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Common European Sales Law

A critique of its rationales, functions, and unanswered questions

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Abstract

Purpose – This article seeks to take a critical look at the proposed Common European Sales Law (CESL).

Design/methodology/approach – The article looks at the rationales given to support the enactment of the CESL. The approach is critical in nature seeking to vet the plausibility of the rationales given for a new regulation The article also takes a critical look at the CESL's structure and trilogy of coverage – sale of goods, supply of digital content, and supply of services.

Findings – The article exposes some of the shortcomings of the CESL and the dangers to substantive private law of crafting a regulation based on political feasibility.

Research limitations/implications – The CESL as proposed offers some innovative ideas in areas of the bifurcation of businesses into large and small to medium-sized enterprises (SMEs), as well as rules covering digital content and the supply of trade-related services. In the end, the analysis suggests a more thorough review is needed to better understand the CESL's interrelationship with the Convention on Contracts for the International Sales Law (CISG) and EU consumer protection law.

Practical implications – Further analysis is needed and unanswered questions need to be answered prior to the enactment of the CESL into law. A practical first step would to begin with a more targeted law focused on internet trading and licensing contracts.

Originality/value – This article questions the rationales given for the enactment of an ambitious new regulation covering disparate areas of sale of goods, supplying (licensing) of digital content, trade-related services, and consumer protection. It further questions the rationality and practicality of the creation of the designation of SMEs as types of businesses in need of extra protections not currently provided by contract law's general policing doctrines.

Keywords Common European Sales Law (CESL),
Convention on Contracts for the International Sale of Goods (CISG), European Union cross-borders sales, Internet trading, Consumer protection, Opt-in instruments, EU Acquis, Small to medium-sized enterprises, Regulation

Paper type Research paper

1. Introduction

The Proposed Common European Sales Law (CESL) is the latest entry into the area of supranational contract and sales law[1]. This provides an opportunity to assess the state of both hard and soft supranational private law. Does the current mix of hard – Convention on Contracts for the International Sale of Goods (CISG) and soft laws – UNIDROIT Principles of International Commercial Contracts ("Principles") and Principles of European

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Contract Law (PECL) provide sufficient avenues to structure international business transactions? Does the CESL fill a void in these established choices of law or does it add an unneeded level of complexity to an already crowded field? What is the likelihood of confusion over what may be interpreted as overlapping legal regimes? This Article will examine the legal nature, objectives, and functions the CESL is expected to serve. This examination will allow for a tentative assessment of a number of important issues including the influence of the CISG on the drafting of the CESL and any resulting redundancies; and whether autonomous interpretations of the CESL should diverge with the CISG? Will judges and arbitrators be tempted to use the CESL in applying the CISG, especially in areas where the CISG lacks sufficient clarity and certainty, such as the conflicting general terms and conditions, the remedy of specific performance, the scope of damages and interest, and the role of good faith in the interpretation, performance, and enforcement of contracts?

Article 1 of CESL restates the fundamental principle of contract law – the parties are "free to conclude a contract and to determine its contents". The principle of freedom of contract or private autonomy is the core rationale for all contract laws. In reviewing a new contract law instrument, the key analysis is how that core principle is limited. Once again, Article 1 continues by saying that the freedom enunciated above is "subject to any applicable mandatory rules". Therefore, the most fruitful analysis looks to determine the rationales for restrictions on complete freedom of contract which include – freedom to contract where the agreed terms are freely enforceable (no prohibitive terms) and freedom from contract (no mandatory terms) are to be automatically implied. In this secondary sense, the second order and over-riding rationale for the CESL is that its numerous mandatory rules are meant to protect weaker parties in the sale or supply of goods, digital content, and related services. Traditionally, such protections were meant to protect consumers in business-to-consumer transactions (B2C). The various EU Directives that intervene into the freedom of contract principle attest to the perceived need to protect consumers from overreaching by businesses. The overreaching is made possible by the superior bargaining power of the business due to the uniqueness of its products, superior information, and, at times, the lack of sophistication of the consumer. This lack of "sophistication" is often due to bounded rationality (limited information or time constraints).

The protection rationale is extended to certain business-to-business (B2B) transactions as well. This is the true novelty found in CESL rules. The CESL carves out a sub-set of businesses and designates them as small-to-medium sized enterprises (SMEs). In most legal systems, there are only the traditional classifications of B2C transactions and commercial or merchant-to-merchant (B2B) transactions. However, some legal systems, such as the German BGB, intervene to police unfair terms in both consumer and commercial transactions. Other legal regimes, such as the American Uniform Commercial Code's (UCC) Article 2 (sale of goods) provide policing doctrines that control all sales of goods transactions. It codifies the principle of unconscionability that allows courts to rescind or reform overly one-sided terms[2]. This doctrine is not limited to consumer transactions and, therefore, applies to merchant-to-merchant transactions as well. However, in reality, courts have only applied the principle to consumer transactions. Neither the German BGB nor the American UCC recognizes the classification of SMEs. The issue of the designation of SMEs as unique types of businesses in need of protection will be further discussed later in this article.

The article begins with a review of the evolution of EU initiatives leading to the proposed CESL. This will include an analysis of the purposes or rationales, express or implied, for the decision to focus on sales law and further, to focus on consumer and SME protections, as well as internet trading and rules for digital content and related services. Of course, part of the answer, is to protect the proposed regulation from the attack of its coverage being outside the competency of the EU. Thus, the Feasibility Study[3] and Explanatory Memorandum[4] focus on the perceived barriers to transborder trade in order to support the claim that CESL advances the goal of creating a fully functioning internal market. These documents provide a plausible case for the "constitutionality" of CESL. Nonetheless, Part 2 will critique the "stated" rationales for the CESL.

