 26 at 140–141; Franzina, *supra* note 61 at 833; Lagarde, *supra* note 9 at 21; Martiny, *supra* note 59 at 1397. *See* CORDERO-MOSS, *supra* note 31 at 203 (noting that a simple difference between domestic and foreign law would be insufficient to trigger the public policy defence); DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, *supra* note 34 at 1871; Lagarde, *supra* note 9 at 44 ("If the rules of the conflict of laws are to have a meaning, obviously foreign law cannot be ousted because it differs from the *lex fori*.").

[63] Ioanna Thoma, *Public Policy (Ordre Public)*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW, vol. 2 at 1453, 1458 (Jürgen Basedow *et al*. eds., 2017); Lagarde, *supra* note 9 at 54; SYMEONIDES, *supra* note 14 at 311; MARTIN WOLFF, PRIVATE INTERNATIONAL LAW 183 (2nd ed. 1950) (arguing that resort to the *lex fori* should be

negative effects of the international public policy with the positive effects of the overriding mandatory rules of the forum.[64] Of course, this observation should hardly be surprising, given the common pool of values and state interests that the two devices share.

As in overriding mandatory provisions, two questions need to be answered. Firstly, how can one identify the fundamental societal values and governmental interests that might negate the application of foreign rules? Secondly, acknowledging the misnomer of *international*—yet truly *national*—public policy,[65] which state's public policy would be relevant in the conflict-of-laws process?

The answer to the first question is anything but straightforward. A reflection of ever-changing societal values and interests,[66] public policy is a dynamic concept, which "is so vague and general as to defy definition."[67] This fluid nature of public policy has inspired a handful of memorable metaphors in jurisprudence and case law, such as the "unruly horse" of private international law,[68] the "assassin of conflicts laws" and "*vieillard terrible*,"[69] "the X of the law, the unknown quantity,"[70] the "bouncer" of multilateral conflicts,[71] and the "omnipotent antidote" to repugnant foreign laws.[72] Granted, it is well-established that international public policy, as an exception to multilateralism, must be interpreted restrictively.[73] Legal theory and

had, only absent an acceptable substitute rule in the *lex causae*). *But see* Law of 16 July 2004, holding the Code of Private International Law, art. 21(3) (Belg.); Private International Law Code, art. 45(3) (Bulg.); Law No. 218 of 31 May 1995, art. 16(2) (It.); Civil Code, art. 22(2) (Port.); Lagarde, *supra* note 9 at 56 (citing the "adaptation" solution proposed by Kegel and Spickhoff); Sebastian Omlor, *Article 21*, *in* ROME I REGULATION: POCKET COMMENTARY 487, 494 (Franco Ferrari ed., 2015) ("Only if the *lex causae* fails to fill the created gap appropriately is residual recourse to be taken to the *lex fori*.").

[64] Bonomi, *supra* note 8 at 614.

[65] DENNIS LLOYD, PUBLIC POLICY: A COMPARATIVE STUDY IN ENGLISH AND FRENCH LAW 73 (1953) ("The description of [public policy] as an 'international public order' is . . . a misnomer, and indeed this expression says nearly the opposite of what it intends since such public order or policy is in itself no more than a national policy operating in an international sphere."); WOLFF, *supra* note 63 at 169 (citing Bartin).

[66] ELIZABETH B. CRAWFORD & JANEEN M. CARRUTHERS, INTERNATIONAL PRIVATE LAW: A SCOTS PERSPECTIVE 45 (4th ed. 2015); JAN PAULSSON, THE IDEA OF ARBITRATION 132 (2013); Thoma, *supra* note 63 at 1457.

[67] HERBERT F. GOODRICH & EUGENE F. SCOLES, HANDBOOK OF THE CONFLICT OF LAWS 14 (4th ed. 1964).

[68] *Richardson* v Mellish [1824] 2 Bingham 229, 252 ("[Public policy] is a very unruly horse, and when once you get astride it you never know where it will carry you.") (Eng.); *Enderby Town Football Club Ltd* v *Football Association Ltd* [1971] Ch. 591, 606–607 ("With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice . . . .") (Eng.).

[69] Ernst Rabel, *Conflicts Rules on Contracts*, *in* LECTURES ON THE CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS 127, 132 (1951).

[70] ALBERT A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 344 (1962).

[71] FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE: SPECIAL EDITION 79 (2005).

[72] GUANGJIAN TU, PRIVATE INTERNATIONAL LAW IN CHINA 43 (2016).

[73] Rome I Reg., recital 37. *See* Moritz Renner, *Rome I: Article 21*, *in* ROME REGULATIONS: COMMENTARY 395, 399 (Gralf-Peter Calliess ed., 2nd ed. 2015). *Cf.* Case C-559/14, *Rudolfs Meroni* v *Recoletos Ltd*, ECLI:EU:C:2016:349, ¶ 38 (2016); Case C-681/13, *Diageo Brands BV* v *Simiramida-04 EOOD*, ECLI:EU:C:2015:471, ¶ 41 (2015); Case C-157/12, *Salzgitter Mannesmann Handel GmbH* v *SC Laminorul SA*, ECLI:EU:C:2013:597, ¶ 27–28 (2013); Case C-139/10, *Prism Investments BV* v *Jaap Anne van der Meer*, 2011

jurisprudence have delineated a handful of examples that could illuminate this conflicts concept. For instance, rules infringing vital interests of the forum state,[74] fundamental human rights,[75] conceptions of morality and justice,[76] and public international law,[77] have all been noted as infringements of public policy, thus "colouring" the "chameleon" *ordre public*.[78] Still, as eloquently put in legal theory,

> [There can be no] reliable exhaustive list [of public policy infringements,] since human activity, it seems, will ever invent new ways to offend against fundamental values, and since our range of tolerance itself changes over time.[79]

As to the second question, the overwhelming majority of private international law regimes adopt the *lex fori* approach whereby only the public policy interests of the forum state can bar the application of foreign rules. Any competing third state interests come into play only through the overriding mandatory provisions mechanism, to the extent, of course, that third state overriding rules are allowed by the forum's conflicts law. This *lex fori* approach has been followed, among others, in the EU private international law regimes,[80] the 1994 Mexico City Convention,[81] and the 1955 Hague Sales Convention.[82] Conversely, in the USA, the Restatement (Second) of Conflict of Laws,[83] the Uniform Commercial Code,[84] and the enacted codifications of Louisiana and Oregon,[85] point to the public policy of the otherwise applicable

E.C.R. I-09511, ¶ 32–33 (2011); Case C-420/07, *Meletis Apostolides* v *David Charles Orams and Linda Elizabeth Orams*, 2009 E.C.R. I-03571, ¶ 55; Case C-38/98, *Régie Nationale des Usines Renault SA* v *Maxicar SpA and Orazio Formento*, 2000 E.C.R. I-02973, ¶ 26–28; Case C-7/98, *Dieter Krombach* v *André Bamberski*, 2000 E.C.R. I-01935, ¶ 21–23; Case C-414/92, *Solo Kleinmotoren GmbH* v *Emilio Boch*, 1994 E.C.R. I-02237, ¶ 20.

[74] WOLFF, *supra* note 63 at 180–182.

[75] ROGERSON, *supra* note 61 at 425.

[76] HILL AND SHÚILLEABHÁIN, *supra* note 5 at 53.

[77] *See e.g. Kuwait Airways Corp* v *Iraqi Airways Co* (Nos 4 and 5) [2002] UKHL 19 (Eng.).

[78] *See* CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW, *supra* note 34 at 135–139. *See also* Institute of International Law [IIL], *De l'Ordre Public en Droit International Privé*, Resolution, Session of Paris. Rapporteur: Pasquale Fiore (Mar. 30, 1910) (¶ 1: "L'Institut exprime le voeu que, pour éviter l'incertitude qui prête à l'arbitraire du juge et compromet, par cela même, l'intérêt des particuliers, chaque législation détermine avec toute la précision possible, celles de ses dispositions qui ne seront jamais écartées par une loi étrangère, quand même celle-ci paraîtrait compétente pour régler le rapport de droit envisagé.").

[79] PAULSSON, *supra* note 66 at 132.

[80] *See e.g.* Rome I Reg., art. 21; 1980 Rome Conv., art. 16; Rome II Reg., art. 26.

[81] 1994 Mexico City Conv., art. 18. *Cf.* Bustamante Code, art. 8.

[82] 1955 Hague Sales Conv., art. 6. *Cf.* 1986 Hague Sales Conv., art. 18.

[83] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b), 188 (A. L. I. 1971) (particularly cmt. g). *But see id.* § 90.

[84] U.C.C. § 1-301(c) (A. L. I. & UNIF. LAW COMM'N 2008).

[85] La. Civ. Code art. 3540; Or. Rev. Stat. §§ 15.355(1) [formerly 81.125] (2015).

law.[86] Lastly, a hybrid position has emerged in the 2015 Hague Principles, which refer to the public policy of both the forum state and the state of the otherwise applicable law.[87]

It is important to note, at this point, that, notwithstanding the nation-centric character of the concept, the expansion of the EU legislation to a vast array of private and public interest issues has unveiled a new "European" dimension of international public policy.[88] Hence, just as EU law becomes an integral part of the Member States' legal orders, fundamental EU interests and policies too become part of the latter's *ordre public*.[89] This evolution of international public policy has three corollaries. First, national courts are required to give effect to and attain the public policy objectives of the EU *ex officio* without recourse to EU organs or courts. Second, when European and national public policy considerations clash, the former prevail by virtue of the general principles of primacy and effectiveness. Third, though inherently national, the outer limits and the operation of the public policy defence are matters of EU law interpretation.[90] Classic examples of EU public policy interests that inform the content of national public policies are those protected under the Four Freedoms, fundamental human rights instruments, antitrust and antidiscrimination regulations, as well as certain regimes safeguarding the interests of the weak contracting party in the Single Market.[91]

In a nutshell, international public policy is the last "line of defence," the corrective mechanism that allows crucial state interests and values to remain intact from the application

[86] *See supra* note 26. *See also* SYMEON C. SYMEONIDES, CHOICE OF LAW 82 (2016) ("[O]ne of the differences between the First Restatement and modern approaches such as interest analysis is that, in Brainer Currie's words, interest analysis 'summon[s] public policy from the reserves and place[s] it in the front lines where it belongs.'").
[87] 2015 Hague Principles, art. 11(3), (4).
[88] *See* Martiny, *supra* note 59 at 1396. *Cf.* Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II"), COM (2003) 427 final (Jul. 22, 2003) (introducing in recital 19 and art. 24 the concept of "community public policy").
[89] Giuliano and Lagarde, *supra* note 12 at 38 ("It goes without saying that [the public policy of the forum] includes Community public policy, which has become an integral part of the public policy ('ordre public') of the Member States of the European Community."; CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW, *supra* note 34 at 752–753; Hans Van Houtte, *From a National to a European Public Policy*, *in* LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 841, 848 [James A.R. Nafziger & Symeon C. Symeonides eds., 2002] ("In fact, nowadays, public policy in European States consists mostly of common principles, with a few local additions. As time passes and more values and policies are shared, the local content becomes even less important."); Omlor, *supra* note 63 at 491.
[90] RICHARD FENTIMAN, INTERNATIONAL COMMERCIAL LITIGATION 173–174 (2nd ed. 2015); Omlor, *supra* note 63 at 491. *Cf.* Case C-34/17, *Eamonn Donnellan* v *The Revenue Commissioners*, ECLI:EU:C:2018:282, ¶ 49 (2018); Case C-559/14, *Rudolfs Meroni* v *Recoletos Ltd*, ECLI:EU:C:2016:349, ¶ 39–40 (2016); Case C-302/13, *flyLAL-Lithuanian Airlines AS* v *Starptautiskā Lidosta Rīga VAS and Air Baltic Corporation AS*, ECLI:EU:C:2014:2319, ¶ 47 (2014); Case C-420/07, *Meletis Apostolides* v *David Charles Orams and Linda Elizabeth Orams*, 2009 E.C.R. I-03571, ¶ 56–57; Case C-394/07, *Marco Gambazzi* v *Daimler Chrysler Canada Inc and CIBC Mellon Trust Company*, 2009 E.C.R. I-02563, ¶ 26; Case C-38/98, *Régie Nationale des Usines Renault SA* v *Maxicar SpA and Orazio Formento*, 2000 E.C.R. I-02973, ¶ 27–28; Case C-7/98, *Dieter Krombach* v *André Bamberski*, 2000 E.C.R. I-01935, ¶ 22–23.
[91] Renner, *supra* note 73 at 405. *See e.g.* Case C-127/97, *Eco Swiss China Time Ltd* v *Benetton International NV*, 1999 E.C.R. I-03055.

of foreign laws. These public policy considerations introduce inroads to the established multilateralism in private international law and may, as a result, limit the ability of the parties to select the regime governing their disputes. This restriction, however, should not be deemed incongruous with the principle of party autonomy. Quite the opposite, it should be viewed as the means for fostering regulatory freedom in international transactions.[92] In light of this, the following section examines the influence of overriding mandatory provisions and international public policy on the applicability of the optional sales law instrument.

III. THE CESL (UN)LEASHED

In relation to the European sales law project, the question that naturally arises is whether important state interests could have interfered with the application of the CESL provisions. Specifically, the issues that need to be explored are: *i*. whether overriding mandatory provisions would have prevailed over the default rules of the sales Regulation, and *ii*. whether public policy considerations would have truncated the regulatory effects of the instrument. This threat to the uniform application of the CESL is allowed by, firstly, the instrument's structure as a second parallel legal regime, which, purportedly, does not amend private international law,[93] and, secondly, the lack of relevant provisions explicating the interplay between the CESL model and any public policy considerations of the interested states.[94] Let us begin with the public policy defence, which raises no serious doctrinal difficulties.

As already suggested, international public policy bars certain foreign rules, the application of which would be manifestly incompatible with fundamental societal values and interests of a state—typically those of the forum. Since the CESL Regulation would have formed an integral part of all EU Member State legal orders, it is axiomatic that the

[92] *See* Andrew Dickinson, *Oiling the Machine: Overriding Mandatory Provisions and Public Policy in the Hague Principles on Choice of Law in International Commercial Contracts*, 22 UNIF. L. REV. 402, 410–411 (2017). *See also* Horatia Muir Watt & Ruth Sefton-Green, *Fitting the Frame: An Optional Instrument, Party Choice and Mandatory/Default Rules*, *in* EUROPEAN PRIVATE LAW AFTER THE COMMON FRAME OF REFERENCE 201, 203, note 11 (Hans-W. Micklitz & Fabrizio Cafaggi eds., 2010) ("To the extent that any choice by the parties is, in any event, restricted by the internationally mandatory provisions (*lois de police*) of the forum [under Art. 9 of the Rome Regulation], it is very difficult to see any justification for not allowing them to choose non-state law.").

[93] European Parliament Legislative Resolution of 26 February 2014 on the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, P7_TA(2014)0159, Amendment 3 (CESL recital 10).

[94] Christopher Bisping, *The Common European Sales Law, Consumer Protection and Overriding Mandatory Provisions in Private International Law*, 62 INT'L & COMP. L. Q. 463, 464 (2013). For a rule proposal, see Max Planck Institute for Comparative and International Private Law, *Policy Options for Progress towards a European Contract Law: Comments on the Issues Raised in the Green Paper from the Commission of 1 July 2010, COM(2010) 348 final*, 75 RABELSZ 371, 407 (2011). *Cf*. PECL art. 1:103(2).

international public policies of the latter would have adapted to the mandates of the new sales law instrument.[95] In other words, the CESL rules would have informed the content of all respective international public policies. Therefore, since the domestic CESL, as an integral part of the *lex fori*, would have been compatible with the fundamental societal objectives of the forum state, the application of the identical rules of a foreign CESL could not have been incompatible, let alone *manifestly* incompatible, with the international public policy of the forum. In a nutshell, the integration of the European sales law instrument in all EU Member States would have "neutralized" the international public policy defence across the Single Market. What remains to be explored is the impact of overriding mandatory provisions on the applicability of the CESL.

At the outset, it should be stressed that the optional nature of the CESL negates *a priori* its classification as mandatory rules.[96] Since the activation of the CESL would have depended on a choice by the parties, the CESL rules clearly lacked the imperative nature that distinguishes overriding mandatory provisions.[97] For that reason, there could be no conflict between an overriding mandatory CESL and other overriding mandatory provisions, but only a conflict between overriding provisions and the *ordinary* rules enshrined in the CESL. By way of example, such a conflict could have arisen between CESL Anx. I, arts. 82–85 on unfair contract terms in consumer sales and the national legislations transposing the Directive 93/13/EEC on Unfair Terms in Consumer Contracts.[98] Under such scenarios, it has been argued that the overriding mandatory provisions would have prevailed over the uniform sales law regime.[99] In this author's opinion, however, the European "DNA" of the instrument

[95] Martijn W. Hesselink, *How to Opt Into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation*, 20 E. R. P. L. 195, 203, note 21 (2012). *See also* EVA LEIN, *Issues of Private International Law, Jurisdiction and Enforcement of Judgments Linked with the Adoption of An Optional EU Contract Law* 12 (2010).

[96] CORDERO-MOSS, *supra* note 31 at 198; Trevor C. Hartley, *Conflict of Laws and the Common European Sales Law*, *in* ENTRE BRUSELAS Y LA HAYA: ESTUDIOS SOBRE LA UNIFICACIÓN INTERNACIONAL Y REGIONAL DEL DERECHO INTERNACIONAL PRIVADO, LIBER AMICORUM ALEGRÍA BORRÁS 525, 528–529 (Joaquim-Joan Forner Delaygua, Christina González Beilfuss, & Ramón Viñas Farré eds., 2013).

[97] CORDERO-MOSS, *supra* note 31 at 198.

[98] Council Directive 93/13/EEC of Apr. 5, 1993, on Unfair Terms in Consumer Contracts, 1993 O.J. (L95) 29. *See* EU Parliament Legislative Resolution on the CESL, *supra* note 93 at Amendment 15 (Proposal for a Regulation recital 27a (new)). *See also* Martijn W. Hesselink, *Unfair Prices in the Common European Sales Law*, *in* ENGLISH AND EUROPEAN PERSPECTIVES ON CONTRACT AND COMMERCIAL LAW: ESSAYS IN HONOUR OF HUGH BEALE 225, 227 (Louise Gullifer & Stefan Vogenauer eds., 2014) ("With regard to the control of unfair terms in consumer contracts, the European Commission's proposal for a Common European Sales Law of 2011 substantially followed the Unfair Terms Directive.").

[99] Hugh Beale & Wolf-Georg Ringe, *Transfer of Rights and Obligations*, *in* THE COMMON EUROPEAN SALES LAW IN CONTEXT: INTERACTIONS WITH ENGLISH AND GERMAN LAW 521, 547–548 (Gerhard Dannemann & Stefan Vogenauer eds., 2013); Bisping, *supra* note 94 at 477–478; Gerhard Dannemann, *Choice of CESL and Conflict of Laws*, *in* THE COMMON EUROPEAN SALES LAW IN CONTEXT: INTERACTIONS WITH ENGLISH AND GERMAN LAW 21, 47 (Gerhard Dannemann & Stefan Vogenauer eds., 2013); Mel Kenny, Lorna Gillies & James Devenney,

does not support such a conclusion. As already noted, the general principles of primacy and effectiveness preclude the application of Member State rules that impede the full effects of EU legislation.[100] The latter prevail over any rules of the forum, including those that pursue fundamental state interests.[101] Thus, before Member State courts, the CESL would have prevailed over any other domestic rules, including overriding mandatory provisions of the forum.[102] In the event of a conflict between various EU mandatory rules, as in the example above, the principle of effectiveness determines which rule will prevail. Given the importance of securing the complete and uniform application of the sales law instrument, as well as the high level of consumer protection achieved in the provisions of the CESL, it is submitted that the European sales law regime would have prevailed over all other EU rules claiming application. With regard to overriding mandatory provisions of third states, which "may" be

The EU Optional Instrument: Absorbing the Private International Law Implications of a Common European Sales Law, 13 Y. B. PRIV. INT'L L. 315, 339 (2011); Simon Whittaker, *Identifying the Legal Costs of Operation of the Common European Sales Law*, 50 C. M. L. REV. 85, 89 (2013). *See also* Gerhard Dannemann, *The CESL as Optional Sales Law: Interactions with English and German Law*, *in* THE COMMON EUROPEAN SALES LAW IN CONTEXT: INTERACTIONS WITH ENGLISH AND GERMAN LAW 708, 731 (Gerhard Dannemann & Stefan Vogenauer eds., 2013) (proposing an express derogation from the effects of Rome I Reg., art. 9(2)); LEIN, *supra* note 95 at 12.

[100] Case C-184/12, *United Antwerp Maritime Agencies (Unamar) NV* v *Navigation Maritime Bulgare*, ECLI:EU:C:2013:663, ¶ 46 ("[T]he fact that national rules are categorised as public order legislation does not mean that they are exempt from compliance with the provisions of the Treaty; if it did, the primacy and uniform application of European Union law would be undermined. The considerations underlying such national legislation can be taken into account by European Union law only in terms of the exceptions to European Union freedoms expressly provided for by the Treaty and, where appropriate, on the ground that they constitute overriding reasons relating to the public interest . . . .") (2013); Joined Cases C-369/96 and 376/96, *Criminal Proceedings against Jean-Claude Arblade and Others*, 1999 E.C.R. I-08453, ¶ 31. *See* Andrea Bonomi, *Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts*, 10 Y. B. PRIV. INT'L L. 285, 290 (2008); Schmidt-Kessel, *supra* note 34 at 335. *Cf.* Commission Proposal for a Regulation on the Law Applicable to Contractual Obligations (Rome I), COM (2005) 650 final (Dec. 15, 2005), recital 13 ("Respect for the public policy (*ordre public*) of the Member States requires specific rules concerning mandatory rules and the exception on grounds of public policy. *Such rules must be applied in a manner compatible with the Treaty* [emphasis added]."). *Cf. also* analysis in *supra* Part II(V)(B).

[101] Bonomi, *supra* note 8 at 628; Schmidt-Kessel, *supra* note 34 at 334–335.

[102] Concurring, albeit on different grounds: Bénédicte Fauvarque-Cosson, *Vers un Droit Commun Européen de la Vente*, RECUEIL DALLOZ 34, 41 (2012) ("En effet, ce 'second régime' interne contient ses propres dispositions impératives, destinées à prévaloir sur les règles impératives des droit nationaux, y compris les lois de police. L'article 9 du règlement Rome I sur la loi applicable aux obligations contractuelles est donc neutralisé."); Matteo Fornasier, *CESL*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW, vol. 1 at 278, 286 (Jürgen Basedow *et al*. eds., 2017); Guillermo Palao Moreno, *Some Private International Law Issues*, *in* EUROPEAN PERSPECTIVES ON THE COMMON EUROPEAN SALES LAW 17, 31 (Javier Plaza Penadés & Luz M. Martínez Velencoso eds., 2015) ("[T]he application of the Draft CESL would be intended to exclude the application of mandatory rules – art. 9.2 Rome I Regulation – since the future instrument would be made applicable '*in its entirety*' for B2C transactions . . . ."); Matthias E. Storme, *The Young and the Restless: CESL and the Rest of Member State Law*, 23 E. R. P. L. 217, 223 (2015). *Cf*. Jürgen Basedow, *Article 1:105: National Law and General Principles*, *in* PRINCIPLES OF EUROPEAN INSURANCE CONTRACT LAW (PEICL) 73, 75 (Jürgen Basedow *et al*. eds., 2nd expanded ed. 2016) ("The Principles of European Insurance Contract Law ensure comprehensive protection of the policyholder, the insured and the beneficiary; while this protection may fall short of corresponding rules in single Member States this does not entitle the judges of those Member States to disregard the rules of the Principles of European Insurance Contract Law and apply provisions of their national law as internationally mandatory rules instead.").

applied under Rome I Reg., art. 9(3) and 1980 Rome Conv., art. 7(1), the principle of effectiveness would have called for a restrictive interpretation of arts. 9(3) and 7(1) respectively so that European courts be precluded from applying third state provisions that could have endangered the full effects of the CESL. Simply put, the general principles of EU law would have safeguarded the uniform and complete application of the European sales law regime.

At this point, it is interesting to note that the 1955 Hague Sales Convention does not provide for the application of overriding mandatory rules.[103] Absent a gateway provision in the Convention or a general principle that could fill this regulatory gap, it appears that, in Denmark, Finland, France, Italy, and Sweden,[104] the above analysis on overriding provisions would be irrelevant for international sales transactions. That said, a creative—verging upon legal sophistry—application of the public policy defence,[105] which would repeatedly negate the application of foreign law until certain domestic or foreign rules be triggered, could introduce, indirectly, overriding mandatory rules to the 1955 Hague Sales Convention contracting states.

Evidently, the above analysis would be applicable to EU fora only. Before courts of third states, neither the international public policy nor the overriding mandatory rules of the forum could be "neutralized" by the principles of EU law. Hence, both the assertive overriding provisions and the public policy defence could have limited the application of the foreign CESL. In a similar manner, arbitral tribunals do not have a *lex fori* and, as a consequence, are not bound by EU law either.[106] Arbitrators are required to resolve the dispute pursuant to the applicable law and any procedural or substantive agreements of the parties. In that context, their fundamental duty is to render an enforceable award.[107] Hence, an award that could be

[103] *Cf.* 1986 Hague Sales Conv., art. 17.
[104] The 1955 Hague Sales Convention is also applicable in Norway and Switzerland.
[105] 1955 Hague Sales Conv., art. 6.
[106] *See* analysis in *supra* Part II(VI).
[107] Martin Hunter & Allan Philip, *The Duties of an Arbitrator*, *in* THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 477, 485 (Lawrence W. Newman & Richard D. Hill eds., 3rd ed. 2014); Sigvard Jarvin, *The Sources and Limits of the Arbitrator's Powers*, 2 ARB. INT'L 140, 158 (1986); MATTI S. KURKELA, SANTTU TURUNEN & CONFLICT MANAGEMENT INSTITUTE (COMI), DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION 1 (2nd ed. 2010); WILLIAM W. PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE 547 (2nd ed. 2012), and, particularly, at 550 ("Of all the arbitrator's duties, the most persistently problematic may well be the obligation to seek an enforceable award. This obligation implicates not only tensions among the various duties themselves, but also conflicts between norms at the arbitral seat and the law of the enforcement forum."); Linda Silberman & Franco Ferrari, *Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting It Wrong*, *in* CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION 371, 431 (Franco Ferrari & Stefan Kröll eds., 2nd ed., 2019). *See also e.g.* LCIA Arbitration Rules (2014), art. 32(2); ICC Rules of Arbitration (2017), art. 42; *Seller (Turkey)* v *Buyer (Turkey)*, Final Award, ICC Case No. 16168 (2013), 38 Y. B. Comm. Arb. 205, 214 (seat of the tribunal in Hamburg, Germany); *Salini Construttori SPA* v *The Federal Democratic Republic of Ethiopia*, Award, ICC Case No. 10623 (2001), 21 ASA Bul. 2003, 82, 85 (seat of the tribunal in Addis Ababa, Ethiopia).

annulled or refused recognition and enforcement would be of limited value to the prevailing party. For that reason, it is submitted that arbitrators must consider and apply *ex officio* the overriding mandatory provisions and the international public policies of both the tribunal's seat and of other states, where enforcement might be sought.[108] This initiative of the tribunal would be vital to minimizing the likelihood of a successful challenge to the award[109] and to ensuring its enforceability.[110] Another justification for such a proactive stance of the arbitrators can be found in the inherent duty of the tribunal not only to resolve a dispute between the parties, but also to perform a judicial function that might affect other parties or states,[111] or even in an

[108] 2015 Hague Principles, art. 11(5); Lando, *supra* note 42 at 108–109; GEORGIOS PETROCHILOS, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION 44 (2003). *But see* FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, 856 (Emmanuel Gaillard & John Savage eds., 1999) ("Were they to have regard only for the effectiveness of the award, the arbitrators would take into account international public policy as understood in countries where the award is likely to be enforced. However, in our opinion the arbitrators' approach should not be restricted in such a way. As their brief is to decide a dispute, arbitrators cannot disregard the fundamental requirements of justice. [. . .] Concerns as to the enforceability of the award should therefore not prevail over the universal requirements of justice."); JEAN-FRANÇOIS POUDRET & SÉBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 610 (Stephen V. Berti & Annette Ponti trans., 2nd ed. 2007) ("Arbitrators must respond not only to the legitimate expectation of the parties, but also to that of the states which allow them the power to decide even disputes in which the general interest is at stake. As guarantor of the respect of international public policy, arbitrators may directly apply the mandatory laws or rules of public policy which deserve to be applied . . . ."); Luca G. Radicati di Brozolo, *Party Autonomy and the Rules governing the Merits of the Dispute in Commercial Arbitration*, *in* LIMITS TO PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION 331, 340 (Franco Ferrari ed., 2016) ("[T]he most appropriate solution seems to be that arbitrators should apply, or take into consideration, the mandatory rules of the states whose rules would normally be applicable, were the dispute not submitted to arbitration.").
On the applicability of overriding mandatory rules in international arbitration, see generally Yves Derains, *Les Normes d'Application Immédiate dans la Jurisprudence Arbitrale Internationale*, *in* LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONALES: ÉTUDES OFFERTES À BERTHOLD GOLDMAN 29 (1982); Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 ARB. INT'L 274 (1986); Anne-Sophie Papeil, *Conflict of Overriding Mandatory Rules in Arbitration*, *in* CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION 341 (Franco Ferrari & Stefan Kröll eds., 2011); LUCA G. RADICATI DI BROZOLO, ARBITRAGE COMMERCIAL INTERNATIONAL ET LOIS DE POLICE: CONSIDÉRATIONS SUR LES CONFLITS DE JURIDICTIONS DANS LE COMMERCE INTERNATIONAL, 315 Recueil des Cours/Collected Cours 265 (2005); Nathalie Voser, *Current Development: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration*, 7 AM. REV. INT'L ARB. 319 (1996).
[109] International Law Association [ILA], International Commercial Arbitration Committee's Report and Recommendations on "Ascertaining the Contents of the Applicable Law in International Commercial Arbitration," 73 INT'L L. ASS'N REP. CONF. 850, 882 (2008), Recommendation No. 13. *See e.g.* UNCITRAL Model Law, arts. 34(1), 34(2)(b)(ii).
[110] Michael Capper, *"Proving" the Contents of the Applicable Substantive Law(s)*, *in* THE APPLICATION OF SUBSTANTIVE LAW BY INTERNATIONAL ARBITRATORS 31, 35 (Fabio Bortolotti & Pierre Mayer eds., 2014) ("In order to fulfil their duty to render a final and enforceable award, the arbitrators may have to consider such mandatory rules even in the event that none of the parties refer to them."). *See also* International Law Association [ILA], International Commercial Arbitration Committee's Final Report on "Public Policy as a Bar to Enforcement of International Arbitral Awards," 70 INT'L L. ASS'N REP. CONF. 352, 352–368 (2002). *See e.g.* 1958 New York Conv., art. V(2)(b); UNCITRAL Model Law, art. 36(1)(b)(ii).
[111] Luca G. Radicati di Brozolo, *When, Why and How Must Arbitrators Apply Overriding Mandatory Provisions? The Problems and a Proposal*, *in* THE IMPACT OF EU LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 351, 370–371 (Franco Ferrari ed., 2017).

ethical duty to not "flout" the application of mandatory rules that have a "legitimate claim" to be applied.[112]

Granted, overriding mandatory provisions or public policy interests that could set aside commercial sales law are quite rare, if existent at all.[113] Conversely, overriding consumer protection rules are commonplace, particularly in developed societies.[114] Yet again, the high level of consumer protection attained in the CESL would only exceptionally have been surpassed by national legislation, thus reducing further the practical relevance of the "public policy considerations" enquiry. Last, but not least, overriding mandatory rules governing, for example, the (il-)legality, (in-)validity, or (im-)morality of the sales contract would seldom have affected the application of the CESL, as these issues generally fall outside the regulatory scope of the proposed instrument.[115]

Summarily, the foregoing analysis has shown that the frequently noted problem of CESL's interplay with international public policy and overriding mandatory provisions would hardly have constituted a problem at all. On the contrary, the principles of European law would have safeguarded the legal unification achieved under the CESL to such an extent that the universally accepted deviations from conflicts multilateralism and party autonomy, the "enemy" of modern conflict-of-laws, would have largely been irrelevant to the CESL model problematic. Although issues falling outside the scope of the CESL could have been subject to such fundamental state interests, the CESL would have remained intact. The CESL provisions could, of course, have been barred by key-state interests in non-EU fora and arbitral proceedings, but this observation should not diminish the value of the instrument. Rather, it accentuates the Euro-centric focus of the CESL Regulation.[116]

IV. CONCLUSION

This Part attempted to explicate the interplay between the draft CESL and fundamental public policy considerations of any interested states. Thus, on the basis of a theoretical review of overriding mandatory provisions and the international public policy defence, it was argued that the integration of the European sales law regime in all EU Member State legal orders would

[112] *Id.* at 373.
[113] *See* HILL AND SHÚILLEABHÁIN, *supra* note 5 at 246.
[114] *See* BENJAMIN'S SALE OF GOODS, *supra* note 34 at 26–044.
[115] CESL recital 27.
[116] *Cf.* analysis in *supra* Part I(V)(C)(2).

have alleviated any public policy concerns and overcome any relevant objections that could be raised in courts of the Single Market. Furthermore, it was shown that the general principles of primacy and effectiveness would have "neutralized" all overriding mandatory provisions that could jeopardize the uniform and complete application of the instrument across the EU. Before arbitral tribunals and courts of third countries, however, state interests could have interfered with the application of the CESL. Nevertheless, this threat to the unification of international sales law should not be exaggerated. Given the "neutralization" of overriding mandatory rules and international public policy before EU courts, the exceptional application of both conflicts devices, and the limited scope of the proposed instrument, it is submitted that fundamental state interests would hardly hinder the application of an instrument such as the CESL.

PART IV

BALANCING NATIONAL, REGIONAL, AND INTERNATIONAL SALES LAW

> "Et la grandeur du génie ne consisterait-elle pas mieux à savoir dans quel cas il faut l'uniformité, et dans quel cas il faut des différences?"
>
> ["And would not great genius lie in knowing when uniformity is required, and when diversity would be appropriate?"][1]

I. INTRODUCTION

Having explored the conflict-of-laws aspects of the proposed CESL in a linear manner, starting with the selection of the instrument, followed by an analysis of its interplay with the national rules on the application of foreign law, and, lastly, measuring CESL's application against overriding mandatory rules and the public policy defence of the forum state, the analysis turns to the intended legal synchronization of the instrument with other uniform law regimes governing international business transactions.

