The scope of the Common European Sales Law: B2B, goods, digital content and services

Rafael Illescas Ortiz and Pilar Perales Viscasillas
Department of Commercial Law, University Carlos III of Madrid, Madrid, Spain

Abstract

Purpose – This article aims to take a critical look at the proposed Common European Sales Law (CESL) and its field of application.

Design/methodology/approach – The article provides a comparative analysis of the scope of application of CESL with that of the Convention on Contracts for the International Sales of Goods (CISG). The approach is critical in nature in that it questions the regulation of business-to-business (B2B) transactions under CESL. It also takes a critical look at the CESL and its coverage of three areas of contracting – sale of goods, supply of digital content, and supply of services.

Findings – The article exposes some of the shortcomings of the CESL in relation to its field of application.

Research limitations/implications – The CESL as proposed offers an optional regulation that complicates the law of transborder sales within the European Union (EU) and between EU member states and non-EU states. The article recommends that CESL not extend its coverage to B2B transactions and leave transborder commercial transactions to the CISG. The article also suggests other changes to improve the CESL.

Practical implications – Further analysis is needed and more defined rules should be considered before CESL is enacted into law.

Originality/value – This article questions the wide scope of application of CESL. It further questions the rationality and practicality of the CESL's coverage of B2B transactions.

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, Supply of goods, services, and digital content, Supply chain management

Paper type Research paper

I. Introduction

The European Union (EU) Proposal for a Regulation on a Common European Sales Law (CESL) of 11 October 2011[1] is a very ambitious project that can be traced back to the idea of building a Civil Code within the EU. This article will not review this history or about the different projects that have been put forth towards the unification of private law within the EU. Instead, we focus but just on the scope of application of the CESL with a specific focus on how it compares to the well-established United Nations Convention on Contracts for the International Sale of Goods (CISG) which was approved at the Vienna Convention in 1980.

CESL and the CISG have similar scopes of application. However, the CESL is an optional instrument for business-to-business transactions (B2B) in the area of the

Commercial Law Professors at University Carlos III of Madrid. The present work was written under Research Project MEC 2008/02244 under the supervision of Prof. Perales Viscasillas.

Journal of International Trade Law and Policy
Vol. 11 No. 3, 2012
pp. 241-258

1477-0024
DOI 10.1108/14770021211267351

international sale of goods[2]. Despite its title, CESL does not only apply to contracts for the sale of goods between European enterprises, but also applies where only one of the parties is from a EU country[3]. So in this way, the CESL may be characterized as both a regional and an international instrument.

The optional regulation applies also to the sale of goods, digital content and services related to any of them.

It is therefore self-evident that the optional regulation has a subjective and objective field of application very similar to that of the CISG (Articles 1-3). The choice of the instrument as applicable law to the contract (opting in) means the exclusion of the CISG (opting out) as recognized by Preamble 25 of CESL[4]. The opting into the CESL is likely to be construed as an opting out of the CISG given the freedom of contract principle and right to derogate provided in the CISG[5].

II. The optional instrument should cover only B2C contracts

If we take into account that the CISG is the Domestic Law of 23 out of the 27 member states[6] and that the CISG has been used as a model law in the revision of numerous civil codes around the globe including those of the EU, the logical question that arises is whether the CESL is a necessary addition to EU law, especially in the area of B2B contracts.

The argument for EU legitimacy or competency to legislate in this area, according to the Preamble of CESL[7], is anchored on a statistical survey showing that businesspersons consider that one of the main problems in cross-border contracts is the choice of the applicable law. The problem of choice of law is partly the outcome of the underutilization of the CISG and the lack of an institution that assures uniform interpretations of the CISG. The survey found that 70 percent of businesses would choose the CESL if it were available. This rationale has been the driving force behind this new optional regulation[8].

In order to assess the need for this instrument, in our opinion, a distinction ought to be made between B2B and B2C transactions. The next two subsections will review the CESL as to how it relates to B2B and B2C transactions.

2.1 B2B contracts

In B2B transactions, the explanatory note of the optional instrument overstates some issues, a position that is reinforced when reading the scope of the Eurobarometer survey, as well as the stated list of questions and answers[9]. This material lodged in support of the CESL evades an important fact – the CISG is the domestic law of most of the EU member states. In this regard, the continued adoption of the CISG by other countries and the possible future applications and uses of the CISG is a better "eurobarometer" of the unification of sales law in Europe than an adoption of an optional regional law, such as the CESL[10].

The differences between contract laws in different countries do not constitute a major obstacle to cross-border trade, and it is not entirely correct to state that the search for the applicable law is a barrier to trade. Although some problems might exist in certain areas of the law, most traders use standard terms drafted by their trade organizations, while others rely on the application of international instruments either by direct application or by the choice of the rules of law. This coupled with the choice of arbitration as the dominate means of commercial dispute resolution makes any variations in national contract laws less important than in the area of consumer contracts.

The need for an optional instrument is unconvincing given the variety of options available to businesses, such as the recently updated UNIDROIT Principles for

International Commercial Contracts (UPIC) and the European Principles of Contract Law (PECL)[11]. Furthermore, the CISG is the applicable law in business transactions between 23 of the 27 EU states and businesses from the remaining four states are free to opt-in into the CISG. The CESL may in fact make the optional use of the CISG more attractive given the mandatory provisions found in the CESL, such as Articles 29's extension of the consumer protection rules to small to medium sized business (SMEs), as well as the mandatory rules relating to late payment.

The Explanatory Memorandum deals summarily with the CISG[12]. It fails to acknowledge the CISG's role in harmonizing international sales law and fails to recognize the fact that the CISG served as a model for many of the rules found within CESL. Finally, it fails to note EU antecedents in this area like PECL or DCFR[13].