Part 3 compares the CESL with the CISG. It examines the scope of both instruments and explores the areas in which CESL is said to cover new ground. This exploration looks at CESL rules to determine their uniqueness relative to CISG rules. This will form the basis for answering the following question: does CESL respond to a sufficient need not currently provided by the CISG or national sales laws? This question is doubly important because the answer will likely be predictive of whether the CESL will become a meaningful opt-in instrument. Part 4 examines the "problems" related to the process of developing the CESL, as well as some unresolved substantive issues and problems relative to CESL's coverage. Part 5 confronts the issues of the impact of CESL on the EU Consumer "Acquis" and the idea that CESL is part of a strategy that will lead to a broad EC Contract Code or an even a broader EU Civil Code. Finally, Part 6 briefly revisits the interrelationship between CESL and the CISG. It also ventures a prognostication of the likelihood that CESL will be a meaningful addition to the marketplace of private law in the event it is enacted into law.

2. CESL: history and rationales

This part briefly reviews the history and process leading up to the publication of CESL. It then analyzes the rationales – expressed and implied – put forward to justify the need for the enactment of CESL.

2.1 History

The CESL can be seen as a progression or culmination of a process in the development of hard and soft laws whose goal is greater harmonization in European and international contract and sales laws. The success of the CISG, measured on its rapid adoption among European countries, helped provide the motivation and structural foundation for new harmonization efforts. The PECL (Lando *et al.*, 2001/2003) and UNIDROIT Principles of International Commercial Contracts (UNIDROIT, 1994) can both be seen as the progeny of the CISG. The CISG showed by its adoption in Europe that additional trans-European and international model or soft laws could help advance the harmonization of private law. Subsequently, the Study Group on a European Civil Code (Principles of European Law)[5] and the "Acquis" Research Group on Existing EC Private Law[6] embarked on the study of more ambitious schemes – the former concerned with the feasibility of a comprehensive civil code for the EU and the latter concerned with the organization of the consumer law "Acquis" into a coherent whole. In the end, these two efforts provided the fodder for the all-encompassing Draft Common Frame of Reference (DCFR) issued in 2009 (von Bar *et al.*, 2009). The crucial development for the CESL was the 2011 publication of a feasibility study entitled

"A European Contract Law for consumers and businesses". Publication of the Results of the Feasibility Study carried out by the Expert Group on European Contract Law for Stakeholders' and Legal Practitioners' Feedback[3].

It is out of this broadly titled instrument – "A European Contract Law for consumers and businesses" – that the CESL evolved.

Starting points in the drafting of the CESL were the CISG, PECL, and the DCFR. This helps explain the general contract law texture of some of its provisions and the numerous CESL provisions that are nearly identical to parallel provisions found in the CISG, especially in the areas of contract formation and contractual duties. In the end, the structure of CESL is best understood as a body of general contract rules with the sales or supply rules as subsequent add-ons (MacQueen, 2012). As such, CESL is a combination of sales law rules and general contract law rules. Also, the influence of the "Acquis" Project – aimed at providing an overall framework for the long list of EU consumer protection directives – is seen in the fact that CESL looks to pre-empt the Directives with a single set of consumer protection rules.

2.2 Purposes and rationales: express and implied

This part explores the stated rationales or purposes for the creation of the CESL and offers an initial critique of the stated rationales. The second part examines some of the more unique substantive rules provided in the CESL for commercial and consumer transactions[7]. It provides a critique of whether these "new" rules justify the enactment of the CESL as an alternative national law.

The core or necessary rationale given for the CESL is the standard rationale given to support EU competency – the development of the internal market. The sub-rationales for any given law, especially in the area of private law, must relate to this core rationale. The higher the threshold in advancing the core rationale the stronger the argument in favor of EU competency, and most of the time, but not always, the lesser the resistance based upon arguments in favor of national sovereignty. The rationales for the CESL can be divided into the two major coverage areas: B2SME and B2C transactions. The CESL is not intended to cover B2B transactions as such, but it does cover transactions between large businesses and small to medium sized businesses or SMEs. The rationales given for purposes of B2SME include:

> 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 SMEs, 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[8].

First, it is necessary to understand what distinguishes a SME from businesses in general. Article 7(2) of the CESL defines a SME as an enterprise with less than 250 employees and less than 50 million € annual turnover or less than 43 million € annual balance sheet total. Given this complexity in determining whether a company possesses SME status is problematic. If a company begins a contract as an SME and grows beyond SME status during the course of the contract does the company retain SME status? If a large business

enters a contract and subsequently downsizes to SME size will that company be able to claim SME protections under the CESL? It is doubtful that businesses looking at such a definition will want to bother with calculating whether they qualify as an SME.

The rationales stated above – the facilitation of cross-border trading by SMEs, if not conceptually flawed, lacks explanatory power. The obvious questions raised by the above given rationales include the degree that transaction costs are increased for purposes of "negotiating and applying foreign law," whether these costs are actually borne by the SME in B2B transactions, the degree that different national laws significantly deter trade among EU countries, and, finally, whether the application of various national sales laws in B2C transactions is an important obstacle to trade. Despite the empirical evidence provided by the Eurobarometers' surveys, businesspersons – whether large or SME – rarely dicker over choice of law. Instead, they almost completely focus on the profit-making goals of their contracts. This is supported by the fact that most business contracts fail to include customized arbitration or *force majeure* clauses. If issues like law, dispute resolution, and choice of law are rarely customized it is because they are generally not a subject to serious negotiation. These important clauses should be negotiated and customized. In fact, they rarely are in sale of goods transactions.