In particular, this Part encompasses a comparative review of the CESL with the widely-ratified UN Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG).[2] The analysis elucidates the application hierarchy of the two instruments by closely examining the differences in their method of application,[3] any "conflict-of-conventions" issues that might arise,[4] the prevalence of regional over international harmonization by virtue of CISG art. 94,[5] and, of course, the distinctive opt-in/opt-out nature of the CESL and the CISG.[6] Finally, due consideration is paid to the interplay between "hard" and "soft law" instruments on international business transactions, placing particular emphasis

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[1] MONTESQUIEU, DE L' ESPRIT DES LOIS Book XXIX, Chapter XVIII (1748).
[2] *See* analysis in *infra* Section II.
[3] *See* analysis in *infra* Section III.
[4] *See* analysis in *infra* Section IV(A).
[5] *See* analysis in *infra* Section IV(B).
[6] *See* analysis in *infra* Section V.

on the UNIDROIT Principles for International Commercial Contracts (UPICC 2016),[7] and the renowned ICC INCOTERMS (2020).[8]

Concisely, Part IV attests to the unnecessary legal complexity that comes with the promulgation of the CESL as a second parallel legal regime and challenges the much-celebrated "added value" of its potential enactment.

II. CISG *VS.* CESL: SISTER INSTRUMENTS OR FOES?

At the outset, it is important to delineate the key-features of the main instruments examined herein. Reviewed already in Part I, the CESL is a draft EU Regulation that creates an optional uniform substantive law instrument governing all cross-border sale of goods contracts linked to the European Union. Differently, the CISG is a multilateral treaty that establishes an opt-out uniform substantive law regime governing international—primarily commercial[9]—sales transactions. The common subject matter of the two instruments and the use of the CISG as blueprint for the drafting of the CESL justify their characterization as "sister instruments." What remains to be determined, however, is whether, in their application, the very same instruments become "foes." Since the application method of the CESL has already been examined earlier in this study,[10] the analysis focuses on the relevant CISG rules. Also, it needs to be noted that, because the CESL covers the prescription of claims arising from the international sale of goods contracts[11] and since the UN Convention on the Limitation Period in the International Sale of Goods (New York, 1974) (LPISG)[12] follows closely the regulatory model of the CISG,[13] the following analysis would be *mutatis mutandis* applicable to the 1974 Limitation Convention as well.

[7] *See* analysis in *infra* Section VI(A).
[8] *See* analysis in *infra* Section VI(B).
[9] CISG arts. 1(3), 2(a).
[10] *See supra* analysis in Part I.
[11] CESL Anx. I, arts. 178-186.
[12] 1511 U.N.T.S. 99 (as amended by the 1980 Vienna Protocol). For a continuously updated list of the LPISG contracting states, including the declared Reservations, see https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=X-7-b&chapter=10&clang=_en. The LPISG has been ratified, accepted, approved, or acceded to, by 7/28 EU Member States, namely Belgium, the Czech Republic, Hungary, Poland, Romania, Slovakia, and Slovenia.
[13] For the purposes of this research project, see CISG art. 1(1) – LPISG art. 3(1); CISG art. 6 – LPISG arts. 3(2), 22; CISG art. 90 – LPISG 37; CISG art. 94 – LPISG art. 34; CISG art. 95 – LPISG art. 36 *bis* (art. XII of the Vienna 1980 Protocol).

The UN Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG)[14] is one of the most successful international uniform law instruments,[15] at least in terms of number of ratifications.[16] This wide accession to the Convention has inspired its characterization as "high expression" of a modern *lex mercatoria*.[17] Setting aside the controversial topic of whether any such modern *lex mercatoria* exists,[18] it has been estimated that the Convention governs approximately 80% of all international sales transactions.[19] As indicated in its name, the *rationae materiae* of the CISG encompasses international sale of goods contracts,[20] although many commentators argue for the interpretative expansion of its

[14] Convention on Contracts for the International Sales of Goods (Vienna, 1980), 1489 U.N.T.S. 3. For the historical background of international sales law harmonization, see e.g. Peter Winship, *The Scope of the Vienna Convention on International Sales Contracts*, *in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1.1, 1.3-1.16 (Nina M. Galston & Hans Smit eds., 1984).

[15] *See* Stefan Kröll, Loukas Mistelis & Pilar Perales Viscasillas, *Introduction to the CISG*, *in* UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG): A COMMENTARY 1, 8 (Stefan Kröll, Loukas Mistelis, & Pilar Perales Viscasillas eds., 2nd ed. 2018); JOSEPH LOOKOFSKY, CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 18 (2012); Ingeborg Schwenzer & Christopher Kee, *International Sales Law-The Actual Practice*, 29 PENN ST. INT'L L. REV. 425, 428 (2010). *See also* Franco Ferrari, *The CISG and Its Impact on National Legal Systems - General Report*, *in* THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS 413 (Franco Ferrari ed., 2008) (discussing the impact and the various measures of success of the CISG). *But see* JAN DALHUISEN, DALHUISEN ON TRANSNATIONAL COMPARATIVE, COMMERCIAL, FINANCIAL AND TRADE LAW, vol. 2 at 190 (6th ed. 2016) ("Although frequently presented as a major achievement, . . . [the CISG] was in many respects a missed opportunity and disappointment. The project was always too academic and even then not very good.").

[16] The CISG counts to date 95 contracting states, including all major trade states, with the exceptions of India, Indonesia, Saudi Arabia, South Africa, and the United Kingdom (all five are G20 Member States). For a continuously updated list of the CISG contracting states, including the declared Reservations, see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&clang=_en#19.

[17] *See e.g. Seller* v *Buyer*, Interim Award, ICC Case No. 6149 (1990), 20 Y. B. COMM. ARB. 41, 54 (seat of the tribunal in Paris, France) (holding in dicta that the application of the *lex mercatoria* would be tantamount to the application of the CISG); Giuditta Cordero-Moss, *Does the Use of Common Law Contract Models Give Rise to a Tacit Choice of Law or to a Harmonised, Transnational Interpretation?*, *in* BOILERPLATE CLAUSES, INTERNATIONAL COMMERCIAL CONTRACTS AND THE APPLICABLE LAW 37, 56 (Giuditta Cordero-Moss ed., 2011); DALHUISEN, *supra* note 15 at 266 ("Where the Convention does not apply under its own terms, it may still figure as a model as part of the general principles of the modern *lex mercatoria*."); Winship, *supra* note 14 at 1–2 ("If many States adopt the convention . . . its text will be the basis for a modern *lex mercatoria*."). *See also* Peter H. Schlechtriem, *25 Years of the CISG: An International Lingua Franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transactional Contracts*, *in* DRAFTING CONTRACTS UNDER THE CISG 167 (Harry M. Flechtner, Ronald A. Brand, & Mark S. Walter eds., 2008) (describing the CISG as "lingua franca" for traders, lawyers, and legislators around the world).

[18] Peter Mankowski, *Article 3*, *in* ECPIL COMMENTARY: ROME I REGULATION 87, 204 (Ulrich Magnus & Peter Mankowski eds., 2017) ("The so-called *lex mercatoria* is and will ever be a mere pseudo-law, an amorphous phenomenon with unclear contents and of extremely dubitable quality. At best, it can be called Esperanto of the law, a fascinating construct without any relevant market."). For a well-substantiated critique of the *lex mercatoria* concept, see Gilles Cuniberti, *Three Theories of Lex Mercatoria*, 52 COLUM. J. TRANSNAT'L L. 369 (2014).

[19] Schwenzer and Kee, *supra* note 15 at 428; Renaud Sorieul, Emma Hatcher & Cyril Emery, *Possible Future Work by UNCITRAL in the Field of Contract Law: Preliminary Thoughts from the Secretariat*, 58 VILL. L. REV. 491, 492 (2013) (noting that, in 2005, the CISG contracting states represented over 2/3 of international trade, and, considering their growing number, the volume of international trade represented must be even greater). *But see* Stefan Grundmann, *Costs and Benefits of an Optional European Sales Law (CESL)*, 50 C. M. L. REV. 225, 229 (2013) ("The CISG . . . does not even cover 10 percent of the cases (irrespective of opt-outs).").

[20] The CISG defines neither "goods" nor "sale of goods contracts." Nevertheless, adhering to the call for an "autonomous" interpretation of the Convention, the rules on the internationality of the contract (CISG art. 1(1)),

scope to similar transactions, such as barter contracts,[21] preliminary agreements,[22] framework agreements,[23] etc.[24]

Drawing more than a quarter of its ratifications from EU Member States,[25] the CISG has been particularly "popular" in Europe.[26] Therefore, it should be expected that upon the enactment of a parallel European sales law instrument, legal issues would arise from their

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and the rights and obligations of the parties (CISG arts. 30 and 53) could be of assistance. Thus, for the purposes of the CISG, an "international sale of goods contract" is that transaction between two parties maintaining their places of business in different states, under which the seller agrees to deliver the goods, hand over any accompanying documents, and transfer the property in the goods to the buyer, while the buyer agrees to pay the price set and take delivery of the goods. As to the concept of "goods," they should be understood as any movable and tangible objects. On these points, see e.g. CLAYTON P. GILLETTE, ADVANCED INTRODUCTION TO INTERNATIONAL SALES LAW 22–23 (2016); CLAYTON P. GILLETTE & STEVEN D. WALT, THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: THEORY AND PRACTICE 26, 43–44 (2nd ed. 2016); PETER HUBER & ALASTAIR MULLIS, THE CISG: A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS 41, 43 (2007); Loukas Mistelis, *Article 1*, *in* UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG): A COMMENTARY 21, 28, 31 (Stefan Kröll, Loukas Mistelis, & Pilar Perales Viscasillas eds., 2nd ed. 2018); Ingeborg Schwenzer & Pascal Hachem, *Article 1*, *in* SCHLECHTRIEM & SCHWENZER COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 27, 30, 33–34 (Ingeborg Schwenzer ed., 4th ed. 2016); Winship, *supra* note 14 at 1.22. Whether software should be regarded as "goods" under the CISG, see GILLETTE AND WALT, *supra* note at 49–55; Sarah Green & Djakhongir Saidov, *Software as Goods*, 51 J. B. L. 161 (2007); HUBER AND MULLIS, *supra* note at 43; Schwenzer and Hachem, *supra* note at 34–35; Ingeborg Schwenzer, *CESL and CISG*, *in* GLOBALIZATION VERSUS REGIONALIZATION: 4TH ANNUAL MAA SCHLECHTRIEM CISG CONFERENCE, 18 MARCH 2012, HONG KONG 97, 98–99 (Ingeborg Schwenzer & Lisa Spagnolo eds., 2013); Hiroo Sono, *The Applicability and Non-Applicability of the CISG to Software Transactions*, *in* SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: FESTSCHRIFT FOR ALBERT H. KRITZER ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY 512 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008).

[21] MICHAEL G. BRIDGE, THE INTERNATIONAL SALE OF GOODS 577 (4th ed. 2018); FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW 28 (1992); GILLETTE, *supra* note 20 at 23; GILLETTE AND WALT, *supra* note 20 at 55–60. *But see* Mistelis, *supra* note 20 at 29; Schwenzer and Hachem, *supra* note 20 at 31; Marco Torsello, *Preliminary Agreements and CISG Contracts*, *in* DRAFTING CONTRACTS UNDER THE CISG 191, 200 (Harry M. Flechtner, Ronald A. Brand, & Mark S. Walter eds., 2008).

[22] For the applicability of the CISG to preliminary agreements broadly defined, see Torsello, *supra* note 21.

[23] BRIDGE, *supra* note 21 at 577; María del Pilar Perales Viscasillas, *Extending the Scope of the 1980 Vienna Convention on the International Sale of Goods to Framework Distribution Contracts*, *in* 35 YEARS CISG AND BEYOND 115 (Ingeborg Schwenzer ed., 2016). *But see* GILLETTE AND WALT, *supra* note 20 at 62–65; HUBER AND MULLIS, *supra* note 20 at 48; Schwenzer and Hachem, *supra* note 20 at 32–33.

[24] For other types of contract that could be governed by the CISG, see e.g. BRIDGE, *supra* note 21 at 579; ENDERLEIN AND MASKOW, *supra* note 21 at 28; HUBER AND MULLIS, *supra* note 20 at 48; Mistelis, *supra* note 20 at 30–31; INGEBORG SCHWENZER, CHRISTIANA FOUNTOULAKIS & MARIEL DIMSEY, INTERNATIONAL SALES LAW 6 (2nd ed. 2012); Winship, *supra* note 14 at 1–22. For a critique of the "expansionist interpretation" of the CISG, see Joseph Lookofsky, *Persuasive Pamesa: Not Running Wild with the CISG*, *in* EUROPE: THE NEW LEGAL REALISM. ESSAYS IN HONOUR OF HJALTE RASMUSSEN 413 (Henning Koch *et al*. eds., 2010).

[25] The CISG has been ratified by 24 out of 28 EU Member States. The four "outliers" are Ireland, Malta, Portugal, and the United Kingdom.

[26] *See* Christiana Fountoulakis, *Sales Law in Europe*, *in* EUROPEAN PRIVATE LAW: A HANDBOOK 41, 46 (Mauro Bussani & Franz Werro eds., 2014). *See also* Draft Council Report on the Need to Approximate Member States' Legislation in Civil Matters (Brussels, 29 October 2001 (05.11) (OR.fr), 13017/01), approved on 7.11.2001 (2385th Meeting of the Council of the European Union, Brussels, 16 November 2001 (OR. Fr), 13978/01), at 5 ("We refer in particular to the United Nations Convention on Contracts for the International Sale of Goods, signed in Vienna on 11 April 1980. Member States which are not yet Parties should be encouraged to ratify such instruments."). For the impact of the CISG on EU "hard" and "soft" law projects, see Stefano Troiano, *The CISG's Impact on EU Legislation*, *in* THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS 345 (Franco Ferrari ed., 2008).

simultaneous applicability to international sale of goods contracts.[27] The quintessential question that arises is whether the courts of a Member State, which has ratified the CISG, should favour the application of one instrument over the other.[28] This enquiry would be reduced, of course, to plain academic discourse, if the two instruments—in this context the CESL and the CISG—were identical. They differ, however, in both their regulatory scope and substantive law rules.[29] This essential "applicability crash-test" of the two instruments develops in three prongs: the temporal hierarchy in their application,[30] the interplay between the CESL and CISG arts. 90 and 94,[31] and, finally, the distinctive nature of the two instruments as opt-in and opt-out regimes respectively.[32]

III. TEMPORAL HIERARCHY BETWEEN THE CISG AND THE CESL

It is self-explanatory that the instrument, which is triggered first, sets the parameters of its application and exclusion, determining, in turn, the (in-)applicability of the instrument coming second in place. In the framework of this research project, the question raised is which sales law instrument should be examined first by the adjudicatory authority: the CESL or the

[27] FRANCO FERRARI & MARCO TORSELLO, INTERNATIONAL SALES LAW - CISG IN A NUTSHELL 53–54 (1st ed. 2014); Ulrich G. Schroeter, *Global Uniform Sales Law - With a European Twist? CISG Interaction with EU Law*, 13 VINDOBONA J. 179, 190 (2009) ("[C]onflicts between EU law and the CISG are always possible. If such a conflict arises, courts in EU States will find themselves in a rather difficult position: on the one hand, they are legally bound to apply the EC Directive or Regulation, because this is an obligation flowing from the European treaties, and on the other hand they are legally bound to apply the CISG, since the CISG is a treaty binding the respective States under public international law."). *Cf.* 1969 Vienna Conv., art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

[28] For an examination of this enquiry in courts of non-contracting states and arbitral tribunals, see analysis in *infra* Section VII.

[29] An elaborate comparative review of the two instruments would extend beyond the scope of this paper. Notably, with respect to their *rationae materiae*, CESL's scope of application is, simultaneously, broader, as it governs consumer sale of goods contracts (CESL Reg., art. 1(3); CISG art. 2(a)), and narrower, as it requires at least one small or medium-sized enterprise (SME) for cross-border commercial transactions (CESL Reg., art. 7; but see CESL Reg., art. 13(b)). For the needs of this analysis, it is assumed that the examined sale of goods agreement falls within the regulatory scope of both the CESL and the CISG. For an overview of the differences between the two instruments see e.g. Larry A. DiMatteo, *Common European Sales Law: A Critique of Its Rationales, Functions, and Unanswered Questions*, 11 J. I. T. L. P. 222, 229–230 (2012); Ulrich Magnus, *CISG and CESL*, *in* LIBER AMICORUM OLE LANDO 225 (Michael Joachim Bonell, Marie-Louise Holle, & Pieter Arnt Nielsen eds., 2012); Ulrich Magnus, *CISG vs. CESL*, *in* CISG VS. REGIONAL SALES LAW UNIFICATION 97, 7 *et seq*. (Ulrich Magnus ed., 2012); Sixto A. Sánchez-Lorenzo, *Common European Sales Law and Private International Law: Some Critical Remarks*, 9 J. PRIV. INT'L L. 191, 200, note 23 (2013); Ingeborg Schwenzer, *The Proposed Common European Sales Law and the Convention on the International Sale of Goods*, 44 U. C. C. L. J. 457, 464–477 (2012); Enrica Senini, *Requiring and Withholding Performance, Termination and Price Reduction - The CESL Compared to the Vienna Sales Convention*, *in* THE PROPOSED COMMON EUROPEAN SALES LAW - THE LAWYER'S VIEW 113 (Guido Alpa *et al*. eds., 2013).

[30] *See* analysis in *infra* Section III.

[31] *See* analysis in *infra* Section IV.

[32] *See* analysis in *infra* Section V.

CISG? Having ascertained that the CESL, as a second parallel legal regime, presupposes the identification of an EU Member State law as the *lex contractus*,[33] this section delves into the applicability provisions of the Vienna Sales Convention. This endeavour would prove anything but easy. Notwithstanding the thousands of CISG judgements and arbitral awards reported over the past 30 years, the legal nature of the CISG applicability rules, and, as a result, the method of approaching international sales disputes under the CISG, remains unsettled.[34] The following paragraphs focus on the "heart of the beast," namely CISG art. 1.

A. The Many-Faced CISG art. 1(1)

In juxtaposition with the CESL, the CISG is an opt-out uniform law instrument that has been promulgated under a multilateral international treaty. Its applicability does not depend on a selection by the parties. Rather, if the CISG application requirements are met,[35] the instrument governs by default the respective international sale of goods contract. This automatic application of the Convention evinces clearly from CISG art. 1(1),[36] which provides that

> This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
>
> (a) when the States are Contracting States; or

[33] *See* analysis in *supra* Part I(IV)(B).

[34] *See* Michael Bridge, *A Commentary on Articles 1-13 and 78*, *in* THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 235, 237 (Franco Ferrari, Harry Flechtner, & Ronald A. Brand eds., 2004) ("There is little in the case law on Article 1 that provides insight into the meaning and significance of its provisions. Though cited in many decisions, it is simply a routine port of call for a tribunal that is identifying the applicable law."). For analysis on the applicability criteria or applicability rules in uniform law instruments, see ANTONIO MALINTOPPI, LES RAPPORTS ENTRE DROIT UNIFORME ET DROIT INTERNATIONAL PRIVÉ, 116 RECUEIL DES COURS/COLLECTED COURSES 1, 53–65 (1965).

[35] Concisely, the CISG application requirements are: *i.* the dispute arises from a sale of goods contract (CISG arts. 30, 53), *ii.* the particular sales transaction does not fall outside the scope of the CISG (CISG arts. 2, 3), *iii.* the dispute arises from an "international" sale of goods contract (CISG art. 1), *iv.* both parties maintain their respective place of business in CISG contracting states (CISG art. 1(1)(a)) or the conflict-of-laws rules of the forum point to a CISG contracting state (CISG art. 1(1)(b)), *v.* the dispute falls within the Convention's temporal scope of application (CISG art. 100), and *vi.* the parties have not excluded the application of the Convention (CISG art. 6).

[36] BRIDGE, *supra* note 21 at 608; Filip De Ly, *Opting Out: Some Observations on the Occasion of the CISG's 25th Anniversary*, *in* QUO VADIS CISG? CELEBRATING THE 25TH ANNIVERSARY OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 25, 34 (Franco Ferrari ed., 2005); JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG 3 (4th (Worldwide) ed. 2012); SCHWENZER, FOUNTOULAKIS, AND DIMSEY, *supra* note 24 at 1, 39. For the expansion of the Convention's applicability by virtue of national legislative measures, see Yehuda Adar, *Israel*, *in* INTERNATIONAL SALES LAW: A GLOBAL CHALLENGE 518, 519 (Larry A. DiMatteo ed., 2014).

> (b) when the rules of private international law lead to the application of the law of a Contracting State.[37]

Although the method of resolving international sales disputes under the CISG has been disregarded by the great majority of commentators, one can identify three main approaches to the issue: *i*. *Primo loco* application of the CISG as international uniform law, *ii*. Classification of CISG art. 1(1) as unilateral or localizing conflict-of-laws rules of the forum, and *iii*. Classification of the CISG as an overriding statute that mandates the application of the Convention independently of the otherwise applicable law.

1. Primo loco application of the CISG

Pursuant to this first approach, the international uniform law nature of the CISG mandates the application of the instrument *before* the private international law rules of the forum. The key-aspects of this theory have been delineated in a number of Italian CISG judgments.[38] In 2012, the District Court of Forlì ruled that

> [T]his Court prefers, over the private international law approach, another solution, that favors as much as possible the application of the rules of uniform substantive international law, such as the 1980 United Nations Convention on Contracts for the International Sale of Goods . . . .

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[37] *Cf.* LPISG art. 3(1).

[38] Trib. di Forlì, Mar. 26, 2009, *translation available at* http://cisgw3.law.pace.edu/cases/090326i3.html (It.); Trib. di Forlì, Feb. 16, 2009, *translation available at* http://cisgw3.law.pace.edu/cases/090216i3.html (It.); Trib. di Forlì, Dec. 11, 2008, *translation available at* http://cisgw3.law.pace.edu/cases/081211i3.html (It.); Trib. di Padova, Jan. 11, 2005, *translation available at* http://cisgw3.law.pace.edu/cases/050111i3.html (It.); Trib. di Padova, Mar. 31, 2004, *translation available at* http://cisgw3.law.pace.edu/cases/040331i3.html (It.); Trib. di Padova, Feb. 25, 2004, *translation available at* http://cisgw3.law.pace.edu/cases/040225i3.html (It.); Trib. di Rimini, Nov. 26, 2002, *translation available at* http://cisgw3.law.pace.edu/cases/021126i3.html (It.); Trib. di Vigevano, Jul. 12, 2000, *translation available at* http://cisgw3.law.pace.edu/cases/000712i3.html (It.); Trib. di Pavia, Dec. 29, 1999, *translation available at* http://cisgw3.law.pace.edu/cases/991229i3.html (It.). Similarly, but without the analytical rigour of the aforementioned judgments, Trib. di Rovereto, Nov. 21, 2007, *translation available at* http://cisgw3.law.pace.edu/cases/071121i3.html (It.). *See* FRANCO FERRARI & MARCO TORSELLO, INTERNATIONAL SALES LAW - CISG IN A NUTSHELL 33–36 (2nd ed. 2018); Franco Ferrari, *PIL and CISG: Friends or Foes?*, 31 J. L. & COM. 45, 47–48 (2013). It is noteworthy that only this approach has been included in all four editions (2004, 2008, 2012, and 2016) of the UNCITRAL Digest of Case Law on the UN Convention on Contracts for the International Sale of Goods. Specifically, UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (4th ed. 2016), at 4, *available at* www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf. For the function of the Digest as a guide or collection of case law, rather than as authoritative analysis of the CISG, see Report of the United Nations Commission on International Trade Law on its Thirty-Fourth Session (25 June-13 July 2001), General Assembly, Official Records, Fifty-sixth Session, Supplement No. 17 (U.N. Doc. A/56/17) (2001), at 74, ¶ 393.

> This approach is justified by the intrinsic nature of uniform substantive law conventions. First of all, these conventions have a specific scope of application, which is more limited compared to that of the rules of private international law. In particular, the Vienna Convention exclusively applies to the contracts for the sale of goods, whose international nature depends on the fact that the contracting parties have their place of business in different States. By contrast—as everyone knows—the rules of private international law apply to every type of international contract, without limitations.
>
> Further, and more importantly, the specific nature of the rules of uniform substantive law—and, as a consequence, their prevalence—is based on the process through which they deal with the merits of the dispute.
>
> The rules of uniform law, in fact, must be considered more specific because they directly determine the questions regarding the merits of the dispute, thus avoiding the two-step process required by the rules of private international law, consisting first in the identification of the applicable law according to the specific applicable criterion, and then in its application.[39]

In 2017, the Italian Supreme Court of Cassation rendered a very similar judgment. Specifically, it ruled that

> The preference of the UN Convention [on Contracts for the International Sale of Goods of 1980] over private international law rules is based, essentially, on the prevalence of uniform substantive law over the latter rules (and that is independently of their source, even if they have been enshrined in an international convention).
>
> Uniform substantive law is, in fact, distinguished by specificity, because it resolves directly the merits of the case at hand, thus avoiding the two-step process under private international law rules, consisting, firstly, in the identification of the applicable law and, secondly, in its application.[40]

Succinctly, this "*primo loco* application" method favours the application of the uniform substantive rules of the CISG over the conflicts rules of the forum. This prevalence is justified

[39] Trib. di Forlì, Nov. 12, 2012, *reported in* Internationales Handelsrecht (IHR) 4/2013, 161, 162 (It.).
[40] Corte Suprema di Cassazione [Cass.], sez. sec., Oct. 19, 2017, n. 1867-18 (It.).

on the ground of specificity,[41] as, firstly, international uniform substantive law is, usually, narrower in scope compared to the all-encompassing conflict-of-laws rules, and, secondly, the direct application of the uniform law instrument enhances legal efficiency by removing the intermediate step of identifying the applicable law under the conflicts rules of the forum.[42] Thus, it may be argued that this clear-cut approach departs from fundamental tenets of international dispute resolution, that is, resorting in the first place to the rules of private international law in order to determine the substantive law regime governing the issue in dispute.[43] To the extent, however, that CISG art. 1(1) ascertains the legal regime governing the issue in dispute, the criteria of CISG arts. 1(1)(a) and 1(1)(b) are conflict-of-laws rules themselves. This classification as *sui generis* or special "applicability rules"—a sub-category of conflict-of-laws of its own—appreciates the unique features and rationale of international uniform substantive law instruments.[44] Should this typology as special applicability rules of international uniform law be rejected, one cannot but classify CISG arts. 1(1)(a) and 1(1)(b) as unilateral or, more appropriately, as localizing conflict-of-laws rules.

2. CISG art. 1(1) as unilateral or localizing conflict-of-laws rules

In contrast to the *primo loco* application method, the second approach embraces traditional private international law, and holds that the provisions of CISG art. 1(1) are themselves ordinary conflict-of-laws rules, which identify the CISG as the regime applicable to international sale of goods contracts.[45]

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[41] *See* the general principle of *lex specialis derogat lege generali*.

[42] Franco Ferrari, *Uniform Substantive Law and Private International Law*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW, vol. 2 at 1772, 1774 (Jürgen Basedow *et al*. eds., 2017). For somewhat similar arguments, see Konrad Zweigert & Ulrich Drobnig, *Einheitliches Kaufgesetz und Internationales Privatrecht*, 29 RABELSZ 146, 148 (1965).

[43] *See* F. A. Mann, *Uniform Statutes in English Law*, 99 L. Q. REV. 376, 392 (1983) (describing this process as "classical").

[44] *See* ALEXANDER J. BĚLOHLÁVEK, ROME CONVENTION, ROME I REGULATION COMMENTARY: NEW EU CONFLICT-OF-LAWS RULES FOR CONTRACTUAL OBLIGATIONS, vol. 2 at 2219 (2010). *Contra* Michael Bridge, *Choice of Law and the CISG: Opting In and Opting Out*, *in* DRAFTING CONTRACTS UNDER THE CISG 65, 68 (Harry M. Flechtner, Ronald A. Brand, & Mark S. Walter eds., 2008) ("[I]t would not be in the spirit of the CISG as uniform law to describe Article 1(1)(a) as a choice of law rule. Rather, it is a rule of application of the uniform law itself which bypasses the choice of law process of the Contracting State."); JAMES J. FAWCETT, JONATHAN M. HARRIS & MICHAEL BRIDGE, INTERNATIONAL SALE OF GOODS IN THE CONFLICT OF LAWS 963 (2005); MICHEL PELICHET, LA VENTE INTERNATIONALE DE MARCHANDISES ET LE CONFLIT DE LOIS, 201 RECUEIL DES COURS/COLLECTED COURSES 9, 36 (1987).

[45] For a strong critique of "absorbing" CISG art. 1(1)(a) and uniform law in general in the choice of law process, see BRIDGE, *supra* note 21 at 564. *See also id.* at 476 ("Unlike the case of Article 1(1)(a), the orthodox approach is to treat Article 1(1)(b) as a conventional rule of private international law.").

Before all else, it should be noted that a conflicts rule need not identify itself as one, let alone be part of a code or other distinct set of conflicts provisions.[46] Rather, in order to define a rule as one of private international law, a functional test should be adopted, namely whether the rule identifies a regime governing the issue in dispute.[47] If the examined rule identifies the regime *in abstracto*, requiring, thus, further effort to ascertain the applicable law, it constitutes a "complete" or "multi-/bi-lateral" conflict-of-laws rule.[48] Conversely, if it mandates the application of the *lex fori*, it forms an "incomplete" or "unilateral" conflicts rule.[49] In the words of Symeonides,

> A unilateral choice-of-law rule is a rule that *mandates the application of the law of the forum state* [emphasis added] to cases that have certain enumerated contracts with that state: (1) without regard to the corresponding claims of any other state to apply its law, and (2) *without* [emphasis in the original] specifying which law will govern cases in which the forum state does not have the enumerated contacts.[50]

Considering that the applicability criteria set forth in CISG art. 1(1), firstly, provide—without more—for the application of the Convention, which forms an integral part of the *lex fori*, and, secondly, do not identify the applicable law in the event of their non-application, they could be classified as unilateral conflict-of-laws rules.[51] Furthermore, because these conflicts rules select the applicable law to international sales contracts, as opposed to contractual obligations in general, they prevail over the generic private international law of the forum by virtue of the general principle *lex specialis derogat legi generali*.[52] Consequently, the

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[46] BĚLOHLÁVEK, *supra* note 44 at 2218.
[47] *Id.* at 2219.
[48] *See e.g. id.* at 2223.
[49] *Id*.
[50] SYMEON C. SYMEONIDES, CHOICE OF LAW 494 (2016).
[51] *See* Peter Mankowski, *Article 25*, *in* ECPIL COMMENTARY: ROME I REGULATION 861, 871–872 (Ulrich Magnus & Peter Mankowski eds., 2017) (with further examples and bibliographical references on this point). *But see* LOOKOFSKY, *supra* note 36 at 13 (without defining the nature of CISG art. 1, it is argued that "there is no 'conflict' of laws: since the international sales law of *all* CISG Contracting States is the *same*, there is simply nothing to 'choose' between in an Article 1(1)(a) situation, at least not as regards the many issues 'governed and settled' by the Convention.").
[52] SYMEONIDES, *supra* note 50 at 494 ("[U]nder the principle *lex specialis* derogate [sic] legi generali, these unilateral rules, being more specific, override even statutory bilateral choice-of-law rules, which usually have a general and residual character."); Carolina Saf, *CISG - A Uniform Law within the Sphere of Conflict of Laws*, *in* CISG PART II CONFERENCE: STOCKHOLM, 4-5 SEPTEMBER 2008 95, 109, note 48 (Jan Kleineman ed., 2009); Carolina Saf, *A Study of the Interplay between the Conventions Governing International Contracts of Sale* 2.1, http://www.cisg.law.pace.edu/cisg/biblio/saf.html. The specificity under the unilateral conflicts rules theory is limited to the first of the two elements referred to in the "*primo loco* application" method, namely the more limited subject matter of the unilateral conflict-of-laws rules compared to the scope of the generic complete conflicts rules of the forum. The second element of the "*primo loco* application" method, namely efficiency on the grounds that

court will have to examine whether the respective dispute meets all the application requirements of the Convention,[53] and, if it does, apply the special conflicts rules of CISG art. 1(1) in the first place, before falling back on multilateral private international law rules.[54]

Granted, it is disputed whether both criteria of CISG art. 1(1) or only CISG art. 1(1)(a) have unilateral effects. Pursuant to the prevailing approach, only CISG art. 1(1)(a) should be considered as a unilateral conflict-of-laws rule;[55] CISG art. 1(1)(b) merely demarcates the application scope of the various sales law regimes in the *lex contractus*.[56] Hence, under

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international uniform law avoids the two-step approach of private international law, is irrelevant here, because the comparison is effected between rules of the same kind—unilateral *vs.* multilateral conflict-of-laws rules.

[53] *See supra* note 35.

[54] *Cf.* MALCOLM A. CLARKE, INTERNATIONAL CARRIAGE OF GOODS BY ROAD: CMR 19 (6th ed. 2014) ("When a case falls within the scope of the CMR, the scope as defined by Article 1, the forum applies the CMR to what is, *ex hypothesi*, an international contract, without resort to normal rules of the conflict of laws . . . Article 1 is a unilateral conflict rule in the *lex fori* of a contracting state: whenever a court in a contracting state characterises the case before it as a contract of the kind defined in Article 1.1, it applies the CMR as enacted in the *lex fori*."); MALCOLM A. CLARKE, CONTRACTS OF CARRIAGE BY AIR 7 (2nd ed. 2010); MALCOLM A. CLARKE & DAVID YATES, CONTRACTS OF CARRIAGE BY LAND AND AIR 2 (2nd ed. 2008).

[55] Petra Butler, *Choice of Law*, *in* INTERNATIONAL SALES LAW: CONTRACT, PRINCIPLES & PRACTICE 1025, 1029 (Larry A. DiMatteo *et al*. eds., 2016); GILLETTE AND WALT, *supra* note 20 at 25–26; Perales Viscasillas, *supra* note 23 at 746; Peter Schlechtriem, *Requirements of Application and Sphere of Applicability of the CISG*, 36 VICTORIA U. WELLINGTON L. REV. 781, 784 (2005). *See also* JOSEPH F. MORRISSEY & JACK M. GRAVES, INTERNATIONAL SALES LAW AND ARBITRATION: PROBLEMS, CASES AND COMMENTARY 61 (2008) ("Article 1(1)(b) is not a conflict of laws rule itself[.]"); Saf, *supra* note 52 at [2.1]; Ingeborg Schwenzer, *Introduction*, *in* SCHLECHTRIEM & SCHWENZER COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 1, 4, note 4 (Ingeborg Schwenzer ed., 4th ed. 2016). For the position that CISG art. 1 in its entirety is a unilateral conflicts rule, see BĚLOHLÁVEK, *supra* note 44 at 2148, 2149; E. Jayme, *Article 1*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 27, 28 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987); Thomas Krebs, *The CISG in English Courts*, *in* EPPUR SI MUOVE: THE AGE OF UNIFORM LAW. ESSAYS IN HONOUR OF MICHAEL JOACHIM BONELL TO CELEBRATE HIS 70TH BIRTHDAY, vol. 2 at 1745, 1748 (UNIDROIT ed., 2016); Kröll, Mistelis, and Viscasillas, *supra* note 15 at 5, note 29; Mistelis, *supra* note 20 at 22; SCHWENZER, FOUNTOULAKIS, AND DIMSEY, *supra* note 24 at 1. For an even broader position on this point, see Ingeborg Schwenzer & Pascal Hachem, *Introduction to Article 1-6*, *in* SCHLECHTRIEM & SCHWENZER COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 17, 19 (Ingeborg Schwenzer ed., 4th ed. 2016) ("*Chapter I* [emphasis added] . . . contains unilateral rules on the conflict of laws which determine the scope of the Convention."). For the rejection of the conflict-of-laws nature of CISG art. 1, see ARTHUR TAYLOR VON MEHREN, *Convention on the Law Applicable to Contracts for the International Sale of Goods: Text adopted by the Diplomatic Conference of October 1985 - Explanatory Report* 59 (1986) ("[S]ince Vienna Article 1(1)(a) has a significant separate role to play [setting the scope of the Vienna Convention's application], interpreting the Article to provide a conflicts rule as well, especially one whose value is limited and problematical, seems both unnecessary and undesirable.").