Also, the assertions made that the CESL is more comprehensive than the CISG is not totally accurate. For example, the CISG has been applied to such areas as defects in consent, unfair contract terms, and prescription. Defects in consent rarely occur in B2B contracts; unfair contract terms are indirectly regulated by the application of the good faith principle and the standard of reasonableness; and the UN Limitation Convention covers prescription. Criticism is also lodged that the CISG has no mechanism to ensure uniform interpretation. However, if the interpretive methodology of CISG Art. 7 is properly followed then uniformity of application is possible. It should be noted that the CESL copies this interpretive methodology[14]. The CESL also fails to acknowledge that most trans-border B2B contracts are resolved through arbitration where uniformity of interpretation is not a major concern.

Since the legal framework provided for by existing instruments is very similar to the optional instrument and the fact that the optional instrument reflects many of the rules found in the CISG, UPIC and PECL, the need for another legal instrument is not readily apparent. In light of such proliferation of regional regimes, the time has come for UNCITRAL to work on a more universal text in the field of contracts. A more comprehensive international convention for B2B contracts would be a more appealing idea for the business community than a regional instrument[15]. As a first step, the EU should issue a recommendation for member states to ratify the Convention on the limitation period in the international sale of goods. Adoption of the CISG by Portugal, Ireland, Malta and the UK would diminish the need for the CESL.

The usefulness of the opting in mechanism: the "opt in" mechanism was the one chosen for international sales law like the ULF and ULIS[16] and were adopted by the UK. To the best of our knowledge, there are no reported cases in the UK that has applied the ULF or the ULIS. This may be the future outcome for the CESL. It blurs the distinction between B2C and B2B contracts and the mass of rules for consumers make the text not very user friendly for traders[17]. There remains a concern that not separating B2C and B2B rules more clearly risks the extension by analogy of consumer rules to B2B transactions.

The distinction between larger and small and medium sized businesses is problematic. There is no conceptual or rational reason from a substantive law point of view to extend consumer-like protections to SMEs and interfere with the principle of freedom of contract[18]. Additionally, there is no solid rationale for not applying the CESL to all B2B transactions[19], as well as limiting its coverage to international, but not domestic transactions. It would also be useful in the CESL provide a model arbitration clause for B2B transaction to promote a fast and specialized method for solving disputes.

2.2 B2C contracts

The CESL may play an important role in regard to B2C contracts in cross-border situations particularly in the area of distant selling since the trader currently has to adapt its contracts to the requirements of the consumer's national law[20]. EU Law is to a certain extent harmonized, but difficulties exist because of the different standards (mandatory rules) of protection adopted within EU countries[21]. To increase the impact of the CESL, it should be extended to cover contracts with consumers domiciled in third countries, as foreseen in Recital 14, as well as to extend the regime to domestic consumer contracts, an option noted in Recital 15[22].

Art. 2(e) of the CESL defines "trader" means any natural or legal person who is acting for purposes relating to that person's trade, business, craft or profession; Art. 2(f) defines "consumer" to be any natural person who is acting for purposes which are outside that person's trade, business, craft or profession. However, the new Directive 2011/83 on consumer rights[23] considers in its Preamble 17 that:

> [. . .] in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the 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.

The CESL's shifting of protection rules to some businesses should be done in a more conscious and open way and not hidden under the Preamble of the new Directive.

III. Examination of the scope of the instrument in regard to goods, services and digital content

Traditionally, domestic laws that regulate the contract of the sale of goods focus on two elements of the transaction – goods and the contract of sale. Given this focus, modern sale or commercial codes generally do not regulate mixed contracts, sale or license of digital content, or sales of services, such as maintenance or training contracts. These types of contracts remain in the domain of general contract law, such as evolving case law have served to fill the gaps of domestic legislation, but this has lead to a degree of legal uncertainty when new types contracts or subject matters are developed. An example is the subject matter of digital content in which some domestic legal systems classify it as goods while others as services[24].

The EU Directives generally have drawn the same distinction between goods and services, but most of then are directed at consumer transactions, especially sale of goods. The 2006 Directive on Services does not relate to the generally contractual aspects of the services other than focusing on information requirements[25]. In contrast, the CESL applies to goods, digital content, and related services. In determining the applicable rules under it depends on the subject matter of the contract, such as whether it is for[26] the sale of goods or digital content. This is in contrast to the new Directive 2011/83 on consumer rights where distinct rules for the various subject matters are generally avoided. Under Directive 2011/83, sales contracts and services contracts are regulated and a practical approach is undertaken in regard to digital content whereby according to Preamble 19:

> [. . .] contracts for the supply of digital content should fall within the scope of the Directive, and if digital content is supplied on a tangible medium, such as a CD or a DVD, it should be considered as goods within the meaning of this Directive. Similarly to contracts for the supply of water, gas or electricity, w here they are not put up for sale in a limited volume or set quantity, or of district

> heating, contracts for digital content which is not supplied on a tangible medium should be classified, for the purpose of this Directive, neither as sales contracts nor as service contracts.

As a consequence, digital content is regulated on two fronts depending on whether it is in a tangible medium or not. In practice, the good-services dichotomy found in the CESL is implicitly found in the Directive with its separation of digital content as a good and digital content as a service. In any event, it would be much clearer if digital content was covered either by goods or services rules, or by a unitary or self-standing set of rules.

Due to the poor and the different treatments of contracts under domestic legal systems[27], especially in the area of digital content, the CESL attempts to offer a unified legal regime in the framework of the general theory of contract law; a regime to be applied for any kind of contract within its scope of application independent of its domestic classification. The new contract law instrument would diminish the uncertainties derived from the application of different contract regimes. The unified legal regime is in line and takes into account the complexities of modern transactions in which not only sale/manufacture/services are combined in a single contract but, also where tangible/intangible goods are packaged together.

A unified system of rules over various subject matters is aligned with modern day transactions since the whole life cycle of the contract should be the same for any kind of goods, tangible or intangible; whether the transaction is a sale of good or a mixed sale; and whether or not the contract is executed through on line platforms, other distance means of communication, or in the physical presence of the contracting parties. However, the CESL rules on mixed contracts exclude those contacts that include subject matter different to the ones regulated under the instrument.