A number of points can be made here for the lack of necessity for the enactment of CESL. First, a national law exists in 23 of the 27 EU countires – CISG – that the parties are free to use not only with EU business partners, but for partners from all over the world. It is true that the CISG is not as comprehensive as it should be, but it should also be noted that a deep jurisprudence is in place that provides interpretive guidance to businesspersons and their lawyers, and is some ways have expanded its scope through implication.

Second, most sales transactions involve the exchange of forms. Unfortunately, in many of these forms choice of law, arbitration, and force majeure classes are found in the fine print terms or general conditions. In some cases, these provisions are in conflict in the exchanged forms. In such cases, the opt-in nature of the CESL would prevent its use since it requires agreement of the parties. However, it should be noted that most internet transactions, mostly involving B2C sales, are single form transactions involving the consumer agreeing to seller's terms by "clicking": "I Agree".

Third, the need to unify EU consumer protection laws is best done by reforming the current Consumer Directive. Although this would leave the issue of the existense of more restrictive consumer protections found in different Member states. The question remains how big of a problem does the existence of stricter national laws present? The Law Commissions' Advice to UK Government notes that CESL:

> [. . .] remedies for non- conformity and unfair terms protection are not necessarily very different across member states. This is mainly due to the fact that most national laws follow the basic structure of the EU Consumer Sales and Unfair Terms Directives[9].

One statement in the above state rationales is worth pointing out: "for SME[s], these additional transaction costs [of different national sales laws] may even be disproportionate to the value of the transaction". This is a rather bold and somewhat counterintuitive rationale for a common sales law (Civitatus, Law and the State, 2011). These types of transactions would have to involve a really small company or very low cost products, and, as such, the seller is not likely to be cognizant of choice of law or care.

In the area of B2C trading, the rationale given for a common sales law is as follows:

> While cross-border shopping could bring substantial economic advantages of more and better offers, the majority of European consumers shop only domestically. One of the important reasons for this situation is that, because of the differences of national laws consumers are often uncertain about their rights in cross-border situations. For example, one of their main concerns is what remedies they have when a product purchased from another Member State is not in conformity with the contract. Many consumers are therefore discouraged to purchase outside their domestic market[10].

This rationale is even less plausible given that consumers are likely to be less sophisticated than SMEs. Does the average consumer really focus on the possible remedies they would have available to themselves when purchasing a consumer item? The Impact Assessment gives a rather far-fetched example of the diminishment of cross-border consumer purchases due to the existence of different national sales laws. The example given in the Assessment is duplicated in Exhibit 1.

Exhibit 1. Example: a consumer uncertain about his rights is dissuaded from cross-border shopping. Manuel is Portuguese and he lives in Lisbon. His partner Joana is a student, who received an Erasmus scholarship and is spending a semester in Berlin. On her birthday she will have to study in Berlin for an exam. Manuel wants to surprise her with a present. He decides to give Joana a watch and finds a beautiful watch for €150 in a French online shop. Luckily they deliver to Germany. However, Manuel has doubts: what if the watch gets damaged on the way and does not work? Would Joana have the right to return the watch, like they do in Portugal? Would she herself have to pay the additional delivery costs for returning the watch? Or if she really wanted to keep the watch, could she replace it? If so, who would bear the costs for the replacement? With all those questions in mind, Manuel thinks it is better to be safe than sorry. He decides to buy Joana a present in Lisbon and to give it to her in person when they see each other in two months (European Commission, 2011j).

Really! Does a consumer really think this way? Granted, if the same product is available in one's home country a consumer is likely to feel more comfortable purchasing domestically. But, if it is not easily available domestically a consumer is unlikely to care about what remedies are available. Even if better remedies are available in Portugal relative to France, which is doubtful, what are the consumer's realistic options in the event that the Portuguese merchant fails to honor the expressed remedies? Is it practical for a consumer to bring litigation over a €150 watch whether purcahsed domestically or in another country? The average consumer is more likely to be influenced by differences in shipping costs than on the availabity of remedies.

In the end, there are numerous rationales that can be put forward to support a common European sales law, such as, harmonization of sales law rules throughout the EU, modernization of rules to address issues relating to internet trading, simplification of consumer protection law, greater certainty and clarity of sales law rules, and the construction of a general contract law embedded in the CESL that can be applied in the future to other specialized types of contracts. The question remains whether the CESL is such a law?

Regarding the uniformity of law, the CESL captures the four EU countries not party to the CISG – UK, Portugal, Ireland, and Malta. In this sense, a single EU sales law makes sense. However, since it is an opt-in instrument, the same type of uniformity is already available in that a party from a non-CISG country is free to opt into the CISG.

The argument that the CESL can be viewed as a modernization of sales law to take better account of internet trading is rationally appealing, but substantively wanting. It leaves out an important area of internet trading, such as, the licensing of technology.

3. CESL and CISG

This part compares the relative scopes of the CISG and CESL, as well as analyzing the uniqueness of CESL's rules.

3.1 It is a matter of scope

CESL, unlike the CISG and national sales laws, is an opt-in or optional instrument. The contracting parties would have to make a choice of law designating CESL as applicable law. CESL, like the CISG, covers only transborder transactions, but CESL places additional emphasis on online or internet transactions. The CISG only covers commercial sales transactions while CESL covers both B2B and B2C transactions. The creation of parallel national laws, however, may cause moral hazard problems. A trader or business in a transborder B2C transaction would have the incentive of selecting CESL in cases where domestic consumer protection laws are stricter than those provided in CESL[11]. In turn, consumers in a B2C transaction would lose the benefits of their stricter national consumer protection laws.