[56] *See* VON MEHREN, *supra* note 55 at 57 ("The basic function of Article 1(1) is clearly to determine, when the sales law of a State Party to the Vienna Convention is in question, whether the relevant body of rules is found in that State's domestic [or internal] sales law or in the Convention."); Schwenzer and Hachem, *supra* note 20 at 41 ("[W]ithin the domestic law of a CISG Contracting State, Article 1(1)(b) . . . has the function of allocating sales issues to the CISG like [other] norms allocating sales matters to a special commercial code or consumer regulations, etc."); PETER SCHLECHTRIEM & PETRA BUTLER, UN LAW ON INTERNATIONAL SALES: THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS 17 (2009) ("As part of the national law of the referred to [CISG] member state, Article 1(1)(b) CISG is a 'distribution' provision which divides the law of the member state in the area of sale of goods into different strands . . . ."); GILLETTE, *supra* note 20 at 17; CLAYTON P. GILLETTE & STEVEN D. WALT, SALES LAW: DOMESTIC AND INTERNATIONAL 41, 42 (3rd ed. 2016); Urs Peter Gruber, *The Convention on the International Sale of Goods (CISG) in Arbitration*, INT'L BUS. L. J. 15, 22, 24 (2009); HUBER

CISG art. 1(1)(b), the Convention applies only as part of the foreign *lex contractus*,[57] opening, thus, the backdoor to strategic (non-)pleading of the "foreign" CISG provisions.[58] This interpretation is corroborated by the underlying rationale of the CISG art. 95 reservation, as evidenced in the *travaux préparatoires* of the instrument:

> Mr. Kopać (Czechoslovakia), introducing his delegation's proposal for a new article C *bis* [(CISG art. 95)] . . . , recalled that . . . [CISG art. 1(1)(b)] would not give rise to any problem for countries where the ordinary rules of law merchant applied to international transactions. An entirely different situation arose, however, in countries . . . where special legislation had been enacted to govern transactions pertaining to international trade. . . . For countries with such a system, *the rule in paragraph 1(b) would mean the exclusion of whole areas of the special legislation enacted to govern international trade transactions* [emphasis added]. The net result was that [such] countries . . . would be unable to ratify the Convention because of the effect which article 1(1)*(b)* would have on the application of their special legislation on international trade. The only solution for those countries was to limit the application of the Convention to contracts concluded between parties having their places of business in different Contracting States [(CISG art. 1(1)(a))].[59]

AND MULLIS, *supra* note 20 at 53; André Janssen & Matthias Spilker, *The Application of the CISG in the World of International Commercial Arbitration*, 77 RABELSZ 131, 139 (2013); Stefan Kröll, *Arbitration and the CISG*, *in* CURRENT ISSUES IN THE CISG AND ARBITRATION 59, 62, 64 (Ingeborg Schwenzer, Yeşim M. Atamer, & Petra Butler eds., 2014); Saf, *supra* note 52 at [2.1].
For a true distribution rule of the kind contemplated by the aforementioned commentators, see Wet van 18 December 1991, Stb. 1991, at 753, art. 2 ("If, pursuant to any rule of private international law, Dutch law is applicable to an international sale of goods contract falling within the scope of the United Nations Convention on Contracts for the International Sale of Goods concluded in Vienna on 11 April 1980 (Trb. 1981, 184), that Convention applies [author's translation].") (Neth.).

[57] *See* Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat A/CONF.97.5 {Original: English} {14 March 1979}, in *United Nations Conference on Contracts for the International Sale of Goods (Vienna, 10 March – 11 March 1980): Official Records* (United Nations, 1991) 14, 15 ("Even if one or both of the parties to the contract have their places of business in a State which is not a Contracting State, the Convention is applicable if the rules of private international law of the forum lead to the application of the law of a Contracting State. In such a situation the question is then which law of sales of *that State* [emphasis added] shall apply. If the parties to the contract are from different States, the appropriate law of sales is this Convention."). *See also* Butler, *supra* note 55 at 1030; Saf, *supra* note 52 at [2.2]; PETER SCHLECHTRIEM, UNIFORM SALES LAW: THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 24 (1986); SCHWENZER, FOUNTOULAKIS, AND DIMSEY, *supra* note 24 at 10.

[58] For the radical effects of the differentiated legal treatment of foreign law, see *supra* analysis in Part II. For an overview of the diverging positions in jurisprudence and case law on the effects of (non-)pleading the CISG, see LISA SPAGNOLO, CISG EXCLUSION AND LEGAL EFFICIENCY 273 *et seq*. (2014).

[59] Czechoslovakia, Proposals and Amendments Submitted to the Plenary Conference, Document A/Conf. 97/L.4, in *United Nations Conference on Contracts for the International Sale of Goods (Vienna, 10 March–11 March 1980): Official Records* (United Nations, 1991) 170, 229.

Against this background, and assuming that the classification of CISG art. 1(1) as special applicability rules of international uniform law has been rejected, it would be more accurate to describe both criteria of CISG art. 1(1) as localizing rules in a substantive law statute. As described by Symeonides,

> Some . . . statutes contain *express* [emphasis in the original] provisions making *the statute* [emphasis added] applicable to multistate situations that have certain prescribed connections to the enacting state.[60]

Because the CISG is a self-executing treaty that enshrines substantive law rules on such "multistate situations," that is, *international* sale of goods contracts, CISG art. 1 should be construed as a localizing rule that requires the application of the Convention—not the *lex fori* in general—to situations that have the prescribed connections to either the territorial scope of the Convention or the CISG contracting states collectively viewed.[61] Setting aside the hardly disputed unilateral effects of art. 1(1)(a),[62] this approach holds that CISG art. 1(1)(b) does not require a fully-fledged application of conflict-of-laws, but only a theoretical determination of the applicable law.[63] Should the laws of a CISG contracting state be identified as the *lex contractus*, the Convention applies as part of the *lex fori*—not as foreign law.[64]

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[60] SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS 294 (2014). *See* David St. Leger Kelly, *Localising Rules and Differing Approaches to the Choice of Law Process*, 18 INT'L & COMP. L. Q. 249, 249 (1969) ("[Localising rules] may be defined as rules whose sole function is to limit the application of the substantive laws which they qualify to certain persons, events or transactions connected in a specified way with the State of whose law they form part."); Kurt Lipstein, *Inherent Limitations in Statutes and the Conflict of Laws*, 26 INT'L & COMP. L. Q. 884, 885 (1977) ("[T]hese special rules of the conflict of laws . . . have attracted increasing attention from writers in various countries, albeit under different titles, such as 'spatially conditioned internal rules,' 'legislatively localised laws' or 'laws containing localising limitations,' 'functionally restricting rules,' or perhaps 'special substantive rules for multi-State problems.'"); Robert Allen Sedler, *Functionally Restrictive Substantive Rules in American Conflicts Law*, 50 S. CAL. L. REV. 27, 32 (1977). For a rejection of the conflict-of-laws nature of localizing rules, see Mann, *supra* note 43 at 395 ("Provisions which make application dependent upon the nationality of the parties, the type of carriage, cargo or shipment, the countries between which goods are carried or similar enactments are not conflict rules, but have a substantive character in that they indicate the scope of the Convention. They are not conflict rules, because they do not prescribe the application of a particular legal system or rule, but deal with the field of application of a Convention or statute known to be applicable (self-limiting substantive provisions)."); ARTHUR NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW 71–73 (1943). For a broader definition and understanding of localizing rules, see generally DAVID ST. LEGER KELLY, LOCALISING RULES IN THE CONFLICT OF LAWS (1974).

[61] *Cf.* KELLY, *supra* note 60 at 31 ("Express localising rules are normally concerned with the minimum application sought to be ensured for certain decisional rules by the legislator, rather than with setting the outer limits of the relevance of those rules.").

[62] The unilateral effects of CISG art. 1(1)(a) would be identical under either the unilateral conflict-of-laws or the localizing rules typology of the provision. *See* SYMEONIDES, *supra* note 60 at 312 ("[L]ocalizing rules . . . function as unilateral rules."); KELLY, *supra* note 60 at 3.

[63] Thomas Kadner Graziano, *The CISG Before the Courts of Non-Contracting States? Take Foreign Sales Law as You Find It*, 13 Y. B. PRIV. INT'L L. 165, 167 (2011).

[64] *See* analysis in *supra* Part II(III)(B).

3. Application of the CISG as an overriding statute

The last approach to the application method of the CISG maintains that international uniform law conventions, which have been ratified by the forum state, constitute overriding statutes that mandate their application irrespective of the otherwise applicable law.[65] First articulated in English case law on international conventions for the carriage of goods and passengers,[66] this approach finds its rationale in international public policy considerations that are "inherent in the unification of international [commercial] law."[67] Although very appealing as it dispenses with any conflict-of-laws enquiries, this method has rarely been followed in practice for many reasons. In particular, not all jurisdictions acquiesce to the concept of overriding rules.[68] Even if the forum courts be familiar with this legal concept, the crucial function of safeguarding the forum state's public interests, which distinguishes overriding

[65] *See e.g.* Butler, *supra* note 55 at 1029 ("[W]hen concentrating on its effect the CISG may be characterized as an overriding mandatory law of the forum or as a self-executing treaty."); Giorgio Conetti, *Uniform Substantive and Conflicts Rules on the International Sale of Goods and Their Interaction*, *in* INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 385, 392, 397 (Petar Šarčević & Paul Volken eds., 1986); DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, vol. 2 at 1890–1891 (15th ed. 2012). For a definition of overriding statutes, see DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, vol.1 at 24–25 (15th ed. 2012) ("[Overriding statutes] are those which must be applied regardless of the normal rules of the conflict of laws, because the statute says so. . . . [They] are an exception to the general rule that statutes only apply if they form part of the applicable law.").

[66] *See The Hollandia* [1983] 1 A.C. 565 (HL) (Eng.); *Thomas Cook Ltd* v *Transportes Agroes Portugoesse* [2002] EWHC 2694 (Comm) [39] (Eng.); *Kenya Railways* v *Antares Pte Ltd* [1987] 1 Lloyd's Rep. 424 (Eng.); *Rothmans of Pall Mall (Overseas) Ltd and Others* v *Saudi Arabian Airlines Corp* [1981] Q.B. 368, 377 (Mustil J) (Eng.); *Corocraft Ltd* v *Pan American Airways Inc* [1969] 1 Q.B. 616, 631 (Donaldson J) (Eng.); DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, vol.1, *supra* note 65 at 29 (referring to the Carriage by Air Act of 1961 [giving effect to the Warsaw Convention as amended in The Hague in 1955, and by Protocols No. 1 and 4 of Montreal in 1975, and the Montreal Convention of 1999], the Carriage of Goods by Road Act of 1965 [giving effect to the Geneva Convention-CMR 1965], the Carriage of Goods by Sea Act of 1971 [giving effect to the Hague-Visby Rules as amended by the Brussels Protocol of 1968], and the Merchant Shipping Act of 1995); ANDREW DICKINSON, THE ROME II REGULATION: THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS 636 (2008) (noting a handful of uniform law conventions on the limitation of liability); BERNARD EDER *ET AL.*, SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING [14-016] (23rd ed. 2015); SHAWCROSS AND BEAUMONT ON AIR LAW, vol. 1 at 215 (Anthony McClean ed., 4th ed. 2011); PIPPA ROGERSON, COLLIER'S CONFLICT OF LAWS 324, note 171 (4th ed. 2013). *But see* CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW, 750 (Paul Torremans & James J. Fawcett eds., 15th ed. 2017); Sedler, *supra* note 60 at 32 (describing the English Carriage of Goods by Sea Act of 1924 [giving effect to the draft Hague Rules of 1923] as a "functionally restrictive substantive rule"). *Contra* RAOUL COLINVAUX, CARVER'S CARRIAGE BY SEA, vol. 2 at 632–633 (13th ed. 1982). For the nature of the Australian *Carriage of Goods by Sea Act 1991* (Cth) (enshrining the Hague-Visby Rules) as overriding legislation, see REID MORTENSEN, PRIVATE INTERNATIONAL LAW IN AUSTRALIA 392 (2006).

[67] DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, vol. 1, *supra* note 65 at 29. *See Grein* v *Imperial Airways Ltd* [1937] 1 K.B. 50 at 74–76 (Greene LJ) (Eng.).

[68] *See* Mary Keyes, *Statutes, Choice of Law, and the Role of Forum Choice*, 4 J. PRIV. INT'L L. 1, 5–6 (2008); Michel Pelichet, *Report on the Law Applicable to International Sales of Goods (Revision of the Convention of June 15, 1955 on the Law Applicable to International Sales of Goods): Preliminary Document No. 1 of September 1982*, *in* PROCEEDINGS OF THE EXTRAORDINARY SESSION 14 TO 30 OCTOBER 1985: DIPLOMATIC CONFERENCE ON THE LAW APPLICABLE TO CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 17, 87 (Hague Conference on Private International Law, Bureau Permanent de la Conférence ed., 1987). *See also* Ole Lando, *Contracts*, III.2 *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 1, 38 (Kurt Lipstein ed., 1976).

mandatory provisions, is not invariably a feature of international uniform law.[69] Lastly, the dispositive nature of the CISG sets apart the Vienna Sales Convention from the uniform law conventions examined by English courts and, of course, from other overriding mandatory provisions. Whereas, the latter are applicable independently of a choice-of-law agreement between the parties, choice-of-law agreements may lead to the exclusion of the Vienna Sales Convention under CISG art. 6.[70] In light of the above, it should not be surprising that there are no reported judgments or arbitral awards applying the CISG as an overriding statute.

B. CISG: Prior in Tempore, Potior in Applicatione

The foregoing analysis has shown that, irrespective of the approach adopted, the CISG should be applied *before* the determination of the *lex contractus*.[71] Since CESL's parallel legal regime would have been triggered *after* the forum's conflicts rules as part of the applicable EU Member State law,[72] the court would have been required to explore the applicability of the CISG before looking at the applicability of the CESL.[73] Having established the temporal methodological prevalence of the CISG over the EU sales law regime, the analysis turns to those CISG provisions, which could reverse the effects of this application priority, namely the "conflict-of-conventions" rule of CISG art. 90,[74] the reservation of CISG art. 94,[75] and the opt-out rule enshrined in CISG art. 6.[76]

[69] *See* analysis in *supra* Part III(II)(A). *See also* SYMEONIDES, *supra* note 60 at 299–300 (noting that this lack of a necessary public policy interest constitutes the key-difference between overriding mandatory provisions and localizing rules).
[70] *See* analysis in *infra* Section V.
[71] For the principle that the application of uniform law should be examined before the application of the conflict-of-laws rules, see Paul Lagarde, *Instrument Optionnel International et Droit International Privé - Subordination ou Indépendance?*, *in* A COMMITMENT TO PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOUR OF HANS VAN LOON 287, 287–288 (The Permanent Bureau of the Hague Conference on Private International Law ed., 2013); Paul Lagarde, *Le Champ d'Application dans l'Espace des Règles Uniformes de Droit Privé Matériel*, *in* ÉTUDES DE DROIT CONTEMPORAIN: VIII[E] CONGRÈS INTERNATIONAL DE DROIT COMPARÉ, PESCARA 1970, 149, 151 (1970).
[72] For the application of the CESL as second parallel legal regime, see analysis in *supra* Part I(IV)(B). *Contra* JAN DALHUISEN, DALHUISEN ON TRANSNATIONAL COMPARATIVE, COMMERCIAL, FINANCIAL AND TRADE LAW, vol.1 at 343–344 (6th ed. 2016).
[73] For the two remaining scenarios, namely locating the forum in a CISG non-contracting state and resolving the international sales dispute before an arbitral tribunal, see analysis in *infra* Section VII.
[74] *See* analysis in *infra* Section IV(A).
[75] *See* analysis in *infra* Section IV(B).
[76] *See* analysis in *infra* Section V.

IV. CISG PART IV: A SECOND CHANCE FOR REGIONAL HARMONIZATION

It is common ground that international conventions are fiercely negotiated. As a result, their final text usually reflects extensive compromises between the positions held during the drafting process.[77] In addition, the diverging interests of the participating states and the refusal of one or more countries to be bound by particular provisions of a draft treaty could lead the negotiations to a dead-end. These undesirable situations can be avoided by introducing reservations that allow interested states to limit their respective international obligations under the international agreement.[78] The CISG, as a multilateral treaty, was not an exception to this practice. Thus, a limited number of reservations were added in Part IV of the Convention (arts. 89-101).[79] The following paragraphs focus on CISG arts. 90 and 94 as legal bases for dispensing with the application of the CISG in favour of the CESL.[80]

A. CISG art. 90

CISG art. 90 provides that

> This Convention does not prevail over any *international agreement* which *has already been or may be entered into* and which contains provisions concerning the *matters governed by this Convention*, provided that the parties have *their places of business in States parties to such agreement* [emphasis added].

[77] *See* Alejandro M. Garro, *Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods*, 23 INT'L LAW. 443 (1989).

[78] 1969 Vienna Conv., art. 2(1)(d) ("'Reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State[.]"). *See* also arts. 19–23. *Cf.* Alain Pellet, *Article 19, Convention of 1969*, *in* THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY, vol. I at 405, 418 (Olivier Corten & Pierre Klein eds., 2011).

[79] CISG art. 98 ("No reservations are permitted except those expressly authorized in this Convention."). *See* CISG Advisory Council [CISG AC], *Declaration No. 2, Use of Reservations under the CISG.* Rapporteur: Ulrich Schroeter 2 (2013) ("The drafting history of Articles 92, 94, 95 and 96 [(albeit not 93)] CISG demonstrates that these reservations were included in the Convention as a means of compromise, designed to cater to specific concerns of specific countries that existed at the time the Convention's final text was adopted in 1980."); BRIDGE, *supra* note 21 at 612 ("The CISG nowhere else [(other than CISG art. 98)] deals with 'reservations', but it does allow in a number of instances States to make 'declarations', which appear to serve the same purpose as reservations."); Winship, *supra* note 14 at 1.44 ("Although a State may make other *declarations* [emphasis in the original] not contemplated by the convention it may only adopt the *reservations* [emphasis in the original] expressly authorized by the convention.").

[80] Though relevant in its subject matter, the reservation of CISG art. 92 is not discussed here, because it requires a declaration "at the time of signature, ratification, acceptance, approval or accession" to the CISG. With 24/28 EU Member States already parties to the CISG, further analysis would be all but an academic exercise.

CISG art. 90 does not enshrine a "reservation" to the CISG provisions, but, rather, a "compatibility clause" or "conflict-of-conventions" rule,[81] which establishes the priority of international sales law treaties over the CISG.[82] For its application, CISG art. 90 requires: *i.* an "international agreement,"[83] *ii.* concerning matters governed by the CISG,[84] *iii.* entered into at any time by the respective states,[85] and *iv.* contracting parties that maintain their respective place of business in states that have acceded to the international agreement.[86] Since the CESL enshrines substantive law rules governing, among others, international sale of goods contracts, and the contracting parties would, typically, have maintained their respective place of business in an EU Member State,[87] the analysis focuses on the thorny issue of whether the CESL Regulation should be deemed an "international agreement" that would have trumped the application of the Convention.[88]

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[81] Ulrich G. Schroeter, *Backbone or Backyard of the Convention? The CISG's Final Provisions*, *in* SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: FESTSCHRIFT FOR ALBERT H. KRITZER ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY 425, 452, 464 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008) (characterizing CISG art. 90 as an "interpretative declaration" or a "conflict of norms" between two international instruments). *Cf.* LPISG art. 37.

[82] Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Jan. 24, 2005, Arb. Proc. No. 66/2004, *translation available at* http://cisgw3.law.pace.edu/cases/050124r1.html; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Mar. 22, 2002, Arb. Proc. No. 225/2000, *translation available at* http://cisgw3.law.pace.edu/cases/020322r1.html; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Oct. 2, 1998, Arb. Proc. No. 113/1997, *translation available at* http://cisgw3.law.pace.edu/cases/981002r1.html; Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, Apr. 14, 1998, Arb. Proc. No. 47/1997, *translation available at* http://cisgw3.law.pace.edu/cases/980414r1.html. *See* ENDERLEIN AND MASKOW, *supra* note 21 at 370 ("There need *not be congruence* [emphasis in the original]. The Contracting States can regulate specific questions in deviation of or amending the provisions of the Convention."); Johnny Herre, *Article 90*, *in* UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG): A COMMENTARY 1168, 1168 (Stefan Kröll, Loukas Mistelis, & Pilar Perales Viscasillas eds., 2nd ed. 2018) ("Only the rules in the CISG that concern the same matters will be replaced by rules of other international agreements."); Ingeborg Schwenzer & Pascal Hachem, *Article 90*, *in* SCHLECHTRIEM & SCHWENZER COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 1245, 1249 (Ingeborg Schwenzer ed., 4th ed. 2016). *See also* Winship, *supra* note 14 at 1.42 ("If . . . an international agreement overlaps with the Vienna convention but is not as detailed or covers only some aspects of the contract of sale the convention should be used to fill gaps rather than domestic law applicable under the rules of private international law.").

[83] Franco Ferrari, *Universal and Regional Sales Law: Can They Coexist?*, 8 UNIF. L. REV. 177, 181 (2003) ("[F]or an international agreement to prevail over the CISG by virtue of Article 90, it need not be an agreement with universal reach.").

[84] Whereas substantive sales law rules fall clearly within the ambit of CISG art. 90, it is disputed whether conflict-of-laws conventions should, also, prevail over the CISG. On this topic, see *infra* analysis.

[85] *But see* CAMILLA B. ANDERSEN, UNIFORM APPLICATION OF THE INTERNATIONAL SALES LAW: UNDERSTANDING UNIFORMITY, THE GLOBAL JURISCONSULTORIUM AND EXAMINATION AND NOTIFICATION PROVISIONS OF THE CISG 27 (2007) (arguing that CISG art. 90 applies only with respect to "pre-existing" international agreements). *Cf.* 1969 Vienna Conv., arts. 30 and 59.

[86] *See* ENDERLEIN AND MASKOW, *supra* note 21 at 371 ("[I]t is . . . no condition that [the parties] have their places of business also in . . . States that are parties to the CISG . . . .").

[87] *Cf.* CESL Reg., art. 4(2).

[88] For an overview of the arguments articulated in legal theory, see Herre, *supra* note 82 at 1170–1171. Since the CISG does not form part of EU law, it is unlikely that the Court of Justice will ever render a judgment on the application requirements of CISG art. 90. *See* Case C-481/13, *Criminal proceedings against Mohammad Ferooz*

To begin with, the interplay between EU Directives on contract law and the CISG has been extensively examined in scholarly writings. In particular, it has been correctly argued that the transposition requirement of EU Directives does not fit with CISG art. 90.[89] The draft CESL, however, achieves a first in that it represents a challenge to the applicability of the CISG by an EU *Regulation* enshrining substantive sales law rules. Hence, would this change in the type of the EU legal act matter for the purposes of CISG art. 90?

In order to answer this question, it is important to appreciate that EU Regulations do not constitute "international agreements" as traditionally viewed by public international law;[90] they are regulatory instruments promulgated by a supra-national organization.[91] Moreover, CISG art. 90 requires that states be "parties to such agreements,"[92] and, certainly, EU member states are not "parties" to a Regulation. Be that as it may, we cannot disregard that the competence to enact Regulations derives from the very founding Treaties. Furthermore, the Member States participate in the drafting and the enactment of Regulations with their representatives in all EU institutions in a similar—albeit exhaustively regulated and rigidly structured—manner to international treaty negotiations. Most importantly, Regulations are functionally similar to international uniform substantive law instruments—the very subject-matter of "international agreements" under CISG art. 90—as they are distinguished by

Qurbani, ECLI:EU:C:2014:2101, ¶ 20–24 (2014); Case C-452/12, *NIPPONKOA Insurance Co (Europe) Ltd* v *Inter-Zuid Transport BV*, ECLI:EU:C:2013:858, ¶ 30 (2013); Case C-533/08, *TNT Express Nederland BV* v *AXA Versicherung AG*, 2010 E.C.R. I-04107, ¶ 58–63; Case C-301/08, *Irène Bogiatzi* v *Deutscher Luftpool*, 2009 E.C.R. I-10185, ¶ 32–34. *But see* Peter Schlechtriem, *Article 90*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 919, 922 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2nd (English) ed. 2005) ("[I]t is difficult to find . . . arguments that are strong enough to convince the European Court of Justice, to which the ultimate decision might fall if, say a state court dealt with a case by applying the CISG and disregarding [or interpreting restrictively] a directive."). *Cf.* Schwenzer and Hachem, *supra* note 82 at 1246 ("The same issue may, at least in the future, also arise in connection with further regional unification of laws efforts on other continents such as APEC, ASEAN, MERCOSUR, NAFTA, or OHADA.").

[89] Ferrari, *supra* note 83 at 182; HUBER AND MULLIS, *supra* note 20 at 28; Ulrich Magnus, *The CISG's Impact on European Legislation*, *in* THE 1980 UNIFORM SALES LAW: OLD ISSUES REVISITED IN THE LIGHT OF RECENT EXPERIENCES (VERONA CONFERENCE 2003) 129, 131 (Franco Ferrari ed., 2003); Schlechtriem, *supra* note 88 at 922, note 8 (with further references to legal scholarship); Pilar Perales Viscasillas, *Late Payment Directive 2000/35 and the CISG*, 19 PACE INT'L L. REV. 125, 129 (2007); Claude Witz, *Harmonization in the European Union*, *in* 35 YEARS CISG AND BEYOND 235, 248 (Ingeborg Schwenzer ed., 2016).

[90] 1969 Vienna Conv., art. 2(a) ("'Treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;"). *See also* ENDERLEIN AND MASKOW, *supra* note 21 at 370 ("The notion 'international agreement' is used here as the generic term for international conventions. Besides, there is no difference between *treaty, convention, charter, covenant, pact, concordat or certified recommendation*."). *But see* Schwenzer and Hachem, *supra* note 82 at 1245 ("The drafting history of the provision shows that the rather unspecific term 'international agreement' has been deliberately chosen so as to not only encompass conventions in a narrow sense merely operating at the level of public international law. It follows that an 'international agreement' the CISG 'does not prevail over' does not necessarily have to be of public international law nature.").

[91] *See* Schlechtriem, *supra* note 88 at 921.

[92] Schwenzer and Hachem, *supra* note 82 at 1247; Schroeter, *supra* note 81 at 466.

the two key-features of the latter, namely the introduction of identical rules into the legal orders of the Member States and the requirement for autonomous interpretation of the rules enshrined therein.[93] Therefore, EU Regulations could be considered, at least indirectly, as "international agreements" under CISG art. 90.[94]

This interpretative expansion of CISG art. 90, however, would come at the expense of legal certainty and predictability in international trade.[95] The latter can be achieved only by interpreting restrictively the rules that dispense with the application of uniform law.[96] For that reason, it is submitted that EU Regulations fall outside the ambit of CISG art. 90.[97] This interpretation is, also, supported by the *travaux préparatoires* of the Convention, where one can find the rather rigid term "conventions," which was hastily replaced during the final Conference in Vienna by the broader, yet equally rigid, term "international agreements."[98]

Finally, as last remarks on CISG art. 90, due consideration should be paid to the interplay between the CISG and two uniform conflicts instruments, namely the 1955 Hague Sales Convention and the Rome I Regulation.

Pursuant to the prevailing interpretation of CISG art. 90, the wording "matters governed by [the CISG]" refers to both substantive law and conflict-of-laws rules.[99] As a consequence,

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[93] Stefan Leible, *Konflikte zwischen CESL und CISG–Zum Verhältnis zwischen Art. 351 AEUV und Artt. 90, 94 CISG*, *in* FESTSCHRIFT FÜR ULRICH MAGNUS ZUM 70. GEBURTSTAG 605, 613 (Peter Mankowski & Wolfgang Wurmnest eds., 2014).

[94] ANDERSEN, *supra* note 85 at 27. For further references to legal scholarship, see Schlechtriem, *supra* note 88 at 921, note 7.

[95] *See* FAWCETT, HARRIS, AND BRIDGE, *supra* note 44 at 962; Herre, *supra* note 82 at 1170–1171 ("Even if it is rather problematic to find convincing reasons for or against the priority of the EU regulations and EC directives over the CISG, there is a strong need of ignoring the EU law in order to avoid very different results on the same matters due to this very complex body of law provided by the EU.").

[96] Franco Ferrari, *Scope of Application: Articles 4-5*, *in* THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 96, 105 (Franco Ferrari, Harry Flechtner, & Ronald A. Brand eds., 2004) ("[A]s Article 90 constitutes an exception to the usual rule on the applicability of the CISG, it should be interpreted restrictively . . . .").

[97] For further references to scholarly writings on this position, see e.g. Schroeter, *supra* note 81 at 466; Schwenzer and Hachem, *supra* note 82 at 1247. *Contra* Leible, *supra* note 93 at 613.

[98] Summary Records of Meetings of the Second Committee: 2nd Meeting (18 March 1980), Document A/CONF.97/C.2/SR.2, in *United Nations Conference on Contracts for the International Sale of Goods (Vienna, 10 March–11 March 1980): Official Records* (United Nations, 1991) 438, 439–440; Draft Convention on Contracts for the International Sale of Goods: Draft Articles Concerning Implementation, Declarations, Reservations and Other Final Clauses, Prepared by the Secretary-General Document A/CONF.97/6 {Original: English} {3l October 1979}, in *United Nations Conference on Contracts for the International Sale of Goods (Vienna, 10 March–11 March 1980): Official Records* (United Nations, 1991) 66, 68, note 2 ("This provision [(CISG art. 90)] makes this Convention subordinate only to other *Conventions* [emphasis added].").

[99] Butler, *supra* note 55 at 1035; Herre, *supra* note 82 at 1169; JOHN O. HONNOLD & HARRY M. FLECHTNER, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 695 (4th ed. 2009); LOOKOFSKY, *supra* note 36 at 166; KARL H. NEUMAYER & CATHERINE MING, CONVENTION DE VIENNE SUR LES CONTRATS DE VENTE INTERNATIONALE DE MARCHANDISES: COMMENTAIRE 576 (1993); Schlechtriem, *supra* note 88 at 920; Schwenzer and Hachem, *supra* note 82 at 1248; Winship, *supra* note 14 at 1.42–1.43.

the 1955 Hague Sales Convention displaces CISG art. 1(1),[100] and courts located in states that have acceded to the former,[101] should apply the conflicts rules enshrined therein rather than those in the CISG. Hence, under such scenarios, the applicability rules of the Vienna Sales Convention would have been by-passed and the CESL would have been triggered in the first place as an integral part of the applicable EU Member State laws. Simply put, the unfortunate omission of a conflict-of-conventions rule in the 1955 Hague Sales Convention,[102] would have, fortuitously, improved the application prospects of another instrument, namely the CESL.

Conversely, the minority of scholars argues—correctly, in this author's opinion—that the rule of CISG art. 90 is limited to substantive sales law provisions.[103] In accordance with the requirement for the restrictive interpretation of reservations, narrowing the scope of the CISG art. 90 exception would further the applicability of the Vienna Sales Convention. By the same token, a restrictive interpretation of CISG art. 90 negates the prevalence of the Rome I Regulation, which enshrines private international law rules.[104] Besides, the Rome I Regulation itself defers, by virtue of art. 25(1), to the conflicts rule of CISG art. 1(1)—be the latter *sui generis*, unilateral/localizing, or overriding mandatory rules.[105] As a result, the uniform

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[100] Butler, *supra* note 55 at 1036; Herre, *supra* note 82 at 1169; HONNOLD AND FLECHTNER, *supra* note 99 at 695; LOOKOFSKY, *supra* note 15 at 205–206; Schwenzer and Hachem, *supra* note 82 at 1249; Winship, *supra* note 14 at 1.43. For the same result under the 1964 Hague Sales Conventions, see RONALD H. GRAVESON, ERNEST J. COHN & DIANA GRAVESON, THE UNIFORM LAWS ON INTERNATIONAL SALES ACT 1967: A COMMENTARY 19–20 (1968). *Contra* Corte Suprema di Cassazione [Cass.], sez. un., Jun. 19, 2000, n. 448, ¶ 3.1, *translation available at* http://cisgw3.law.pace.edu/cases/000619i3.html (It.); BRIDGE, *supra* note 21 at 567–568 (distinguishing, however, CISG art. 1(1)(a) and 1(1)(b)); Morten M. Fogt, *Private International Law in the Process of Harmonization of International Commercial Law: The "Ugly Duckling"?*, *in* UNIFICATION AND HARMONIZATION OF INTERNATIONAL COMMERCIAL LAW: INTERACTION OR DEHARMONIZATION? 57, 90 (Morten M. Fogt ed., 2012).

[101] Denmark, Finland, France, Italy, Norway, Sweden, and Switzerland.

[102] *Cf.* 1986 Hague Sales Conv., art. 23(a).

[103] Corte Suprema di Cassazione [Cass.], sez. un., Jun. 19, 2000, n. 448, ¶ 3.1, *translation available at* http://cisgw3.law.pace.edu/cases/000619i3.html (It.); Tribunal de Commerce [Comm.] [Commercial Court] Bruxelles, 7e ch., Oct. 5, 1994, *translation available at* http://cisgw3.law.pace.edu/cases/941005b1.html (Belg.); Michael Joachim Bonell & Fabio Liguori, *The U.N. Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law - 1997 (Part I)*, 2 UNIF. L. REV. 385, 392 (1997); Franco Ferrari, *Choice of Forum and CISG: Remarks on the Latter's Impact on the Former*, *in* DRAFTING CONTRACTS UNDER THE CISG 103, 126 (Harry M. Flechtner, Ronald A. Brand, & Mark S. Walter eds., 2008); Saf, *supra* note 52 at 108. *Cf.* 1986 Hague Sales Conv., art. 23(a); 1983 Agency Conv., art. 23 ("This Convention does not prevail over any international agreement . . . which contains *provisions of substantive law* [emphasis added] concerning matter governed by this Convention . . . .").

[104] It is noteworthy that the 1980 Rome Convention has been superseded by the 1955 Hague Sales Convention. *But see* Jürgen Basedow, *Rome II at Sea: General Aspects of Maritime Torts*, 74 RABELSZ 118, 128 (2010) ("Under its Art. 1(1) the Rome II Regulation shall apply 'in situations involving a conflict of laws' . . . . But in most official languages of the Community the wording of Art. 1(1) and its purpose leave no doubt that a conflict of laws is a condition precedent for the application of the Regulation's conflict of laws rules. To the extent, however, that uniform law conventions are applicable, there is no conflict of laws, and the Rome II Regulation including its Art. 28 is therefore inapplicable. In general this would also apply to uniform law conventions which contain isolated choice of law rules for supplementing the uniform substantive rules.").