IV. CESL's coverage of goods, digital content, and related services

The CESL reflects two general themes – consumer (and SME) protection and the need to harmonize trade law to expand internet and cross-border trading within the EU – and coverage of the subject matter areas of goods, digital content, and related services. This part will examine the CESL coverage in these three areas.

4.1 Goods

The definition of goods is found in Art. 2(h) CESL and it is in line with the traditional concept found in many domestic legal systems: goods are defined as "any tangible movable item", and for the purposes of the regulation it excludes electricity and natural gas, water, and other types of gas unless they are put up for sale in a limited volume or a set quantity. These exclusions follow those in Directive1999/44[28] and which are now are now found in the definition of goods under Directive 2011/83[29]. If the CESL were to cover all B2B transactions, the exclusions should be reassessed to cover those found in Art. 2 of the CISG. Presently, some of the exclusions in Art. 2 CISG seem to be covered under the optional regulation.

4.2 Digital content

(1) Digital content in B2B and B2C transactions under existing domestic and international law. Digital content as such is not regulated under domestic legal systems, but its regulation is conducted to the general theory of contract law whether domestically it might be considered to be a good or a service.

In regard to B2B transactions under the CISG, software – especially, fungible or "off the shelf" types of software – have been considered as a good. Other intangible goods, such as gas[30], are not excluded under the CISG. The CISG, also recognizes both formation and performance by electronic mean and thus, technically there is no problem to cover digital content transmitted through electronic means. Finally, CISG Articles 42 and 43 considers the sale if goods might be subject to intellectual property rights[31], which actually would be the case for software contained in a tangible medium (as well as transmitted electronically)[32]. Rationally, there is no substantive difference between including software in a tangible medium within the coverage of the CISG and to exclude coverage when sold electronically[33].

Once considered as a good under CISG, a further analysis needs to be made and relates to what kind of contract is used for software transactions. As noted in the previous paragraph, some courts have made a distinction between standard versus custom-made software. So, when a transaction relates to standard software the CISG applies, but it does not apply to custom-made software because such transactions are generally construed as sale of services.

This standard-custom template is found in the German BGB, but should not be implied into the CISG. There are grounds, under CISG Art. 3.1, for considering software within the scope of the CISG whether or not sold on a tangible medium. In the sale of customized goods, the CISG considers the labor or services provided incorporated into the sale of goods contract. By analogy, custom-made and standard software are within the CISG, unless the buyer provides a substantial part of the materials (raw materials) necessary for its manufacture or production[34]. Finally, the fact that software and its digital content are often "sold" through a license does not preclude CISG coverage. This is due to the fact that the CISG does not regulate the transfer of property as such[35] and therefore, the sale of goods may include the sale of a license to use software.

(2) Digital content under the new instrument. A sale or contract code covering he sale of digital content is a novelty since, it was not specifically considered under previous instruments, such as, the DCFR or PECL (Barendrecht *et al.*, 2007). The May 2011 Feasibility Study did not address digital content, but put forward the question of whether the future instrument should include it or not[36]. The August 2011 Feasibility Study included coverage of digital content. It defined digital content to mean "data which is produced and supplied in digital form, whether or not according to the consumer's specifications"[37].

The EU Directives on consumer law generally revolves around the classical distinction between goods and services, and thus legal uncertainty arises as to how to classify digital content. However, the new Directive 2011/83 on consumer rights defines digital content as data produced and supplied in digital form (Art. 2.11) which is duplicated in Art. 2(j) of the CESL. However, Preamble 19 of Directive 2011/83 provides more specificity by way of example by stating digital content includes computer programs, applications, games, music, videos and texts.

The CESL requires the digital content include "data in digital form". As pointed out in Recital 17 and Art. 5(b), the concept of digital content does not depend upon whether or not that content is supplied on a tangible medium[38]. For example, music content is digital content independently of whether it is contained in a CD or whether it is electronically transmitted. A better definition of digital content would be "data which is produced and supplied in digital form, whether or not that content is supplied on a tangible medium [. . .]".

Another shortcoming of the CESL's definition of digital content includes the cumulative nature of the definition. According to Art. 5(b), the CESL is applicable CESL to digital content that can be "stored, processed or accessed, and re-used" by the user. This can be construed to mean that all the conditions are cumulative instead of being alternatives. If this were to be the interpretation it would mean that instant consumption of digital content, such as online movies and digital content that it is not capable of being re-used (for example, online purchases of theater or movie tickets), would not be covered under the CESL. Two options are possible:

- *Option 1.* To complete the definition of digital content:

  > Digital content means data which is produced and supplied in digital form, whether or not that content is supplied on a tangible medium, and that can be stored, processed or accessed, and re-used by the user. Digital content includes, among others, video, audio, picture or written digital content, digital games, software and digital content which makes it possible to personalize existing hardware or software; it excludes: [. . .].

- *Option 2.* To refine the definition:

  > The CESL may be used for digital content which can be "stored, processed, accessed, or re-used" by the user.

There is a second element of the definition of digital content found in Art. 2(j): "whether or not according to the buyer's specifications". This feature is shared with the definition of the sale of goods. As such, it would be best to move this aspect to the definition of sales and supply contracts.

Finally, it is doubtful whether CESL covers cloud computing. The definition of digital content as data that is produced and supplied in a digital form if read literally would exclude cloud computing. The definition should clearly state it covers cloud computing by refining the definition of digital content to state that it includes "data which are produced, supplied or made available in digital form", or to list cloud computing in expressly in the definition or implicitly by stating that "digital content includes applications that are hosted by the business and that are made available to the consumer over the network"[39]. It is interesting to note that cloud computing seems to be included under the new Directive 2011/83 on consumer rights were Preamble 19 of the Directive 2011/83 considers digital content "irrespective of whether they are accessed through downloading or *streaming*, from a tangible medium or through any other means".

Art. 2(j) of the CESL provides a list of exclusions, including:

> [. . .] financial services, including online banking services; legal or financial advice provided in electronic form; electronic healthcare services; electronic communications services and networks, and associated facilities and services; gambling; and the creation of new digital content and the amendment of existing digital content by consumers or any other interaction with the creation of other users.