CESL extends the scope of the CISG's coverage of international sales of goods to include "cross-border" contracts for the sale of goods, supply of "digital content", and for the supply of related services. It notes that 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[12]. The CESL contains 171 Articles to 88 articles in the CISG[13]. This extension at first blush seems to cover new territory, but, in fact, the coverage of the CISG is not limited merely to the sale of goods. First, "digital content" despite the issue of intangibility can be viewed as a good, given it is part of an electronic medium, and, therefore, covered by the CISG. Second, the CISG implicitly stipulates that services related to the sale of goods are covered by the CISG unless the services make up a predominant part of the transaction[14].

The CESL covers consumer transactions and some B2B transactions. But, the CISG technically covers certain consumer transactions as well. The CISG states that the CISG does not cover "goods bought for private use"[15]. But, this is not an absolute restriction since it only applies in cases where the seller "neither knew nor ought to have known the goods were bought for private use[15]". Lacking that knowledge, a consumer transaction can be covered under the CISG. Given that an increasing amount of consumer and commercial transactions are conducted over the internet, the true identity of the buyer may be unclear. In such a case, the presumption would be that the sale is covered under the CISG. The consumer-buyer would have the burden of proving that the seller knew or should have known that it was dealing with a consumer. Professor Robert Koch gives the following example. If a university professor buys a book online for shipment to his home address, then the transaction would not be covered under the CISG. However, if the order goes through on university letterhead for deliver at the professor's university office, then an argument can be made that such a transaction is covered under the CISG (Robert, 2012).

The rationales behind the CESL are similar to those given for the CISG and for existing soft laws. The CESL aims to lower the legal barriers to European sales transactions. This aim feeds into the standard rubric that such laws are appropriate because they

work to improve the functioning of the internal market and, thereby, rationalizing its intervention into on national law. The CISG stated rationale is to contribute to the removal of legal barriers to the international sale of goods. The difference being that the CISG does not impede on domestic law since it is voluntarily adopted as a part of a country's domestic law. 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.

3.2 CESL rules: covering new ground

The CESL does cover some new ground. The question becomes is it ground worth covering. CESL enacted as a regulation would have direct application to EU member states. Is there is a potential conflict of having two national laws in B2SME transborder transactions – CISG and CESL? If the CESL is viewed as a complimentary law to the CISG does the fact that both laws call for autonomous interpretations likely to cause confusion and unneeded complexity if similar provisions are interpreted differently under the two laws? Additionally, in cases where the CESL provides greater clarity, will future courts use CESL jurisprudence to aid them in the interpretation of the CISG? This would be in areas clearly covered by the CISG, but for which the CISG does not provide a clear rule. Should the more detailed and clearer rules of the CESL be used as surrogates? This would be antithetical to the notion of autonomous interpretation. It would also symbolize a lesser commitment by European countries to the advancement of the CISG.

Still, The CESL covers areas in sales law not covered in the CISG. Mostly, it expressly recognizes an immutable duty of good faith and fair dealing applicable to all transactions, while the CISG states that the duty only applies in the interpretation of the CISG[16]. In practice, the courts and arbitral tribunals have generally implied such a duty into CISG contracts. However, the CESL also covers certain areas of pre-contract, namely, information disclosure requirements and requires the parties to re-negotiate the contract due to certain changes of circumstances subsequent to the contract formation[17]. Good faith appears again in the CESL's articles dealing with unfair contracts. In essence, terms that are not the product of good faith and fair dealing are deemed to be unfair. An unfair terms is of "such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing"[18]. These types of issues have been dealt with more covertly by the CISG, but the CESL expressly embraces an aggressive use of the good faith duty.

The CESL also covers areas of basic contract law that are not found in the CISG. It includes provisions on policing doctrines, such as, mistake, fraud, threat or unfair exploitation, as well as unfair terms. It also provides more indepth rules on the payment of interest and restitution. Finally, it provides a prescription period not found in the CISG. However, an associated UNCITRAL Convention on Limitation Period for Contracts for the International Sale of Goods does provide prescription rules[19] These "new grounds" of coverage makes for an argument that the CESL provides greater depth and clarity to international (European) sales transactions. A more detailed look at some of its provisions may shed some light on this claim.

The CESL covers the sale of goods and related services. Related services include "service related to goods or digital content, such as installation, maintenance, repair or any other processing"[20]. However, oddly enough, it excludes portions of the contact dealing

with "training services"[21]. This is odd because the CESL covers digital content which in numerous instances, especially in B2B transactions, there is often a need for such services.

Since, the CISG only covers B2B transactions, the consumer rules found in the CESL have no counterpart. So, it is more important to look at areas involving B2B transactions to see if the CESL rules for B2SME provides more clarity and different or better rules than the CISG. For the most part CESL rules dealing with contract formation, as well as the obligations of the buyer and seller, are taken directly from the CISG[22]. However, in certain areas the CESL does provide greater clarity. For example, it provides a separate body of specialized rules for contracts concluded by electronic means. CESL requires that a "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"[23]. It contrast, the CISG has no such specialized rule.

The greatest advancement made by the CESL vs the CISG is ita provisions dealing with conflicting standard terms in B2SME contracts. The CISG's broad definition of material terms[24] is an outdated version of the common law's "mirror image" rule. Such a rule is boderline absurd when recognizing the commercial reality that business parties constantly exchange forms with conflicting terms in the formation of contracts. The CESL firmly recognizes this commercial reality by stating that contracts are formed despite the existence of conflicting terms[25]. It adopts the knock out rule where only the standard contract terms that "are common in substance" enter into the contact[25] However, freedom of contract is respected because CESL allows a party to opt-out of the above rule: "no contract is concluded if one party 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 that conflicting standard terms cancel each other out[26].