[105] MICHAEL BOGDAN, CONCISE INTRODUCTION TO EU PRIVATE INTERNATIONAL LAW 119 (3rd ed. 2016) (focusing on CISG art. 1(1)(a)); 2 BĚLOHLÁVEK, *supra* note 44 at 2148 (focusing on CISG art. 1(1)(b)).

conflicts regimes of both the 1955 Hague Sales Convention and the Rome I Regulation would have been incapable of reversing the default application order of the CISG and the CESL.[106]

It should be noted, at this point, that this interplay between CISG art. 90 and the CESL constitutes a rather esoteric issue of limited practical importance, particularly in light of the more rigorous reservation of CISG art. 94.[107]

B. CISG art. 94

The second basis for negating the application of the CISG in favour of the CESL is found in CISG art. 94,[108] which provides that

> 1. Two or more *Contracting States* which have *the same or closely related legal rules on matters governed by this Convention* may *at any time* declare that the Convention is not to apply to contracts of sale or to their formation *where the parties have their places of business in those States*. Such declarations may be made jointly or by reciprocal unilateral declarations [emphasis added].

See also BRIDGE, *supra* note 21 at 569–570; CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW, *supra* note 66 at 750 ("While it is true that Article 25 refers only to international conventions 'which lay down conflict-of-law rules relating to contractual obligations', the rules of the conventions which define their substantive, personal and territorial scope could be regarded as conflict-of-law rules in a wide sense."); Mankowski, *supra* note 51 at 872 ("Any assertion that there is no potential of a conflict between the two regimes since uniform law operates on the level of substantive law whereas the Rome I Regulation operates on the level of PIL disregards the nature of said rules."). *Contra* Gralf-Peter Calliess & Hermann Hoffmann, *Rome I: Article 25*, *in* ROME REGULATIONS: COMMENTARY 431, 432–433 (Gralf-Peter Calliess ed., 2nd ed. 2015) (rejecting the pertinence of art. 25(1) to international uniform substantive law instruments, but acknowledging that, irrespective of the position adopted, the Rome I Regulation would be excluded); Graziano, *supra* note 63 at 172; MICHAEL MCPARLAND, THE ROME I REGULATION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS 98 (2015); Sebastian Omlor, *Article 25*, *in* ROME I REGULATION: POCKET COMMENTARY 505, 507 (Franco Ferrari ed., 2015).

[106] *See* analysis in *supra* Section III.

[107] *See* Franco Ferrari, *CISG and OHADA Sales Law: Or the Relationship between Global and Regional Sales Law*, *in* CISG VS. REGIONAL SALES LAW UNIFICATION 79, 94 (Ulrich Magnus ed., 2012) ("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."); Peter Schlechtriem, *Article 94*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 929, 929 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2nd (English) ed. 2005) ("Article 94 leads with more certainty to a complete exclusion of the CISG in the relationships concerned, while Article 90 only gives priority to divergent rules. Proposals to 'reconcile' directives and regulations with the CISG by requiring that EC Member States make a declaration under Article 94, therefore, would achieve more certainty . . . ."). *See also* Witz, *supra* note 89 at 248.

[108] *Contra* CISG Advisory Council [CISG AC], *Declaration No. 1, The CISG and Regional Harmonization*. Rapporteur: Michael Bridge 3 (2012) ("The draft Common European Sales Law [CESL] would not as such call for any Article 94 reservations to be entered by Member States of the European Union . . . because contracting parties may opt-out of the CISG under Article 6 and would be subject to CESL only if they opted into it . . . .").

> 2. A *Contracting State* which has *the same or closely related legal rules on matters governed by this Convention* as one or more non-Contracting States may *at any time* declare that the Convention is not to apply to contracts of sale or to their formation *where the parties have their places of business in those States* [emphasis added].[109]

Because it allows the coexistence of both the CISG and regional uniform law regimes, this reservation reduces the likelihood of limited accession to or subsequent denunciation of the CISG by states that participate or might participate in regional sales law unification or harmonization efforts. Specifically, by virtue of CISG art. 94, the CISG—or smaller parts of the Convention[110]—gives way to unified or harmonized national sales law, when both contracting parties maintain their respective place of business in states that have enacted other unified or harmonized laws.[111]

Turning to the conditions of the reservation, CISG art. 94 sets no temporal or formal requirements for its application.[112] It only requires "same or closely related legal rules on matters governed by the Convention,"[113] the form or method of such legal unification or

[109] *Cf.* LPISG art. 34.

[110] Ingeborg Schwenzer & Pascal Hachem, *Article 94*, *in* SCHLECHTRIEM & SCHWENZER COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 1258, 1259 (Ingeborg Schwenzer ed., 4th ed. 2016). *But see* Johnny Herre, *Article 94*, *in* UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG): A COMMENTARY 1181, 1182 (Stefan Kröll, Loukas Mistelis, & Pilar Perales Viscasillas eds., 2nd ed. 2018).

[111] For the prevailing interpretation that the CISG should be inapplicable independently of the forum state, see Herre, *supra* note 110 at 1182–1183; Schwenzer and Hachem, *supra* note 110 at 1260–1261 (with further references to legal scholarship). *But see* FRANCO FERRARI, CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: APPLICABILITY AND APPLICATIONS OF THE 1980 UNITED NATIONS SALES CONVENTION 71–72 (2012) (arguing that, notwithstanding the CISG art. 94 reservation, the CISG would still be applicable, if, firstly, the forum of the dispute be located in a CISG contracting state that has not made the art. 94 reservation, and, secondly, the private international law rules point to a CISG contracting state). These diverging interpretations could be apposite at the stage of determining the law governing the international sales transaction, if, for example, the forum be located in a CISG contracting state, such as Switzerland, which has not made the declaration of CISG art. 94. Granted, arguing that the CISG could be applicable in the event of a choice-of-law agreement in favour of the laws of a CISG non-reservatory state, see ENDERLEIN AND MASKOW, *supra* note 21 at 378; Malcolm Evans, *Article 94*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 650, 653 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987); Herre, *supra* note 110 at 1183; Schwenzer and Hachem, *supra* note 110 at 1261.

[112] *See* Schwenzer and Hachem, *supra* note 110 at 1259 ("In contrast to the other reservations, those under Article 94 can be made at any time. That takes account of the expected further regional unification of laws which would otherwise increasingly give States cause to denounce the CISG. In particular, in the case of a future European unification of contract law, such a declaration has to be considered.").

[113] Marco Torsello, *The CISG's Impact on Legislators: The Drafting of International Contract Law Conventions*, *in* THE 1980 UNIFORM SALES LAW: OLD ISSUES REVISITED IN THE LIGHT OF RECENT EXPERIENCES (VERONA CONFERENCE 2003) 199, 95 (Franco Ferrari ed., 2003) ("The very notion of 'States which have […] closely related legal rules' is regrettably vague, since it does not give the slightest clue as to the degree of similarity required to determine whether or not two different States have 'closely related legal rules'.").

harmonization being irrelevant.[114] Furthermore, the degree of legal unification or harmonization achieved may not be scrutinized by any other state or UNCITRAL itself, but remains a prerogative of the declaring states.[115] For the purposes of this study, it is indisputable that the CESL would have attained a high degree of legal harmonization, and, therefore, no doubts could be raised *vis-à-vis* this requirement.

The second requirement of CISG art. 94 is that both contracting parties maintain their respective place of business in states of unified or harmonized sales laws. Since the CESL Regulation would have entered into force in EU Member States only, CISG art. 94 would have been relevant only with respect to purely EU-sales transactions, namely sale of goods contracts whereby both the seller and the buyer maintain their place of business in different EU Member States.[116] Thus, considering that CESL's application could extend to cases whereby only one of the parties is located in the EU,[117] it becomes apparent that CISG art. 94 would have achieved limited success in dispensing with the application priority of the CISG over the CESL.

Lastly, CISG art. 94 mandates that the interested CISG contracting states advise the global community of the identical or very similar content of their legal orders by virtue of a declaration deposited with the United Nations.[118] In this regard, the practical question that arises is whether a CISG art. 94 declaration in favour of the CESL or a similar instrument could be either effected or requested by the European Union itself, or whether such a declaration remains in the discretion of the respective Member States. The difference in the two approaches lies in that a discretionary reservation necessitates reciprocal or joint declarations by all

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[114] ENDERLEIN AND MASKOW, *supra* note 21 at 378; Schwenzer and Hachem, *supra* note 110 at 1259–1260 ("The wording of Article 94 as well as the drafting history of this provision suggest that the legal nature of the harmonized rules is not of relevance for the question whether the requirement of 'same or closely related legal rules' is satisfied. This is of particular interest with regard to EU regulations and directives. EU Member States may use Article 94 to provide a greater degree of certainty with regard to the relationship of these legal instruments to the CISG.").

[115] Ferrari, *supra* note 83 at 183; Herre, *supra* note 110 at 1184; Schwenzer and Hachem, *supra* note 110 at 1259.

[116] Schwenzer and Hachem, *supra* note 110 at 1259, note 6. For purely EU international sales transactions involving parties located in one of the EU Member States that has not acceded to the CISG, CISG art. 94(2) would be applicable.

[117] CESL Reg., art. 4(2).

[118] CISG arts. 89, 97(2). *See* ENDERLEIN AND MASKOW, *supra* note 21 at 379 ("Declarations which relate to one another *require prior arrangement* [emphasis in the original] by the States concerned. A unilateral declaration may, of course, *also refer to a future declaration* [emphasis in the original] by another State."). *See also* Joseph Lookofsky, *The Scandinavian Experience*, *in* THE 1980 UNIFORM SALES LAW: OLD ISSUES REVISITED IN THE LIGHT OF RECENT EXPERIENCES (VERONA CONFERENCE 2003) 95, 95 (Franco Ferrari ed., 2003) (describing it as the "neighbor-State" declaration). *Cf.* Declarations by Denmark, Finland, Iceland, Norway and Sweden that the CISG shall not govern international sales transactions whereby both the seller and the buyer maintain their respective place of business in any of these countries. For the text of these declarations, see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&clang=_en#19.

Member States that have acceded to the CISG, whereas a binding Council Decision requires only qualified majority of all Member States by virtue of TEU art. 16(4) and TFEU art. 218(8).

The answer to this enquiry is not to be found in the CISG, but rather in the EU Treaties, and, specifically, in the provisions delineating the external competences of the European Union.[119] Because the conclusion of an international agreement between EU Member States and non-EU Member States could affect the internal market, the Court of Justice has ruled, early in the European integration project, that the Union enjoys exclusive competence for the conclusion of or accession to international agreements, if such conclusion or accession by the Member States could interfere with the harmonization achieved in the Single Market.[120] This judicial expansion of the exclusive external competences of the EU, first articulated in the *ERTA/AETR* decision by the ECJ—thus, the "*ERTA/AETR* principle,"[121]—has been enshrined in TFEU arts. 3(2) and 216(1),[122] which provide in mirroring wording that

> The Union shall also have *exclusive competence* for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or *in so far as its conclusion may affect common rules or alter their scope* [emphasis added],[123]

[119] *Cf.* TEU arts. 5(1), 5(2).

[120] Case 22/70, *Commission* v *Council [ERTA]*, 1971 E.C.R. 263, ¶ 17–18 ("[E]ach time the Community with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules. As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system."). *See also* Joined Cases 3, 4 and 6/76, *Kramer and Others*, 1976 E.C.R. 1279, ¶ 30/33, 44/45; *Open Skies* Judgments (Case C-466/98, *Commission* v *UK*, 2002 E.C.R. I-09427; Case C-467/98, *Commission* v *Denmark*, 2002 E.C.R. I-09519; Case C-468/98, *Commission* v *Sweden*, 2002 E.C.R. I-09575; Case C-469/98, *Commission* v *Finland*, 2002 E.C.R. I-09627; Case C-471/98, *Commission* v *Belgium*, 2002 E.C.R. I-09681; Case C-472/98, *Commission* v *Luxembourg*, 2002 E.C.R. I-09741; Case C-475/98, *Commission* v *Austria*, 2002 E.C.R. I-09797; Case C-476/98, *Commission* v *Germany*, 2002 E.C.R. I-09855; Case C-523/04, *Commission* v *Netherlands*, 2007 E.C.R. I-03267). *Cf.* TFEU art. 2(1).

[121] For a succinct presentation of the principle's content, *see* Geert De Baere, *EU External Action*, *in* EUROPEAN UNION LAW 704, 712 (Catherine Barnard & Steve Peers eds., 2014) ("[T]he Member States are not allowed to act internationally in a way that would affect existing EU law, because the situation cannot be remedied by merely disapplying the infringing rule. The Member States' competence is thus excluded, which necessitates the existence of EU competences to compensate for the Member States' inability to act."); ROBERT SCHÜTZE, FOREIGN AFFAIRS AND THE EU CONSTITUTION: SELECTED ESSAYS 287 (2014).

[122] Marise Cremona, *External Relations and External Competence of the European Union: The Emergence of an Integrated Policy*, *in* THE EVOLUTION OF EU LAW 217, 225 (Paul Craig & Gráinne De Búrca eds., 2nd ed. 2011); ALAN DASHWOOD *ET AL.*, WYATT AND DASHWOOD'S EUROPEAN UNION LAW 921 (2011).

[123] *See* Albrecht Weber, *Article 5 [Principles on the Distribution and Limits of Competences] (ex-Article 5 EC)*, *in* THE TREATY ON EUROPEAN UNION (TEU): A COMMENTARY 255, 271 (Hermann-Josef Blanke & Stelio Mangiameli eds., 2013) ("[TFEU art. 3(2)] is concretised in Art. 216 *et seq*.").

and

> The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or *is likely to affect common rules or alter their scope* [emphasis added].

Since the first three grounds of TFEU art. 216 are irrelevant to this study, the analysis focuses on the last ground of exclusive external EU competence, namely that the conclusion or accession to a particular international agreement would "likely . . . affect common rules or alter their scope." Elucidated by the Court of Justice's case law, this limitation of the Member States' sovereignty is essential to "ensure a uniform and consistent application of the Community rules and the proper functioning of the system which they establish in order to preserve the full effectiveness of Community law."[124] Considering that the temporal priority of the CISG over the CESL would have amounted to the introduction of an additional applicability requirement of the latter—that is, the non-application of the CISG—it should be expected that the Vienna Sales Convention would "likely" have interfered with the applicability rules of the CESL. This possibility is attenuated by the lack of a supra-national organ that authoritatively interprets the (non-)application of the CISG.[125] As a result, upon the enactment of the CESL,[126] the EU would have acquired exclusive competence to conclude or accede to any international uniform law conventions,[127] which could, possibly, affect the application of the Regulation.[128]

[124] Opinion 1/03, 2006 E.C.R. I-01145, ¶ 128. *See also* Opinion 1/13, ECLI:EU:C:2014:2303, ¶ 89 (2014).
[125] For "one of the most striking examples of diverging interpretations of an international uniform contract law convention," see Franco Ferrari, *"Forum Shopping" despite International Uniform Contract law Conventions*, 51 INT'L & COMP. L. Q. 689, 704–705 (2002) (referring to the interpretation of CMR art. 41 by the Italian Supreme Court, which, essentially, transformed a uniform law instrument that is applicable by default, into an optional one).
[126] *See* Cremona, *supra* note 122 at 245.
[127] Opinion 1/03, 2006 E.C.R. I-01145, ¶ 126 ("[I]t is not necessary for the areas covered by the international agreement and the Community legislation to coincide fully.") *See also* DASHWOOD *ET AL*., *supra* note 122 at 927 ("Subsequent cases [(*Open Skies* judgments)] have confirmed that it is not necessary, in order to produce an *AETR* effect, that an international agreement and existing EU rules be coextensive, so long as the test of coverage 'to a large extent' is satisfied.").
[128] The indirect expansion of EU external competences would not constitute a first for EU instruments governing cross-border disputes. For this expansion into the field of private international law, see Alex Mills, *Private International Law and EU External Relations: Think Local Act Global, or Think Global Act Local*, 65 INT'L & COMP. L. Q. 541 (2016).

Two corollaries would have followed from such a conferral of exclusive competence to the EU. Firstly, all Member States that have not acceded to the CISG, namely Ireland, Malta, Portugal, and the United Kingdom, would have lost competence to become CISG contracting states absent permission by the Union. Secondly, notwithstanding the conferral of exclusive competence, the EU would not have been allowed to become party to the CISG,[129] let alone declare the inapplicability of the Convention by virtue of CISG art. 94, as the Vienna Sales Convention itself provides that only sovereign "States" can ratify, accept, approve or accede to the CISG, and only sovereign "Contracting States" can make the declaration of art. 94.

Passing both hurdles would have required permission by the EU Council.[130] Such authorization could, firstly, allow all remaining Member States to accede to the Convention subject to a CISG art. 94 declaration that the Convention would be inapplicable to sales contracts whereby the contracting parties maintain their respective place of business in the EU and a valid CESL opt-in agreement had been concluded.[131] Secondly, it could require all Member States that have already acceded to the CISG to make the same declaration.[132] The core provision of a relevant Council's Decision could read along the following lines:

> **Article X**
>
> The Council hereby authorises Ireland, Malta, Portugal, and the United Kingdom, to ratify, accept, approve, or accede to, the United Nations Convention on Contracts for the International Sale of Goods (CISG), concluded on 11 April 1980, in the interest of the Union. When ratifying, accepting, approving, or acceding to, the Convention, Ireland, Malta, Portugal, and the United Kingdom, shall make the Declaration of Article Z.
>
> **Article Y**
>
> The Council hereby authorises Austria, Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece,

[129] CISG art. 99(2). *Cf.* CTC, art. 48; 2005 Hague Choice of Court Conv., arts. 29(1), 30(1) (allowing Regional Economic Integration Organisations to sign, accept, approve or accede to the Conventions).
[130] TFEU art. 218. The Commission could, of course, request the denunciation of the CISG. Further analysis of this possibility, however, would take this research project to the fields of academic imagination.
[131] *Cf.* Council Decision, 2013/434/EU; Council Decision, 2003/93/CE; Council Decision, 2002/762/EC.
[132] *Cf.* Council Decision 2008/431/EC [10].

Hungary, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain, and Sweden, to make the Declaration of Article Z.

Article Z

The Member States shall make the following Declaration:

With reference to CISG art. 94, in respect of […][1], in accordance with art. 94(1), and otherwise in accordance with art. 94(2), the Convention will not apply to contracts of sale where the parties, firstly, maintain their respective place of business or, absent a place of business, their habitual residence in […][2], and, secondly, have entered into a valid CESL opt-in agreement by virtue of CESL Reg., art. 8.

[1] Insert Member States that have ratified, accepted, approved, or acceded to the CISG.

[2] Insert Member States.

Bearing in mind the optional nature of the EU sales law regime, it should be doubted whether the EU Member States could condition the effects of the CISG art. 94 declaration upon the submission of proof that the parties have entered into a fully-fledged opt-in agreement.[133] Although such a requirement would limit the effects of the CISG art. 94 reservation, it would amount to an illegitimate amendment of the CISG without a new international agreement of the CISG contracting states, and would indirectly place on courts—even non-EU courts—the additional burden of examining the validity and effects of opt-in agreements. This is, presumably, the reason commentators have argued for a declaration of the CISG art. 94 reservation by analogy.[134] In light of the above analysis, it would be very difficult for the

[133] *But see* Fryderyk Zoll, *Searching the Optimum Way for the Unification and Approximation of the Private Law in Europe - A Discussion in the Light of the Proposal for the Common European Sales Law*, 17 CONTRATTO E IMPRESA/EUROPA 397, 411 (2012) (arguing that such a reservation would, probably, be admissible).
[134] Magnus, *supra* note 29 at 107. *But see* CISG art. 98.

EU Commission to persuade the Member States to give up the CISG in favour of an optional and yet-to-be-tested instrument.[135]

Granted, it should be certain that failure of the Member States to comply with the Council's Decision would amount to a breach of their duty of loyalty under TEU art. 4(3)[136] or, for Member States that have acceded to the CISG before joining the Union,[137] their duty of adaptation under TFEU art. 351(2). All non-complying Member States would risk, at least theoretically, legal action for not preserving the uniform application of the instrument by aligning their Union and international law obligations.[138] In its essence, a CISG art. 94 declaration would operate as an *ex post* "disconnection clause" preserving the EU regional harmonization in the global setting.[139]

All in all, the foregoing paragraphs showcase that, even under the reservations of CISG arts. 90 and 94, negating the application of the CISG in favour of the CESL would not have been devoid of difficulties. Therefore, the port of last resort and safest—if safe at all—means

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[135] *See* Ole Lando, *CESL or CISG? Should the Proposed EU Regulation on a Common European Sales Law (CESL) Replace the United Nations Convention on International Sales (CISG)?*, *in* GEMEINSAMES EUROPÄISCHES KAUFRECHT FÜR DIE EU? ANALYSE DES VORSCHLAGS DER EUROPÄISCHEN KOMMISSION FÜR EIN OPTIONALES EUROPÄISCHES VERTRAGSRECHT VOM 11.OKTOBER 2011 15, 18 (Oliver Remien, Sebastian Herrler, & Peter Limmer eds., 2012) ("CISG . . . has a worldwide extension . . . and it may be a ticklish matter if a 'desertion from the CISG' in the intra-EU trade becomes a reality.").

[136] *See* De Baere, *supra* note 121 at 740.

[137] Austria, Bulgaria, Croatia, the Czech Republic, Estonia, Finland, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, Sweden.

[138] *See* TFEU arts. 258–259. *See also* Ulrich G. Schroeter, *Reservations and the CISG: The Borderland of Uniform International Sales Law and Treaty Law After 35 Years*, *in* 35 YEARS CISG AND BEYOND 29, 64–65 (Ingeborg Schwenzer ed., 2016). *Contra* Marise Cremona, *Disconnection Clauses in EU Law and Practice*, *in* MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD 160, 166 (Christophe Hillion & Panos Koutrakos eds., 2010) ("Could it be argued that in . . . cases, where there is no automatic disconnection clause but where a declaration is an option, Member States are under a Union law obligation to make such a declaration, at least in cases where there is an internal Union *acquis*? If we consider the effects in and on Union law of *not* making such a declaration, the answer seems to be no: a failure to make a declaration would not alter the Union law obligation whereby Union law takes precedence as regards Member States' relations *inter se*; it is hard, therefore, to argue that a Member State is in breach of its obligations under Union law by failing to make a declaration."); Witz, *supra* note 89 at 248–249 (arguing that the primacy of the CISG is preserved, even under TFEU 351). *Cf.* Council Decision, 2013/434/EU; Council Decision, 2002/762/EC. For an overview of the duty of loyalty in the field of EU external relations, see e.g. Eleftheria Neframi, *The Duty of Loyalty: Rethinking Its Scope through Its Application in the Field of EU External Relations*, 47 C. M. L. REV. 323 (2010).

[139] *See* Marise Cremona, *A Triple Braid*, *in* PRIVATE LAW IN THE EXTERNAL RELATIONS OF THE EU 33, 48 (Marise Cremona & Hans-W. Micklitz eds., 2016); Cremona, *supra* note 122 at 256 ("The ['disconnection clause'] . . . provides that as between EU Member States it will be EU law which will apply, rather than the international agreement; it is not intended to affect the position of the Member States with respect to other contracting parties."); Bruno De Witte, *The Emergence of a European System of Public International Law: The EU and Its Member States as Strange Subjects*, *in* THE EUROPEANISATION OF INTERNATIONAL LAW: THE STATUS OF INTERNATIONAL LAW IN THE EU AND ITS MEMBER STATES 39, 53 (Jan Wouters, André Nollkaemper, & Erika De Wet eds., 2008) ("Through disconnection clauses, EU Member States become 'hyphened' parties to . . . conventions, since many of the rights and obligations contained in those conventions do not actually apply to their relations with other EU countries."). *Cf.* "Savings clauses," which achieve the converse result, that is, allowing for the application of the international convention to the exclusion of a particular EU instrument, e.g. Rome I Reg., art. 25; Rome II Reg., art. 28; Brussels I Reg. (*bis*), arts. 67–73; SCHÜTZE, *supra* note 121 at 169–170.

of clarifying the complex interplay between the CESL and the CISG would have been the opt-out rule of CISG art. 6.

V. CESL OPT-IN & CISG OPT-OUT AGREEMENTS: TWO SIDES OF THE SAME COIN?

It has already been noted that, save for the relevant CISG reservations, the applicability of the Vienna Sales Convention should be examined before any classic conflict-of-laws, and, of course, before any CESL applicability enquiries arise. Bearing in mind the dispositive nature of the Vienna Sales Convention,[140] the question that comes to mind is whether an agreement selecting the CESL or any other similar instrument should be interpreted as an implicit agreement to either exclude the application of the Convention or derogate from certain of its rules. The CISG opt-out rule is found in CISG art. 6,[141] which provides that

> The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.[142]

An enshrinement of the party autonomy principle,[143] CISG art. 6 gives contracting parties significant leeway with regard to the applicability of the Convention to their sales transaction. It sets no formal requirements for the opt-out agreement,[144] and, as a result, in addition to express agreements,[145] implicit—albeit clear[146]—exclusion of or derogations from the CISG

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[140] FERRARI, *supra* note 111 at 154; Loukas Mistelis, *Article 6*, *in* UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG): A COMMENTARY 101, 103 (Stefan Kröll, Loukas Mistelis, & Pilar Perales Viscasillas eds., 2nd ed. 2018).

[141] For a concise legislative history of the provision, see Michael Joachim Bonell, *Article 6*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 51, 51–53 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987).

[142] *Cf.* CESL Anx. I, art. 1(2); LPISG arts. 3(2), 22.

[143] Bonell, *supra* note 141 at 51; FERRARI, *supra* note 111 at 153–154; GILLETTE AND WALT, *supra* note 20 at 66; HUBER AND MULLIS, *supra* note 20 at 60; SCHWENZER, FOUNTOULAKIS, AND DIMSEY, *supra* note 24 at 39; Winship, *supra* note 14 at 1.33.

[144] CISG art. 11. Mistelis, *supra* note 140 at 104. *But see* CISG arts. 12, 96.

[145] *See e.g.* Bonell, *supra* note 141 at 54–55; ENDERLEIN AND MASKOW, *supra* note 21 at 48; GILLETTE, *supra* note 20 at 20; HUBER AND MULLIS, *supra* note 20 at 62; Mistelis, *supra* note 140 at 108–109.

[146] *See e.g.* Corte Suprema di Cassazione [Cass.], sez. sec., Oct. 19, 2017, n. 1867-18 (It.); Oberlandesgericht Linz [OLG] [Higher Regional Court] Jan. 23, 2006, Docket No. 6 R 160/05z, *translation available at* http://cisgw3.law.pace.edu/cases/060123a3.html (Austria); Oberster Gerichtshof [OGH] [Supreme Court] Oct. 22, 2001, Docket No. 1 Ob 77/01g, *translation available at* http://cisgw3.law.pace.edu/cases/011022a3.html ("[A]n implicit exclusion may only be assumed if the corresponding intent of the parties is sufficiently clear. If it cannot be established with sufficient clarity that an exclusion of the Convention was intended (taking into account the criteria provided by Art. 8 CISG for the interpretation of a party's statements and other conduct), then the CISG is to be applied . . . .") (Austria); Handelsgericht Zürich [HG] [Commercial Court], Jul. 9, 2002, Docket No. 000120/U/zs, *translation available at* http://cisgw3.law.pace.edu/cases/020709s1.html (Switz.); Tribunal de Commerce [Comm.] [Commercial Court] Namur, Jan. 15, 2002, *translation available at* http://cisgw3.law.pace.edu/cases/020115b1.html (Belg.); ENDERLEIN AND MASKOW, *supra* note 21 at 48;

may be effected.[147] What is more, remarkable consistency has been achieved in CISG art. 6 case law on two frequent "positive choice-of-law scenarios."[148] Specifically, it is hardly disputed that a choice-of-law agreement in favour of a CISG non-contracting state law would amount to an implicit exclusion of the CISG.[149] Conversely, the choice of a CISG contracting

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FERRARI, *supra* note 111 at 161–162; GILLETTE, *supra* note 20 at 20; HONNOLD AND FLECHTNER, *supra* note 99 at 104–105. *Cf.* Rome I Reg., art. 3(1); 1980 Rome Conv., art. 3(1); 1955 Hague Sales Conv., art. 2(2); 1986 Hague Sales Conv., art. 7(1); 2015 Hague Principles, art. 4; 1994 Mexico City Conv., art. 7(1).

[147] *See e.g.* Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 7, 2017, *available at* http://www.cisg-online.ch/content/api/cisg/display.cfm?test=2961 (Ger.); Trib. di Forlì, Nov. 12, 2012, *reported in* Internationales Handelsrecht (IHR) 4/2013, 161, 163 (It.); Cour de Cassation [Cass.] [Supreme Court for judicial matters] non publié, Sept. 13, 2011, *available at* http://www.cisg.fr/decision.html?lang=fr&date=11-09-13 (Fr.); Oberster Gerichtshof [OGH] [Supreme Court] Apr. 2, 2009, Docket No. 8 Ob 125/08b, *translation available at* http://cisgw3.law.pace.edu/cases/090402a3.html (Austria); Oberster Gerichtshof [OGH] [Supreme Court] Jul. 4, 2007, Docket No. 2 Ob 95/06v, *translation available at* http://cisgw3.law.pace.edu/cases/070704a3.html (Austria); Cour de Cassation [Cass.] [Supreme Court for judicial matters] 1e civ., Oct. 25, 2005, Bull. Civ. I, No. 381, *available at* http://cisgw3.law.pace.edu/cases/051025f1.html (Fr.); Cour de Cassation [Cass.] [Supreme Court for judicial matters] 1e civ, Jun. 26, 2001, Bull. Civ. I, No. 189, *available at* http://unilex.info/cisg/case/718 (Fr.). For consistent U.S. case law requiring express exclusion of the CISG, see e.g. *Roser Technologies, Inc* v *Carl Schreiber GmbH*, No. 11CV302, 2013 WL 4852314 (W.D. Pa. Sept. 10, 2013), *available at* http://cisgw3.law.pace.edu/cases/130910u1.html (USA); *It's Intoxicating, Inc* v *Maritim Hotelgesellschaft GmbH*, No. 11-CV-2379, 2013 WL 3973975 (M.D. Pa. Jul. 31, 2013), *available at* http://cisgw3.law.pace.edu/cases/130731u1.html (USA); *Hanwha Corp* v *Cedar Petrochemicals, Inc*, 760 F. Supp. 2d 426 (S.D.N.Y. 2011), *available at* http://cisgw3.law.pace.edu/cases/110118u1.html (USA); *Easom Automation Sys, Inc* v *Thyssenkrupp Fabco, Corp*, No. 06-14553, 2007 WL 2875256 (E.D. Mich. Sept. 28, 2007), *available at* http://cisgw3.law.pace.edu/cases/070928u1.html (USA); *Travelers Prop Cas Co of Am* v *Saint-Gobain Tech Fabrics Canada Ltd*, 474 F. Supp. 2d 1075 (D. Minn. 2007), *available at* http://cisgw3.law.pace.edu/cases/070131u1.html (USA); *BP Oil Int'l, Ltd* v *Empresa Estatal Petroleos de Ecuador*, 332 F.3d 333 (5th Cir. 2003), *available at* http://cisgw3.law.pace.edu/cases/030611u1.html (USA).

In legal scholarship, see e.g. Bonell, *supra* note 141 at 55; BRIDGE, *supra* note 21 at 609; ENDERLEIN AND MASKOW, *supra* note 21 at 48; FERRARI, *supra* note 111 at 161; HUBER AND MULLIS, *supra* note 20 at 62; Mistelis, *supra* note 140 at 105–108; Peter Schlechtriem, *Article 6*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 82, 86 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2nd (English) ed. 2005); Ingeborg Schwenzer & Pascal Hachem, *Article 6*, *in* SCHLECHTRIEM & SCHWENZER COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 101, 102–103 (Ingeborg Schwenzer ed., 4th ed. 2016); SCHWENZER, FOUNTOULAKIS, AND DIMSEY, *supra* note 24 at 39; Winship, *supra* note 14 at 1.35. *See* also Commentary on the Draft Convention on Contracts for the International Sale of Goods, Prepared by the Secretariat A/CONF.97.5 {Original: English} {14 March 1979}, in *United Nations Conference on Contracts for the International Sale of Goods (Vienna, 10 March – 11 March 1980): Official Records* (United Nations, 1991) 14, 17 ("The second sentence of ULIS, article 3, providing that 'such exclusion may be express or implied' has been eliminated lest the special reference to 'implied' exclusion might encourage courts to conclude, on insufficient grounds, that the Convention had been wholly excluded."); Report of the First Committee, Document A/CONF.97.11 {Original: English} {7 April 1980}, in *United Nations Conference on Contracts for the International Sale of Goods (Vienna, 10 March – 11 March 1980): Official Records* (United Nations, 1991) 82, 85–86. *Cf.* LPISG art. 3(2) ("This Convention shall not apply when the parties have *expressly* [emphasis added] excluded its application.").

[148] For this typology, see Schwenzer and Hachem, *supra* note 147 at 106.

[149] *See e.g.* Oberster Gerichtshof [OGH] [Supreme Court] Apr. 2, 2009, Docket No. 8 Ob 125/08b, *translation available at* http://cisgw3.law.pace.edu/cases/090402a3.html (Austria); Trib. di Forlì, Mar. 26, 2009, *available at* http://cisgw3.law.pace.edu/cases/090326i3.html (It.); Oberster Gerichtshof [OGH] [Supreme Court] Jul. 4, 2007, Docket No. 2 Ob 95/06v, *translation available at* http://cisgw3.law.pace.edu/cases/070704a3.html (Austria); Trib. di Padova, Jan. 11, 2005, *translation available at* http://cisgw3.law.pace.edu/cases/050111i3.html (It.); Tribunal Cantonal du Jura, Nov. 3, 2004, Docket No. Ap 91/04, *translation available at* http://cisgw3.law.pace.edu/cases/041103s1.html (Switz.); *Ajax Tool Works, Inc* v *Can-Eng Mfg Ltd*, No. 01 C 5938, 2003 WL 223187 (N.D. Ill. Jan. 30, 2003), *available at* http://cisgw3.law.pace.edu/cases/030129u1.html (USA); CISG Advisory Council [CISG AC], *Opinion No. 16, Exclusion of the CISG under Article 6*. Rapporteur: Lisa Spagnolo 2 (2014); Bonell, *supra* note 141 at 56; BRIDGE, *supra* note 21 at 609; ENDERLEIN AND MASKOW,

state law would *not* result, without more, in such an exclusion,[150] because the CISG forms an integral part of that law[151] and the choice-of-law agreement would not be meaningless, as its purpose would be to fill the remaining regulatory gaps of the Convention.[152]

Examining the interplay between the opt-in and opt-out nature of the two instruments in light of this well-established case law, four scenarios may be contemplated regarding CESL's applicability: *i.* an express exclusion of the CISG, accompanied by a CESL opt-in agreement, *ii.* a choice-of-law agreement in favour of a CISG non-contracting state law,

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supra note 21 at 49; FERRARI, *supra* note 111 at 163–164; GILLETTE, *supra* note 20 at 20; GILLETTE AND WALT, *supra* note 20 at 68–69; HUBER AND MULLIS, *supra* note 20 at 63; Mistelis, *supra* note 140 at 106; Schwenzer and Hachem, *supra* note 147 at 106–107; SCHWENZER, FOUNTOULAKIS, AND DIMSEY, *supra* note 24 at 39. *But see* Schlechtriem, *supra* note 147 at 84, note 17a ("This is not a 'typical case of implicit derogation' . . . but a most explicit derogation.").