Some of the exclusions do not make sense since they are restricted to electronic forms, and thus it seems to suggest that when the legal or financial advice is provided in another form, such as by fax, mail or in direct conversation, then it is within the coverage of the CESL. The same can be said for electronic healthcare services.

Therefore, some of the exclusions ought not be qualified by the means of communication used, but by the fact that they are considered to be pure services (providing information, advice or treatment)[40]. We propose the following text changes.

The CESL does not cover:

- financial services, including banking services;
- legal or financial advice;
- healthcare services[41];
- electronic communication services and networks, and associated facilities and services;
- gambling[42]; and
- the creation of new digital content and the amendment of existing digital content by consumers or any other interaction with the creation of other users.

4.3 Related services

This section analyzes what is meant by "related services". Are related services ancillary services to the sale of goods or digital content or can they be services that are the main object of a contract?

(a) Related services to sale of goods and digital content. The CESL considers under its scope related services to the sale of goods and digital contract in a non-exhaustive list that covers installation, maintenance, repair or any other processing, excluding some kind of services, such as, transport, training, financial and telecommunication support services. When a related service is provided Art. 9 states that the rules of Part IV applies to the sale of the goods or digital content, while Part V applies to the related services.

This approach to related services, in regard to the material scope of application of the instrument, is a sensible approach considering that ancillary services to goods or digital content are a common feature in modern sales transactions. Therefore, mixed contracts are considered within the scope of the instrument following what was the trend initiated by the CISG (Art. 3.2), Directive 1999/44 (Art. 2.5), and more recently Directive 2011/83 (Art. 2.5). More importantly, mixed contracts are considered under a unitary approach and thus the general theory of contract law in the Regulation applies also to the related services, with some special rules (Part V), as opposed to the application of different contract laws based upon the nature of the contract (sale or service). This approach also avoids the difficulties of characterizing the contract as one or the other (either a sales or a service contract)[43]. To simply things even more would entail considering the merger of Parts IV and V, which would integrate the special rules found in Part V with those of Part IV.

In regard to the exclusions, there is a question of why transport services are excluded[44]? Transport of goods or digital content when contained in a tangible medium is a necessary step in cross-border transactions, as recognized in CESL Art. 14(1)(b) relating to information about price and additional charges or costs[45]. Also, Art. 145 deals with the carriage of goods. Since transport services are major obligations under trans-border contracts to exclude ancillary transport services to the sale of goods or digital content is not coherent with the scope of the instrument. The incoherency is also apparent since Art. 6.1 strictly considers that CESL may not be used for mixed-purpose contracts including any elements other than the sale of goods, the supply of digital

content and the provisions of related services within the meaning of Art. 5[46]. Additionally, Preamble 51 of the Directive 83/2011 on consumer rights states:

> The main difficulties encountered by consumers and the main source of disputes with traders are about delivery of goods, including goods getting lost or damaged during transport and late and partial delivery. Therefore, it is appropriate to clarify and harmonise the national rules as to when delivery should occur.

Therefore, transport services should be deleted from Art. 2(m), and included as an ancillary service. The same can be said for training services and for financial services[47].

However, the CESL makes clear that only the transport services that are ancillary to the sales contract should be covered but not those services provided by a third party. Preamble 20 rationalizes that that CESL rules are only meant to apply to the core agreement and not to third party contracts that are ancillary to that agreement. Therefore, to be covered the seller undertakes towards the buyer a related service ancillary to the sale of goods. Under this scenario, the seller is contractually obligated to provide, whether directly or through a third party[48].

(b) Extending the scope of the CESL over services? The digital content definition plus the exclusions relating to services make for the real possibility that it may be difficult for parties, courts, and arbitral tribunals to distinguish the sale of digital content from the supply of services. The services referred to here are not those referring to services related to the sale of goods and digital content, but to services that are the main obligation of a contract – nonetheless, a contract that is ancillary to the sale of goods or digital content.

Both the DCFR and The Principles of European Law, Service Contracts (PEL SC) (Barendrecht *et al.*, 2007) cover, among other services, the supply of digital content as an incorporeal service. Therefore, an important issue arises as to whether the CESL covers not only digital content but also pure services (for example, tangible immovable structures)[49]. In contrast to the CESL, the PEL SC follows a flexible and rather broad definitional approach to services that include pure intellectual services, as well as, material services involving the supply of an immovable structure or a movable thing, which may be defined as different types of contracts under domestic laws. The obligations of care and skill of services provider under the PEL SC the general obligations attached services in general[50]. Therefore, there is a rational argument to be made that the CESL's coverage should be extended to all service contracts[51]. However, it is important to realize that the CESL is already an ambitious initiative and therefore expansion to other services can be done at a subsequent time by amendment or by a separate, more detailed instrument.

Despite its optional nature, the CESL represents a revolutionary step in the development of a trans-EU private law since it provides a comprehensive set of rules for sales contracts that can be sued in all 27 EU countries. However, whether the CESL produces a "revolution" ultimately depends on whether businesses elect to opt-in. In sum, despite the above critique, the CESL is essentially correct in its approach to offering an optional harmonizing law instrument.

V. Reconsidering the CESL's division of sale of goods and the supply of digital content

The general framework and coverage of the CESL – sale of movable goods, including the manufacture or production of such goods, contracts for the supply of digital content

whether or not their content is supplied on a tangible medium, and services related to such sale and supply contracts – is reasonable in nature.

1. The sales contract

The CESL's name indicates its primary focus is upon the contract of sale and to this regard its provides the following definition:

> [S]ales 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[52].

The definition of a contract of sale of goods is almost universal. The vast majority of the national statutes contain a definition of a contract of sale that revolves around the obligations of the parties under the contract – the seller has to deliver the goods; the buyer has to pay the price[53]. The seller's obligation is thus characterized as an obligation to give (*dare*) as opposed to other contracts in which the obligation is an obligation to do something (*facere*) as is the case with work, services or construction contracts. Distinguishing sales contracts from work or services contracts is not always simple. For example, a work contract may include a party providing materials for the construction, as well as the necessary labour.