However, greater clarity can come at a cost. Such is the case for the CESL rule relating to time allowed for the inspection of goods. The CISG's Article 38 provision has caused much litigation due to the vagueness of its requirement that the inspection be performed "within as short a time as is practicable in the circumstances"[27]. The CESL seems to clarify the determination of time for inspection by stating that it shall be performed "within as short a period as is reasonable not exceeding 14 days from the date of delivery"[28]. In comparing the two rules, the CESL one seems to be the better one. But, CISG jurisprudence has shown that various times, some beyond 14 days, are reasonable. The determination of what is a reasonable time for inspection is purely a contextual one. Despite the litgation over the meaning of CISG Article 38(1) – which has produced a jurisprudence that now provides much more clarity to its meaning – it is the superior rule over the brightline rule of 14 days found in the CESL. The cost of clarity is the injustice that would occur when an inspection past the 14 day requirement is a reasonable one.

The uniqueness of the CESL can be partially understood by analyzing its intended purposes and functions. Its meta-rationale is to remove obstacles to trans-European sales of goods, digital content, and related services. A common sales law is best justified by its purpose of lowering transaction costs and lowering the legal obstacles to cross-border trading. In reviewing the substantive provisions of CESL, one must ask a few questions. Is the proposed law likely to encourage additional transborder transactions, especially online sales? Is CESL over-inclusive in that it covers areas that far exceed the goals of its stated purpose? If it does, does it create the likelihood of unintended, negative consequences? The next part will ferret out some of the potential problems if CESL is enacted.

4. Problems with the CESL

The stated rationales noted earlier are laudable goals, but are not supported by strong evidence. The word "may" is often used to refer to the perceived issues that the new law seeks to rectify. But, a strong "may" argument can be made that these perceived problems do not exist in a meaningful way. Do the differences in national consumer protections really deter internet and distance selling in a meaningful way? What is the degree of variation between consumer protection laws among EU countries? In fact, most consumer protection laws found in Member states are quite similar due to the imposition of the EU Consumer Sales and Unfair Terms Directives. The fact that a Member state "may" make their consumer protection laws more stringent than those required by the Directives has yet to become a real issue. A law whose foundational rationales are based upon "may" propositions should be subjected to the highest practical and academic scrutiny. For now, a brief listing of some of the "may" rationales will be listed, as well as some of the more dubious empirical estimates:

- CESL to boost trade between Member states by €26 billion (European Commission, DG Justice, 2011; European Commission, 2011b).
- Differences in contract law between Member States *may* hinder cross-border trade (European Commission, 2011a).
- Indeed, 44 per cent of European consumers say that uncertainty about their consumer rights discouraged them from purchasing from other EU countries (European Commission, 2011e).
- If the 44 per cent of consumers who shop online only domestically and who are uncertain about their cross-border rights, would make at least one online cross-border purchase, they could save €380 million (European Commission, 2011f).
- As market trends evolve and prompt Member States to take action independently (e.g. regulating digital content products) regulatory divergences (will) lead to increased transaction costs and legal complexity for business; gaps in the protection of consumers risk [will] grow (European Commission, 2011g).
- [CESL] would result in costs savings for new exporters and potential savings by current exporters which would expand their cross-border sales to new countries. The annual savings for new exporters can be estimated at €150-€400 million while the potential savings for current exporters could be estimated at €3.7-€4.3 billion (European Commission, 2011h).
- Exporters who decide to use the optional CESL would initially face certain transaction costs. However, this option would be chosen voluntarily by businesses (European Commission, 2011i).
- This option would also ensure a high level of consumer protection which would increase consumer certainty and confidence about rights in cross-border shopping (European Commission, 2011i).

The above list helps illustrate the perceived rationales for the enactment of CESL. First, "[d]ifferences in contract law hinder businesses from cross border trade and limit their cross-border operations" (European Commission, 2011a, p. 10, at 2.1). The CESL aims to eliminate such differences through a uniform, second national law regime that would reduce tansaction costs and, thereby, increase cross-border sales. Additionally,

the Impact Assessment states that the complexity of dealing with numerous national sales laws deters potentially new inter-EU traders from entering the market (European Commission, 2011c, p. 17, at 2.3.3). Again, these rationales should be placed in the context that 23 EU countries are members of the CISG, so the problem of non-uniform law is weakened by this fact. Furthermore, many inter-European sales involving the four non-CISG countires would still come under the jurisdiction of the CISG due to Article 1(1)(b) which gives jurisdiction to the CISG when private international law rules direct a court or arbitral tribunnal to the European country that had adopted the CISG.

The Impact Assessment notes that the current legal regime not only deters businesses from selling, but also deters consumers from buying. It states that "[c]onsumers are hindered from cross-border purchases and missed opportunities" (European Commission, 2011d, p. 17, at 2.4). The notion of "missed opportunities" refers to the idea that if more consumers engaged in cross-border purchases, then they would be able to find goods at cheaper prices. This is, again, a laudable rationale, but, as dicussed previously, economic motives play a much stronger role in cross-border purchasing then worries about applicable law.

In a way, CESL is serving two masters. On one side it is attempting to remove legal obstacles to internet trading and trading by SMEs, and on the other hand, providing mandatory consumer protection rules. However, its requirements that a consumer assent to application of the CESL by separate notice and separate agreement[29], as well as the prohibition against derogating from CESL provisions[30] provide disincentives against businesses opting-in. CESL further requires the use of the notice form provided in its Annex II and requires Member States to set down penalties for breaches by traders relating to these consumer provisions[31].

