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CISG and CESL

1. Dedication

Ole Lando is Europe's most influential lawyer of the second half of the 20th century. His idea to develop Principles of European Contract Law by collaboration of outstanding academics from different countries stimulated many others to establish similar groups in other fields of law. Numerous research groups followed the example and method of the Lando Principles and prepared or still prepare sets of principles for almost all fields of law. Ole has been the source and is the godfather of this specific European movement of private academic Europeanization of law which has become a characteristic of Europe's last forty years.

It is a particular honour and privilege to know Ole, to be befriended with him since long and to write for him on the occasion of his 90th birthday.

2. General relationship between CISG and CESL

The subject of this paper is to examine the relationship between the United Nations Convention on Contracts for the International Sale of Goods (CISG) of 1980 and the Proposal for a Common European Sales Law (CESL) which the EU Commission published on 11 October 2011[1] and to compare both instruments. However, only major differences will be discussed. The CESL is formally Annex I to the Proposal for a Regulation of the European Parliament and the Council on a Common European Sales Law (in the following text CESL is used for the proposed Annex I and Proposal for the Proposal for the Regulation).

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1. COM (2011) 635 final.

2.1. Objectives of CISG and CESL

First, the objectives of the CISG and the CESL shall be discussed. They differ more than at first glance may be thought.

2.1.1. CISG

The central objective of the CISG is well known and needs hardly mentioning: it is the global unification of the substantive law of professional international sales of moveable goods. It covers all kinds of professional sales but principally excludes consumer sales.[2] The CISG's ground of justification is the insight that the sales laws of the national states differ rather widely and that these differences impair international trade. It can be questioned whether these differences are really serious hindrances for international trade; normally merchants do not care too much about law when they conclude transborder contracts.[3] However, the least that can be said is that the differences between the national sales laws certainly do not promote transactions across borders. The solution of the CISG therefore is to replace as far as the CISG reaches the otherwise applicable national law.

2.1.2. CESL

"The purpose of the Regulation <*on CESL*> is to improve the conditions for the establishment and the functioning of the internal market by making available a uniform set of contract law rules."[4] In essence it is the same idea underlying both instruments that national differences of law are obstacles to international trade and therefore should be removed.[5] Like the CISG on a global level CESL intends to achieve this aim within the EU. However, CESL in contrast to the CISG does not replace the differing national laws. CESL intends to facilitate international sales not by primarily unifying European sales law. Instead, it offers a further ("second")[6] contract law regime which

2. Art. 2 lit a CISG. The CISG covers however consumer sales which the seller could not recognize as such as well as sales where the consumer sells to a professional buyer.
3. However, the *Eurobarometer 320 on European contract law in business-to-business transactions of 2011,* pp. 15 and the *Eurobarometer 321 on European contract law in consumer transactions of 2011,* pp. 19, show that merchants when asked regard differences of contract law as a certain impediment for their trading across the border.
4. Art. 1 Proposal; see also Explanatory Memorandum to the CESL, COM (2011) 635 final, p. 4.
5. See in particular Explanatory Memorandum to the CESL, COM (2011) 635 final, pp. 1.
6. See Explanatory Memorandum to the CESL, COM (2011) 635 final, p. 4.

the parties may choose in order to avoid the differences between the national laws. The drafters hope that the new instrument will attract such choice due to the inherent advantages of CESL. It is only a slight exaggeration that CISG and CESL compare like octroi and seduction.

Further, CESL does not intend to offer a sales regime for all international sales transactions. Its main purpose is to provide a special, largely protective sales regime for consumers and smaller enterprises: CESL therefore covers sales only between professional sellers and consumers and for sales between professional traders if one of them is a small or medium-sized enterprise (SME).[7] The SMEs are not too small; Article 7 (2) Proposal 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 (or the equivalent in another currency). The original coverage of CESL is thus limited and excludes international sales between larger enterprises. The Member States may, however, make CESL available also to big enterprises but they must do so expressly.[8]