Most legal systems consider a contract to be a service or work contract when the buyer (owner) provides all or a substantial part of the materials. When the seller (contractor) provides work, services and materials the contract may be classified as a sale, work, a mixed contract, or a sui generis contract. These mixed contracts are called by different names – *Obra* (Spain); *appalto* or *dópera* (Italy); *louage dóuvrage* or *déentreprise* (France and Switzerland); *empreitada* (Portugal); and *works and materials* (UK). Under the old German BGB, Section 651, when the buyer supplied the goods the contract was a *Werklieferungsvertrag* (a kind of a work contract); if the seller provided for the materials it was considered a mixed contract if the materials were non-fungible (*nicht vertretbare Sachen*); or sales contracts if fungible. The new Section 651 no longer refers to the *Werklieferungsvertrag*, but instead applies the rules relating to sales contracts no matter whether it is the buyer or the seller who supplies the materials. Instead, the classification of the contract is based upon the character of the object. So, if the object is a non-fungible good, several rules referring to contracts for work and materials apply additionally to sales rules. The new German BGB follows the CISG and the EU Directive 1999/44, sale of consumer goods and associated guarantees.

Under Art. 3.1 of the CISG and Art. 1.4 of Directive 1999/44[54], the scope of sale of goods has been enlarged to embrace other kinds of contracts, such as, contracts for the sale of goods to be manufactured or produced[55]. Therefore, the work or services provided for the manufacture or production of the goods does not change the character of the contract away a sale of goods contract. This approach is also followed by the CESL. The major difference is the CESL's distinguishing of digital content "whether or not according to the buyer's specifications"[56] as a different type of contract. This is unfortunate since it would have been better if digital content were made to be part of the definition of the sale of goods. In fact, the 2011 Directive on consumer rights introduced a new definition: "goods made to the consumer's specifications" which includes non-prefabricated goods made on

the basis of an individual choice of or decision by the consumer. The CESL should change align itself with this definition and should state:

> 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, whether or not according to the buyer's specifications[57], and excludes contracts for sale on execution or otherwise involving the exercise of public authority.

This modification of the definition serves to align the sale or supply digital content with the sale of goods and preclude a finding that a good sold following the specific instructions of the buyer is a service contract[58]. This revised definition would allow the CESL to cover sales contracts incorporated in framework agreements, such as distribution and franchise contracts[59]. Finally, it is important to note that the consumer rights Directive uses an extended concept of the sale of goods whereby the definition of the contract for the sale of goods includes mixed contracts of delivery of goods plus services, as opposed to contracts for pure services[60].

2. Supply of digital content contract

Despite its numerous references to "supply contracts", the CESL fails to define the term. It is clear, however, that the term "sales contract" is used to reference the sale of goods, while "supply contracts" relate to digital content transactions. This lack of a definition for supply contracts indicates the distinction between the delivery and supply of tangible versus intangible goods is an artificial one. This distinction ignores the fact that digital content might be contained in a tangible medium and that the simple use of the term "sales contact" is sufficient to cover both types of subject matter.

Alternative options that would remove the confusion based upon the above discussion include:

(1) Option 1. Adding a definition of the supply contract. Any such definition would have to contain the essential features of that contract:

> Supply contract means any contract under which the trader (the supplier) undertakes to supply digital content to another person (the buyer) whether or not in an exchange for payment of the price and it includes a contract for the supply of digital content to be produced whether or not according to the buyer's specifications[61].

This option provides a unitary approach to the scope the digital content. It would avoid the differences found in domestic classifications of sales of goods or supply of services and provides the flexibility to include future technical developments in the area of digital content. Definitional ambiguity should be avoided in order to make the CESL legal regime as clear as possible.

(2) Option 2. Considering a broader concept of sales contract. As noted above, simply enlarging the concept of the sales contract could unify the two types of contracts recognized under the CESL. In this way, the contract of sale would cover both the delivery of goods (including, digital content in a tangible medium) as well as the delivery (supply) of digital content[62]:

> Sales contract means any contract under which the trader (the seller) transfers or undertakes to transfer the ownership of goods to another person (the buyer) and the buyer pays or undertakes to pay the price thereof; it includes the license of digital content whether or not in an exchange for payment of the price, and the contract for the supply of goods or digital content to be

> manufactured or produced, whether or not according to the buyer's specifications, and excludes contracts for sale on execution or otherwise involving the exercise of public authority.

In considering option 2, EU legislators may want to extend the concept of goods to cover both tangible movable items and digital content, making it clear that digital content is considered a good. This approach would prevent the distortions under domestic laws that have already incorporated Directive 1999/44, which defines goods as tangible movable items and to remove the possibility that software would be excluded from Directive 1999/44.

(3) Option 3. Adopt the definitions under Directive 2011/83 on consumer rights. Art. 2 of the Directive on consumer rights provides the following foundational definitions:

> "Sales contract" means any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services.
>
> "Service contract" means any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof.
>
> "Ancillary contract" means a contract by which the consumer acquires goods or services related to a distance contract or an off-premises contract and where those goods are supplied or those services are provided by the trader or by a third party on the basis of an arrangement between that third party and the trader.

Interesting to note that Preamble 19 of Directive 2011/83 considers that:

> Contracts for the supply of digital content should fall within the scope of this Directive. If digital content is supplied on a tangible medium, such as a CD or a DVD, it should be considered as goods within the meaning of this Directive [. . .]. Contracts for digital content which is *not supplied on a tangible medium* should be classified, for the purpose of this Directive, neither as sales contracts nor as service contracts.

Despite the Directive's failure to recognize digital content not supplied on a tangible medium, Preamble 19 states that: "The Commission should examine the need for further harmonisation of provisions in respect of digital content and submit, if necessary, a legislative proposal for addressing this matter". Taken in this context, in our there are no dramatic differences between digital content as a good or digital content as a service and in fact domestic contract law in the area of software shows that one solution is to consider software either as a good or was a service to which the sale of goods rules applies by analogy. In the end, the CESL improves upon Directive by extending its scope of coverage. Art. 2b) Directive 2002/65/EC on the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC.