The hastiness in which CESL has evolved is also cause for concern. The Commission adopted a Decision on 26 April 2010 to establish an Expert Group to conduct a feasibility study on a draft European contract law instrument[32]. Soon thereafter, in July 2010, the Commission launched a Green Paper on policy options on progress towards a European contract law for consumers and businesses[33]. This lead to the publication of an Impact Assessment on 11 October 2011 (European Commission, 2011j). Previously, ommission requested a number of surveys or Eurobarometers to provide empirical findings of the impact of the current law regime and the benefits of enacting a uniform contract law. Doralt (2012) suggests a more delibrative approach and notes the new European Law Insitute[34] as a place where new laws can be more fully analyzed before their adoption.

5. Consumer "Acquis" and conspiracy theory

The last 35 years or so have seen the enactment of numerous Directives focusing on specific issues of contract and consumer law. The list is long covering such areas as consumer protection in distance contracts[35], protection from unfair terms[36], protections on certain aspects of the sale of goods and associated guarantees[37], procedures for the award of public service contracts[38], procedures for the award of public supply contracts[39], procedures for awarding public works contracts[40], protection of employees in the event of employer insolvency[41], protections for self-employed commercial agents[42], and combating late payments in commercial transactions[43]. The coherency of this consumer "Acquis" has been challenged for some time. In 2005, a Report of the European Committee of the House of Lords noted that:

> [T]he [EU] Commission accepts, that there are problems with the acquis. There are uncertainties, terms are not defined or are defined in some Directives but not in others. There are inconsistencies – for example, there are divergent durations and methods of calculation of the periods within which consumers may withdraw from contracts (withdrawal periods). In some cases, several Community measures that produce conflicting results can be applicable. Further difficulties are created by differences in national implementation (House of Lords, European Committee, 2005).

The Report suggests that the first order of business should by to remedy the problems of the "Acquis", before undertaking the lengthy process of drafting a Common Frame of Reference, EU contract law, or a civil code. Unfortunately, that was not the case.

The "promulgation of a European Civil Code in the traditional legislative sense was politically impractical even when seen as desirable in the longer term" (Whittaker (2012)). The attempt to harmonize major consumer law directives in 2008[44]:

> [. . .] met with considerable opposition, particularly as regards to its provisions on unfair contract terms and consumer guarantees, which had important wider implications for national contract laws and which in some would have led to a reduction of consumer protection [provided by existing] national laws (Whittaker, 2009).

Given this background, CESL can be seen as another attempt to accomplish the above task. It is narrowing from a contract law project to one of sales law is due to the fact that a broader regulation would not be politically acceptable, especially by the UK. The issue of lack of EU competency beyond what is covered by Rome I could also have been grounds for a challenge[45]. Finally, before a broader code is enacted much more preparatory work will be needed. Christian Twiggs-Flesner suggests that before the EU embarks on a Contract Code or Civil Code it must first build a common legal culture; "otherwise, a detailed European code would soon fall victim to the diversity of legal traditions and the different approaches that would inevitably be taken to its interpretation and application" (Twiggs-Flesner, 2012). However, he does note that targeted laws for specific types of contracts may prove helpful in the shorter term. Whether the CESL is such a law is the debate at hand.

The loss of consumer rights due to traders opting into CESL, and thus avoiding Rome I, is rationalized under the CESL by requiring the trader to provide notice of its intention to make the CESL the choice of law and requiring that the trader and consumer reach a separate agreement to opt into CESL. Simon Whitacker takes issue with the "separate agreement" requirement as working against the stated rationales of consumer protection and increasing cross-border sales:

> The CESL is portrayed as optional and this allows the Commission to argue that it represents a proportionate response to the obstacles to cross-border trade which it identifies "without interfering with deeply embedded national legal systems and tradition". The Proposal seeks to address the need for the consumer's consent to be conscious and informed and, by so doing, appears to require a further distinct agreement in addition to the parties' agreement as to applicable law under Rome I and the agreement which forms the basis of the substantive contract. However, in my view, in the case of consumer contracts, the provision of information about the CESL by the trader which is specifically required by the Proposal would be insufficient to allow consumers to make a proper choice in favour of the CESL as they would not thereby be advised of the potentially prejudicial effect of losing the practical protection of article 6(2) Rome I. On the other hand, if the trader was required to inform the consumer of this effect or a trader was to choose to do so, this would tend to discourage the consumer from entering the contract[46].

The fact that the CESL restricts its coverage to B2C and B2SME transactions is likely due political expediency. Thus, the CESL rationale builds upon the consumer protection theme. The SME designation, and its detailed and somewhat irrational definition in CESL, allows for a broader reach to CESL without calling it a politically unacceptable general contract code. The goal of increasing internet trading serves the purpose of signaling that CESL is a modernizing law and serves to fill in a gap in EU regulatory law. However, it is a somewhat dubious rationale. The world of internet trading is ubiquitous encompassing all types of trading: B2B, B2SME, B2C, SME2SME, SME2C, and C2C. Limiting the scope of CESL to only a few types of internet transactions (B2C and B2SME) results in an irrational harmonization; one likely not to be embraced by the business community, especially SMEs for which it aims to protect. More about this point can be found in Part 6 below.

The English-Scottish Law Commissions have issued a joint report an Optional Common European Sales Law: Advantages and Problems, Advice to the UK Government (Advice) (English Law Commission and Scottish Law Commission, 2011) This Advice is generally supportive of the CESL.