2.1.3. Comparison

The objectives of CISG and CESL correspond to a limited extent only. CESL's primary aim is the facilitation of transborder trade for consumers and small businesses (primarily in the EU), whereas the CISG aims at the facilitation of all kinds of professional, international sales on a global level, generally excluding consumer sales. Concerning the addressees of the two instruments there is therefore an overlap between CISG and CESL with respect to SMEs. Both instruments address these persons or enterprises whereas CESL does not intend to formulate sales rules for "big" traders (though the Member States may open CESL for them) and CISG does not intend to regulate consumer sales. Further, while the CISG strives for global unification of substantive sales law that replaces national sales law, CESL offers a mere option for another sales regime leaving existing differences between national laws unaffected. CESL's drafters evidently regard unification of law – with binding force – as unnecessary for the facilitation of international trade. They believe in the voluntary use of uniform rules that are optional even if they contain mandatory elements. Should the Proposal become law, the future will show whether this belief is well-founded. In comparison, the objectives of the CISG appear clearer, easier achievable and more straightforward.

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7. See Art. 7 (1) Proposal.
8. Art. 13 lit. b Proposal.

2.2. Opt-in vs. Opt-out

A fundamental difference between CISG and CESL concerns the automatism with which the respective instrument applies: Where its conditions of application are met the CISG applies automatically. Yet, it leaves the parties the free option to exclude its applicability or to vary its provisions.[9] It is not applicable where the parties used the opt-out possibility with sufficient clarity.

CESL, on the contrary, is applicable if and only if chosen by the parties.[10] An opt-in is necessary. Without a valid agreement CESL remains inapplicable.

Unification of sales law has gained certain experience with an opt-in model, and the experience provides a warning: Great Britain ratified the Uniform Hague Sales Law of 1964 (ULIS and ULFIS)[11] under the reservation that the parties opt for the application of the Uniform Sales Law. Since the ratification of the Hague Law in 1972 until today – Great Britain is still one of the two remaining Contracting State of the Hague Law[12] – English courts had to deal with no single case where the Hague Sales Law was in fact applicable. The only English decision mentioning ULFIS is *Butler Machine Tool Co. Ltd. v. Ex Cell-O Corp. (England)*.[13] There the Uniform Law was discussed for the sake of argument, not because it was applicable. In forty years, in no published English case parties did opt for the Hague Law. There was, on the other hand, a vivid practical use of the Uniform Sales Law in those Contracting States that like Belgium, Germany, Italy or the Netherlands had accepted the opt-out solution which applied the uniform law unless the parties excluded it.[14] The British ratification of the Hague Law under the opt-in reservation has to be considered a mere alibi for the intention to avoid the application of the Uniform Sales Law in practice. It is doubtful whether a European opt-in solution will fare any better.

One may point to the US-American experience with the Uniform Commercial Code which is a complete optional model as well. The UCC, a model law without any binding force as such, has nonetheless been adopted by all single US-States, even by Louisiana, despite her Civil Law tradition. However, it were the legislators of the US States that enacted the UCC or

9. Art. 6 CISG.
10. Art. 3 Proposal.
11. ULIS was the Convention on the substantive sales law and ULFIS the separate Convention on the formation of international sales contracts.
12. The other Contracting State is Gambia.
13. [1977] EWCA Civ 9; [1979] 1 W.L.R. 401.
14. See P. Schlechtriem/U. Magnus, *Internationale Rechtsprechung zu EKG und EAG. Eine Sammlung belgischer, deutscher, italienischer, israelischer und niederländischer Entscheidungen zu den Haager Einheitlichen Kaufgesetzen* (1987).

respective provisions in their states and gave it binding force. It were not private parties who chose the instrument for their contracts. The US experience thus does not support the opt-in solution of the CESL.

Also other world regions that unified their sales law, namely adopted the CISG more or less as their law, like the OHADA[15] or the Nordic countries,[16] did not introduce it as an option but as the general default rule, partly even mandatory.

The mentioned experiences raise doubts on the wisdom of an opt-in solution. There is the danger that CESL remains dead letter. Probably a rather strong (economic) incentive would be necessary to persuade parties to choose CESL. Whether such incentive exists is however doubtful. The CESL functions rather similar to standard contract terms or a set of Principles like the UNIDROIT Principles, however with the exception that in consumer sales most of the CESL and in other sales parts of the CESL[17] can neither be excluded nor varied. Since the CESL intends to maintain and does maintain a high level of consumer protection[18] – partly even higher than the current EU level[19] – and since it will regularly be the business that proposes the contract terms, it appears more than doubtful whether businesses will propose the CESL as their standard contract terms. The Explanatory Memorandum to the Proposal points out that the main advantage of CESL is that in B2C sales businesses need no longer "identify the mandatory consumer protection provisions in the consumer's law, since the Common European Sales Law would contain fully harmonized consumer protection rules providing for a