Notes

1. http://ec.europa.eu/justice/contract/files/common_sales_law/regulation_sales_law_en.pdf
2. The optional regulation also applies to business-to-consumer transactions (B2C), but the current undertaking focuses upon business-to-business transactions (B2B).
3. CESL, Art. 4.

4. "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".
5. CISG, Art. 6.
6. The list of contracting states that it is now 78 can be found at: www.uncitral.org/uncitral/es/uncitral_texts/sale_goods/1980CISG_status.html
7. See Explanatory Memorandum, pp. 1-2.
8. Eurobarometer 320, available at: http://ec.europa.eu/public_opinion/flash/fl_320_en.pdf
9. See also Scottish Law Commission (2011).
10. The adoption of the CISG by countries continues to expand. Brazil and San Marino recently ratified the Convention and will soon be joined by Costa Rica. At the same time, the Nordic countries are withdrawing their Art. 92 reservations and thus they will be contracting parties to Part II of the Convention: Finland and Sweden have already approved in their parliaments their withdrawal of Art. 92 reservation; and Denmark has already done so by Law No. 1376, 28 December 2011 by implementing Part II of the Convention. Finally, it is word to mention that Lithuania and Latvia are initiating the process of the withdrawal of Art. 96 reservation. This process of erosion of the reservations (China is also considering the withdrawal of all the declarations and reservations it made) shows that more and more countries have seen the value of a truly international sales law.
11. See Lehmann (2011, p. 11) (in order to avoid competing instruments B2B should be excluded), and also in favor of the not interference of the optional instrument with International Law Rules, Lehmann (2011, p. 9), considering that it would help SME if Rome I is modified as to include UPIC and PECL within Preamble 14, since they are actually considered under Preamble 13: "This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention" and Preamble 14: "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". See also, Lando (2011) (noting the necessity that proposed Regulation incorporate rules on the general theory of contract law similar to the European Principles or the UNIDROIT Principles).
12. See Explanatory Memorandum, p. 5.
13. Draft Common Frame of Reference, 2009.
14. It is forgotten that an imperative uniform body such as the European Union Court of Justice might not be adequate in this area due to its lack of specialization in international trade matters, and the serious problem of delays. In addition, most international contracts are subject to arbitration and are, thus, outside the scope of the Court of Justice of the European Union.
15. Ole Lando recommends the EU coordinate with UNCITRAL a revision of the CISG (Lando, 2011, p. 722a).
16. Convention relating to a Uniform Law on the International Sale of Goods and Convention relating to a Uniform Law for the Formation of the Contract (The Hague, 1 July 1964).
17. See also Scottish Law Commission (2011, p. 41) No. 4.10, considering that CESL should also include its own interpretative notes (No. 4.11).
18. For example, Section 2 (pre-contractual Information to be given by a trader dealing with another trader) is from our point of view an unjustified extension of the pre-contractual information duties from B2C to B2B, particularly in the light of Art. 29.

19. See also criticism of the restriction to SMEs: Scottish Law Commission (2011), No. 6.41 et seq, and No. 6.50 advising the UK to extend CESL to large businesses contracting between themselves (Lando, 2011, p. 720). It should be pointed out that the criteria for the application to SME are almost impossible to ascertain making the instrument difficult to apply in practice. See Art. 7 CESL.
20. See Scottish Law Commission (2011, p. xiii) (considering the creation of a European Code for Consumer Sales over the internet).
21. Rome I, Regulation, Art. 6. See Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ l 177/6, 4 July 2008 (Schulte-Nölke, 2007).
22. In agreement for the latter, see Lehmann (2011, p. 9) and Scottish Law Commission (2011, pp. 38-9) (although only in regard to distance selling).
23. Directive 2011/83/EU of the European Parliament and of The Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. OJ L 304/64, 22 November 2011. OJ L 304/64, 22 November 2011.
24. Foe the status of this question under EU Law, see Final Report (n.d., pp. 32 et seq).
25. Art. 22, Directive 2006/123/EC of the European Parliament and of The Council of 12 December 2006 on services in internal market, OJ L 376/36, 27 December 2006.
26. Art. 22, Directive 2006/123/EC of the European Parliament and of The Council of 12 December 2006 on services in internal market, OJ L 376/36, 27 December 2006.
27. An explanation of the different theories and its application within domestic legal systems in Europe can be found at Principles of European Law on Sales (PEL S), Sellier, 2008, pp. 118 et seq.
28. Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 7 July 1999.
29. Art. 2.3: "goods" means any tangible movable items, with the exception of items sold by way of execution or otherwise by authority of law; water, gas and electricity shall be considered as goods within the meaning of this Directive where they are put up for sale in a limited volume or a set quantity; Art. 2.4: "goods made to the consumer's specifications" means non-prefabricated goods made on the basis of an individual choice of or decision by the consumer.
30. It is true that even if contained in a tangible medium, it is the copy of the software contained in the tangible medium that has the economic value for the user and thus this would be considered an obstacle to consider software as a good and to treat it as a service.
31. See López-Tarruella Martínez (2006, p. 55), Illescas Ortiz and Perales Viscasillas (2003, pp. 102-104). See also considering a flexible interpretation of the CISG as to include software contracts: Mistelis/Raymond, Art. 3 CISG, in Kröll/Mistelis/Perales Viscasillas, UN Convention on Contracts for the International Sale of Goods (CISG) (C.H. Beck-Hart-Nomos, 2011), No. 23-25.
32. Digital content is subject to the protection derived from industrial or intellectual property rights. Patents on software are not allowed under the Munich Convention on the European Patent of 1973. But, if the patent is on an invention incorporated into the software, then it can obtain a patent. According to Directive 91/250, software is protected under intellectual rights law. In fact, under this Directive software is impliedly considered as a good when in Art. 4(3). It establishes that the first sale within EU of the software copy consumes the right to distribute the software. See López-Tarruella (2006, 55 pp. et seq). The draft optional instrument does not deal with the issues derived from the industrial or intellectual rights of the software.
33. In agreement, see López-Tarruella (2006, p. 57).