[150] *See e.g.* Corte Suprema di Cassazione [Cass.], sez. sec., Oct. 19, 2017, n. 1867-18 (It.); Bundesgerichtshof [BGH] [Federal Court of Justice] May 11, 2010, *available at* http://www.globalsaleslaw.com/content/api/cisg/display.cfm?test=2125 (Ger.); Oberster Gerichtshof [OGH] [Supreme Court] Apr. 2, 2009, Docket No. 8 Ob 125/08b, *translation available at* http://cisgw3.law.pace.edu/cases/090402a3.html (Austria); Rb. Rotterdam, Nov. 5, 2008 (*Vigo-Pontevedra v. Ibromar B.V.*), *translation available at* http://cisgw3.law.pace.edu/cases/081105n2.html (Neth.); Oberster Gerichtshof [OGH] [Supreme Court] Jan. 14, 2002, Docket No. 7 Ob 301/01t, *available at* http://unilex.info/cisg/case/858 (Austria); Oberlandesgericht München [OLG] [Higher Regional Court] Jul. 9, 1997, *translation available at* http://cisgw3.law.pace.edu/cases/901221g1.html (Ger.). *But see* Tribunal Cantonal du Jura, Nov. 3, 2004, Docket No. Ap 91/04, *translation available at* http://cisgw3.law.pace.edu/cases/041103s1.html ("[When the parties have selected the laws of a CISG Contracting State,] it is appropriate to determine on a case by case basis the true intention of the parties, as there is no presumption in the Convention in favor of uniform laws in that case. Where there is doubt, the parties' choice in favor of the law of a Contracting State signifies that they have had the specific intention of setting to one side the Convention in favor of internal law . . . .") (Switz.); BRIDGE, *supra* note 21 at 609 ("The case law has hardened in support of the view that choice of law clauses in favour of the law of a Convention State do not exclude the CISG. This cannot be correct as a bald proposition for ultimately, the issue turns upon whether the parties have sufficiently clearly expressed their intention to exclude the CISG under Article 6, and intention is a creature of circumstance."); HONNOLD AND FLECHTNER, *supra* note 99 at 108–110 (arguing that this established case law is not, necessarily, followed in all regions and jurisdictions); Schlechtriem, *supra* note 147 at 84.

[151] *See e.g.* Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 7, 2017, *available at* http://www.cisg-online.ch/content/api/cisg/display.cfm?test=2961 (Ger.); Corte Suprema di Cassazione [Cass.], sez. sec., Oct. 19, 2017, n. 1867-18 (It.); Cour de Cassation [Cass.] [Supreme Court for judicial matters] non publié, Sept. 13, 2011, *available at* http://www.cisg.fr/decision.html?lang=fr&date=11-09-13 (Fr.); Oberster Gerichtshof [OGH] [Supreme Court] Apr. 2, 2009, Docket No. 8 Ob 125/08b, *translation available at* http://cisgw3.law.pace.edu/cases/090402a3.html (Austria); Trib. di Forlì, Mar. 26, 2009, *available at* http://cisgw3.law.pace.edu/cases/090326i3.html (It.); Oberlandesgericht Stuttgart [OLG] [Higher Regional Court] Mar. 31, 2008, *translation available at* http://cisgw3.law.pace.edu/cases/080331g1.html (Ger.); Rechtbank van Koophandel [Kh.] [Commercial Court] Hasselt, Feb. 15, 2006, *available at* http://cisgw3.law.pace.edu/cases/060215b1.html (Belg.); Oberlandesgericht Zweibrücken [OLG] [Higher Regional Court] Jul. 26, 2002, *translation available at* http://cisgw3.law.pace.edu/cases/020726g1.html (Ger.); Oberster Gerichtshof [OGH] [Supreme Court] Oct. 22, 2001, Docket No. 1 Ob 77/01g, *translation available at* http://cisgw3.law.pace.edu/cases/011022a3.html (Austria); Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 25, 1998, *available at* http://cisgw3.law.pace.edu/cases/981125g1.html (Ger.); Bonell, *supra* note 141 at 56; ENDERLEIN AND MASKOW, *supra* note 21 at 49; GILLETTE, *supra* note 20 at 20; HUBER AND MULLIS, *supra* note 20 at 64; LOOKOFSKY, *supra* note 15 at 48–49. *But see* BRIDGE, *supra* note 21 at 609–610 ("[S]ince the [exclusion of or derogation from the CISG] depends upon party intention, judicial statement that a choice of the national law of a Contracting State cannot exclude the CISG, because the CISG is part of the internal law of that State, are missing the point.").

[152] HUBER AND MULLIS, *supra* note 20 at 63–64; Mistelis, *supra* note 140 at 106–107.

accompanied by a CESL opt-in agreement, *iii.* a choice-of-law agreement in favour of a CISG contracting state law, accompanied by a CESL opt-in agreement, and *iv.* a plain CESL opt-in agreement.

The position of the law under the first two scenarios would have been quite clear, raising no interpretation issues whatsoever. An express CISG opt-out agreement together with a CESL opt-in agreement would have signalled the clear and unequivocal intent of the parties to exclude the CISG in favour of the EU instrument. Similarly, a choice-of-law agreement selecting a CISG non-contracting state law, together with a CESL opt-in agreement, would also have amounted to an implicit exclusion of the CISG in favour of the CESL together with the CISG non-contracting state law as regulatory gap-filler.

Under scenarios three and four, however, neither the choice of a CISG contracting state law nor the silence of the parties would have been sufficient to exclude the Convention by virtue of CISG art. 6. Rather, in determining the intent of the parties under CISG art. 8,[153] the relevant test should be whether the provisions of the selected CESL be irreconcilable with the corresponding provisions of the CISG. In the event of such incongruity, the CISG would have given way to the CESL. Granted, a quick comparative review of the CISG black-letter rules and case law on the one hand, and the CESL on the other, uncovers the regulatory affinity of the two regimes.[154] Therefore, given the consonance of the two instruments, it would be untenable to argue that a CESL opt-in agreement would have implied, without more, a CISG opt-out under CISG art. 6. Rather, the opt-in agreement could be construed as an agreement to merely deviate and supplement the CISG. Besides, it is anything but clear whether agreements in favour of specific national law instruments, as opposed to national law in general, should be treated as CISG opt-outs.[155]

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[153] For the prevailing view that, where the CISG is "automatically" applicable by virtue of CISG art. 1(1), the opt-out agreement should be interpreted pursuant to CISG arts. 8 and 14 *et seq.*, see e.g. Oberster Gerichtshof [OGH] [Supreme Court] Oct. 22, 2001, Docket No. 1 Ob 77/01g, *translation available at* http://cisgw3.law.pace.edu/cases/011022a3.html (Austria); CISG Advisory Council, *supra* note 149 at 2; Bonell, *supra* note 141 at 55–56; GILLETTE AND WALT, *supra* note 20 at 68; Robert Koch, *CISG, CESL, PICC and PECL*, *in* CISG VS. REGIONAL SALES LAW UNIFICATION 125, 134 (Ulrich Magnus ed., 2012); LOOKOFSKY, *supra* note 15 at 49; Schwenzer and Hachem, *supra* note 147 at 103; Winship, *supra* note 14 at 1.35. *See also* HUBER AND MULLIS, *supra* note 20 at 63 ("[C]ourts in a Contracting State should apply Art. 8 CISG and use autonomous standards when interpreting the derogation agreement, whereas courts in Non-Contracting States should apply the rules designated for such purposes by their private international law."). *But see* Schlechtriem, *supra* note 147 at 85–86 (arguing that the interpretation of the exclusion agreement will be determined pursuant to the law applicable to the opt-out agreement, as identified by the conflict-of-laws rules of the forum).

[154] *See supra* note 29.

[155] *See* Mistelis, *supra* note 140 at 109 (noting that it might not be easy to ascertain the extent of derogation in all cases); Schwenzer and Hachem, *supra* note 147 at 114. In favour of an implicit exclusion of the CISG, see e.g. Oberlandesgericht Koblenz [OLG] [Higher Regional Court], Jan. 20, 2016, *reported in* Internationales

Granted, CESL recital 25 provides that

> 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.

Although this recital does not amend or otherwise affect the interpretation of CISG art. 6, since an instrument can give way to another instrument,[156] but cannot declare prevalence over another,[157] this over-reaching "shy rule" of the CESL could inform the court with respect to the acts and statements of the contracting parties under CISG art. 8. In particular, sellers and buyers contracting under the CESL would, justifiably, have expected that a valid opt-in agreement guarantees the application of the "complete" European sales law regime. The parties would have actively bought into the application of the CESL, not the CISG. Therefore, in light of CESL recital 25, a valid CESL opt-in agreement was to have been deemed *prima facie* an implicit agreement to exclude *in toto* the application of the Vienna Sales Convention.[158] By the same token, a partial selection of the CESL by virtue of CESL Reg., art. 8(3) was to have implied only a partial exclusion of the CISG.[159] This presumption could be rebutted, of course, by proving that the selection of the CESL did not amount to a CISG opt-out, but operated, instead, as a gap-filling mechanism.

Handelsrecht (IHR) 1/2017, 18 (Ger.); Oberster Gerichtshof [OGH] [Supreme Court] Apr. 2, 2009, Docket No. 8 Ob 125/08b, *translation available at* http://cisgw3.law.pace.edu/cases/090402a3.html (Austria); Trib. di Forlì, Mar. 26, 2009, *available at* http://cisgw3.law.pace.edu/cases/090326i3.html (It.); Oberlandesgericht Stuttgart [OLG] [Higher Regional Court] Mar. 31, 2008, *translation available at* http://cisgw3.law.pace.edu/cases/080331g1.html (Ger.); Oberster Gerichtshof [OGH] [Supreme Court] Jul. 4, 2007, Docket No. 2 Ob 95/06v, *translation available at* http://cisgw3.law.pace.edu/cases/070704a3.html (Austria); Trib. di Padova, Jan. 11, 2005, *translation available at* http://cisgw3.law.pace.edu/cases/050111i3.html (It.); Handelsgericht Zürich [HG] [Commercial Court], Jul. 9, 2002, Docket no. 000120/U/zs, *translation available at* http://cisgw3.law.pace.edu/cases/020709s1.html (Switz.); *Asante Techs., Inc.* v. *PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142 (N.D. Cal. 2001), *available at* http://cisgw3.law.pace.edu/cases/010727u1.html (USA); Oberlandesgericht Frankfurt [OLG] [Higher Regional Court] Aug. 30, 2000, *translation available at* http://cisgw3.law.pace.edu/cases/000830g1.html (Ger.); FERRARI, *supra* note 111 at 168–169; GILLETTE AND WALT, *supra* note 20 at 68–69; HUBER AND MULLIS, *supra* note 20 at 64; LOOKOFSKY, *supra* note 36 at 25; Schlechtriem, *supra* note 147 at 89.

[156] *See e.g.* CISG art. 90.

[157] *See* Martijn W. Hesselink, *How to Opt Into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation*, 20 E. R. P. L. 195, 202 (2012) (characterizing the claim of CESL recital 25 as "*ultra vires*").

[158] Sánchez-Lorenzo, *supra* note 29 at 202. *See also* Morten M. Fogt, *Private International Law Issues in Opt-Out and Opt-In Instruments of Harmonization: The CISG and the Proposal for a Common European Sales Law*, 19 COLUM. J. EUR. L. 83, 90 (2012) ("*In dubio*, there is no opt-out and the CISG still applies."); Hesselink, *supra* note 157 at 202 ("[I]n most cases, it should not be difficult for a court to deduce from an explicit opting into the CESL that the parties wanted to opt out of the CISG."

[159] CESL Reg. art. 8(3) (*a contrario*).

Last, but not least, it should be emphasized that this subtle presumption presupposes a valid selection of the CESL bearing the effects of CESL Reg., art. 11. An "invalid," that is, not meeting all the applicability requirements,[160] CESL opt-in agreement would not have been sufficient to exclude the CISG. Rather, salvaged as a plain incorporation-by-reference clause, it would merely have supplemented and, where necessary, derogated from the applicable CISG or national law rules. Conversely, a direct selection of the CESL—not as a second parallel legal regime—would have been sufficient to exclude the CISG before courts and arbitral tribunals that permit the selection of non-state law.[161] In any case, the exclusion/derogation effects of CESL's selection would have to be determined on a case-by-case basis under CISG arts. 8 and 14 *et seq.*, reducing, thus, all the above to mere starting points for an *in casu* legal analysis, rather than to established interpretations of the law.

In light of the foregoing, parties contracting under the CESL model are advised to conclude an express CISG opt-out agreement in order to clarify, at least with regard to the Convention's non-applicability, some legal aspects of their international business transaction.[162] This opt-out would come in addition to the required opt-in agreement,[163] and, most likely, in addition to another choice-of-law agreement in favour of an EU Member State law, and a choice-of-court or arbitration agreement. Considering that dispute resolution clauses are agreed to by the parties, usually, at the last minute of the negotiations as incomprehensible legal formalities, one could only imagine how three applicable law-related agreements would be perceived by the mercantile community.

VI. KILLING CERTAINTY "SOFTLY"

In the context of this study, the numerous "soft-law" instruments published throughout the years add yet another layer of complexity to the applicable regime enquiry. In the interest of brevity, only two instruments, namely, the UNIDROIT Principles of International Commercial Contracts and the ICC INCOTERMS, are examined as examples of "complete" and "incomplete" or "partial" soft-law instruments respectively.

[160] *See* analysis in *supra* Parts I.
[161] For the admissibility of choice-of-rules agreements and their effects as exclusion of or derogation from the rules of the CISG, see e.g. Schwenzer and Hachem, *supra* note 147 at 104; Schlechtriem, *supra* note 147 at 83. *See also* Mistelis, *supra* note 140 at 103.
[162] Hesselink, *supra* note 157 at 202.
[163] *See* Magnus, *supra* note 29 at 106–107.

A. The UNIDROIT Principles of International Commercial Contracts (UPICC 2016)

The UNIDROIT Principles of International Commercial Contracts (UPICC), currently in their fourth edition (2016), comprise a set of non-binding rules on general law of obligations for international business transactions.[164] Since the drafting committee was independent of governmental mandates, the UPICC do not reflect compromises of the represented legal systems. Instead, adopting the "better-rule" approach, they enshrine "optimal" rules, that is, a mixture of universally accepted rules, provisions found in the minority of legal systems, and, of course, novel rules.[165]

Notwithstanding the ambitious Preamble of the UPICC,[166] the legal effects of the Principles depend greatly on the conflict-of-laws rules of the forum.[167] Should the latter allow for the selection of a-national law, the wide regulatory scope of the Principles will, normally, imply the exclusion of any otherwise applicable regime. Conversely, should the relevant conflicts rules allow for the selection of statist law only, the selection of the UPICC will have no impact on the determination of the applicable law. The Principles will merely be incorporated by reference into the commercial transaction as contractual terms superseding the dispositive rules of the applicable law.[168] Hence, depending on the conflict-of-laws regime of the forum, a choice of the UPICC in international sales transactions will either implicitly exclude or merely supplement the rules of the CISG.[169] The simultaneous selection of both the CESL and the UPICC—or, more appropriately, one of the PECL, Acquis Principles, and DCFR,—although possible, belongs to the realm of academic imagination and legal

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[164] *See* DALHUISEN, *supra* note 15 at 152 ("Neither internationality nor commerciality are defined, but the use of these notions may imply some reference to the international commercial legal order.").

[165] Michael Joachim Bonell, *Towards a Legislative Codification of the UNIDROIT Principles?*, *in* SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: FESTSCHRIFT FOR ALBERT H. KRITZER ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY 62, 63 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008); Fabio Bortolotti, *The UNIDROIT Principles and Their Application in the Context of International Arbitration*, *in* LIBER AMICORUM EN L'HONNEUR DE SERGE LAZAREFF 81, 83 (Laurent Lévy & Yves Derains eds., 2011); Herbert Kronke, *The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond*, 25 J. L. & COM. 451, 458–459 (2005).

[166] *Cf.* PECL art. 1:101.

[167] UPICC 2016, Preamble, Comment No. 4(a). *Cf.* analysis in *supra* Part I(V)(B).

[168] Trib. di Padova, Jan. 11, 2005, *translation available at* http://cisgw3.law.pace.edu/cases/050111i3.html (It.). *See* UPICC 2016, art. 1.4.

[169] CISG Advisory Council, *supra* note 149 at 14; Ralf Michaels, *Preamble I*, *in* COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC) 31, 53 (Stefan Vogenauer ed., 2nd ed. 2015). *See* Katharina Boele-Woelki, *Terms of Co-Existence: The CISG and the UNIDROIT Principles*, *in* THE INTERNATIONAL SALE OF GOODS REVISITED 203, 230 (Petar Šarčević & Paul Volken eds., 2001) (noting that, due to the primacy of party autonomy, the selection of the UPICC would amount to the exclusion of the CISG). *See also* Bridge, *supra* note 34 at 251 ("[O]nce validity provisions have been stripped out, the UPICC, if appropriately supplementing the CISG, add some useful extra detail in certain areas but hardly venture into parts of contract that are not dealt with in the CISG . . . .").

experimentation, as the synchronized application of a yet-to-be-tested and of a seldom-applied regime would hardly be commercially justifiable.

Granted, it has been argued that the Principles could still be relevant to the applicable law enquiry, even absent a choice by the contracting parties. They could either inform the interpretation of and assist in filling the gaps of international uniform law instruments,[170] or operate as trade usages.[171] Closer scrutiny of these propositions, however, mandates their tentative rejection. Firstly, both the CISG and the CESL contain their own interpretation and gap-filling provisions, namely CISG art. 7 and CESL art. 4.[172] These rules resolve any legal issues that might arise. The UPICC—and, particularly with regard to purely EU-sales contracts, the corresponding PECL/Acquis Principles/DCFR—could be used only to inspire or

[170] UPICC 2016, Preamble ("[These Principles] may be used to interpret or supplement international uniform law instruments."); PECL art. 1:101(4) ("These Principles may provide a solution to the issue raised where the system of rules of law applicable do not do so."). *See e.g.* Cour de Cassation [Cass.] [Supreme Court for judicial matters], Feb. 17, 2015, *available at* http://unilex.info/cisg/case/1999 (Fr.); Hof van Cassatie [Cass.] [Court of Cassation], Jun. 19, 2009, AR C070289N, *translation available at* http://cisgw3.law.pace.edu/cases/090619b1.html (Belg.); *Seller (Netherlands)* v *Buyer (Italy)*, Interim Award, Feb. 10, 2005, Netherlands Arbitration Institute, 32 Y. B. Comm. Arb. 93, 103; *Agent* v *Principal*, Final Award, ICC Case No. 8817 (1997), 25 Y. B. Comm. Arb. 355, 358; ICC Case No. 8128 (1995), *translation available at* http://cisgw3.law.pace.edu/cases/958128i1.html; Jürgen Basedow, *Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts*, 5 UNIF. L. REV. 129, 137 (2000); Alejandro M. Garro, *The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG*, 69 TUL. L. REV. 1149, 1159 (1994); Ulrich Magnus, *Interpretation and Gap-Filling in the CISG and in the CESL*, 11 J. I. T. L. P. 266, 276 (2012); Ulrich Magnus, *Tracing Methodology in the CISG: Dogmatic Foundations*, *in* CISG METHODOLOGY 33, 45–46 (André Janssen & Olaf Meyer eds., 2009) ("In my view the Principles can be used both as an aid to the interpretation and even as general principles although they did not exist at the time when the CISG was drafted."); Michaels, *supra* note 169 at 83; MORRISSEY AND GRAVES, *supra* note 55 at 58. *See also* BRIDGE, *supra* note 21 at 607 ("Except where they would contradict the CISG, the Unidroit Principles may stimulate the search for unstated general principles in the CISG. It is quite likely, however, that in the great number of cases a general principle can be inferred from the CISG without any direct reference to the Unidroit principles."); Pilar Perales Viscasillas, *Article 7*, *in* UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG): A COMMENTARY 112, 142–143 (Stefan Kröll, Loukas Mistelis, & Pilar Perales Viscasillas eds., 2nd ed. 2018) ("[M]odern trends in the interpretation of the CISG allow considering the *lex mercatoria*, the PICC and to a lesser extent the PECL, as a means of interpreting and supplementing the CISG when no general principles within the Convention are found."); Pilar Perales Viscasillas, *The Role of the UNIDROIT Principles and the PECL in the Interpretation and Gap-Filling of CISG*, *in* CISG METHODOLOGY 287, 303 (André Janssen & Olaf Meyer eds., 2009). *Contra* John Y. Gotanda, *Using the UNIDROIT Principles to Fill Gaps in the CISG*, *in* CONTRACT DAMAGES: DOMESTIC AND INTERNATIONAL PERSPECTIVES 107, 116 (Djakhongir Saidov & Ralph Cunnington eds., 2008) ("[I]t goes too far to apply the UNIDROIT Principles as the primary source of authority for filling a gap in the CISG."). For a proposal that UNCITRAL should adopt a formal Recommendation to use the UPICC as means of interpretation and supplementation of the CISG, see Bonell, *supra* note 165 at 71.

[171] *See* HUBER AND MULLIS, *supra* note 20 at 19–20, 36.

[172] FERRARI AND TORSELLO, *supra* note 38 at 66–67. *See* FERRARI, *supra* note 111 at 265 ("[The UPICC] do not really constitute 'general principles on which [the CISG] is based.'"); Franco Ferrari, *Interpretation of the Convention and Gap-Filling: Article 7*, *in* THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 138, 170 (Franco Ferrari, Harry Flechtner, & Ronald A. Brand eds., 2004); Harry M. Flechtner, *The CISG's Impact on International Unification Efforts: The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law*, *in* THE 1980 UNIFORM SALES LAW: OLD ISSUES REVISITED IN THE LIGHT OF RECENT EXPERIENCES (VERONA CONFERENCE 2003) 169, 190–197 (Franco Ferrari ed., 2003).

corroborate the interpretation and application of principles that already flow from the CISG or the CESL provisions.[173] In that regard, any such use of the Principles would not amount to their simultaneous application with the CISG or the CESL. By the same token, should specific UPICC rules be considered as restating trade usages applicable under either CISG art. 9 or CESL Anx. I, art. 67, it would be the very usages that mandate a derogation from the CISG rules, not the UPICC *per se*.[174] Besides, it would be very difficult to argue that the UNIDROIT Principles have risen to the status of international trade usages,[175] particularly given their infrequent selection and/or application to international business transactions.

All in all, this brief analysis showcases that the growing number of international and regional uniform law instruments significantly limits the doctrinal relevance of the UPICC, and, by extension, of all other "complete" soft-law projects, such as the Principles of European Contract Law (PECL), the Acquis Principles, the Draft Common Frame of Reference (DCFR), etc. Granted, the practical significance of such "complete" soft-law instruments, either as corroborating sources or restatement of established commercial usages and customs, cannot be overstated.

B. The ICC INCOTERMS (2020)

In contradistinction to the UNIDROIT Principles, the INCOTERMS govern only a limited number of issues. Drafted by the International Chamber of Commerce (ICC), and, currently, in their ninth edition (2020), the INCOTERMS comprise sets of rules, under

[173] UPICC 2016, Preamble, Comment No. 5 ("The Principles could considerably facilitate [judges and arbitrators] in their task [of interpreting and supplementing international uniform law]."); Ferrari, *supra* note 172 at 170; Gotanda, *supra* note 170 at 119; HUBER AND MULLIS, *supra* note 20 at 36; Ingeborg Schwenzer & Pascal Hachem, *Article 7*, *in* SCHLECHTRIEM & SCHWENZER COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 119, 138 (Ingeborg Schwenzer ed., 4th ed. 2016); SCHWENZER, FOUNTOULAKIS, AND DIMSEY, *supra* note 24 at 81.

[174] *See* Bridge, *supra* note 44 at 82 ("Given the recent coining of the UPICC and the means by which they were developed, the UPICC could not be dealt with as a package but would have to be treated severally, with a case being made for each and every usage contained in its provisions."); Michaels, *supra* note 169 at 77; SCHWENZER, FOUNTOULAKIS, AND DIMSEY, *supra* note 24 at 81. *See also* Viscasillas, *supra* note 170 at 313.

[175] *See* Bortolotti, *supra* note 165 at 99, note 46; BRIDGE, *supra* note 21 at 607 ("It is possible that tribunals may bring some of [the UPICC] in under Article 9(2) of the CISG . . . . Nevertheless, whilst this may be an appropriate thing to do for provisions dealing with the manner and method of performance, such as the means by which payment must be made, general contract rules hardly qualify as usages, which are trade practices and understandings."); Ferrari, *supra* note 172 at 204; Martin Schmidt-Kessel, *Article 9*, *in* SCHLECHTRIEM & SCHWENZER COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 181, 195–196 (Ingeborg Schwenzer ed., 4th ed. 2016) ("While [the INCOTERMS, UCP, UPICC] do not . . . represent a trade usage in their entirety, individual provisions of these rules can readily be deemed trade usages insofar as the prerequisites under Article 9(2) are met.").

three-letter acronyms, dealing with the delivery obligations of the parties, the costs of shipping and insuring the goods, and the risks assumed by the contracting parties.[176] Given their "incomplete" or "partial" regulatory scope, these sets of rules operate as add-on facilities to the applicable law, modifying the dispositive provisions of the latter by virtue of CISG art. 6 or CESL Anx. I, art. 1(2). For that reason, a choice of the INCOTERMS would be insufficient to either imply an exclusion *in toto* of either the CISG or the CESL.[177] In any case, setting aside the possibility of incorporating INCOTERMS as international trade usages under CISG art. 9 and CESL Anx. I, art. 67,[178] their incorporation into the examined sale of goods contract requires an additional rules-selection agreement, intensifying, thus, the legal drafting burden of the contracting parties.

[176] MORRISSEY AND GRAVES, *supra* note 55 at 148.

[177] *See e.g.* Oberster Gerichtshof [OGH] [Supreme Court] Oct. 22, 2001, Docket No. 1 Ob 77/01g, *translation available at* http://cisgw3.law.pace.edu/cases/011022a3.html ("The agreement to apply Incoterms . . . does not necessarily indicate an agreement to exclude the CISG, because they provide only for singular aspects of the sales contract and do not require the basis of a certain sales law that diverges from the CISG . . . .") (Austria); Rechtbank van Koophandel [Kh.] [Commercial Court] Kortrijk, Apr. 19, 2001, *available at* https://www.law.kuleuven.be/apps/cisg/en/search/content/63/ (Belg.); Bridge, *supra* note 44 at 77; FERRARI, *supra* note 111 at 172; GILLETTE AND WALT, *supra* note 20 at 279; HUBER AND MULLIS, *supra* note 20 at 64; Mistelis, *supra* note 140 at 108; Schlechtriem, *supra* note 147 at 89; Schwenzer and Hachem, *supra* note 147 at 114.

[178] *See* Tribunal Cantonal du Valais, Jan. 28, 2009, Docket No. C1 08 45, *translation available at* http://cisgw3.law.pace.edu/cases/090128s1.html ("In lack of an express agreement between the parties, [INCOTERMS] may also be applicable under Art. 9(2) CISG, as their role as usages is widely recognized and regularly observed in international trade, provided, however, that the applicable Incoterm clause is relevant to the contract . . . .") (Switz.); BRIDGE, *supra* note 21 at 620 ("Incoterms seem to be commonly incorporated in bulk oil sales; even if they were not expressly incorporated in such contracts, they might therefore be brought in under Article 9(2)."); DALHUISEN, *supra* note 15 at 262 ("[The INCOTERMS] may . . . have acquired the status of industry custom although not necessarily in all circumstances and detail . . . ."); ENDERLEIN AND MASKOW, *supra* note 21 at 257 ("Only in rare cases will there be proof that a certain clause of the INCOTERMS has become a usage in respect of a certain kind of trade."); Pascal Hachem, *Introduction to Articles 66-70*, *in* SCHLECHTRIEM & SCHWENZER COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 950, 956 (Ingeborg Schwenzer ed., 4th ed. 2016) ("[D]espite their popularity, the ICC Incoterms are not in and of themselves a trade usage within the meaning of Article 9(2), as otherwise one would have to clarify, which clause is a usage for which type of contract (Type of goods? Geographical considerations?)."); NEUMAYER AND MING, *supra* note 99 at 120 ("Les Incoterms ne constituent pas des usages."); Charis Pamboukis, *The Concept and Function of Usages in the United Nations Convention on the International Sale of Goods*, 25 J. L. & COM. 107, 127 (2005) ("Because of their broad application . . . [INCOTERMS] should be regarded in principle as usages."). *See also* Michael Joachim Bonell, *Article 9*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 103, 115 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987) (noting that considering the world-wide acceptance of the ICC INCOTERMS and UCP for Documentary Credits, "it should not be too difficult to justify . . . an implied reference [under CISG art. 9(1)].").

VII. THE CISG *VS.* CESL RIVALRY

IN NON-CONTRACTING STATES AND IN ARBITRAL PROCEEDINGS

Following the above review of the conflict between the CESL and the CISG before courts located in CISG contracting states, this section examines the applicability of the two instruments before arbitral tribunals and courts that are not bound by the Vienna Sales Convention.

As already suggested, fora in CISG non-contracting states have no international obligation to apply the CISG, and, therefore, are not required to examine the applicability of the Convention by virtue of CISG arts. 1(1)(a) or 1(1)(b).[179] More accurately, the almost universal prohibition of *renvoi* in contracts conflicts precludes any such enquiries.[180] Hence, absent a different international uniform law instrument governing international sales transactions, the conflicts rules of the forum must be used to establish the legal framework of the dispute, including the applicability of either the CESL or the CISG as parts of the *lex contractus*.[181] Under such scenarios, the court would have to select the appropriate applicable law track for the resolution of the dispute, namely the first "ordinary" laws of the *lex contractus* or the second parallel legal regime of a European instrument. Should there be a fully-fledged opt-in agreement, the EU sales law regime would govern the sales transaction without going through CISG arts. 1, 6, 90 or 94.

In like manner, arbitral tribunals—even those seated in CISG contracting states—are not bound by the Vienna Sales Convention, because they are not organs of any state.[182] For that

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[179] FERRARI, *supra* note 111 at 91–92; Graziano, *supra* note 63 at 168; Mistelis, *supra* note 20 at 38. *See* CISG Advisory Council [CISG AC], *Opinion No. 15, Reservations under Articles 95 and 96 CISG*. Rapporteur: Ulrich G. Schroeter 15 (2013); Christophe Bernasconi, *The Personal and Territorial Scope of the Vienna Convention on Contracts for the International Sale of Goods (Article 1)*, 46 N. I. L. R. 137, 155 (1999). *But see* analysis in *supra* Section III(A)(2) and the argument that CISG art. 1(1)(b) should be treated as a demarcating rule, which must be applied by all courts in contracting and non-contracting states alike.

[180] *See e.g.* Rome I Reg, art. 20; 1980 Rome Conv., art. 15; 1994 Mexico City Conv., art. 17; 1986 Hague Sales Conv., art. 15; 2015 Hague Principles, art. 8; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, cmt. h (A. L. I. 1971) (but see § 8); La. Civ. Code art. 3540, cmt. e; Or. Rev. Stat. §§ 15.300 [formerly 81.100] (2015). *But see* Swiss PILA, art. 14; Institute of International Law [IIL], *Taking Foreign Private International Law to Account*, Resolution, Session of Berlin. Rapporteur: Kurt Lipstein (Aug. 23, 1999); Institute of International Law [IIL], *The Autonomy of the Parties in International Contracts between Private Persons or Entities*, Resolution, Session of Basel. Rapporteur: Eric Jayme (Aug. 31, 1991) (art. 2(3)). For an interesting argument on the interplay between CISG art. 1 and Rome I Reg., arts. 20 and 25, see Krebs, *supra* note 55 at 1748–1749.

[181] *See e.g. Kingspan Environmental Ltd* v *Borealis A/S* [2012] EWHC 1147 (Comm), ¶ 617 (the High Court applied the CISG as part of the applicable Danish law without reference to the criteria of CISG arts. 1(1)(a) or 1(1)(b)) (Eng.).

[182] GILLETTE AND WALT, *supra* note 20 at 26; Gruber, *supra* note 56 at 23–24; Janssen and Spilker, *supra* note 56 at 137, 138; Nils Schmidt-Ahrendts, *CISG and Arbitration*, LIX ANNALS FAC. L. BELGRADE INT'L ED. 211, 214 (2011); Schwenzer and Hachem, *supra* note 55 at 21.

reason, the applicable legal regime should not be determined directly by CISG art. 1(1),[183] but, instead, by virtue of the applicable law-related provisions of the *lex arbitri*.[184] Considering, firstly, the wide admission of choice-of-rules agreements in international arbitration, and, secondly, the latitude of arbitral tribunals to apply a-national law even absent a relevant choice by the parties, arbitrators should find no difficulty in giving effect to the CESL or any other rules (e.g. CISG, UPICC, DCFR, PECL, etc.) that the parties have selected or that the arbitral tribunal finds appropriate.

This succinct examination of the CESL-CISG interplay before non-CISG courts and arbitral tribunals showcases the comparatively "smooth" application of the CESL model in legal unification *vacua*, as well as in party autonomy-orientated arbitral proceedings. Considering the wide-accession to the CISG by the EU Member States, and the infrequent use of arbitration as a dispute resolution mechanism by SMEs, it becomes apparent that successfully activating a second parallel legal regime could prove an exceptionally complicated endeavour.

VIII. CONCLUSION

This Part has sought to address difficult issues pertaining to the interplay between the CESL and various uniform law instruments on international sale of goods contracts. Setting as point of departure the application hierarchy of the CISG and the proposed CESL, the analysis showcased the priority of the CISG over both the generic conflict-of-laws rules of the forum and CESL's second parallel legal regime. This priority undermines the harmonization initiative under the European sales law regime, particularly in light of the shortcomings associated with

[183] In this author's opinion, whereas CISG art. 1(1)(b) is not applicable altogether, CISG art. 1(1)(a) could be relevant only before tribunals following the *voie indirecte* approach. *Contra* Butler, *supra* note 55 at 1048–1052 (arguing for the applicability of both CISG arts. 1(1)(a) and 1(1)(b) in arbitral proceedings); Gruber, *supra* note 56 at 23–24 (arguing, firstly, that CISG art. 1)(1)(a) may be applicable in arbitral proceedings, and, secondly, that CISG art. 1(1)(b) must be applied, if private international law leads the tribunal to the law of a contracting state); Kröll, *supra* note 56 at 64–69 (noting that, in arbitral proceedings, CISG art. 1(1)(a) would be applicable only under the *voie indirecte* approach, whereas CISG art. 1(1)(b) every time the laws of a Contracting State have been identified as the *lex contractus*); Pilar Perales Viscasillas, *Applicable Law, the CISG, and the Future Convention on International Commercial Contracts*, 58 VILL. L. REV. 733, 741 (2013) ("*Article 1.1(b)* [emphasis added] is directed to the judges, but not to arbitrators.").