15. The OHADA (Organisation pour l'Harmonisation en Afrique du Droit des Affaires) comprises 16 African States and introduced a slightly modified version of the CISG.
16. The Nordic countries Denmark, Finland, Iceland, Norway and Sweden adopted a rather uniform Nordic Sales Act of 1905. Its modernised version of the 1980ies borrowed considerably from the CISG; see J. Lookofsky, "The Scandinavian Experience", in F. Ferrari (Ed.), *The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences* (2003), pp. 95 (pp. 110).
17. For instance, the general provisions on unfair contract terms (Arts. 79-81 CESL).
18. See Recital 11 of the Proposal.
19. For instance, the consumer/buyer is immediately entitled to termination in case of delivery of non-conforming goods unless the non-conformity is "insignificant" (Art. 114 (2) CESL; sellers right to cure under Art. 109 CESL, which the buyer can only refuse under certain conditions, does not apply to consumer sales; Art. 106 (3) (a) CESL). Under the current Consumer Sales Directive, termination is generally available only if repair or replacement did not work (Art. 3 (5) Consumer Sales Directive). Moreover, Art. 158 CESL allows the consumer to freely cancel a service contract related to the sale at any time and without any reason.

high standard of protection throughout the whole of the European Union."[20] Whether this will provide a sufficient incentive for businesses to opt for CESL, remains to be seen. It cannot be overlooked that the advantage has a certain price: as mentioned, consumer protection under CESL is partly higher than under current EU law.

In sum, an opt-out solution appears by far preferable.

2.3. Partial adoption of CISG and CESL?

The CISG is to the widest possible disposal of the parties. According to Article 6 CISG the parties can exclude each part or each single provision of the CISG if they so want. The only express exception that Article 6 mentions is Article 12 CISG which reserves the Contracting States the right to introduce a form requirement. Further unwritten exceptions which the parties cannot dispose of are the final provisions[21] of the Convention (which are not addressed to the parties but to the Contracting States) and Article 7 (1) CISG which prescribes that good faith in international trade must be observed. Even in the exceptional case that a consumer sale falls under the CISG the parties are free to exclude or vary provisions or parts of the CISG as they wish. The validity of such variations depends however on the control of the applicable national law[22] which in turn may use the CISG as the model standard according to which the validity has to be judged.[23]

Since CESL provides for many mandatory rules it cannot be fully left to the disposal of the parties. In B2C sales the parties can only adopt the CESL as a whole.[24] That evidently means that in such cases the parties cannot exclude parts of the CESL. It is not clear whether this also means that the parties of a B2C sale even cannot vary, or derogate from, non-mandatory provisions of CESL. Recital 24 stresses that the parties' selective choice "could disturb the balance between the rights and obligations of the parties and adversely affect the level of consumer protection." Therefore the choice of CESL should cover it as a whole. On the other hand, according to Recital 30 "the freedom of contract should be the guiding principle underlying the Common European Sales Law. Party autonomy should be restricted only

20. See COM (2011) 635 final, p. 4.
21. Arts. 89-101 CISG. A partial re-exception is however Art. 100 CISG which concerns the temporal scope of application; the parties may agree on the applicability of the Convention even though the temporal scope is not given.
22. See Art. 4 in connection with Art. 7 (2) CISG.
23. As for instance in German law whose § 307 para. 2 Nr. 1 BGB provides that a standard contract term is unreasonable and therefore invalid if it substantially deviates from the solution prescribed by the law. The law then is not the BGB but the CISG.
24. See Art. 8 (3) Proposal.

where and to the extent that this is indispensable, in particular for reasons of consumer protection. Where such a necessity exists, the mandatory nature of the rules in question should be clearly indicated." This statement militates in favour of possible variation and derogation of non-mandatory rules.

While in consumer sales Article 8 (3) CESL requires that the CESL must be chosen in its entirety, this is by *argumentum e contrario* apparently not mandatory in non-consumer cases. Here, even if SMEs are involved professional traders may apparently opt for parts of the CESL or freely vary and exclude parts or provisions of it when they choose the CESL.