34. Mistelis/Raymond, No. 23-25; and Schwenzer/Hachem, Artículo 1, in Schlechtriem/Schwenzer, Comentario sobre la Convención de las Naciones Unidas sobre los contratos de compraventa internacional de mercaderías. Tomo I, I. Schwenzer/E. Muñoz (Directores). Thomson/Aranzadi, 2011, No. 18. Contra: López-Tarruella (2006, p. 56), and Oliva Blázquez (2002).

35. The only references are in Art. 4b) to exclude from the Convention issues related to "the effect which the contract may have on the property in the goods sold" and in Art. 30 that states that the seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required "by the contract and this Convention". As mentioned above, the Convention does not regulate the transfer of the property and thus it is only the contract that can provide for the obligation of the seller to transfer the property; as it happens in the latter case with software. Contrary: Schwenzer/Hachem, Art. 1, No. 18.

36. Commission Expert Group on European Contract Law Feasibility study for a future instrument in European Contract Law, 3 May 2011, No. 7 (http://ec.europa.eu/justice/contract/files/feasibility-study_en.pdf): "The text of the Expert Group only covers the durable medium on which digital content can be delivered. Do you think that a European contract law instrument should also cover the digital content itself (whether it is delivered on a durable medium or directly downloaded from the internet)?" (a) If you consider it should, do you then believe that the rules on pre-contractual information in Art. 13 should be modified? Do you for instance think that it would be appropriate to include specific rules on the functionality of digital content (i.e. the ways in which digital content can be used including any technical restrictions)? (b) If you consider it should, do you then think that the general rules on sales and remedies in Part IV should be modified? Or are you of the opinion that the instrument should provide for specific rules? In the latter case do you think for instance it would be appropriate to include a rule clarifying that for a digital content which is not provided on a one-time permanent basis, the business should ensure that the digital content remains in conformity with the contract throughout the contract period (e.g. by way of updates which are free of bugs)? (c) If you consider it should, do you then think that the general rule on passing of risk in Art. 145 could be appropriate? Or do you think it may be necessary to include specific rules, for instance to ensure that the risks of loss or damage of the digital content pass only once the consumer or a third person designated by the consumer has obtained the control of the content. Do you think that the notion of "obtaining control of digital content" would be sufficiently clear?

37. http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf

38. Preamble 19, Directive 2011/83 considers digital content "irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means". Note, however, that under CESL, the cooling-off withdrawal period is different depending upon the form that the digital content is supplied; if made on a tangible medium then the same rule as sale of goods apply (delivery), whereas, if digital content is not supplied on a tangible medium the services rule applies (conclusion of the contract).

39. The definition derives from: www.ivir.nl/publications/helberger/digital_content_contracts_for_consumers.pdf, p. 175.

40. In fact these are included under Chapters 6 (Information) and 7 (Treatment) PEL SC.

41. Also excluded also from Directive 83/2011 on consumer rights by Preamble 30: "Healthcare requires special regulations because of its technical complexity, its importance as a service of general interest as well as its extensive public funding. Healthcare is defined in Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application on patients 'rights in cross-border healthcare as' health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and medical devices".

42. Excluded also from Directive 83/2011 on consumer rights, Preamble 31: "Gambling should be excluded from the scope of this Directive. Gambling activities are those, which involve wagering at stake with pecuniary value in games of chance, including lotteries, gambling in casinos and betting transactions. member states should be able to adopt other, including more stringent, consumer protection measures in relation to such activities".
43. DCFR, Part C (Services) and PEL S only deal with the sale of goods, but not related services that are left to PEL SC.
44. In fact, the Scottish Law Commission (2011, p. 91) considers both transport and financial services to be included otherwise "almost all sales contracts would be excluded".
45. Art. 14.1(b): "[. . .] additional freight, delivery or postal charges".
46. Note, this provision might be amended or even deleted since it creates confusion in regard to the scope of the instrument.
47. In Art. 2(b) Directive 2002/65/EC on the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, financial services are defined as "any service of banking, credit, insurance, personal pension, investment or payment nature" and Art. 2.13 Proposal for a Directive of the European Parliament and of the Council on consumer rights), COM (2008), 9 October 2008, 614 final.
48. Art. 150 CESL states that: "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 [. . .]".
49. This is the outcome of a service in accordance to PEL SC. See PEL SC, at p. 140.
50. See, for example, DCFR Art. IV. C. – 2: 105 y 2: 106).
51. For examples of unitary regulation for sales contracts and services contracts, as well as other contracts see: UNIDROIT Principles of International Commercial Contracts (2010); also for civil contracts (PECL and DCFR). Indeed as pointed out by PEL SC, p. 137, considering that the issue of qualification of the contract as a service or as sales contract is in practice of not of a great importance as regards conformity, since the obligations of the seller or the service provider will be similar.
52. The last exclusions derive from Art. 1.2(b) of Directive 1999/44, which excludes goods sold by way of execution or otherwise by authority of law.
53. See Art. 1445 Spanish Civil Code (CC) (1889): "por el contrato de compraventa uno de los contratantes se obliga a entregar una cosa determinada y el otro a pagar por ella un precio cierto, en dinero o signo que lo represente"; Art. 1582 French CC (1804) and Art. 1582 Belgium CC (1886): "La vente est une convention par laquelle lún sóblige à livrer une chose, et láutre à la payer". Also, the obligation to transfer the property of the goods forms part of the definition in some statutes. See, for example, the 1979 Sale of Goods Act of the United Kingdom: "A contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price", and Art. 2439 Louisiana Civil Code: "Sales is a contract whereby a person transfers ownership of a thing to another for a price in money". See also section 433 BGB (German Civil Code) (1900); Art. 1323 Argentinean CC (1869); Art. 874 CC of Portugal (1966); Art. 1470 Italian CC (1942); Art. 737 CC of Paraguay (1987); Art. 2248 CC Mexico (1928); and Art. 454.1 CC Russian Federation (1994).
54. Art. 3.1 CISG: "Art. 3(1) CISG: Contracts for the supply of goods to be manufactured or produced 'are to be considered sales' unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture". Art. 4.1 of Directive 199/44: Contracts for the supply of consumer goods to be manufactured or produced

"shall also be deemed contracts of sale" for the purpose of this Directive. Following this trend: Art. IV.A-I: 102 DCFR (Goods to be manufactured or produced): "A contract under which one party undertakes, for a price, to manufacture or produce goods for the other party and to transfer their ownership o the other party is to be considered as primarily a contract for the sale of the goods". There is no doubt that the Regulation improves the definition under Art. 3.1 CISG and thus, under the regulation contracts for the supply of goods to be manufactured or produced are to be considered sales whether or not the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production. The same approach as under Art. 3.1 CISG is found in Art. 1: 102 PEL S.