[184] HUBER AND MULLIS, *supra* note 20 at 67; Janssen and Spilker, *supra* note 56 at 137; Schmidt-Ahrendts, *supra* note 182 at 214; Schwenzer and Hachem, *supra* note 55 at 21; SPAGNOLO, *supra* note 58 at 11. For an overview of the various approaches to the applicability of the CISG in international commercial arbitration, see Franco Ferrari, *CISG and the Law Applicable in International Commercial Arbitration: Remarks Focusing on Three Common Hypotheticals*, *in* A TRIBUTE TO JOSEPH M. LOOKOFSKY 55 (Mads Bryde Andersen & René Franz Henschel eds., 2015).

triggering the "second chance" rules of CISG arts. 90 and 94. Similarly, an opt-in agreement selecting the CESL or any other similar instrument, alone, would not guarantee the simultaneous implicit exclusion of the CISG, thus upsetting the legitimate interests and expectations of contracting parties. As if matters were not complicated enough, the multitude of soft-law instruments on international business transactions adds another layer to the applicable regime enquiry. Thus, a series of express agreements between the parties would be required in order to establish legal certainty for sale of goods contracts. Since applicable law and dispute resolution agreements are usually concluded right before the finalization of the commercial transaction, it should be expected that the introduction of an instrument such as the CESL would place an insurmountable contract drafting burden on the parties and their counsels.

CONCLUSION

> "Une Convention sur la vente a pour but de rendre plus faciles les échanges commerciaux. Elle ne remplira son rôle que si elle peut être facilement comprise, non seulement des juristes de profession, mais et surtout, des hommes d'affaires. Ceux-ci doivent pouvoir en saisir le sens et en déduire nettement les conséquences de leurs accords. S'il n'en est pas ainsi, l'œuvre entreprise est vouée à l'échec."
>
> ["A Convention on the sale of goods is designed to facilitate trade. It will not fulfil its role, unless it can be easily understood by professional lawyers and, most importantly, by businessmen. The latter should be able to grasp both its rules and the consequences of their agreements. If this is not the case, the entire undertaking is doomed to fail."][1]

The foregoing analysis sought to achieve the research goal set out in the Introduction. Its concern was to shed light on CESL's unique legal structure as a second parallel legal regime and highlight its place in the study of uniform law. It sought to examine the CESL's role in European legal integration, the law relating to international commercial transactions, and private international law. In this endeavour, the four parts of this study explored the four main conflict-of-laws enquiries that would arise in the activation and application of the CESL and any future instrument adopting a similar model. Specifically, the analysis explored: *i*. the selection of the CESL regime by the parties, *ii*. the ascertainment of CESL's provisions by the adjudicatory authority, *iii*. the impact of public policy considerations on the applicability of the instrument, and *iv*. the interplay between the CESL and other uniform law instrument governing international sale of goods contracts.

Concisely, Part I systematized the extremely complex application requirements of the draft Regulation and defined the nature and legal effects of the CESL opt-in mechanism. Thus, on the basis of a two-tier comparative review of rules-selection agreements and approaches to party autonomy, it was argued that the CESL introduced a novel concept into the conflict-of-laws theory, namely the "*quasi* choice-of-law agreement." This new term sets the foundations for better understanding of the theoretical and practical facets of optional uniform

[1] Léon Julliot De La Morandière, *Rapport du Comité Spécialement Chargé de Préparer Un Projet de Convention sur la Vente*, *in* DOCUMENTS RELATIFS A LA SEPTIEME SESSION TENUE DU 9 AU 31 OCTOBRE 1951 5, 5 (Conférence de La Haye de Droit International Privé ed., 1952).

law regimes. Further, it was shown that the CESL model would work relatively smoothly alongside the EU conflict-of-laws regimes, but important issues pertaining to consumer transactions would still remain open. Lastly, it was argued that the positive and negative choice-of-law effects of the opt-in facility introduced by the CESL refute *a priori* any parallels with other unsuccessful optional instruments, such as the ULIS 1964.

Part II focused on the crux of the conflict-of-laws process, namely the ascertainment of the content and the application of foreign law.[2] This Part examined the impact of the respective approaches to the content-of-laws enquiry on the applicability of the CESL. Surprisingly, the analysis illustrated that, despite the extensive unification of both conflict-of-laws and substantive sales law rules, the very same dispute could have been resolved against different legal standards, if brought before courts adopting different approaches to the ascertainment of foreign law. Unlike international litigation, however, it was further shown that, in international arbitral proceedings, a change in the tribunal's seat would hardly have affected the legal outcome of the dispute. In a nutshell, Part II illustrated that the diverging approaches to the application of foreign law could have, firstly, jeopardized the uniformity achieved under the EU and international conflict-of-laws instruments, and, secondly, nullified the prospect of uniform application of second parallel legal regimes.

Part III scrutinized the impact of public policy considerations on the applicability of the CESL model. In particular, it looked at the interplay between the CESL and important state interests, as the latter would have manifested in overriding mandatory provisions and the public policy defence. Hence, challenging conventional wisdom, it was argued that the general principles of EU law would have "neutralized" any public policy considerations that might have arisen in a Single Market setting. Before courts of non-Member States and arbitral tribunals, however, public policy broadly defined could have interfered with the uniform and complete application of the CESL.

Finally, Part IV examined the interplay between the numerous regimes governing international sales transactions. In light of the multitude of uniform sales law instruments, this Part examined the legal synchronization of various international sales law regimes, placing particular emphasis on the interplay between the CESL and the CISG. The analysis explicated the application hierarchy of the two instruments by closely examining the differences in their regulatory method, any "conflict-of-conventions" issues that might arise, and, of course, their

[2] RICHARD FENTIMAN, FOREIGN LAW IN ENGLISH COURTS: PLEADING, PROOF AND CHOICE OF LAW 1 (1998).

distinctive opt-in/opt-out nature. On that basis, it was shown that the CISG would have prevailed, thus dictating the terms of CESL's applicability. Due consideration was, also, paid to the interplay between "hard" and "soft-law" instruments on international business transactions. Summarily, Part IV uncovered the Byzantine complexity, the regulatory redundancy, and the insurmountable legal drafting burden that come with the proliferation of uniform law regimes on sale of goods contracts.

The over-arching conclusion of this study is that the draft CESL would have been largely—yet, not fully—compatible with established conflict-of-laws principles. Because of its inherent shortcomings, the CESL would have led only to sub-optimal unification of international sales law in Europe. The drafters of the instrument, however, should not be blamed for its shortcomings. It is precisely the inflexible principles of EU law, the limited legislative competence of the Union, and the piecemeal unification of private international law, which mandated the unique legal structure and the onerous applicability requirements of the CESL. Hence, legislative and political courage will be required in order to revive the pro-European contract law sentiment and to overcome these limitations. Since any new project will have to go through the clashing rocks of the TEU and the TFEU, it appears that the EU legislator will have to sacrifice a piece of uniformity in the Single Market in order to set the stepping stone for further unification of private law in the future.

In light of the foregoing, three final and largely intertwined enquiries need to be explored. Specifically, given the current state of the law as described above, do businesses and consumers need a European sales law—or, even broader, a European contract law—regime? Furthermore, if such a European substantive law instrument is needed, how should this instrument be structured in order to avoid the shortcomings of the CESL model? Finally, what should the drafting process of such an instrument entail?

To begin with, statistical evidence illustrates the positive disposition of merchants and consumers towards an optional European contract law instrument.[3] Granted, positive disposition should not be equated with a need for a new layer of regulation. Hence, in exploring

[3] Stefan Vogenauer & Stephen Weatherill, *The European Community's Competence to Pursue the Harmonisation of Contract Law - An Empirical Contribution to the Debate*, *in* THE HARMONISATION OF EUROPEAN CONTRACT LAW: IMPLICATIONS FOR EUROPEAN PRIVATE LAWS, BUSINESS AND LEGAL PRACTICE 105, 132 (Stefan Vogenauer & Stephen Weatherill eds., 2006) (offering statistical evidence that 83% of respondents noted their favourable or very favourable disposition to the concept of a harmonised European contract law), at 134 (74% of respondents noted their overall preference for an optional—including the opt-out possibility—rather than a mandatory European contract law instrument), and at 135 (84% of respondents noted that they would, likely or very likely, make use of a European contract law instrument).

the first enquiry, the analysis needs to bifurcate between consumer and commercial transactions. Whereas the persisting legal divergences *vis-à-vis* consumer protection and the unification "quicksand" rule of Rome I Reg., art. 6(2) mandate the promulgation of a single instrument that would accumulate all cross-border consumer transactions under one regulatory "umbrella," it appears that there is no pressing need for an instrument governing cross-border commercial contracts.

The relative success of the Vienna Sales Convention together with the principles of party autonomy and freedom of contract allow contracting parties to structure their deals as they deem appropriate. As a matter of fact, the 101 articles of the Convention and the growing body of CISG case law set a solid regulatory foundation for international non-consumer sales contracts in Europe. Hence, there seems to be no need for a European instrument in this area.[4] Actually, rather than pursuing the creation of a completely new European instrument, the EU could "free-ride" on the unification efforts of UNCITRAL by using the CISG for its internal market-building purposes. This "Europeanization" of the CISG could be effected either with the exertion of pressure on the remaining four Member States (Ireland, Malta, Portugal, United Kingdom) to ratify the CISG,[5] or, more appropriately, with the introduction of a "Model European Sales Contract" for commercial transactions.[6] Considering that the overwhelming majority of international sales contracts in the Single Market are governed by the CISG, the model European sales agreement should be drafted with the presumed applicability of the Vienna Sales Convention in mind—drawing, however, inspiration from other projects as well, such as the PECL, the DCFR, the CESL, and the UPICC, and filling the regulatory gaps of the Convention. But this model agreement should not encompass exclusively substantive sales clauses that would prevail over the dispositive rules of the *lex contractus*. Rather, it should be accompanied by a concise checklist for merchants, who could readily ascertain whether their

[4] Ole Lando, *Comments and Questions Relating to the European Commission's Proposal for a Regulation on a Common European Sales Law*, 19 E. R. P. L. 717, 722 (2011) ("CESL's improvements on CISG are hardly significant enough to justify a CESL as the first regulation governing B2B contracts."). *But see* Hugh Beale, *A Common European Sales Law (CESL) for Business-to-Business Contracts*, *in* THE MAKING OF EUROPEAN PRIVATE LAW: WHY, HOW, WHAT, WHO 65, 70 (Luigi Moccia ed., 2013) ("[W]hy do we need a CESL when we already have the 1980 Vienna Convention on International Sale of Goods [CISG]? [. . .] [M]y answer is simple. It is that elements that are crucial for SMEs – validity and the control of unfair terms – are not covered by the CISG.").

[5] The accession of Brazil to the CISG may lead, eventually, to the accession of Portugal to the Vienna Sales Convention.

[6] *Cf*. European Parliament Legislative Resolution of 26 February 2014 on the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, P7_TA(2014)0159, Amendment 21 (Proposal for a regulation Recital 34c (new)) and Amendment 258 (Proposal for a regulation Annex I – Article 186c (new)).

transaction meets the applicability requirements of the CISG.[7] This list would allow parties to evaluate *ex ante* the suitability of the European model agreement for their business, thus maximizing the effectiveness of their contractual arrangement. Also, it is important to note that because this European standard form would not tamper with the regulatory frameworks of the respective EU Member States, no legislative measure and, hence, no special majorities or procedures would be required for its promulgation. Instead, the added effort and resources required for the promulgation of a new contract law instrument could be redirected to the wide dissemination and use of the forms, which could lead to the bottom-up convergence of sales laws.

Granted, the advantages of streamlining both consumer and commercial transactions under one regime should not be overlooked. Legal simplicity would foster legal certainty and predictability in intra-Single Market commerce.[8] This last paragraph brings us to the second enquiry, that is, if a European sales law instrument is to be promulgated, what should that instrument look like?

For a sales law instrument to be successful, it has to avoid the pitfalls in the CESL model noted in Parts I-IV of this thesis. Succinctly, it should be optional and provide for a simple and transparent selection mechanism, which would not depend on a gateway Member State law and which would also avoid the limitations of Rome I Reg., art. 6(2). It should be structured in such a way that it avoids the hurdle of any content-of-laws enquiries in dispute resolution proceedings. Lastly, its content and structure should ensure a smooth interplay with any public policy considerations of the respective Member States. With regard to the interplay between any such instrument and the CISG, this issue cannot be addressed by the instrument itself, but would remain, instead, an issue regulated by CISG arts. 6, 90, and 94. Still, an easy-to-select and widely acceptable instrument would bear a de facto rebuttable presumption against the applicability of any other competing regulation.

Of all optional regulatory structures,[9] the only type of regulation that meets all these prerequisites without uprooting the foundations of EU private international law is the

[7] *See* analysis in *infra* Part IV, note 35.
[8] *See Miller* v *Fletcher* [1779] 99 E.R. 151, 152 (as put by Lord Mansfield almost 250 years ago, "[t]he great object in every branch of the law, but especially in mercantile law, is certainty . . . .") (Eng.).
[9] *E.g*. a second parallel legal regime, a regime that embeds the optional instrument in the conflict-of-laws system, a pan-European regime, a model European sales agreement, etc. Analysis of the advantages and disadvantages of the potential regulatory avenues for European contract law extends beyond the scope of this thesis. *Cf*. Commission Green Paper on Policy Options for Progress towards a European Contract Law for Consumers and Businesses, COM (2010) 348 final (Jul. 1, 2010).

supra-national pan-European instrument.[10] Such an instrument would set forth a clear opt-in mechanism without asterisks or complicated applicability criteria; as an integral part of all Member States' *leges fori*, it would be readily ascertainable by EU Member State courts; as EU law, it would circumnavigate the public policy considerations hurdle; and, finally, as a transparent and easy-to-select regime, it would manifest the clear intention of the parties to exclude the application of all other instruments governing sale of goods contracts.

It has already been noted, however, that the two major drawbacks of such a plan would be the possibility of conflict-of-regimes situations regarding sales transactions and, most importantly, the unanimity required in the Council for its enactment.

With regard to the inevitable overlap of instruments on sales law, a sequence of special rules[11] and general principles, such as the principles of *lex posterior* and *lex specialis*,[12] as well as the principle that uniform substantive law comes before uniform conflicts provisions,[13] would ensure the prevalence of the pan-European instrument over other competing regimes.

With regard to the EU Council difficulties, the exit of the United Kingdom from the EU would be tantamount to the removal of the strongest common law stronghold in the legislative process. Without objections from one of the fiercest opponents of EU contract law, initiatives for a European sales law could pick up pace and unanimity might not be elusive after all. But this much coveted unanimous vote in the Council cannot be achieved, unless the instrument addresses a true problem in the Single Market—thus amplifying the importance that there must be a need for such a European sales law regime. Possibly, Member States could be persuaded through a "test-it-and-enact-it" approach, which would entail the gradual establishment of a European sales law framework in the EU. As suggested above, this could take the form of an optional pan-European legal regime for consumer transactions, which would be supplemented by a model standard form for commercial transactions. With time, the limited or wide use of the model agreement could lead the mercantile community either to jettison altogether the idea of an EU sales law or to seek the enactment of a rigorous "hard" European law covering also

[10] *See* Giesela Rühl, *The Common European Sales Law: 28th Regime, 2nd Regime or 1st Regime?*, 19 MAASTRICHT J. EUR. & COMP. L. 148, 162 (2012) (proposing the enactment of such a pan-European instrument or, in the words of Prof. Rühl, a "1st regime-model").
[11] Rome I Reg., art. 25; Rome II Reg., art. 27. *Cf*. analysis in *supra* Part IV(IV)(A).
[12] Gerhard Dannemann, *Choice of CESL and Conflict of Laws*, *in* THE COMMON EUROPEAN SALES LAW IN CONTEXT: INTERACTIONS WITH ENGLISH AND GERMAN LAW 21, 28 (Gerhard Dannemann & Stefan Vogenauer eds., 2013).
[13] Horst Eidenmüller *et al*., *The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law*, 16 EDINBURGH L. REV. 301, 318 (2012). *Cf*. analysis in *supra* Part IV(III).

commercial transactions. In due course, the EU could further substitute the optional instruments with a binding regime for all sale of goods contracts, thus reviving the political goal of Napoleon to set forth a single law for all Europe.[14]

If such an instrument is to be promulgated, the ultimate question is what should the drafting process entail? Bearing in mind the CESL experience, no future project can be successful without a clear regulatory vision and involvement of all interested parties throughout the preparatory and enactment stages.

First and foremost, the instrument needs to be drafted with a clear regulatory objective in mind. Any project that aims to complete the internal market, but is covered under a dubious consumer protection cloak, has limited chances of success. Member States would be unwilling to promote an undisclosed agenda of the EU Commission, and private parties would not trust using an instrument that has political rationale, yet lacks business rationale. Indeed, the proposed CESL appeared to lack this clear vision. The draft Regulation was opaque *vis-à-vis* its regulatory goals, which purportedly encompassed consumer protection, legal certainty in commercial transactions, and the completion of the Single Market. Although all three goals can co-exist theoretically, the structure and content of the CESL clearly reflected the pursuit of the last goal, while the former two were used as ancillary justifications for the enactment of the instrument. In other words, the CESL was more of a means to advance a political agenda of nation-building through enhanced legal integration in the Single Market, rather than a regulatory reform for consumers and merchants in the EU.[15] Although the decision on this matter has been postponed as a result of CESL's withdrawal, the EU will have to decide, sooner than later, whether to proceed with the further integration of the Single Market or to preserve the close, yet not-so-close, cooperation of Member States. Whereas the former would lead to a

[14] *See* Hugh Collins, *Why Europe Needs a Civil Code*, 21 E. R. P. L. 907, 913–914 (2013) ("It is of course, possible that the Commission foresees that there is a strong chance that few will use the rules of the optional code. That will provide the Commission with a reason to discard the optional nature of the code and promote instead mandatory full harmonization of consumer sales law in order to complete the internal market.").

[15] *See* Larry A. DiMatteo, *Common European Sales Law: A Critique of Its Rationales, Functions, and Unanswered Questions*, 11 J. I. T. L. P. 222, 229 (2012) ("The CESL's reliance on the PECL and the DCFR is especially telling – given that these prior instruments are viewed as potential precursors to a European Contract or Civil Code. This leaves one wondering whether the true purpose of the CESL is a tactical one aimed at advancing the cause of a European civil code."); Christiana Fountoulakis, *Sales Law in Europe*, *in* EUROPEAN PRIVATE LAW: A HANDBOOK, vol. II at 41, 77 (Mauro Bussani & Franz Werro eds., 2014) ("[T]he Proposal extends to general issues of contract law and may thus be perceived as a *first European mini-code*, despite its optional nature. [. . .] [I]n effect, it would constitute a first 'trial run of [a] new European *contract* law'."); Reinhard Zimmermann, *Codification: The Civilian Experience Reconsidered on the Eve of a Common European Sales Law*, *in* CODIFICATION IN INTERNATIONAL PERSPECTIVE: SELECTED PAPERS FROM THE 2ND IACL THEMATIC CONFERENCE 11, 27 (Wen-Yeu Wang ed., 2014) ("[T]he DCESL may be the nucleus of a European code of contract law properly so called, and perhaps even of a European Civil Code . . . ."). For the importance of a European Civil Code in creating a pan-European polity, see Collins, *supra* note 14 at 916–917.

quasi-federation model of rigorous private law harmonization, the latter avenue would entail a piecemeal harmonization of the law and, possibly, a slow and gradual legal integration through CJEU judgments—reducing the EU to a "state" run by judges.[16] Therefore, political vision and courage is necessary to determine the future of both European contract law and the European Union itself.

Secondly, although the effort to harmonize contract law in Europe have extended for decades, the CESL was drafted in a relatively short period of time. This expediency in promulgating a new instrument necessitated the minimal involvement of stakeholders, academics, and practitioners, thus repeating the mistake made under the 1964 Hague Sales Conventions whereby developing countries were left out of the drafting and negotiation process and, as a result, boycotted the final Conventions. In like manner, stakeholders, academics, and practitioners, were not substantially involved in the drafting of the CESL. Unsurprisingly, the excluded parties have become the most ferocious critics of the proposed Regulation.[17] For that reason, the new instrument needs to be drafted in an open manner—not behind the closed doors of the EU Commission. The latter should form a drafting committee of learned scholars, practicing attorneys, and stakeholders, who will produce a doctrinally coherent and useful practically draft instrument. At a second stage, the general public, including universities, research centres, bar associations, learned institutions, and private individuals, should have the opportunity to offer comments on that draft. Upon the conclusion of that consultation process, the drafting committee should prepare a final document, which would serve as the basis for the classic regulatory process under the Treaties. Paraphrasing President Lincoln's democratic principle as articulated in the seminal Gettysburg Address,[18] a quintessential instrument for the archetypal cross-border transaction cannot but be a product "of the people, by the people, for the people."[19]

In conclusion, the stalemate reached in European contract law should not be viewed as the end of a long unsuccessful regulatory endeavour. The CESL should not be viewed as the

[16] *See e.g.* Case C-281/02, *Andrew Owusu* v *NB Jackson*, 2005 E.C.R. I-01383.
[17] *See* Stefan Grundmann, *CESL, Legal Nationalism or a Plea for Appropriate Governance?*, 8 E. R. C. L. 241, 242 (2012) ("[E]uro-optimists are disappointed that the process towards the CESL proposed has been characterised by exclusion and not inclusion, by a situation in which competition of ideas has not been invited but a closed-shop has been organised—all this in good part driven by conflicts of interest.").
[18] *See generally* Dean Grodzins, *"Of All, By All, For All": Theodore Parker, Transcendentalism, and the Gettysburg Address*, *in* THE GETTYSBURG ADDRESS: PERSPECTIVES ON LINCOLN'S GREATEST SPEECH 88 (Sean Conant ed., 2015).
[19] Sean Conant, *Appendix: The Five Copies of the Gettysburg Address*, *in* THE GETTYSBURG ADDRESS: PERSPECTIVES ON LINCOLN'S GREATEST SPEECH 321, 323, 325, 327, 329, and 332 (Sean Conant ed., 2015).

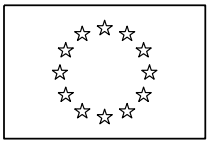
pinnacle and, simultaneously, the death-bed of EU contract law initiatives. Fifteen years of rigorous comparative work and scholarly analysis cannot be easily cast aside. On the contrary, as eloquently put, fifty years, ago by David,

> The failure of attempts at unifications [sic] does not necessarily prove that unification is impossible; it may simply be that the attempts in question were premature, or that they were not made with the necessary caution, or with adequate methods and processes.[20]

[20] René David, *The International Unification of Private Law*, II.5 *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 1, 41 (Kurt Lipstein ed., 1969).

APPENDICES

APPENDIX A



EUROPEAN COMMISSION

Brussels, 11.10.2011
COM(2011) 635 final

2011/0284 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on a Common European Sales Law

{SEC(2011) 1165 final}
{SEC(2011) 1166 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. Surveys[1] 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 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.

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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.

2 OJ L 177, 4.7.2008, p. 6.

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]

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

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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 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."

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 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

[5] COM (2001) 398, 11.7.2001.

consumers and businesses'[6] (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'[7] 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 Europe[8] 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 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 Convention[9] 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 Directive[10] 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

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6 COM (2010) 348 final, 1.7.2010.

7 The Single Market Act, COM (2011) 206 final, 13.4.2011, p. 19, and the Annual Growth Survey, Annex 1, progress report on Europe 2020, COM (2011) 11 - A1/2, 12.1.2010, p. 5, also mention the initiative on European contract law.

8 COM (2010) 245 final, 26.8.2010, p. 13.

9 Exceptions are the UK, Ireland, Portugal and Malta.

10 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.

17 June 2008 on the law applicable to contractual obligations (Rome I)[11], 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)[12]. 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 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

11 OJ L 177, 4.7.2008, p. 6.
12 OJ L 199, 31.7.2007, p. 40.

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 2003/361[13] 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.

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,[14] 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-

13 OJ L 124, 20.5.2003, p. 36.
14 OJ L 105, 27.4.2010, p. 109.

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 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[15]. 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.

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.

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[15] Commission Communication on Building Trust in EU-wide Justice: a New Dimension to European Judicial Training, COM (2011) 551 final, 13.9.2011.

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[16].

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*.

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16 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.

2011/0284 (COD)

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[17],

Having regard to the opinion of the Committee of the Regions[18],

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

17 OJ C , , p. .
18 OJ C , , p. .

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 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),[19] 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

[19] OJ L 177, 4.7.2008, p. 6.

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.

(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)[20], or any other relevant conflict of law rule. The agreement to use the Common European Sales Law should therefore not amount to,

[20] OJ L 199, 31.7.2007, p. 40.

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.

(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 availability 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.[21] 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

[21] OJ L 124, 20.5.2003, p. 36.

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 Common 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[22].

(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.

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22 OJ L 376, 27.12.2006, p. 36.

(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.

(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	*For the Council*
The President	*The President*

ANNEX I
COMMON EUROPEAN SALES LAW

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Part I Introductory provisions

Chapter 1 General principles and application

SECTION 1 GENERAL PRINCIPLES

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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.

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SECTION 2 APPLICATION

Article 4
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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 (c) 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 (c) 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 (c) 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 workplace;

   (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 redispatched 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 redispatch, 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 currecy 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**[23]. 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

[23] Insert a link here.

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.

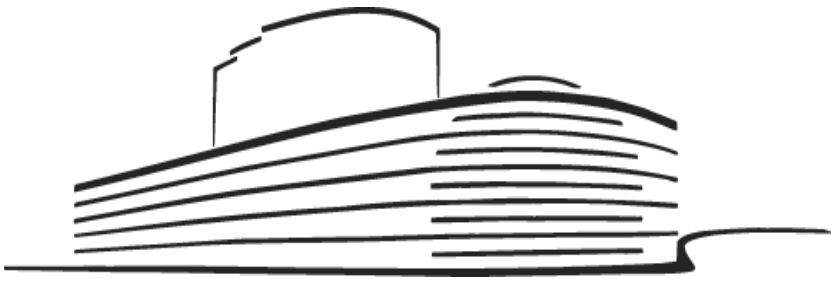
In case of dispute you may wish to ask for legal advice.

APPENDIX B

EUROPEAN PARLIAMENT 2013 - 2014

TEXTS ADOPTED
PART III
at the sitting of

Wednesday
26 February 2014



P7_TA-PROV(2014)02-26 PROVISIONAL EDITION PE 526.539

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TEXTS ADOPTED

P7_TA-PROV(2014)0159

Common European Sales Law ***I

European Parliament legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011)0635 – C7-0329/2011 – 2011/0284(COD))

(Ordinary legislative procedure: first reading)

The European Parliament,

– having regard to the Commission proposal to Parliament and the Council (COM(2011)0635),

– having regard to Article 294(2) and Article 114 of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C7-0329/2011),

– having regard to Article 294(3) of the Treaty on the Functioning of the European Union,

– having regard to the reasoned opinions submitted, within the framework of Protocol No 2 on the application of the principles of subsidiarity and proportionality, by the Belgian Senate, the German Bundestag, the Austrian Federal Council and the United Kingdom House of Lords, asserting that the draft legislative act does not comply with the principle of subsidiarity,

– having regard to the opinion of the European Economic and Social Committee of 29 March 2012[1],

– having regard to Rule 55 of its Rules of Procedure,

– having regard to the report of the Committee on Legal Affairs and the opinions of the Committee on the Internal Market and Consumer Protection and the Committee on Economic and Monetary Affairs (A7-0301/2013),

1. Adopts its position at first reading hereinafter set out;

2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;

3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

[1] OJ C 181, 21.6.2012, p. 75.

Amendment 1

Proposal for a regulation
Recital 8

Text proposed by the Commission	*Amendment*
(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.	(8) ***Contract-law-related barriers prevent consumers and traders from fully exploiting the potential of the internal market and are particularly relevant in the area of distance selling, which should be one of the tangible results of the internal market. In particular, the digital dimension of the internal market is becoming vital for both consumers and traders as consumers increasingly make purchases over the internet and an increasing number of traders sell online. Given that communication and information technology means are constantly developing and becoming increasingly accessible, the growth potential of internet sales is very high. Against this background, and*** to overcome ***such*** contract-law-related barriers, parties should have the possibility to agree that contracts ***they conclude at a distance, and, in particular, online,*** should be governed by a single uniform set of contract law rules with the same meaning and interpretation in all Member States, a Common ***European*** Sales Law. ***That*** Common European Sales Law should represent an additional option ***for distance selling and, in particular, internet trade,*** 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.

Amendment 2

Proposal for a regulation
Recital 9

Text proposed by the Commission	*Amendment*
(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.	(9) This Regulation establishes a Common European Sales Law ***for distance contracts and in particular for online contracts***. It ***approximates*** the contract laws of the Member States not by requiring amendments to the ***first*** national contract**-**law ***regime***, but by creating a second contract**-**law regime for contracts within its scope. This ***directly applicable*** second regime ***should be an integral part of the legal order applicable in the territory of the Member States. In so far as its scope allows and where parties have validly agreed to use it, the Common European Sales Law should apply instead of the first national contract-law regime within that legal order. It*** 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.

Amendment 3

Proposal for a regulation
Recital 10

Text proposed by the Commission	*Amendment*
(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)	(10) The agreement to use the Common European Sales Law should be a choice exercised within the respective national ***legal order*** which is ***determined as the applicable law*** 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), 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.	No 864/2007), or any other relevant conflict of law rule. The agreement to use the Common European Sales Law ***results from a choice between two different regimes within the same national legal order. That choice,*** therefore***, does*** not amount to, and ***should*** not be confused with, a choice ***between two national legal orders*** 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 ***such as those contained in Regulation (EC) No 593/2008***.

Amendment 4

Proposal for a regulation
Recital 11

Text proposed by the Commission	*Amendment*
(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.	(11) The Common European Sales Law should comprise a ***comprehensive*** set of ***uniform*** 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. ***Furthermore, the adoption of this Regulation should not preclude revision of the Directive on consumer rights, with the aim of providing full high-level harmonisation of consumer protection in the Member States.***

Amendment 5

Proposal for a regulation
Recital 11 a (new)

Text proposed by the Commission	*Amendment*
	(11a) The definition of consumer should cover natural persons who are acting outside their trade, business, craft or profession. However, in the case of dual-purpose contracts, where the contract is concluded for purposes partly within and partly outside a person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person should also be considered as a consumer. In order to determine whether a natural person is acting fully or partly for purposes which come within that person's trade, business, craft or profession, the way in which the person in question behaves towards the contracting party should be taken into account.

Amendment 6

Proposal for a regulation
Recital 12

Text proposed by the Commission	*Amendment*
(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.	(12) ***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.*** Since the Common European Sales Law contains a ***comprehensive*** set of ***uniform*** 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) of Regulation (EC) No 593/2008, which is predicated on the existence of differing levels of consumer protection in the Member States, has no practical ***relevance to*** the issues covered by the Common European Sales Law***, as it would amount to a comparison between the mandatory provisions of two***

identical second contract-law regimes.

Amendment 7

Proposal for a regulation
Recital 13

Text proposed by the Commission	*Amendment*
(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.	(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***, and that distance trade, in particular trade online, has a high potential***. 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.

Amendment 8

Proposal for a regulation
Recital 17 a (new)

Text proposed by the Commission	*Amendment*
	(17a) Cloud computing is developing rapidly and has great potential for growth. The Common European Sales Law provides a coherent set of rules adapted to the distance supply, and in particular the supply online, of digital content and related services. It should be possible for those rules to also apply when digital content or related services are provided using a cloud, in particular when digital content can be downloaded from the

	seller's cloud or temporarily stored in the provider's cloud.

Amendment 9

Proposal for a regulation
Recital 18

Text proposed by the Commission	*Amendment*
(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 availability of the Common European Sales Law should not depend on whether a price is paid for the specific digital content in question.	(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 availability of the Common European Sales Law should not depend on whether a price is paid for the specific digital content in question. ***However, in such cases, the remedies of the buyer should be limited to damages. On the other hand, the buyer should be able to have recourse to the full range of remedies, except price reduction, even if he is not obliged to pay a price for the supply of digital content, provided that his counter-performance, such as the provision of personal data or other utility having commercial value for the supplier, equals the payment of the price, given that in such cases the digital content is not actually supplied free of charge.***

Amendment 10

Proposal for a regulation
Recital 19

Text proposed by the Commission	*Amendment*
(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.	(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 ***or temporary storage of digital content in the provider's cloud***.

Amendment 11

Proposal for a regulation
Recital 19 a (new)

Text proposed by the Commission	*Amendment*
	(19a) The Common European Sales Law may also be used for a contract that is linked to another contract between the same parties that is not a sales contract, a contract for the supply of digital content or a related services contract. The linked contract is governed by the respective national law which is applicable pursuant to the relevant conflict-of-law rule. The Common European Sales Law may also be used for a contract that includes any element other than the sale of goods, the supply of digital content or the provision of related contracts, provided those elements are divisible and their price can be apportioned.

Amendment 12

Proposal for a regulation
Recital 22

Text proposed by the Commission	*Amendment*
(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.	(22) The agreement of the parties to a contract ***to the use of the Common European Sales Law*** 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.

Amendment 13

Proposal for a regulation
Recital 23 a (new)

Text proposed by the Commission	*Amendment*
	(23a) Where the agreement of the parties to the use of the Common European Sales Law is invalid or where the requirements to provide the standard information notice are not fulfilled, questions as to whether a contract is concluded and on what terms should be determined by the respective national law which is applicable pursuant to the relevant conflict-of-law rules.

Amendment 14

Proposal for a regulation
Recital 27

Text proposed by the Commission	*Amendment*
(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***.	(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 ***unless the reasons for such illegality or immorality are addressed in the Common European Sales Law***, 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. ***In the interest of clarity and legal certainty, the Common European Sales Law should clearly refer to those issues which are, and those which are not, addressed therein.***

Amendment 15

Proposal for a regulation
Recital 27 a (new)

Text proposed by the Commission	*Amendment*
	(27a) The unfair commercial practices referred to in Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial

	practices in the internal market ('Unfair Commercial Practices Directive')[1] would be covered by the Common European Sales Law in so far as they overlap with rules on contract law, including in particular those relating to unfair commercial practices that can lead to avoidance of a contract due to mistake, fraud, threat or unfair exploitation or to remedies for breach of the duty to provide information. Unfair commercial practices other than those that overlap with rules on contract law should fall outside the scope of the Common European Sales Law.
	[1] OJ L 149, 11.6.2005, p. 22.

Amendment 16

Proposal for a regulation
Recital 29

Text proposed by the Commission	*Amendment*
(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.	(29) 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.