It indicates that CESL is a useful, optional law in that it gives businesses a second national sales law regime that avoids private international law determinations and the "uncertainty" provided to SME-sized businesses under Rome I. But, how likely are such companies to make use of the CESL? As noted earlier, the fact that it is an opt-in instrument does not bode well for its implementation. Behavioral law and economics or behavioral decision theory notes that opting-in is less likely to be employed because the parties are often unaware of the opt-in instrument, the high transaction costs of learning a new legal regime acts, and parties generally prefer to stay with what they perceive as the status quo (Sunstein, 2000; Simon, 1955; Samuelson and Zeckhauser, 1988; Korobkin, 1998; Magnus, 2012) In the case of an English internet trader or SME, the party is likely to feel more comfortable with the application of the pre-existing UK's Sale of Goods Act. In Germany, an SME is likely to feel more comfortable with the CISG and its surrounding German jurisprudence or opting into the BGB, then opting into a new alternative national sales regime.

Nonetheless, even if the above prognostications prove true, the importance of CESL may prove to be significant – at least in a symbolic sense. Magnus notes that if CESL is enacted it represents the:

> [. . .] first time that the EU codifies contract law and tries to enact a complete regulation of the most important contract type. It is a great step ahead from piecemeal legislation in the past to this new codifying approach (Magnus, 2012).

This is further reason that CESL should be more carefully reviewed and understood before it is enacted.

6. CESL, CISG, and the problem of opting-in

The CISG will remain the gateway to CESL where the contracting parties are from countries that have adopted both CESL and the CISG. Whether CESL applies to such contracting parties must be determined through Article 6 of the CISG that allows for derogation[47]. If the parties expressly decide to opt-in to the CESL, then the best interpretation of the choice of law clause would be that the parties are implicitly opting-out of the CISG. Unlike the CISG, the CESL is not the mandatory, default law

of a country. For example, if a choice of law clause states that the law of France shall be the applicable law, the characteristics of the parties (domestic vs international transaction) will determine whether the applicable law is the French Code Civile or the CISG. If the parties expressly select the CESL, then that could only be interpreted as an opt-in to the CESL and an opt-out of the CISG.

The question remains whether the optional nature of CESL will result in it being mostly ignored by contract parties? Professor Magnus uses the example of the Hague Uniform Sales Law as an example:

> [. . .] the experience with opt-in solutions is not promising. England is still a Contracting State of the Hague Uniform Sales Law, the predecessor of the CISG, but ratified it under the reservation that the parties choose it. In 40 years no single case has reached the English courts concerning the Hague Sales Law (Magnus, 2012).

Thinking that businesspersons and their lawyers will read and select CESL is being optimistic.

Is the CESL an example of a reverse Ockham's Razor – a relatively superfluous law that adds unnecessary complexity to a field already covered by numerous hard laws – national sales laws, EU Directives, and the CISG, as well as a number of soft law alternatives – PERC, PECL, and the DCFR? One argument is that since CESL is merely an opt-in alternative that has to be expressly chosen by the contracting parties it can do no harm and would not conflict with the CISG because of the CISG's right to derogate[48]. This is likely to be true as a purely descriptive matter, but does CESL theoretically pose some normative consequences? It has been noted that with the creation of a global market place, the business and consumer is often faced with "overlapping normative communities" (Berman, 2012). In international sales, especially in Europe, there are numerous hard and soft laws that can be argued to have greater normative force. One commentator states that CESL keeps the area of national private law remedies in place because the scope of CESL is limited to sales of goods, and therefore, its remedies provisions are limited. But she notes that, since CESL is viewed as an alternative national law, it "will create another layer of remedies aimed at the enforcement of contracts" (Leczykiewicz, 2012). Ultimately, it will be arbitral tribunals not restricted by a choice of law to determine which of the competing legal regimes – hard or soft – best meets the needs of the contesting parties and better reflect the real world of business transactions. Is CESL a case of what Stefan Vogenauer has called soft (-hard) law overkill? (Vogenauer, 2010) If enacted, will contracting parties elect to opt-in to CESL or will it be ignored like The Hague Sales Convention?

7. Conclusion

There are many unanswered questions relating to the feasibility, need, and practicality of enacting CESL as an EU regulation. The rationales for CESL – protection of consumers-SMEs and removal of legal obstacles to internet trading – seem to be based upon unreasonably high expectations. The questions remains: what are the great difficulties caused by the existing non-unified sales law (national, EU, CISG) that warrants the enactment of CESL? If non-unity is a problem, then should not CESL be made mandatory or, at the least, and opt-out law? If CESL is considered a piecemeal step towards a European contract code, it would be better to implement it in piecemeal steps in order to ensure a more thought-out progression towards such a code. Since the

facilitation of internet trading is one of the stated goals of CESL, than it would be prudent to begin with a more pinpoint law that deals with issues of licensing. Although CESL covers digital content, it fails to address many issues relating to the licensing of software and other informational products, such as shareware. On one hand CESL seems to do too much and on the other hand too little. The English and Scottish Law Commissions allude to this issue as follows

> Distance selling needs its own clear rules, designed around automated processes. The CESL is based on more general contract law principles and we think that it would benefit from greater focus on distance sales[49].