55. Domestic legal systems differ as to the criteria and factors to be applied in order to characterize a contract as a sales contract. The criteria to be followed include, among others, the comparison between the obligation to do and the obligation to give; the character of the object/goods (fungible/non-fungible; standard/custom-made); the possible alteration of the object (whether or not an item is created that possesses its own individuality); whether the production of the goods was done before the contract, or if the goods are the kind of goods that are usually produced by the seller; the skill of the person who is to produce the goods; and, finally, the need to transfer property in the goods. See CISG-AC, Opinion no. 4: Contracts for the Sale of Goods to be manufactured or produced and mixed contracts (Art. 3 CISG), 24 October 2004; Rapporteur Professor Pilar Perales Viscasillas, available at: www.cisg-ac.org; Perales Viscasillas (2005).

56. Whether or not the buyer provides for a substantial part of the materials necessary for the production of the goods is irrelevant for the definition of the sales contract under the CESL. Although, it is important under the CISG Art. 3.1) and for domestic systems that might consider it a different type of contract.

57. Therefore, instead of the sale of a thing (for example a wedding dress or software), designed under the wishes and directions of the client, being considered to be a service under Chapter 5 (Design) PEL S, it should be considered a sales contract.

58. In fact, this is the option under PEL S. See Art. 2: 201 and Illustration 2, which considers within its scope of application: "the construction of tailor-made machinery, software and websites as examples of this".

59. See also, in relation to distribution contracts: Scottish Law Commission (2011) No. 6.58-6.63. However, confusing the framework contract with the contracts of sale concluded under it may lead to the incorrect conclusion that the instrument covers "distribution contracts in which the seller undertakes to transfer title in the goods to the distributor and the distributor undertakes to pays the price".

60. Art. 2.5: "'sales contract' means any contract under which the trader transfers or undertakes to transfer the ownership of goods to the consumer and the consumer pays or undertakes to pay the price thereof, including any contract having as its object both goods and services" and Art. 2.6: "'service contract' means any contract other than a sales contract under which the trader supplies or undertakes to supply a service to the consumer and the consumer pays or undertakes to pay the price thereof".

61. PEL S, p. 107, in regard to Art. 1: 102, considers that it improves Art. 3.1 CISG, as it does away with the term "supply of goods", since supply does not necessarily involve any transfer of ownership. Note, the distinction between sale and supply might be difficult to translate into other languages. See also definition of supply under DCFR: "'supply' goods means to make them available to another person whether by sale, gift, barter, lease or other means; to 'supply' services means to provide them to another person, whether or not for a price. Unless otherwise stated, 'supply' covers the supply of goods and services". Actually, one might think as a further

option to use the term supply to embrace both sale of goods and the license of digital content. But again difficulties in translation should not be underestimated.

62. This was the option under PEL S where Art. 1: 105 (Application to other assets) applies with appropriate adaptations to contract for the sale of: "(b) information and data, including software and databases. And the same approach under DCFR: The contract for the sale of goods applies with appropriate adaptations to: d) contracts conferring, in exchange for a price, rights in information or data, including software and databases (Art. IV.A.-I: 101 d)".

References

Barendrecht, J.M., Jansen, C.E.C., Loos, M.B.M., Pinna, A.P., Cascao, R.M. and van Gulijk, S. (2007), *Principles of European Service Contracts* (*PEL SC*), Oxford University Press, Oxford.

Final Report (n.d.), "Comparative analysis, law and economics analysis, assessment and development of recommendations for possible future rules on digital content contracts", 32 pp. available at: www.ivir.nl/publications/helberger/digital_content_contracts_for_consumers.pdf

Illescas Ortiz, R. and Perales Viscasillas, P. (2003), *El Derecho Mercantil Internacional: El Derecho Uniforme*, Cerasa, Madrid, pp. 102-4.

Lando, O. (2011), "Comments and questions relating to the European Commission's proposal for a regulation on a Common European Sales Law", *European Review of Private Law*, No. 6, p. 718.

Lehmann, M. (2011), "Derecho Privado Europeo Un Derecho Opcional", Noticias de la Unión Europea, No. 320, p. 11, September.

López-Tarruella Martínez, A. (2006), *Contratos Internacionales de Software*, Tirant lo Blanch, Valencia, p. 55.

Oliva Blázquez, F. (2002), *Compraventa internacional de mercaderías*, Tirant lo Blanch, Valencia.

Perales Viscasillas, P. (2005), "From and before the CISG, to and beyond the EU Directive 1999/44 on the sale of consumer goods", *Uniform Commercial Code Law Journal*, Vol. 38, pp. 137-58.

Schulte-Nölke, V.H. (2007), "EC Law on the formation of contract – from the common frame of reference to the 'Blue Button'", *European Review of Contract Law*, No. 3, pp. 348-9.

Scottish Law Commission (2011), *An Optional Common European Sales Law: Advantages and Problems, Advice to the UK Government*, No. 6.22 et seq, Scottish Law Commission, Edinburg, 10 November, available at: www.scotlawcom.gov.uk/news/advice-on-european-sales-law/

Corresponding author
Pilar Perales Viscasillas can be contacted at: pperales@der-pr.uc3m.es