Amendment 17

Proposal for a regulation

Recital 31

Text proposed by the Commission	*Amendment*
(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.	(31) The ***general*** 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 ***general*** 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. ***The general principle of good faith and fair dealing should set a standard of conduct which ensures an honest, transparent and fair relationship. While it precludes a party from exercising or relying on a right, remedy or defence which that party would otherwise have, the principle as such should not give rise to any general right to damages. Rules of the Common European Sales Law constituting specific manifestations of the general principle of good faith and fair dealing, such as avoidance for fraud or the non-performance of an obligation created by an implied term, can give rise to a right to damages, but only in very specific cases.***

Amendment 18

Proposal for a regulation
Recital 34

Text proposed by the Commission	*Amendment*
(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.	(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. ***A database should be established which is easily accessible, fully systematised and easily searchable. In order to overcome problems relating to different approaches to judgments within the Union and to enable the database to be operated efficiently and economically, judgments should be communicated on the basis of a standard judgment summary which should accompany the judgment. It should be succinct, thus rendering it easily accessible. It should be divided into five sections which should set out the main elements of the judgment communicated, namely: the issue and the relevant Common European Sales Law article; a brief summary of the facts; a short summary of the main arguments; the decision; and the reasons for the decision, clearly stating the principle decided.***

Amendment 19

Proposal for a regulation
Recital 34 a (new)

Text proposed by the Commission	*Amendment*
	(34a) A commentary on the Common European Sales Law could be a valuable tool, as it would provide clarity and guidance on that law. Such a commentary should provide a clear and comprehensive

exegesis of the articles of the Common European Sales Law together, where appropriate, with an explanation of the policy choices which underpin specific articles. A clear explanation of such choices would enable courts across the Member States to interpret and apply properly the Common European Sales Law, as well as enabling them to fill any gaps. As such, it will facilitate the development of a consistent, uniform application of the Common European Sales Law. The Commission should explore the possibilities of providing for such a commentary.

Amendment 20

Proposal for a regulation
Recital 34 b (new)

Text proposed by the Commission	*Amendment*
	(34b) An additional obstacle to cross-border trade is the lack of access to efficient and inexpensive redress mechanisms. Therefore, a consumer and a trader concluding a contract on the basis of the Common European Sales Law should consider submitting disputes arising from that contract to an existing alternative dispute resolution entity within the meaning of point (h) of Article 4(1) of Directive 2013/11/EU of the European Parliament and of the Council[1]. This should be entirely without prejudice to the possibility for the parties to initiate proceedings before the competent courts without first having recourse to alternative dispute resolution.

[1] ***Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) (OJ L 165, 18.6.2013, p,***

63).

Amendment 21

Proposal for a regulation
Recital 34 c (new)

Text proposed by the Commission	*Amendment*
	(34c) To help facilitate the use of the Common European Sales Law, the Commission should work towards the development of European model contract terms with the assistance of a working group, composed mainly of groups representing consumers and businesses and supported by academics and practitioners. Such model contract terms could usefully complement the Common Sales Law rules when describing the specific features of a given contract, and should take into account the particularities of relevant commercial sectors. They should respond to stakeholders' needs and draw lessons from the initial practical experience of the use of the Common European Sales Law. The model contract terms should be made available to the public as they would provide added value to traders who choose to conclude cross-border contracts using the Common European Sales Law. In order for those model contract terms to effectively accompany the Common European Sales Law, the Commission's work should start as soon as possible.

Amendment 22

Proposal for a regulation
Recital 35

Text proposed by the Commission	*Amendment*
(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.	(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.	The review should take into account, amongst other things, the need to ***include*** further ***rules relating to retention of title clauses***, market and technological developments in respect of digital content and future developments of the Union acquis. ***Particular consideration should be given, in addition, to the question whether the limitation to distance contracts, and in particular online contracts, remains appropriate or whether a wider scope, including on-premises contracts, may be feasible.***

Amendment 23

Proposal for a regulation
Table of contents (new)

Text proposed by the Commission	*Amendment*
	Table of contents
	[...]

(A table of contents is inserted at the beginning of the operative part. It will be adapted in order to reflect the content of the instrument. See amendment deleting the table of contents at the beginning of the Annex).

Amendment 24

Proposal for a regulation
Title I (new) – title

Text proposed by the Commission	*Amendment*
	Title I
	General provisions

Amendment 25

Proposal for a regulation
Part -I (new)

Text proposed by the Commission	*Amendment*
	Part -I: Application of the instrument

Amendment 26

Proposal for a regulation
Article 1 – paragraph 1

Text proposed by the Commission	*Amendment*
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.	1. The purpose of this Regulation is to improve the conditions for the establishment and the functioning of the internal market by making available***, within the legal order of each Member State,*** 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 ***which are conducted at a distance, in particular online,*** where the parties to a contract agree to do so.

Amendment 27

Proposal for a regulation
Article 1 – paragraph 2

Text proposed by the Commission	*Amendment*
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.	2. This Regulation enables traders***, in particular small or medium-sized enterprises ('SMEs'),*** 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.

Amendment 28

Proposal for a regulation
Article 2 – point b

Text proposed by the Commission	*Amendment*
(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;	***deleted***

(See amendment for new point fe; the text has been amended)

Amendment 29

Proposal for a regulation
Article 2 – point c

Text proposed by the Commission	*Amendment*
(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;	***deleted***

(See amendment for new point fg)

Amendment 30

Proposal for a regulation
Article 2 – point d

Text proposed by the Commission	*Amendment*
(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;	***deleted***

(See amendment for new point ff)

Amendment 31

Proposal for a regulation
Article 2 – point e

Text proposed by the Commission	*Amendment*
(e) 'trader' means any natural ***or*** legal person who is acting for purposes relating to that person's trade, business, craft***,*** or profession;	(e) 'trader' means any natural ***person or any*** legal person***, irrespective of whether privately or publicly owned,*** who is acting for purposes relating to that person's trade, business, craft or profession ***in relation to contracts***;

Amendment 32

Proposal for a regulation
Article 2 – point f

Text proposed by the Commission	*Amendment*
(f) 'consumer' means any natural person who is acting for purposes which are outside 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; ***where the contract is concluded for purposes partly within and partly outside that person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person shall also be considered to be a consumer;***

(See the wording of recital 17 of Directive 2011/83/EU)

Amendment 33

Proposal for a regulation
Article 2 – point f a (new)

Text proposed by the Commission	*Amendment*
	(fa) '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;

(See amendment for point n)

Amendment 34

Proposal for a regulation
Article 2 – point f b (new)

Text proposed by the Commission	*Amendment*
	(fb) 'customer' means any person who purchases a related service;

(See amendment for point o)

Amendment 35

Proposal for a regulation
Article 2 – point f c (new)

Text proposed by the Commission	*Amendment*
	(fc) 'creditor' means a person who has a right to performance of an obligation, whether monetary or non-monetary, by another person, the debtor;

(See amendment for point w)

Amendment 36

Proposal for a regulation
Article 2 – point f d (new)

Text proposed by the Commission	*Amendment*
	(fd) 'debtor' means a person who has an obligation, whether monetary or non-monetary, to another person, the creditor;

(See amendment for point x)

Amendment 37

Proposal for a regulation
Article 2 – point f e (new)

Text proposed by the Commission	*Amendment*
	(fe) 'good faith and fair dealing' means a standard of conduct characterised by honesty, openness and, in so far as may be appropriate, reasonable consideration for the interests of the other party to the transaction or relationship in question;

Amendment 38

Proposal for a regulation
Article 2 – point f f (new)

Text proposed by the Commission	*Amendment*
	(ff) '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;

(See amendment for point d)

Amendment 39

Proposal for a regulation
Article 2 – point f g (new)

Text proposed by the Commission	*Amendment*
	(fg) '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 quality of life and loss of enjoyment;

(See amendment for point c)

Amendment 40

Proposal for a regulation
Article 2 – point g a (new)

Text proposed by the Commission	*Amendment*
	(ga) 'mandatory rule' means any provision the application of which the parties cannot exclude, or derogate from, or the effect of which they cannot vary;

(See amendment for point v)

Amendment 41

Proposal for a regulation
Article 2 – point g b (new)

Text proposed by the Commission	*Amendment*
	(gb) 'obligation' means a duty to perform which one party to a legal relationship owes to another party and which that other party is entitled to enforce as such;

(See amendment for point y)

Amendment 42

Proposal for a regulation
Article 2 – point g c (new)

Text proposed by the Commission	*Amendment*
	(gc) 'express' means, in relation to a statement or agreement, that it is made separately from other statements or agreements and by way of active and unequivocal conduct, including by ticking a box or activating a button or similar function;

Amendment 44

Proposal for a regulation
Article 2 – point m – introductory part

Text proposed by the Commission	*Amendment*
(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:	(m) ‘related service’ means any service related to goods or digital content, such as ***storage or any other processing, including*** installation, maintenance ***or*** repair, 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 ***or provided for, even if only as an option, in the sales contract or in the contract for the supply of digital content***; it excludes:

Amendment 45

Proposal for a regulation
Article 2 – point m – point ii

Text proposed by the Commission	*Amendment*
(ii) training services,	***deleted***

Amendment 46

Proposal for a regulation
Article 2 – point m – point iv

Text proposed by the Commission	*Amendment*
(iv) financial services;	(iv) financial services***, including payment services and the issue of electronic money and insurance of any kind, whether for goods and digital content or otherwise;***

Amendment 47

Proposal for a regulation
Article 2 – point n

Text proposed by the Commission	*Amendment*
(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;	***deleted***

(See amendment for point fa)

Amendment 48

Proposal for a regulation
Article 2 – point o

Text proposed by the Commission	*Amendment*
(o) 'customer' means any person who purchases a related service;	***deleted***

(See amendment for point fb)

Amendment 49

Proposal for a regulation
Article 2 – point p

Text proposed by the Commission	*Amendment*
(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;	(p) 'distance contract' means any contract between the trader and the consumer ***or another trader*** under an organised distance sales scheme concluded without 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 the other trader***, with the exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded;

Amendment 50

Proposal for a regulation
Article 2 – point q

Text proposed by the Commission	*Amendment*
(q) 'off-premises contract' means any contract between a trader and a consumer:	***deleted***
(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;	

Amendment 51

Proposal for a regulation
Article 2 – point r

Text proposed by the Commission	*Amendment*
(r) 'business premises' means:	***deleted***
(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;	

Amendment 52

Proposal for a regulation
Article 2 – point s

Text proposed by the Commission	*Amendment*
(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;	(s) 'commercial guarantee' means any undertaking by the trader or a producer ***(the guarantor)*** to the consumer, in addition to ***his*** legal ***obligation relating to the guarantee*** of conformity**,** to reimburse the price paid or to replace**,** repair or service goods or digital ***contents*** 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;

Amendment 53

Proposal for a regulation
Article 2 – point s a (new)

Text proposed by the Commission	*Amendment*
	(sa) 'repair' means, in the event of lack of conformity, the act of processing non-conforming goods or digital content to bring them into conformity with the contract;

Amendment 54

Proposal for a regulation
Article 2 – point v

Text proposed by the Commission	*Amendment*
(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;	***deleted***

(See amendment for point ga)

Amendment 55

Proposal for a regulation
Article 2 – point w

Text proposed by the Commission	*Amendment*
(w) 'creditor' means a person who has a right to performance of an obligation, whether monetary or non-monetary, by another person, the debtor;	***deleted***

(See amendment for point fc)

Amendment 56

Proposal for a regulation
Article 2 – point x

Text proposed by the Commission	*Amendment*
(x) 'debtor' means a person who has an obligation, whether monetary or non-monetary, to another person, the creditor;	***deleted***

(See amendment for point fd)

Amendment 57

Proposal for a regulation
Article 2 – point y

Text proposed by the Commission	*Amendment*
(y) 'obligation' means a duty to perform which one party to a legal relationship owes to another party.	***deleted***

(See amendment for point gb)

Amendment 58

Proposal for a regulation
Article 2 – point y a (new)

Text proposed by the Commission	*Amendment*
	(ya) 'free of charge' means free of the costs necessarily incurred in order to bring the goods into conformity, particularly the cost of postage, labour and materials.

Amendment 59

Proposal for a regulation
Article 3

Text proposed by the Commission	*Amendment*
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	The parties may agree***, subject to the requirements laid down in Articles 8 and 9,*** that the Common European Sales Law governs their cross-border contracts for the sale of goods, for the supply of digital

territorial, material and personal scope as set out in Articles 4 to 7.	content and for the provision of related services within the territorial, material and personal scope as set out in Articles 4 to 7.

Amendment 60

Proposal for a regulation
Article 4 – paragraph 1

Text proposed by the Commission	*Amendment*
1. The Common European Sales Law may be used for cross-border contracts.	1. The Common European Sales Law may be used for ***distance contracts which are*** cross-border contracts.

Amendment 61

Proposal for a regulation
Article 5 – paragraph 1 – introductory part

Text proposed by the Commission	*Amendment*
The Common European Sales Law may be used for:	The Common European Sales Law may be used for ***distance contracts, including online contracts, which are***:

Amendment 62

Proposal for a regulation
Article 5 – paragraph 1 – point b

Text proposed by the Commission	*Amendment*
(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.	(b) contracts for the supply of digital content***,*** whether supplied on a tangible medium ***or through any other means,*** 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 ***or in exchange for a counter-performance other than the payment of a price, or is not supplied in exchange for any other counter-performance***.

Amendment 63

Proposal for a regulation
Article 6 – title

Text proposed by the Commission	*Amendment*
Exclusion of mixed-purpose contracts and ***contracts linked to a consumer credit***	***Linked*** contracts and ***mixed-purpose contracts***

Amendment 64

Proposal for a regulation
Article 6 – paragraph 1

Text proposed by the Commission	*Amendment*
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.	1. The Common European Sales Law may ***also*** be used for***:***
	(a) cases where a contract governed by the Common European Sales Law is linked to a contract other than a sales contract, a contract for the supply of digital content or a related service contract, or
	(b) cases where a contract includes any elements other than the sale of goods, the supply of digital content ***or*** the provision of related services within the meaning of Article 5***, provided those elements are divisible and their price can be apportioned***.

Amendment 65

Proposal for a regulation
Article 6 – paragraph 1 a (new)

Text proposed by the Commission	*Amendment*
	1a. In the cases referred to in point (a) of paragraph 1, the linked contract shall be governed by the otherwise applicable law.

Amendment 66

Proposal for a regulation
Article 6 – paragraph 1 b – introductory wording and point a (new)

Text proposed by the Commission	*Amendment*
	1b. In the cases referred to in point (a) of paragraph 1, and
	(a) where, in the context of the contract governed by the Common European Sales Law, either of the parties exercises any right, remedy or defence, or that contract is invalid or not binding, the national law applicable to the linked contract shall determine the effects on the linked contract;

Amendment 67

Proposal for a regulation
Article 6 – paragraph 1 b – point b (new)

Text proposed by the Commission	*Amendment*
	(b) where, in the context of the linked contract, either of the parties exercises any right, remedy or defence, or that contract is invalid or not binding under the national law applicable to that contract, the obligations of the parties under the contract governed by the Common European Sales Law shall be unaffected unless a party would not have concluded that contract governed by the Common European Sales Law but for the linked contract, or would have done so only on fundamentally different contract terms, in which case that party shall be entitled to terminate the contract governed by the Common European Sales Law.

Amendment 68

Proposal for a regulation
Article 6 – paragraph 1 c (new)

Text proposed by the Commission	*Amendment*
	1c. In the cases referred to in point (b) in paragraph 1, the other elements included in the contract shall be deemed to have been agreed upon under a linked contract.

Amendment 69

Proposal for a regulation
Article 6 – paragraph 2

Text proposed by the Commission	*Amendment*
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.	***deleted***

Amendment 70

Proposal for a regulation
Article 7

Text proposed by the Commission	*Amendment*
Article 7	Article 7
Parties to the contract	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***	The Common European Sales Law may be used only if the seller of goods or the supplier of digital content is a trader.

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.	

Amendment 71

Proposal for a regulation
Article 8 – paragraph 2

Text proposed by the Commission	*Amendment*
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.	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 ***and if the requirements under Article 9 are fulfilled***. The trader shall provide the consumer with a confirmation of that agreement on a durable medium.

Amendment 72

Proposal for a regulation
Article 8 – paragraph 3

Text proposed by the Commission	*Amendment*
3. In relations between a trader and a consumer the Common European Sales Law may not be chosen partially, but only in its entirety.	3. In relations between a trader and a consumer the Common European Sales Law may not be chosen partially, but only in its entirety. ***In relations between traders, the Common European Sales Law may be chosen partially, provided***

that exclusion of the respective provisions is not prohibited therein.

Amendment 73

Proposal for a regulation
Article 11 – paragraph 1

Text proposed by the Commission	*Amendment*
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***.	***1.*** 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***, instead of*** the contract***-law regime that would, in the absence of such an agreement,*** govern the ***contract within the legal order determined as the applicable law***.

Amendment 74

Proposal for a regulation
Article 11 – paragraph 1 a (new)

Text proposed by the Commission	*Amendment*
	1a. Where the parties enter into negotiations, or otherwise take preparatory steps for the conclusion of a contract, with reference to the Common European Sales Law, the Common European Sales Law shall also govern compliance with, and remedies for, failure to comply with the pre-contractual duty to provide information, and other matters that are relevant prior to the conclusion of a contract.
	The application of the Common European Sales Law as referred to in the first subparagraph shall be without prejudice to the law applicable under the relevant conflict-of-laws rules, where the trader has also made reference to other legal regimes.

Amendment 75

Proposal for a regulation
Article 11 a (new) – paragraph 1

Text proposed by the Commission	*Amendment*
	Article 11a
	Matters covered by the Common European Sales Law
	1. The Common European Sales Law addresses in its rules the following matters:
	(a) pre-contractual duties to provide information;
	(b) the conclusion of a contract including formal requirements;
	(c) the right of withdrawal and its consequences;
	(d) avoidance of the contract as a result of mistake, fraud, threat or unfair exploitation and the consequences of such avoidance;
	(e) interpretation;
	(f) contents and effects, including those of the relevant contract;
	(g) the assessment and the effects of unfairness of contract terms;
	(h) the rights and obligations of the parties;
	(i) remedies for non-performance;
	(j) restitution after avoidance or termination or in the case of a non-binding contract;
	(k) prescription and preclusion of rights;
	(l) sanctions available in the event of breach of the obligations and duties arising under its application.

Amendment 76

Proposal for a regulation
Article 11 a (new) – paragraph 2

Text proposed by the Commission	*Amendment*
	2. Matters not addressed in the Common European Sales law are governed by the relevant rules of the national law applicable under Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict-of-law rule. Such matters include:
	(a) legal personality;
	(b) the invalidity of a contract arising from lack of capacity, illegality or immorality, except where the grounds giving rise to illegality or immorality are addressed in the Common European Sales Law;
	(c) determination of the language of the contract;
	(d) matters of non-discrimination;
	(e) representation;
	(f) plurality of debtors and creditors and change of parties, including assignment;
	(g) set-off and merger;
	(h) the creation, acquisition or transfer of immovable property or of rights in immovable property;
	(i) intellectual property law; and
	(j) the law of torts, including the issue of whether concurrent contractual and non-contractual liability claims can be pursued together.

Amendment 77

Proposal for a regulation
Article 11 a (new) – paragraph 3

Text proposed by the Commission	*Amendment*
	3. This Article is without prejudice to any mandatory rules of a non-Member State which may be applicable according to the relevant rules governing the conflict of laws.

Amendment 78

Proposal for a regulation
Article 14

Text proposed by the Commission	*Amendment*
Article 14	***deleted***
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.	

(See amendment for Article 186a; the text has been amended)

Amendment 79

Proposal for a regulation
Article 15

Text proposed by the Commission	*Amendment*
Article 15	***deleted***
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.

(See amendment for Article 186b)

Amendment 80

Proposal for a regulation
Article 16

Text proposed by the Commission	*Amendment*
Article 16	***deleted***
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.

(See amendment for Article 186f)

Amendment 81

Proposal for a regulation
Annex I – Table of contents

Text proposed by the Commission	*Amendment*
Table of contents	***deleted***
[...]	

(See amendment inserting the table of contents at the beginning of operative part).

Amendment 82

Proposal for a regulation
Title II (new) – title

Text proposed by the Commission	*Amendment*
	Title II
	Provisions of the Common European Sales Law

Amendment 83

Proposal for a regulation
Annex I – Article 2 – paragraph 2

Text proposed by the Commission	*Amendment*
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***.	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, ***but shall not give rise directly to remedies for non-performance of an obligation***.

Amendment 84

Proposal for a regulation

Annex I – Article 9 – title

Text proposed by the Commission	*Amendment*
Mixed-purpose contracts	***Contracts including the provision of related services***

Amendment 85

Proposal for a regulation
Annex I – Article 10 – paragraph 1

Text proposed by the Commission	*Amendment*
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.	1. 'Notice' includes the communication of any statement which is intended to have legal effect or to convey information for a legal purpose.

Amendment 86

Proposal for a regulation
Annex I – Article 11 – paragraph 1

Text proposed by the Commission	*Amendment*
1. The provisions of this Article apply in relation to the computation of time for any purpose under the Common European Sales Law.	***deleted***

Amendment 87

Proposal for a regulation
Annex I – Article 11 – paragraph 1 a(new)

Text proposed by the Commission	*Amendment*
	1a. 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 shall not be considered as falling

within the period in question.

(See amendment for paragraph 3.)

Amendment 88

Proposal for a regulation
Annex I – Article 11 – paragraph 3

Text proposed by the Commission	*Amendment*
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.	***deleted***

(See amendment for paragraph 1a.)

Amendment 89

Proposal for a regulation
Annex I – Article 11 – paragraph 6

Text proposed by the Commission	*Amendment*
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.	***deleted***

(See amendment for paragraph 7a.)

Amendment 90

Proposal for a regulation
Annex I – Article 11 – paragraph 7 a (new)

Text proposed by the Commission	*Amendment*
	7a. 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 that period is to begin, then, in the absence of indications to the contrary, the period shall be calculated from the moment the document reaches the addressee.

(See amendment for paragraph 6; the text has been amended)

Amendment 91

Proposal for a regulation
Annex I – Article 12 – paragraph 3

Text proposed by the Commission	*Amendment*
3. Articles 59 to 65 apply with appropriate adaptations to the interpretation of unilateral statements indicating intention.	***deleted***

(See amendment for Article 58(3a))

Amendment 92

Proposal for a regulation
Annex I – Article 12 – paragraph 4

Text proposed by the Commission	*Amendment*
4. The rules on defects in consent in Chapter 5 apply with appropriate adaptations to unilateral statements indicating intention.	***deleted***

(See amendment for Article -48(2))

Amendment 93

Proposal for a regulation
Annex I – Article 13 – title

Text proposed by the Commission	*Amendment*
Duty to provide information ***when***	Duty to provide information

concluding a distance or off-premises contract

Amendment 94

Proposal for a regulation
Annex I – Article 13 – paragraph 1 – introductory wording

Text proposed by the Commission	*Amendment*
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:	1. A trader concluding a 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:

Amendment 95

Proposal for a regulation
Annex I – Article 13 – paragraph 3 – introductory wording

Text proposed by the Commission	*Amendment*
3. ***For a distance contract, the*** information required by this Article must:	3. ***The*** information required by this Article must:

Amendment 96

Proposal for a regulation
Annex I – Article 13 – paragraph 4

Text proposed by the Commission	*Amendment*
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.***	***deleted***

Amendment 97

Proposal for a regulation
Annex I – Article 13 – paragraph 5 – point b

Text proposed by the Commission	*Amendment*
(b) concluded by means of an automatic vending machine or automated commercial premises;	***deleted***

Amendment 98

Proposal for a regulation
Annex I – Article 13 – paragraph 5 – point c

Text proposed by the Commission	*Amendment*
(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.	***deleted***

Amendment 99

Proposal for a regulation
Annex I – Article 13 – paragraph 5 – point c a (new)

Text proposed by the Commission	*Amendment*
	(ca) in accordance with the laws of Member States, established by a public office-holder who has a statutory obligation to be independent and impartial and who must ensure, by providing comprehensive legal information, that the consumer only concludes the contract on the basis of careful legal consideration and with knowledge of its legal scope.

Amendment 100

Proposal for a regulation
Annex I – Article 17 – title

Text proposed by the Commission	*Amendment*
Information about rights of withdrawal ***when concluding a distance or off-premises contract***	Information about rights of withdrawal

Amendment 101

Proposal for a regulation
Annex I – Article 18

Text proposed by the Commission	*Amendment*
Article 18	***deleted***
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.	

Amendment 102

Proposal for a regulation
Annex I – Article 19 – title

Text proposed by the Commission	*Amendment*
Distance contracts: additional information and other requirements	***Additional*** information and other requirements

Amendment 103

Proposal for a regulation
Annex I – Article 20

Text proposed by the Commission	*Amendment*
Article 20	***deleted***
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.	

Amendment 104

Proposal for a regulation
Annex I – Article 24 – paragraph 3 – point e

Text proposed by the Commission	*Amendment*
(e) the ***contract terms***.	(e) the ***terms on the basis of which the trader is prepared to conclude the contract***.

Amendment 105

Proposal for a regulation
Annex I – Article 24 – paragraph 4

Text proposed by the Commission	*Amendment*
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.	4. ***Without prejudice to any stricter requirements for a trader dealing with a consumer under Section 1,*** the trader must ensure that the 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.

Amendment 106

Proposal for a regulation
Annex I – Article 24 – paragraph 5

Text proposed by the Commission	*Amendment*
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.	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. ***Such acknowledgement***

	shall display the content of the offer or of the acceptance.

Amendment 107

Proposal for a regulation
Annex I – Article 29 – paragraph 1

Text proposed by the Commission	*Amendment*
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.	1. A party which has failed to comply with any duty imposed by this Chapter is liable ***under Chapter 16*** for any loss caused to the other party by such failure.

Amendment 108

Proposal for a regulation
Annex I – Article 30 – paragraph 2

Text proposed by the Commission	*Amendment*
2. Agreement is reached by acceptance of an offer. ***Acceptance may be made explicitly or by other statements or conduct.***	2. Agreement is reached by acceptance of an offer.

Amendment 109

Proposal for a regulation
Annex I – Article 31 – paragraph 1 – point b

Text proposed by the Commission	*Amendment*
(b) it has sufficient content and certainty for there to be a contract.	(b) it has sufficient content and certainty for there to be a contract. ***In relations between a trader and a consumer, an offer shall only be considered to have sufficient content and certainty if it contains an object, a quantity or duration, and a price.***

Amendment 110

Proposal for a regulation
Annex I – Article 34 – paragraph 2

Text proposed by the Commission	*Amendment*
2. Silence or inactivity does not in itself constitute acceptance.	2. Silence or inactivity does not in itself constitute acceptance. ***In particular, in cases of unsolicited delivery of goods, supply of digital content or provision of related services, the absence of a response from the consumer shall not constitute acceptance.***

Amendment 111

Proposal for a regulation
Annex I – Article 38 – paragraph 4 a (new)

Text proposed by the Commission	*Amendment*
	4a. In relations between a trader and a consumer, a reply by the offeree which states or implies additional or different contract terms shall in any event constitute a rejection and a new offer.

Amendment 112

Proposal for a regulation
Annex I – Chapter 4 – title

Text proposed by the Commission	*Amendment*
Right to withdraw ***in distance and off-premises contracts between traders and consumers***	Right to withdraw

Amendment 113

Proposal for a regulation
Annex I – Article 40 – paragraph 2 – point i a (new)

Text proposed by the Commission	*Amendment*
	(ia) a contract which, in accordance with the laws of Member States, is established by a public office-holder who has a statutory obligation to be independent and impartial and who must ensure, by providing comprehensive legal information, that the consumer only concludes the contract on the basis of careful legal consideration and with knowledge of its legal scope.

Amendment 114

Proposal for a regulation
Annex I – Article -48 (new)

Text proposed by the Commission	*Amendment*
	Article -48
	Scope
	1. This Chapter shall apply to the avoidance of a contract on account of defects in consent and similar defects.
	2. The rules laid down in this Chapter shall apply, with appropriate adaptations, to the avoidance of an offer, acceptance or other unilateral statement indicating intention, or equivalent conduct.

(For paragraph 2, see amendment for Article 12(4))

Amendment 115

Proposal for a regulation
Annex I – Article 48 – paragraph 1 – point a

Text proposed by the Commission	*Amendment*
(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	(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

Amendment 116

Proposal for a regulation
Annex I – Article 48 – paragraph 1 – point b – point i

Text proposed by the Commission	*Amendment*
(i) caused the mistake;	(i) caused the mistake; ***or***

Amendment 117

Proposal for a regulation
Annex I – Article 48 – paragraph 1 – point b – point ii

Text proposed by the Commission	*Amendment*
(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;	(ii) caused the contract to be concluded *by* mistake by failing to comply with any pre-contractual information duty under Chapter 2, Sections 1 to 4; ***or***

Amendment 118

Proposal for a regulation
Annex I – Article 49 – paragraph 3 – introductory part

Text proposed by the Commission	*Amendment*
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:	3. In determining whether good faith and fair dealing require a party to disclose particular information, regard ***is to*** be ***had*** to all the circumstances, including:

Amendment 119

Proposal for a regulation
Annex I – Article 49 – paragraph 3 – point e

Text proposed by the Commission	*Amendment*
(e) the ***apparent*** importance of the information to the other party; and	(e) the ***likely*** importance of the information to the other party; and

Amendment 120

Proposal for a regulation
Annex I – Article 50 a (new)

Text proposed by the Commission	*Amendment*
	Article 50a
	Third parties
	1. Where a third party for whose acts a person is responsible or who, with that person's assent, is involved in the making of a contract:
	(a) causes a mistake, or knows of, or could be expected to know of, a mistake, or
	(b) is guilty of fraud or threats or unfair exploitation,
	remedies under this Chapter shall be available as if the behaviour or knowledge had been that of the person with responsibility or giving assent.
	2. Where a third party for whose acts a person is not responsible and who does not have the person's assent to be involved in the making of a contract is guilty of fraud or threats, remedies under this Chapter shall be available if that person knew or could reasonably be expected to have known of the relevant facts, or at the time of avoidance did not act in reliance on the contract.

Amendment 121

Proposal for a regulation
Annex I – Article 55

Text proposed by the Commission	*Amendment*
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	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 ***under Chapter 16*** from the other

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.	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.

Amendment 122

Proposal for a regulation
Annex I – Article 58 – paragraph 2

Text proposed by the Commission	*Amendment*
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.	2. Where one party intended an expression used in the contract ***or equivalent conduct*** 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 ***or equivalent conduct*** is to be interpreted in the way intended by the first party.

Amendment 123

Proposal for a regulation
Annex I – Article 58 – paragraph 3 a (new)

Text proposed by the Commission	*Amendment*
	3a. Expressions used in a contract shall be interpreted in the light of the contract as a whole.

(See amendment for Article 60; the text has been amended)

Amendment 124

Proposal for a regulation
Annex I – Article 58 – paragraph 3 b (new)

Text proposed by the Commission	*Amendment*
	3b. The rules in this Chapter shall apply to the interpretation of an offer, acceptance or other unilateral statement indicating intention, or equivalent

conduct, with appropriate adaptations.

(See amendment for Article 12(3); the text has been amended)

Amendment 125

Proposal for a regulation
Annex I – Article 59 – point a

Text proposed by the Commission	*Amendment*
(a) the circumstances in which it was concluded***, including the preliminary negotiations***;	(a) the circumstances in which it was concluded;

Amendment 126

Proposal for a regulation
Annex I – Article 59 – point b

Text proposed by the Commission	*Amendment*
(b) the conduct of the parties, ***even*** subsequent to the conclusion of the contract;	(b) the conduct of the parties, ***prior, during and*** subsequent to the conclusion of the contract;

Amendment 127

Proposal for a regulation
Annex I – Article 59 – point c

Text proposed by the Commission	*Amendment*
(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;	(c) the interpretation which ***the parties have previously given*** to expressions which are identical to or similar to those used in the contract;

Amendment 128

Proposal for a regulation
Annex I – Article 60

Text proposed by the Commission	*Amendment*
Article 60	***deleted***
Reference to contract as a whole	
Expressions used in a contract are to be interpreted in the light of the contract as a whole.	

(See amendment for Article 58(3a))

Amendment 129

Proposal for a regulation
Annex I – Article 61 – paragraph 1a (new)

Text proposed by the Commission	*Amendment*
	Where a contract document in the consumer's national language has been used, that version shall be considered as the authoritative one. The parties may not, to the detriment of the consumer, exclude the application of this paragraph or derogate from or vary its effects.

Amendment 130

Proposal for a regulation
Annex I – Article 61 a (new)

Text proposed by the Commission	*Amendment*
	Article 61a
	Preference for interpretation which gives effect to contract terms
	An interpretation which gives effect to contract terms shall prevail over one which does not.

(See amendment for Article 63)

Amendment 131

Proposal for a regulation

Annex I – Article 61 b (new)

Text proposed by the Commission	*Amendment*
	Article 61b
	Interpretation in favour of consumers
	1. Where there exists any 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 in question 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.

(See amendment for Article 64)

Amendment 132

Proposal for a regulation
Annex I – Article 62 – title

Text proposed by the Commission	*Amendment*
Preference for individually negotiated ***contract terms***	***Contract terms which are not*** individually negotiated

Amendment 133

Proposal for a regulation
Annex I – Article 62 – paragraph 1 a (new)

Text proposed by the Commission	*Amendment*
	1a. Where, despite Article 61b, there exists 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.

(See amendment for Article 65)

Amendment 134

Proposal for a regulation
Annex I – Article 63

Text proposed by the Commission	*Amendment*
Article 63	***deleted***
Preference for interpretation which gives contract terms effect	
An interpretation which renders the contract terms effective prevails over one which does not.	

(See amendment for Article 61a)

Amendment 135

Proposal for a regulation
Annex I – Article 64

Text proposed by the Commission	*Amendment*
Article 64	***deleted***
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.	

(See amendment for Article 61b)

Amendment 136

Proposal for a regulation
Annex I – Article 65

Text proposed by the Commission	*Amendment*
Article 65	***deleted***

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.	

(See amendment for Article 62(1a))

Amendment 137

Proposal for a regulation
Annex I – Title II – Part III – Chapter 7 – section 1 (new) – title

Text proposed by the Commission	*Amendment*
	Section 1: General provisions

Amendment 138

Proposal for a regulation
Annex I – Article 67 – paragraph 3

Text proposed by the Commission	*Amendment*
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.	3. Usages and practices do not bind the parties to the extent to which they conflict with ***the agreement of the parties*** or any mandatory rules of the Common European Sales Law.

Amendment 139

Proposal for a regulation
Annex I – Article 68 – paragraph 2

Text proposed by the Commission	*Amendment*
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***.	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.

Amendment 140

Proposal for a regulation
Annex I – Article 69 – paragraph 1

Text proposed by the Commission	*Amendment*
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:	1. Where the trader***, or a person engaged in advertising or marketing for 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 ***the trader shows that***:
(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***	(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;
	(aa) the statement had been corrected by the time of conclusion of the contract; or
(b) the other party's decision to conclude the contract could not have been influenced by the statement.	(b) the other party's decision to conclude the contract could not have been influenced by the statement.

Amendment 141

Proposal for a regulation
Annex I – Article 69 – paragraph 2

Text proposed by the Commission	*Amendment*
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.	***deleted***

Amendment 142

Proposal for a regulation
Annex I – Article 69 – paragraph 3

Text proposed by the Commission	*Amendment*
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.	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 ***shows that***, at the time of conclusion of the contract, ***the trader*** did not know and could not be expected to have known of it.