2.4. Opt-in outside the scope of application?

There is wide unanimity that in principle parties can choose the CISG even if the transaction falls outside the original scope of application of the Convention. They can thus extend the range of the CISG. However, the validity of such choice and its admissible extent is governed by the applicable national law.[25] An extension of the territorial and temporal scope is considered unproblematic whereas, according to the prevailing opinion, the extension of the material scope cannot exclude the otherwise applicable mandatory law on the material validity of the sales transaction (which is anyway outside the scope of the CISG).[26] The extension to consumer sales is principally admissible but does not oust the mandatory national consumer protection.[27]

It is questionable whether the CESL can be chosen outside its scope of application. Although the parties are entirely free to opt for the CESL, the Proposal nonetheless defines its material, personal and territorial scope meticulously. It excludes for instance the use of CESL for mixed-purpose contracts and contracts linked to consumer credits.[28] Its original personal scope of application covers only B2C sales and sales with one SME involved.[29] The territorial scope concerns cross-border contracts only. Yet, the Member States may extend the personal scope to traders being no SMEs

25. See F. Ferrari, in P. Schlechtriem/I. Schwenzer (Eds.), *Kommentar zum Einheitlichen UN-Kaufrecht – CISG –,* 5th ed. (2008) Art. 6 para. 40; U. Magnus, Wiener UN-Kaufrecht (CISG), in J. von Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (2005) Art. 6 para. 65.
26. F. Ferrari, in P. Schlechtriem/I. Schwenzer Art. 6 para. 41; U. Magnus, "Wiener UN-Kaufrecht (CISG)", in J. von Staudinger Art. 6 para. 67.
27. F. Ferrari, in P. Schlechtriem/I. Schwenzer Art. 6 para. 39; P. Mankowski, *RIW 2003,* 10 s; D. Martiny, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch vol. 10*, 5th ed. (2010) CISG para. 84.
28. Art. 6 Proposal.
29. Art. 7 Proposal.

and the territorial scope to purely internal sales.[30] From this regulation it probably must be inferred that parties are not free to extend the scope of the CESL beyond its borders, at least not with the effect that the otherwise applicable mandatory law is excluded. However, since CESL is generally optional the parties should also be free to agree on CESL even if its "scope of application" is not met. Consequently, a choice of the CESL outside its scope has the same effect as the choice of standard contract terms. They are applicable as far as the actually governing law accepts them.

Compared to the CISG, it is unclear how far and to which effect the CESL can be chosen beyond its original scope.

2.5. Separate choice for sales contract and related service contract?

It is a further question whether parties can opt for CESL for related service contracts alone without opting for CESL for the accompanying sales contract. The answer is not clear. If Article 5 Proposal is construed verbally a separate choice of CESL for the sales part alone appears possible. Likewise, Article 5 Proposal seems to favour an understanding that the choice of the CESL for the sales contract does not automatically mean its choice for any related service contract as well. Article 9 (1) CESL, on the other hand, gives the contrary impression that once the CESL applies to the sales contract it also applies to the related service contract. A clearer regulation appears desirable.

Under the CISG it is clear that if Article 3 (2) CISG covers a sales contract the Convention also applies to the accompanying labour or other service element.

2.6. Further scope of application

Differences between CISG and CESL also exist with respect to the further scope of application.

2.6.1. Covered contracts

The CISG is confined to sales and supply contracts. They include contracts where the seller manufactures or produces the goods except where the buyer supplies a substantial part of the necessary material.[31] Contracts with further service, for instance labour, elements are only covered where the sales ele-

30. Art. 13 Proposal.
31. Art. 3 (1) CISG.

ment exceeds in value the value of the service elements.[32] CISG cases which focus on the service element are rare.[33]

Similarly, CESL covers sales (which include contracts for the supply of goods to be manufactured or produced)[34] and contracts for the supply of digital content, as well as service contracts which are related to the sales contract "such as installation, maintenance, repair or any other processing" and which the seller provides.[35] However, the value ratio between the sales element and the service element is irrelevant. CESL remains applicable even if the value of the labour or service element is higher than that of the sales element. On the other hand, CESL excludes certain accompanying services such as transport, training, telecommunications support and financial services[36] whereas the CISG covers them if their value is less than the sales part.

The avoidance of the value ratio may appear as an advantage of CESL; for, it removes uncertainty over the applicability.