The author aligns himself in the camp of scholars who believe that CESL is unlikely to have much practical significance if adopted. In the real world of business, choice of law is not high on a businessperson's list of priorities in the negotiation of contracts (especially for SMEs). The argument that transborder sales, especially those involving the internet, have been severely retarded by different national sales and consumer protection laws is not a very plausible one. The availability of the CISG, as the mandatory law of 23 of the 27 EU countries, and its availability as an opt-in transborder law for non-CISG EU countries, diminishes the need for another transborder European sales law. The CESL runs the risk of creating unneeded complexity to areas not needing to be fixed. The very definition of a SME in CESL leaves one perplexed by the thought that SMEs will actually read, understand, or care whether they are a SMEs or not. In the end, CESL is likely to be ignored by the business community, but it retains significance from a theoretical perspective. What is the future of European Private Law? Is CESL a stepping-stone to a European Contract Code?

Notes

1. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM (2011) 635 final, recital 2 Pr. This proposal is prefaced with an explanatory memorandum ("Explanatory Memorandum") from the Commission. Annex 1 contains the substantive sales law rules of the Common European Sales Law (CESL).
2. UCC, Section 2-302.
3. This study was the work of Feasibility Study by an Expert Group (2011) and Schulze and Stuyck (2011).
4. Explanatory Memorandum, Com (2011) 635; 2011/0824 (COD) (Brussels 11 October 2011).
5. Eight of the projected 12 volumes have so far been published; see for up-to-date details the web site of the publisher, Sellier, available at: www.sellier.de/pages/en/buecher_s_elp/europarecht/454.htm
6. Research Group on the Existing EC Private Law (Acquis Group) (2009). On the approach adopted by the Acquis Group (Schulze, 2005).
7. For further explanation and criticism of the rules, see Schulze (2012).
8. Explanatory Memorandum, para. 6.
9. Advice to UK Government, at vi. However, the "Advice" commonsensically notes that "these directives are minimum harmonisation measures: member states may add to them".
10. The "Feasibility Study" was published on 3 May 2011 and an informal consultation was open until 1 July 2011.
11. See CESL, Article 2.

12. Proposal for a Regulation of the European Parliament and of the Council for a Common European Sales Law, COM (2011) 635 (Brussels, 11. 10. 2011), p. 5.
13. Articles 89-101 were not included since they deal mainly with procedural matters, such as, adoption and reservations.
14. CISG, Article 3(2).
15. CISG, Article 2(a).
16. In its Introductory material its states that "the general principles of contract law which all parties need to observe in their dealings, such as good faith and fair dealing". CESL, at p. 13.
17. CESL, Article 89.
18. CESL, Article 86(1)(b).
19. UNCITRAL.
20. CESL, Article 2(m).
21. CESL, Article 2(m)(ii).
22. See, e.g. CESL Article 38 and CISG Article 19 (modified acceptance); CESL Article 32(1) and CISG Article 16(1).
23. CESL, Article 24(2).
24. CISG, Article 19(3).
25. CESL, Article 39(1).
26. CESL, Article 39(2)(a).
27. CISG, Article 38(1).
28. CESL, Article 121(1).
29. CESL, Article 8(2) and Article 9(1).
30. CESL, Article 8(3).
31. CESL, Article 10.
32. Commission Decision 2010/233/EU, OJ 105 of 27 April 2010.
33. Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, COM (2010) 348 final, 1 July 2010.
34. For more information on the newly founded European Law Institute (ELI) see: www.europeanlawinstitute.eu
35. Directive 85/577/EEC; [1985] OJ L 372/31.
36. Directive 93/13/EEC; [1993] OJ L 95/29.
37. Directive 99/44/EC; [1999] OJ L 171/7.
38. Directive 92/50/EEC; 1992] OJL 209/1.
39. Directive 93/36/EEC; [1993] OJL 199/1.
40. Directive 93/37/EEC; [1993] OJL 199/54.
41. Directive 80/987/EEC; [1980] OJL 283/23.
42. Directive 86/653/EEC; [1986] OJ L 382/17.
43. Directive 2000/35/EC; [2000] OJL200/35.

44. Proposal for a Directive of the European Parliament and of the Council on Consumer Rights of 8 October 2008 Com (2008) 614/3 final.
45. Regulation (EC) No. 593/2008 on the law applicable to contractual obligations ("Rome I") [2008] OJ L 177/6.For a comparative analysis of Rome I, CISG, and CESL, see Pauknerova (2012).
46. Whittaker (2012), partially quoting CESL, Explanatory Memorandum, 10.
47. CISG Article 6 states that the "parties may exclude the application of this Convention or ... derogate from or vary the effect of any of its provisions". One commentator notes that if the forum court is in a CISG Contracting State "the court should apply the CISG in order to decide on the validity of the derogation". On the other hand, if the forum is in a non-contracting state then it is "the private international law of the forum to decide" on the validity of the derogation (Huber and Mullis, 2007).
48. CISG, Article 6.
49. Advice to UK Government, at vii.

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European Commission (2011c), Staff Working Paper: Executive Summary of Impact Assessment, Brussels, 11 October, at 2.3.3.

European Commission (2011d), Staff Working Paper: Executive Summary of Impact Assessment, Brussels, 11 October, at 2.4.

European Commission (2011e), Staff Working Paper: Executive Summary of Impact Assessment, Brussels, 11 October, at 2.4.1.

European Commission (2011f), Staff Working Paper: Executive Summary of Impact Assessment, Brussels, 11 October, at 2.4.2.

European Commission (2011g), Staff Working Paper: Executive Summary of Impact Assessment, Brussels, 11 October, at 2.5.

European Commission (2011h), Staff Working Paper: Executive Summary of Impact Assessment, Brussels, 11 October, at 5.

European Commission (2011i), Staff Working Paper: Executive Summary of Impact Assessment, Brussels, 11 October, at 6.

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