Amendment 143

Proposal for a regulation
Annex I – Article 70

Text proposed by the Commission	*Amendment*
Article 70	***deleted***
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.	

(See amendment for paragraph 76a, the text has been amended)

Amendment 144

Proposal for a regulation
Annex I – Article 71

Text proposed by the Commission	*Amendment*
Article 71	***deleted***
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.	

(See amendment for paragraph 76b)

Amendment 145

Proposal for a regulation
Annex I – Article 74 – paragraph 2

Text proposed by the Commission	*Amendment*
2. The parties may not exclude the application of this Article or derogate from or vary its effects.	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.

Amendment 146

Proposal for a regulation
Annex I – Title II – Part III – Chapter 7 – Section 2 (new)– title

Text proposed by the Commission	*Amendment*
	Section 2: Specific provisions governing contracts between traders and consumers

Amendment 147

Proposal for a regulation
Annex I – Article 76 a (new) – title

Text proposed by the Commission	*Amendment*
	Article 76a
	Duty to raise awareness of contract terms which have not been individually negotiated

Amendment 148

Proposal for a regulation
Annex I – Article 76 a – paragraph 1 (new)

Text proposed by the Commission	*Amendment*
	1. Contract terms supplied by a trader and not individually negotiated within the meaning of Article 7 may be invoked against a consumer only if the consumer was aware of them, or if the trader took reasonable steps to draw the consumer's attention to them, before or when the contract was concluded.

(See amendment for paragraph 70(1))

Amendment 149

Proposal for a regulation
Annex I – Article 76 a – paragraph 2 (new)

Text proposed by the Commission	*Amendment*
	2. For the purposes of this Article, contract terms are not sufficiently brought to the consumer's attention unless they are:
	(a) presented in a way which is suitable to attract the attention of a consumer to their existence; and
	(b) given or made available to a consumer by a trader in a manner which provides the consumer with an opportunity to comprehend them before the contract is concluded.

(See amendment for paragraph 70(2), the text has been amended)

Amendment 150

Proposal for a regulation
Annex I – Article 76 a – paragraph 3 (new)

Text proposed by the Commission	*Amendment*
	3. Contract terms shall not be considered as having been sufficiently brought to the consumer's attention by a mere reference to them in a contract document, even if the consumer signs that document.

(See amendment for Article 70(2))

Amendment 151

Proposal for a regulation
Annex I – Article 76 a – paragraph 4 (new)

Text proposed by the Commission	*Amendment*
	4. The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from, or vary, its effects.

Amendment 152

Proposal for a regulation
Annex I – Article 76 b (new)

Text proposed by the Commission	*Amendment*
	Article 76b
	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, shall not be 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 makes the additional payment without having expressly consented to it, 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.

(See amendment for paragraph 71)

Amendment 153

Proposal for a regulation
Annex I – Article 80 – paragraph 2

Text proposed by the Commission	*Amendment*
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.	***deleted***

Amendment 154

Proposal for a regulation
Annex I – Article 82

Text proposed by the Commission	*Amendment*
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.	Where a trader supplies contract terms, it has a duty to ensure that they are drafted and communicated in plain, ***clear and*** intelligible language.

Amendment 155

Proposal for a regulation
Annex I – Article 83 – paragraph 1

Text proposed by the Commission	*Amendment*
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.	1. In a contract between a trader and a consumer, a contract term supplied by the trader 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.

Amendment 156

Proposal for a regulation
Annex I – Article 83 – paragraph 2 – point c a (new)

Text proposed by the Commission	*Amendment*
	(ca) whether it is of such a surprising nature that the consumer could not have expected the proposed term;

Amendment 157

Proposal for a regulation
Annex I – Article 84 – point b a (new)

Text proposed by the Commission	*Amendment*
	(ba) 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;

Amendment 158

Proposal for a regulation
Annex I – Article 84 – point c a (new)

Text proposed by the Commission	*Amendment*
	(ca) restrict the evidence available to the consumer or impose on the consumer a burden of proof which legally lies with the trader;

Amendment 159

Proposal for a regulation
Annex I – Article 84 – point f a (new)

Text proposed by the Commission	*Amendment*
	(fa) 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 of the alteration with reasonable notice, and that the consumer is free to terminate the contract at no cost to the consumer;

Amendment 160

Proposal for a regulation

Annex I – Article 84 – point f b (new)

Text proposed by the Commission	*Amendment*
	(fb) 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;

Amendment 161

Proposal for a regulation
Annex I – Article 84 – point f c (new)

Text proposed by the Commission	*Amendment*
	(fc) allow a trader to demand a higher price for his services than that which was fixed when the contract was concluded, unless the contract also allows for a price reduction if price change requirements have been agreed upon, the circumstances required for a price change are set out in the contract and are objectively justified and a price change cannot be brought about arbitrarily by the trader;

Amendment 162

Proposal for a regulation
Annex I – Article 84 – point g a (new)

Text proposed by the Commission	*Amendment*
	(ga) oblige a consumer to perform all his obligations under the contract where the trader fails to perform its own;

Amendment 163

Proposal for a regulation
Annex I – Article 84 – point g b (new)

Text proposed by the Commission	*Amendment*
	(gb) 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 event that the trader withdraws from or terminates the contract;

Amendment 164

Proposal for a regulation
Annex I – Article 84 – point h a (new)

Text proposed by the Commission	*Amendment*
	(ha) impose an excessive burden on the consumer in order to terminate a contract of indeterminate duration;

Amendment 165

Proposal for a regulation
Annex I – Article 85 – point a

Text proposed by the Commission	*Amendment*
(a) restrict the evidence available to the consumer or impose on the consumer a burden of proof which should legally lie with the trader;	***deleted***

Amendment 166

Proposal for a regulation
Annex I – Article 85 – point b

Text proposed by the Commission	*Amendment*
(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	***deleted***

under the contract;

Amendment 167

Proposal for a regulation
Annex I – Article 85 – point e a (new)

Text proposed by the Commission	*Amendment*
	(ea) consider specific consumer behaviour equivalent to the issue or non-issue of a statement, unless the significance of the consumer's behaviour is specifically pointed out to him at the beginning of the period intended for this purpose and the consumer has an appropriate length of time in which to make an explicit statement;

Amendment 168

Proposal for a regulation
Annex I – Article 85 – point f

Text proposed by the Commission	*Amendment*
(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;	***deleted***

Amendment 169

Proposal for a regulation
Annex I – Article 85 – point i

Text proposed by the Commission	*Amendment*
(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	***deleted***

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;	

Amendment 170

Proposal for a regulation
Annex I – Article 85 – point j

Text proposed by the Commission	*Amendment*
(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;	***deleted***

Amendment 171

Proposal for a regulation
Annex I – Article 85 – point k

Text proposed by the Commission	*Amendment*
(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***;	(k) provide that the price of goods, digital content or related services is to be determined at the time of delivery or supply;

Amendment 172

Proposal for a regulation
Annex I – Article 85 – point l

Text proposed by the Commission	*Amendment*
(l) oblige a consumer to perform all their obligations under the contract where the trader fails to perform its own;	***deleted***

Amendment 173

Proposal for a regulation
Annex I – Article 85 – point n

Text proposed by the Commission	*Amendment*
(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;	(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***, and without the consumer having expressly required the supply of an equivalent***;

Amendment 174

Proposal for a regulation
Annex I – Article 85 – point v

Text proposed by the Commission	*Amendment*
(v) impose an excessive burden on the consumer in order to terminate a contract of indeterminate duration;	***deleted***

Amendment 175

Proposal for a regulation
Annex I – Article 86 – paragraph 1 – point b

Text proposed by the Commission	*Amendment*
(b) it is of such a nature that its use grossly deviates from ***good*** commercial practice, contrary to good faith and fair dealing.	(b) it is of such a nature that its use grossly deviates from ***customary*** commercial practice, contrary to good faith and fair

dealing.

Amendment 176

Proposal for a regulation
Annex I – Article 88 – paragraph 3

Text proposed by the Commission	*Amendment*
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.	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 ***under Chapter 16*** for any loss resulting from the breach of this duty.

Amendment 177

Proposal for a regulation
Annex I – Article 89 – paragraph 3 – point c

Text proposed by the Commission	*Amendment*
(c) the aggrieved party did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances.	(c) the aggrieved party***, relying on the change of circumstances,*** did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances.

Amendment 178

Proposal for a regulation
Annex I – Article 91 – paragraph 1 – point b

Text proposed by the Commission	*Amendment*
(b) transfer the ownership of the goods, including the tangible medium on which the digital content is supplied;	(b) ***transfer or undertake to*** transfer the ownership of the goods, including the tangible medium on which the digital content is supplied;

Amendment 179

Proposal for a regulation
Annex I – Article 91 a (new)

Text proposed by the Commission	*Amendment*
	Article 91a
	Retention of title
	If a retention of title clause has been agreed, the seller shall not be obliged to transfer ownership of the goods until the buyer has fulfilled the obligation to pay the price as agreed.

Amendment 180

Proposal for a regulation
Annex I – Article 93 – paragraph 1 – point a

Text proposed by the Commission	*Amendment*
(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;	(a) in the case of a consumer sales contract or a contract ***between a trader and a consumer*** for the supply of digital content, the consumer's place of residence at the time of the conclusion of the contract;

Amendment 181

Proposal for a regulation
Annex I – Article 94 – paragraph 1 – point a

Text proposed by the Commission	*Amendment*
(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;	(a) in the case of a consumer sales contract or a contract ***between a trader and a consumer*** for the supply of digital content, by transferring the physical possession or control of the goods or the digital content to the consumer;

Amendment 182

Proposal for a regulation
Annex I – Article 95 – paragraph 1

Text proposed by the Commission	*Amendment*
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***.	1. Where the time of delivery cannot be otherwise determined, the goods or the digital content must be delivered ***within a reasonable time*** after the ***contract was concluded***.

Amendment 183

Proposal for a regulation
Annex I – Article 98

Text proposed by the Commission	*Amendment*
Article 98	***deleted***
Effect on passing of risk	
The effect of delivery on the passing of risk is regulated by Chapter 14.	

Amendment 184

Proposal for a regulation
Annex I – Article 99 – paragraph 3

Text proposed by the Commission	*Amendment*
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.	3. In a contract ***between a trader and a consumer***, any agreement derogating from the requirements of Articles 100***, 101 and*** 102 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.

Amendment 185

Proposal for a regulation

Annex I – Article 100 – point g

Text proposed by the Commission	*Amendment*
(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.	(g) possess such qualities and performance capabilities as the buyer may expect***, including appearance and the absence of defects***. When determining what the ***buyer*** 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 ***or any counter-performance***.

Amendment 186

Proposal for a regulation
Annex I – Article 102 – paragraphs 3 and 4

Text proposed by the Commission	*Amendment*
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.	3. ***Paragraph*** 2 does not apply where
	(a) in contracts between traders, 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.	***(b)*** in contracts between a trader and a consumer, the consumer knew of the rights or claims based on intellectual property at the time of the conclusion of the contract.

Amendment 187

Proposal for a regulation
Annex I – Article 103

Text proposed by the Commission	*Amendment*
Article 103	***deleted***

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.	

Amendment 188

Proposal for a regulation
Annex I – Article 104

Text proposed by the Commission	*Amendment*
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.	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 ***of that lack of conformity. In a contract between traders, that also applies if the buyer*** could not have been unaware of the lack of conformity.

Amendment 189

Proposal for a regulation
Annex I – Article 105 – paragraph 2

Text proposed by the Commission	*Amendment*
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.	2. In a contract ***between a trader and a consumer***, 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.

Amendment 190

Proposal for a regulation
Annex I – Article 105 – paragraph 4

Text proposed by the Commission	*Amendment*
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.	4. Where the digital content must be subsequently updated by the trader, ***or where the trader supplies its components separately,*** the trader must ensure that the digital content remains in conformity with the contract throughout the duration of the contract.

Amendment 191

Proposal for a regulation
Annex I – Article 106 – paragraph 1 – introductory part

Text proposed by the Commission	*Amendment*
1. In the case of non-performance of an obligation by the seller, the buyer may do any of the following:	1. In the case of non-performance of an obligation by the seller, the buyer may***, where the specific requirements for the respective remedies are met,*** do any of the following:

Amendment 192

Proposal for a regulation
Annex I – Article 106 – paragraph 3 – point a

Text proposed by the Commission	*Amendment*
(a) the buyer's rights are not subject to cure by the seller***; and***	(a) the buyer's rights are not subject to cure by the seller***, except where they relate to goods or digital content which are manufactured, produced or modified in accordance with the consumer's specifications or which are clearly personalised; or***

Amendment 193

Proposal for a regulation
Annex I – Article 107

Text proposed by the Commission	*Amendment*
Limitation of remedies for digital content	Limitation of remedies for digital content not supplied in exchange for ***payment of*** a

not supplied in exchange for a price	price ***or any other counter-performance***
	- 1. Where digital content is supplied in exchange for a counter-performance other than the payment of a price, the buyer may resort to any of the remedies referred to in Article 106(1) except for price reduction under point (d) thereof.
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.	***1.*** Where digital content is not supplied in exchange for ***any counter-performance***, 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.

Amendment 194

Proposal for a regulation
Annex I – Article 109 – paragraph 4 – point -a (new)

Text proposed by the Commission	*Amendment*
	(-a) where the buyer is a consumer, the buyer's remedies are not subject to cure by the seller under point (a) of Article 106(3);

Amendment 195

Proposal for a regulation
Annex I – Article 109 – paragraph 5

Text proposed by the Commission	*Amendment*
5. The seller has a reasonable period of time to effect cure.	5. The seller has a reasonable period of time to effect cure. ***In contracts between a trader and a consumer, that reasonable period shall not exceed 30 days.***

Amendment 196

Proposal for a regulation
Annex I – Article 109 – paragraph 7

Text proposed by the Commission	*Amendment*
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.	7. Notwithstanding cure, the buyer retains the right to claim damages ***under Chapter 16*** for delay as well as for any harm caused or not prevented by the cure.

Amendment 197

Proposal for a regulation
Annex I – Article 110 – paragraphs 1 and 2

Text proposed by the Commission	*Amendment*
1. The buyer is entitled to require performance of the seller's obligations.	1. The buyer is entitled to require performance of the seller's obligations***, which includes the remedying, free of charge, of a performance which is not in conformity with the contract***.
2. The performance which may be required includes the remedying free of charge of a performance which is not in conformity with the contract.	

Amendment 198

Proposal for a regulation
Annex I – Article 111 – paragraph 1 – introductory part

Text proposed by the Commission	*Amendment*
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:	1. Where, in a consumer sales contract, the trader is required to remedy a lack of conformity pursuant to Article ***110,*** 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:

Amendment 199

Proposal for a regulation
Annex I – Article 111 – paragraph 2

Text proposed by the Commission	*Amendment*
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.***	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***:***
	(a) the trader has not completed repair or replacement within a reasonable time, not exceeding 30 days***;***
	(b) the trader has implicitly or explicitly refused to remedy the lack of conformity;
	(c) the same fault has occurred again following repair or replacement.

Amendment 200

Proposal for a regulation
Annex I – Article 113 – paragraph 3 a (new)

Text proposed by the Commission	*Amendment*
	3a. In a contract between a trader and a consumer, the entire performance may be withheld, unless such withholding is disproportionate to the significance of the lack of conformity.

Amendment 201

Proposal for a regulation
Annex I – Article 119

Text proposed by the Commission	*Amendment*
1. The buyer loses the right to terminate under this Section if notice of termination is not given within ***a reasonable time*** from	1. The buyer loses the right to terminate under this Section if notice of termination is not given within ***two months*** from when

when the right arose or the buyer became, or could be expected to have become, aware of the non-performance, whichever is later.	the right arose or the buyer became, or***, if the buyer is a trader that buyer*** could be expected to have become, aware of the non-performance, whichever is later.
2. Paragraph 1 does not apply***:***	2. Paragraph 1 does not apply where no performance at all has been rendered.
(a) where the buyer is a consumer; or	
(b)where no performance at all has been rendered.	

Amendment 202

Proposal for a regulation
Annex I – Article 120 – paragraph 3

Text proposed by the Commission	*Amendment*
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.	3. A buyer who reduces the price cannot also recover damages ***under Chapter 16*** for the loss thereby compensated but remains entitled to damages for any further loss suffered.

Amendment 203

Proposal for a regulation
Annex I – Article 121 – paragraph 1

Text proposed by the Commission	*Amendment*
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.	1. In a contract between traders the buyer is expected to examine the goods ***or digital content***, 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.

Amendment 204

Proposal for a regulation
Annex I – Article 122 – paragraph 1 – subparagraph 1

Text proposed by the Commission	*Amendment*
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.	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. ***However, the buyer may still reduce the price or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.***

Amendment 205

Proposal for a regulation
Annex I – Article 123 – paragraph 2

Text proposed by the Commission	*Amendment*
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.	2. ***For contracts for the supply of digital content:***
	(a) point (a) of paragraph 1 does not apply where the digital content is not supplied in exchange for the payment of a price***;***
	(b) point (b) of paragraph 1 does not apply where the digital content is not supplied on a tangible medium.

Amendment 206

Proposal for a regulation
Annex I – Article 127 – paragraph 4

Text proposed by the Commission	*Amendment*
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.	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 ***under Chapter 16*** for any loss caused by that acceptance.

Amendment 207

Proposal for a regulation
Annex I – Article 131 – paragraph 1 – introductory part

Text proposed by the Commission	*Amendment*
1. In the case of a non-performance of an obligation by the buyer, the seller may do any of the following:	1. In the case of a non-performance of an obligation by the buyer, the seller may***, where the specific criteria for the respective remedies are met,*** do any of the following:

Amendment 208

Proposal for a regulation
Annex I – Article 131 – paragraph 2

Text proposed by the Commission	*Amendment*
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.	2. If the buyer's non-performance is excused, the seller may resort to any of the remedies referred to in paragraph 1 except damages.

Amendment 209

Proposal for a regulation
Annex I – Article 142 – paragraph 3

Text proposed by the Commission	*Amendment*
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.	***deleted***

Amendment 210

Proposal for a regulation
Annex I – Article 143 – title

Text proposed by the Commission	*Amendment*
Time when risk passes	***Passing of risk in contracts between traders***

Amendment 211

Proposal for a regulation
Annex I – Article 143 – paragraph 2

Text proposed by the Commission	*Amendment*
2. ***Paragraph 1 is subject to Articles 144, 145 and 146.***	2. ***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.*** ***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.***

(See amendment for Article 144)

Amendment 212

Proposal for a regulation
Annex I – Article 143 – paragraph 2 a (new)

Text proposed by the Commission	*Amendment*
	2a. In a contract of sale which involves the carriage of goods, regardless of whether the seller is authorised to retain documents controlling the disposition of the goods:

(a) 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;

(b) 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.

(See amendment for Article 145; structure has been changed)

Amendment 213

Proposal for a regulation
Annex I – Article 143 – paragraph 2 b (new)

Text proposed by the Commission	*Amendment*
	2b. Where goods are sold in transit the risk passes to the buyer as from the time when the goods were handed over to the first carrier or when the contract is concluded, depending on the circumstances. Risk does not pass to the buyer if, at the time of 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.

(See amendment for Article 146; text has been amended)

Amendment 214

Proposal for a regulation
Annex I – Article 144

Text proposed by the Commission	*Amendment*
Article 144	***deleted***
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.

(See amendment for Article 143(2))

Amendment 215

Proposal for a regulation
Annex I – Article 145

Text proposed by the Commission	*Amendment*
Article 145	***deleted***
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.	

(See amendment for Article 143(3))

Amendment 216

Proposal for a regulation
Annex I – Article 146

Text proposed by the Commission	*Amendment*
Article 146	***deleted***
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.	

(See amendment for Article 143(4))

Amendment 218

Proposal for a regulation
Annex I – Article 155 – paragraph 1 – point e

Text proposed by the Commission	*Amendment*
(e) to claim damages.	(e) to claim damages ***under Chapter 16***.

Amendment 219

Proposal for a regulation
Annex I – Article 155 – paragraph 2

Text proposed by the Commission	*Amendment*
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***.	2. Without prejudice to paragraph 3, the customer's remedies are subject to a right of the service provider to cure.

Amendment 220

Proposal for a regulation
Annex I – Article 155 – paragraph 5 – point a

Text proposed by the Commission	*Amendment*
(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;	***deleted***

Amendment 221

Proposal for a regulation
Annex I – Article 155 – paragraph 5 – point b

Text proposed by the Commission	*Amendment*
(b) in relation to the remedying of a non-conforming performance Articles 111 and 112 do not apply; and	***deleted***

Amendment 222

Proposal for a regulation
Annex I – Article 157 – paragraph 1 – point d

Text proposed by the Commission	*Amendment*
(d) to claim interest on the price or damages.	(d) to claim interest on the price or damages ***under Chapter 16***.

Amendment 223

Proposal for a regulation
Annex I – Article 172 – title

Text proposed by the Commission	*Amendment*
Restitution ***on*** avoidance ***or termination***	Restitution ***in the event of*** avoidance***, termination or invalidity***

Amendment 224

Proposal for a regulation
Annex I – Article 172 – paragraph 1

Text proposed by the Commission	*Amendment*
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.	1. Where a contract ***or part of a contract*** is avoided or terminated by either party ***or is invalid or not binding for reasons other than avoidance or termination***, each party is obliged to return what that party (***"***the recipient***"***) has received from the other party ***under the contract affected or part thereof***.

Amendment 225

Proposal for a regulation
Annex I – Article 172 – paragraph 2 a (new)

Text proposed by the Commission	*Amendment*
	2a. Restitution shall be made without undue delay and in any event not later than 14 days from receipt of the notice of avoidance or termination. Where the recipient is a consumer, this deadline shall be considered met if the consumer takes the necessary steps before the period of 14 days has expired.

Amendment 226

Proposal for a regulation
Annex I – Article 172 – paragraph 2 b (new)

Text proposed by the Commission	*Amendment*
	2b. The recipient bears the cost of returning what was received.

Amendment 227

Proposal for a regulation
Annex I – Article 172 – paragraph 2 c (new)

Text proposed by the Commission	*Amendment*
	2c. A party may withhold the performance of an obligation to return, where that party has a legitimate interest in doing so, for instance where this is necessary in order to ascertain the existence of a lack of conformity.

Amendment 228

Proposal for a regulation
Annex I – Article 172 – paragraph 2 d (new)

Text proposed by the Commission	*Amendment*
	2d. In the case of non-performance of an obligation to return or to pay under this Chapter by one party, the other party may claim damages under Articles 159 to 163.

Amendment 229

Proposal for a regulation
Annex I – Article 172 a (new) – title

Text proposed by the Commission	*Amendment*
	Article 172a
	Returning digital content and returning the counter-performance in the case of supply of digital content

Amendment 230

Proposal for a regulation
Annex I – Article 172 a (new) – paragraph 1

Text proposed by the Commission	*Amendment*
	1. Digital content shall only be considered returnable where:
	(a) the digital content was supplied on a tangible medium and the medium is still sealed or the seller did not seal it before

delivery; or

(b) it is otherwise clear that the recipient who sends back a tangible medium cannot have retained a usable copy of the digital content; or

(c) the seller can, without significant effort or expense, prevent any further use of the digital content on the part of the recipient, for instance by deleting the recipient's user account.

Amendment 231

Proposal for a regulation
Annex I – Article 172 a (new) – paragraph 2

Text proposed by the Commission	*Amendment*
	2. The recipient of digital content supplied on a tangible medium which is returnable in accordance with points (a) and (b) of paragraph 1 shall be considered to have fulfilled the obligation to return by sending back the tangible medium.

Amendment 232

Proposal for a regulation
Annex I – Article 172 a (new) – paragraph 3

Text proposed by the Commission	*Amendment*
	3. Where digital content is supplied in exchange for a counter-performance other than the payment of a price, such as the provision of personal data, and that counter-performance cannot be returned, the recipient of the counter-performance shall refrain from further use of what was received, for instance by deleting received personal data. The consumer shall be informed of the deletion of personal data.

Amendment 233

Proposal for a regulation

Annex I – Article 173 – paragraph 1

Text proposed by the Commission	*Amendment*
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.	1. Where what was received, including fruits where relevant, cannot be returned, 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.

Amendment 234

Proposal for a regulation
Annex I – Article 173 – paragraph 5

Text proposed by the Commission	*Amendment*
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.	***deleted***

Amendment 235

Proposal for a regulation
Annex I – Article 173 – paragraph 6

Text proposed by the Commission	*Amendment*
6. ***In the case of*** digital content ***which*** is not supplied in exchange for the payment	6. ***Where the*** digital content is not supplied in exchange for the payment of a price, ***but***

of a price, ***no restitution will be made***.	***for a counter-performance other than the payment of a price or without counter-performance, and the digital content cannot be considered as returnable under Article 172a(1), the recipient of the digital content does not have to pay its monetary value***.

Amendment 236

Proposal for a regulation
Annex I – Article 173 – paragraph 6 a (new)

Text proposed by the Commission	*Amendment*
	6a. Without prejudice to Article 172a(3), where the digital content is supplied in exchange for a counter-performance other than the payment of a price and that counter-performance cannot be returned, the recipient of the counter-performance does not have to pay its monetary value.

Amendment 237

Proposal for a regulation
Annex I – Article 174 – title

Text proposed by the Commission	*Amendment*
Payment for use and interest on money received	Payment for use and interest on money received ***and diminution in value***

Amendment 238

Proposal for a regulation
Annex I – Article 174 – paragraph 1

Text proposed by the Commission	*Amendment*
1. A recipient who has made use of goods must pay the other party the monetary value of that use for any period where:	1. A recipient who has made use of goods ***or digital content*** 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;	(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	(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.	(c) having regard to the nature of the goods ***or digital content***, 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 ***or digital content*** for that period.

Amendment 239

Proposal for a regulation
Annex I – Article 174 – paragraph 3

Text proposed by the Commission	*Amendment*
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.	3. For the purposes of this Chapter, a recipient is not obliged to pay for use of goods ***or digital content*** received or interest on money received in any circumstances other than those set out in paragraphs 1***, 1a*** and 2.

Amendment 240

Proposal for a regulation
Annex I – Article 174 – paragraph 3 a (new)

Text proposed by the Commission	*Amendment*
	3a. The recipient is liable under Articles 159 to 163 for any diminution in the value of the goods, the digital content or their fruits to the extent that the diminishment in value exceeds depreciation through regular use.

Amendment 241

Proposal for a regulation
Annex I – Article 174 – paragraph 3 b (new)

Text proposed by the Commission	*Amendment*
	3b. The payment for use or diminution in value shall not exceed the price agreed for the goods or the digital content.

Amendment 242

Proposal for a regulation
Annex I – Article 174 – paragraph 3 c (new)

Text proposed by the Commission	*Amendment*
	3c. Where the digital content is not supplied in exchange for the payment of a price, but for a counter-performance other than the payment of a price or without any counter-performance, the recipient of the digital content does not have to pay for use or diminished value.

Amendment 243

Proposal for a regulation
Annex I – Article 174 – paragraph 3 d (new)

Text proposed by the Commission	*Amendment*
	3d. Without prejudice to Article 172a(3), where the digital content is supplied in exchange for a counter-performance other than the payment of a price, the recipient of the counter-performance does not have to pay for use or diminished value of what was received.

Amendment 244

Proposal for a regulation
Annex I – Article 175 – paragraph 1

Text proposed by the Commission	*Amendment*
1. Where a recipient has incurred expenditure on goods or digital content, the recipient is entitled to compensation to the	1. Where a recipient has incurred expenditure on goods or digital content ***or the fruits thereof***, the recipient is entitled

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.	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.

Amendment 245

Proposal for a regulation
Annex I – Article 175 – paragraph 2

Text proposed by the Commission	*Amendment*
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.	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***, or the fruits thereof,*** from being lost or diminished in value, provided that the recipient had no opportunity to ask the other party for advice.

Amendment 246

Proposal for a regulation
Annex I – Article 177

Text proposed by the Commission	*Amendment*
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.	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***, before notice of avoidance or termination is given***.

Amendment 247

Proposal for a regulation
Annex I – Article 177 a (new)

Text proposed by the Commission	*Amendment*
	Article 177a

	Commercial guarantees
	1. A commercial guarantee shall be binding on the guarantor under the conditions laid down in the guarantee statement. In the absence of a guarantee statement, or if the guarantee statement is less advantageous than advertised, the commercial guarantee shall be binding under the conditions laid down in the advertising relating to the commercial guarantee.
	2. The guarantee statement shall be drafted in plain, intelligible language and shall be legible. It shall be drafted in the language of the contract concluded with the consumer and shall include the following:
	(a) a statement of the rights of the consumer, as provided for in Chapter 11, and a clear statement that those rights are not affected by the commercial guarantee, and
	(b) the terms of the commercial guarantee, in particular those relating to its duration, transferability and territorial scope, the name and address of the guarantor and, if different from the guarantor, the person against whom any claim is to be made and the procedure by which the claim is to be made.
	3. If not otherwise provided for in the guarantee document, the guarantee is also binding without acceptance in favour of every owner of the goods within the duration of the guarantee.
	4. At the consumer's request, the trader shall make the guarantee statement available in a durable medium.
	5. Non compliance with paragraph 2, 3 or 4 shall not affect the validity of the guarantee.

Amendment 248

Proposal for a regulation
Annex I – Article 178

Text proposed by the Commission	*Amendment*
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.	A right to enforce performance of an obligation, and any right ancillary to such a right, ***including the right to any remedy for non-performance except withholding performance,*** is subject to prescription by the expiry of a period of time in accordance with this Chapter.

Amendment 249

Proposal for a regulation
Annex I – Article 179 – paragraph 2

Text proposed by the Commission	*Amendment*
2. The long period of prescription is ***ten*** years or, in the case of a right to damages for personal injuries, thirty years.	2. The long period of prescription is ***six*** years or, in the case of a right to damages for personal injuries, thirty years.

Amendment 250

Proposal for a regulation
Annex I – Article 179 – paragraph 2 a (new)

Text proposed by the Commission	*Amendment*
	2a. Prescription takes effect when either of the two periods has expired, whichever is the earlier.

Amendment 251

Proposal for a regulation
Annex I – Article -181

Text proposed by the Commission	*Amendment*
	Article -181
	Suspension in the case of repair or replacement
	1. Where a lack of conformity is remedied by repair or replacement, the running of

	the short period of prescription is suspended from the time when the creditor has informed the debtor of the lack of conformity.
	2. Suspension lasts until the time when the non-conforming performance has been remedied.

Amendment 252

Proposal for a regulation
Annex I – Article 183 a (new)

Text proposed by the Commission	*Amendment*
	Article 183a
	Suspension in cases of force majeure
	1. The running of the short period of prescription shall be suspended for the period during which the creditor is prevented from pursuing proceedings to assert the right by an impediment which is beyond the creditor's control and which the creditor could not reasonably have been expected to avoid or overcome.
	2. Paragraph 1 shall apply only if the impediment arises, or subsists, within the last six months of the prescription period.
	3. Where the duration or nature of the impediment is such that it would be unreasonable to expect the creditor to take proceedings to assert the right within the part of the period of prescription which has still to run after the suspension comes to an end, the period of prescription shall not expire before six months have passed after the impediment was removed.

Amendment 253

Proposal for a regulation
Title III (new) – title

Text proposed by the Commission	*Amendment*
	Title III
	Flanking measures

Amendment 254

Proposal for a regulation
Annex I – Article 186 a (new) – paragraph 1

Text proposed by the Commission	*Amendment*
	Article 186a
	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.

Amendment 255

Proposal for a regulation
Annex I – Article 186 a (new) – paragraph 2

Text proposed by the Commission	*Amendment*
	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. It shall be fully systematised and easily searchable.

Amendment 256

Proposal for a regulation
Annex I – Article 186 a (new) – paragraph 3

Text proposed by the Commission	*Amendment*
	3. Judgments which are communicated under paragraph 1 shall be accompanied by a standard judgment summary comprising the following sections:
	(a) the issue and the relevant article(s) of the Common European Sales Law;
	(b) a brief summary of the facts;
	(c) a brief summary of the main arguments;
	(d) the decision; and
	(e) the reasons for the decision, clearly stating the principle decided.

Amendment 257

Proposal for a regulation
Annex I – Article 186 b (new)

Text proposed by the Commission	*Amendment*
	Article 186b
	Alternative dispute resolution
	1. In contracts between a consumer and a trader, parties are encouraged to consider submitting disputes arising from a contract for which they have agreed to use the Common European Sales Law to an ADR entity within the meaning of point (h) of Article 4(1) of Directive 2013/11/EU.
	2. This Article shall not exclude or restrict the parties' right to refer their case at any moment to a court or tribunal instead of submitting their dispute to an ADR entity.

Amendment 258

Proposal for a regulation
Annex I – Article 186 c (new)

Text proposed by the Commission	*Amendment*
	Article 186c
	Development of 'European model contract terms'
	1. As soon as possible and at the latest within three months of the entry into force of this Regulation, the Commission shall set up an expert group to assist it in developing 'European model contract terms' based on, and complementary to, the Common European Sales Law, and to foster its practical application.
	2. The Commission shall endeavour, with the assistance of the expert group, to present first European model contract terms within [xxx] of the entry into force of this Regulation.
	3. The expert group shall comprise members representing, in particular, the interests of users of the Common Sales Law within the Union. It may decide to set up specialist sub-groups to consider separate areas of commercial activity.

Amendment 259

Proposal for a regulation
Title IV (new) – title

Text proposed by the Commission	*Amendment*
	Title IV
	Final provisions

Amendment 260

Proposal for a regulation
Annex I – Article 186 d (new)

Text proposed by the Commission	*Amendment*
	Article 186d
	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, covering in particular the level of acceptance of the Common European Sales Law, the extent to which its provisions have given rise to litigation and 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, inter alia, the need to extend the scope of the Common European Sales Law in relation to business-to-business contracts, market and technological developments in respect of digital content and future developments of the Union acquis. Particular consideration shall further be given to whether the limitation in respect of distance, and in particular online contracts, remains appropriate or whether it may be feasible to widen its scope to cover, inter alia, on-premises contracts.

(See amendment for Article 15; the text has been amended)

Amendment 261

Proposal for a regulation
Annex I – Article 186 e (new)

Text proposed by the Commission	*Amendment*
	Article 186e
	Amendment to Regulation (EC) No

	2006/2004
	In the Annex to Regulation (EC) No 2006/2004[1], the following point shall be added:
	'18. Regulation of the European Parliament and of the Council on a Common European Sales Law (OJ L ...).'
	[1] Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation) (OJ L 364, 9.12.2004, p. 1).

Amendment 262

Proposal for a regulation
Annex I – Article 186 f (new)

Text proposed by the Commission	*Amendment*
	Article 186f
	Entry into force and application
	1. This Regulation shall enter into force on the twentieth 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.

(See amendment for Article 16)

Amendment 263

Proposal for a regulation
Annex I – Appendix 1 – point 5 – point b – indent 4

Text proposed by the Commission	*Amendment*
– 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."	***deleted***

Amendment 264

Proposal for a regulation
Annex II – Your rights before signing the contract

Text proposed by the Commission	*Amendment*
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.	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. You are entitled to damages if this information is incomplete or wrong.

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