As already mentioned the CISG excludes consumer sales in general while CESL covers them.

2.6.1. Goods

Like the CISG CESL concerns primarily the substantive law of sale of moveable goods ("tangible movable items").[37] Both instruments exclude electricity;[38] on further details concerning goods CISG and CESL differ, however more in formulation than in outcome. Only CESL expressly excludes natural gas as well as water and other types of gas "unless they are put up for sale in a limited volume or set quantity".[39] Since in practice gas and water is generally sold in volume or specified quantities that means that

32. See Art. 3 (2) CISG.
33. See the collection (CLOUT) of decisions by UNCITRAL which counts only 14 decisions on Art. 3 (2) CISG out of about 1000 decisions. The most comprehensive collection (cisg.pace) reports 34 decisions on Art. 3 CISG out of almost 3000 decisions; only a part of them concerns Art. 3 (2) CISG.
34. Art. 2 (k) Proposal.
35. See Art. 2 (m) Proposal.
36. Art. 2 (m) (i)-(iv) Proposal.
37. Art. 2 (h) Proposal.
38. Art. 2 (f) CISG and Art. 2 (h) (i) Proposal.
39. Art. 2 (h) (ii) Proposal.

these contracts are covered. They fall within the scope of both instruments.[40] The same is true for the purchase of oil[41] and nuclear material.[42]

Contrary to the CISG which excludes "ships, vessels, hovercraft and or aircraft"[43] CESL does not specifically mention them and thus covers them. This avoids the moderate uncertainty under the CISG what constitutes a ship or vessel.

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

In contrast to the CISG the CESL particularly addresses the supply of digital content. Article 2 (j) CESL defines digital content as "data which are produced and supplied in digital form" including digital games or software and excluding services in electronic form. It is the prevailing view that the CISG also covers the sale of software, at least standard software whether or not it is on a tangible medium.[44]

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

2.6.3. Material scope of application

The central contents of both instruments is identical, namely the regulation of the formation of (international) sales contracts and the rights and obliga-

40. See for the CISG F. Ferrari, in P. Schlechtriem/I. Schwenzer Art. 2 para. 46; U. Magnus, "Wiener UN-Kaufrecht (CISG)", in J. von Staudinger, Art. 2 para. 50; K. Siehr, in H. Honsell, *Kommentar zum UN-Kaufrecht* (2nd ed., 2010) Art. 2 para. 19.
41. See for the CISG the references in the preceding note.
42. U. Magnus, "Wiener UN-Kaufrecht (CISG)", in J. von Staudinger Art. 2 para. 50.
43. Art. 2 (e) CISG.
44. See OGH 21.6.2005, IHR 2005, 195 [196] with note B. Piltz; OLG Koblenz RIW 1993, 936; OLG Köln RIW 1994, 970; LG Trier 17. 2. 2000, CISG-Pace; RB Arnhem 28.6.2006, CISG-online Nr 1265; indirekt auch BGH 27.6.2007, NJW 2007, 3501 [the application of the CISG on a sale of hardware and software by the lower court accepted without commentary]; F. Ferrari, in P. Schlechtriem/I. Schwenzer Art. 2 para. 38; J. Lookofsky, *Understanding the CISG*, 3rd ed. (2008) 19 ff.; U. Magnus, "Wiener UN-Kaufrecht (CISG)", in J. von Staudinger Art. 1 para. 44; K. Siehr, in Honsell Art. 2 para. 8; probably also L. Mistelis, in St. Kröll/L. Mistelis/P. Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary (2011)* Art. 1 para. 40.

tions of the parties of those contract.[45] Yet, the CESL regulates a considerable number of legal issues not contained in the CISG. But also the CISG regulates aspects which the CESL does not contain.

2.6.3.1. Pre-contractual information duty

Only CESL deals – extensively – with pre-contractual information duties[46] even with respect to businesses.[47] The CISG, too, addresses certain aspects of the pre-contractual phase in Article 8 (3), 15 (2), 16 (2) (b), 29 (2) and 35 (2) (b). But none of these provisions enacts an explicit pre-contractual information duty.

2.6.3.2. Right of withdrawal

From the acquis communautaire CESL took over provisions on consumers' rights to withdrew from contracts that meet certain specific conditions.[48] Since CISG generally does not cover consumer sales it is not surprising that there are no comparable provisions in CISG.

2.6.3.3. Defects in consent

Contrary to the CISG, CESL regulates defects in consent,[49] namely mistake,[50] fraud,[51] threat[52] and unfair exploitation[53] and awards the aggrieved party the right of avoidance in all these cases. The CISG treats these cases as problems of validity which fall outside its scope and must be dealt with by the applicable national law. Under the CISG, an exception is a mistake concerning the quality of the goods[54] or the creditworthiness of the other party.[55] The CISG also regulates an error in transmission of a communication.[56]

It is a shortcoming of the CISG that it does not provide rules for all kinds of defects of consent but leaves them to national law. However, in

45. See Art. 4 CISG and Art. 30 et seq. and 87 et seq. CESL.
46. Arts. 13-29 CESL.
47. Arts. 23-29 CESL.
48. Arts. 40-47 CESL.
49. Arts. 48-57 CESL.
50. Art. 48 CESL.
51. Art. 49 CESL.
52. Art. 50 CESL.
53. Art. 51 CESL.
54. These cases are covered by Art. 45 et seq. CISG.
55. This case is covered by Art. 71 CISG.
56. Art. 27 CISG.

the CISG court practice the non-covered cases do not play a particularly significant role.[57]

2.6.3.4. Unfair contract terms

Again in accordance with the acquis communautaire, the CESL contains provisions on unfair contract terms.[58] Such terms are generally invalid;[59] CESL's provisions on them are mandatory, even for transactions between businesses.[60] However, CESL provides for different unfairness standards for B2C sales[61] and B2B sales.[62]

The CISG refers the matter of unfair contract terms as an aspect of material validity to the applicable national law.[63]

Certainly, the uniform regulation of the issue of unfair contract terms is an undeniable progress. It is however unlikely that presently such a progress could be achieved on the global level which the CISG is addressing and in fact regulating. Moreover, this issue is particularly relevant for consumer sales, less so for sales between businesses. The CISG is focussing only on the latter; it rarely covers consumer sales.

2.6.3.5. Related service contracts

In contrast to the CISG the CESL provides for separate rules on related service contracts[64] and establishes certain specific obligations such as the duty to warn of unexpected or uneconomic cost.[65] In general, the obligations and remedies for the service part correspond to those of the sales part, though.

Under Article 3 (2) CISG which includes sales contracts with non-preponderant service elements the general sales rules apply to those related service contracts which the CISG covers. The practical experience with Article 3 (2) CISG does not urgently call for special rules for such accompanying labour or other service contracts.[66]

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57. There are only few published cases where mistake, fraud or threat was discussed in a CISG case; see for instance LG Aachen RIW 1993, 760 (761); Arbitration Court of the Chamber of Commerce Zürich (31 May 1996) UNILEX; OGH ZfRV 1997, 204 (207); OLG Hamburg TranspR-IHR 1999, 37 (39).
58. Arts. 79-86 CESL.
59. Arts. 79 (1) CESL.
60. Art. 81 CESL.
61. See Arts. 82-85 CESL.
62. Art. 86 CESL.
63. Art. 6 CISG.
64. Arts. 147-158 CESL.
65. Art. 152 CESL.
66. For this practice see *supra* note 33.

2.6.3.6. Prescription

Also in contrast to the CISG CESL regulates prescription[67] and provides for two different prescription periods: a short one of two years which starts with the creditor's knowledge or negligent non-knowledge and a long one of ten years – and thirty years in case of damages claims for personal injuries – which starts when the debtor did act or should have acted.[68] Evidently, the long period is the default rule that applies when the creditor did not and could not know of the own right.

The CISG on the other hand leaves the prescription issue to the applicable national law or to the UN Convention on the Limitation Period in the International Sale of Goods of 1974/80 where this Convention is applicable. However, only a good third[69] of the CISG States[70] – and only few of the economically important CISG States[71] – also have ratified the Limitation Convention which provides for a mandatory prescription period of four years.[72]

In comparison, CESL's prescription rules appear superior to those of the UN Limitation Convention since they are more flexible and adequate.

2.6.3.7. Duty to preserve the goods

Only under formal aspects the CISG differs from the CESL as far as the duty of each party is concerned to preserve the goods if they are in this party's possession even though the other party is legally responsible for them, for instance, if the buyer has validly terminated the contract but still is in possession of the goods. In a separate chapter the CISG regulates this issue and obliges the buyer to take reasonable steps to preserve the goods;[73] and vice versa also the seller must preserve the goods if the buyer is in delay to take the goods.[74] By analogy the preservation duty extends also to the case that the buyer has to return the goods in exchange for a replacement.

The CESL contains a similar provision only with respect to the seller if the buyer wrongfully refused to take the goods.[75] However, at a rather hidden place (in Art. 90 (2)) CESL extends the duty to preserve the goods "with appropriate adaptations" to comparable cases.

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67. Arts. 178-186 CESL.
68. See Arts. 179 and 180 CESL.
69. There are 29 States party to the Limitation Convention (1 Feb. 2012).
70. There are 77 CISG States (1 Feb. 2012).
71. The United States is the only economically important Contracting State of the Limitation Convention.
72. Arts. 8 and 22 Limitation Convention.
73. See Art. 86 CISG.
74. Art. 85 CISG.
75. Art. 97 CESL.

2.6.3.8. Comparison

The CESL regulates a number of legal issues which the CISG omits. The Explanatory Memorandum to the proposed CESL Regulation criticises that the CISG "leaves important matters outside its scope, such as defects in consent, unfair contract terms and prescription."[76] However, partly the issues that CESL covers in addition are primarily or entirely relevant for consumer sales, namely the pre-contractual information duties, the right of withdrawal and the regulation of unfair contract terms. If at all, there is only a limited need to regulate these issues within the CISG. There is a slightly greater need that the CISG should cover all kinds of defects in consent. However, as mentioned, the practical experience does not prove an urgent need since there are not many CISG cases which raise this problem.

Moreover, neither CESL nor CISG regulate a number of legal issues which have considerable practical relevance: first there is set-off which parties rather often use as defence. Neither CESL nor CISG deal with it expressly; however, CISG probably covers set-off with claims out of CISG contracts or at least out of the same CISG contract.[77] Secondly, assignment is regulated neither by CESL nor by CISG. Thirdly, both instruments omit rules on representation, an issue also rather often raised. Fourthly, both instruments leave further matters of material validity to the applicable national law, namely capacity, violation of good morals (*Sittenwidrigkeit*), violation of legal order and/or public policy, validity of penalties.

In sum, there are differences in the material scope of application of CISG and CESL; but they are of no great importance. In my view they do not justify to prefer the CESL over the CISG where the latter is applicable.

3. The conflict of laws problem

The conflict of laws problem is relatively easy with respect to the CISG: as far as the CISG reaches does it supersede private international law. Only where the CISG expressly refers to private international law – like in Article 1 (1) (b) – or outside the scope of the CISG including its underlying general

76. COM (2011) 635 final, p. 5.

77. See M. Djordjevic, in St. Kröll/L. Mistelis/P. Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary,* Art. 4 para. 41; U. Magnus, *Wiener UN-Kaufrecht (CISG),* in J. von Staudinger, Art. 6 para. 47; but contra F. Ferrari, in P. Schlechtriem/I. Schwenzer, Art. 6 para. 40.

principles (Art. 7 (2)) must the court seized with the case apply its rules of private international law).[78]

The conflict of laws problem is more complicated with respect to the optional CESL. The idea of an optional sales law with mandatory elements is an innovative European concept. However, to some extent it wants to make the impossible possible: to impose the voluntary use of mandatory rules. This poses questions of private international law not only but primarily in regard of consumer sales. Whether CESL always prevails over mandatory national law, in particular over consumer protection law, is not entirely certain.

The Recitals and the Explanatory Memorandum to the proposed CESL Regulation show two intentions of the drafters which in fact contradict. On the one hand, it is the intention that CESL shall entirely replace the otherwise applicable law and shall constitute a separate and single ("second") system that can be chosen as the applicable law. Article 11 Regulation Proposal provides: "Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules." On the other hand, Recital 10 and the Explanatory Memorandum clearly express that the choice of CESL shall not affect the Rome I Regulation and its Article 6.[79] However, Article 6 (2) Rome I Regulation prescribes that a choice of law must not deprive the consumer of the protection of the law at his or her habitual residence if the professional at least directed its activities to that country.[80] It is thus the consequence of Article 6 Rome I Regulation that if a consumer's national law is more favourable than CESL the national law must be applied.

Recital 12 to the Proposal forecasts that such case cannot happen: "(s)ince the Common European Sales Law contains a complete set of fully harmonized mandatory consumer protection rules, there will be no disparities between the laws of the Member States in this area, where the parties have chosen to use the Common European Sales Law." But this is only true if there is full harmonization of consumer sales law in its strict sense which prohibits Member States to provide better protection and that this harmonized consumer law and CESL fully correspond. Presently, Article 8 (2) Consumer Sales Directive entitles Member States to adopt or maintain a higher level of protection. The standard of the Consumer Sales Directive is a mere minimum standard which the Member States may overbid. Evidently,

78. Unless other international conventions such as the UN Limitation Convention of 1974/80 apply.
79. So expressly Explanatory Memorandum, COM (2011) 635 final, p. 6.
80. Art. 6 (2) in connection with (1) Rome I Regulation.

as Article 33 of the Proposal for a Directive on consumer rights[81] shows, this situation of minimum harmonization shall continue. Thus, if Article 6 (2) Rome I Regulation remains truly unaffected it cannot be excluded that national consumer sales provisions – of EU Member States and even more of Non-Member States which are not bound by any European standard – will be more favourable to consumers than CESL. In such a situation, according to Article 6 Rome I Regulation, the national rules must be applied. At least, businesses continue to be required to check whether national consumer laws are more favourable than CESL. The promised advantage of CESL that national consumer law can be neglected[82] would only be available as long as CESL, in all respects, affords the highest level of consumer protection, both compared to Member States law and to third states law.

It is not easy to reconcile the contradicting intentions of establishing an independent "second" regime and the full application of the existing conflicts rules, in particular of Article 6 (2) Rome I Regulation. The drafters of the Proposal seem to argue that Article 6 Rome I Regulation has no practical application (at least for consumers habitually resident in the EU) because CESL constitutes the standard to measure the more favourable law at the consumer's place of habitual residence.[83] The Explanatory Memorandum could be understood in this sense when it states: "The latter provision <Article 6 Rome I Regulation> however can have no practical importance if the parties have chosen within the applicable national law the Common European Sales Law. The reason is that the provisions of the Common European Sales Law of the country's law chosen are identical with the provisions of the Common European Sales Law of the consumer's country. Therefore the level of the mandatory consumer protection laws of the consumer's country is not higher and the consumer is not deprived of the protection of the law of his habitual residence."[84] Recital 12 to the Proposal is less explicit but probably meant in the same direction. If understood in this sense the optional CESL would represent the standard of consumer protection in all EU countries even if a Member State maintains a higher mandatory level of protection. However, the optional CESL does not constitute the mandatory consumer protection

81. COM (2008) 614 final as adopted by the European Parliament on 23 June 2011. Art. 33 obliges the Member States to inform the Commission of more stringent consumer protection provisions than provided for by Art. 5 and 7 (1) Consumer Sales Directive.
82. See Explanatory Memorandum, COM (2011) 635 final, p. 4.
83. In this sense D. Staudenmayer (ed.), *Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über ein Gemeinsames Europäisches Kaufrecht* (2012), p. XIX.
84. Explanatory Memorandum, COM (2011) 635 final, p. 6.

law in the consumer's country (and even less so if this is a third country). The yardstick for Article 6 (2) Rome I Regulation to measure CESL cannot be CESL itself but only the mandatory law that would be applicable without the choice of CESL. For, this is the law in force from which a choice of CESL would deviate. Moreover, this technique of self-reference would not work where consumers from third states are involved.

One also could argue that the Regulation on CESL entirely excludes Article 6 Rome I Regulation: where CESL is chosen Article 6 Rome I Regulation becomes inapplicable. However, this the drafters of CESL evidently did not intend, since the Explanatory Memorandum – and similarly Recital 10[85] – states that "(t)he Rome I Regulation … will continue to apply and will be unaffected by the proposal."[86] Though, this contradicts Article 11 Proposal that "only the Common European Sales Law shall govern..." and the text of the proposed Regulation would prevail over the Recital and the Explanatory Memorandum which both have no binding force. Yet, the contradiction between Article 11 Proposal and Article 6 (2) Rome I Regulation would still remain.

The only way to resolve it is to understand Article 11 Proposal as an exception to Article 6 (2) Rome I Regulation. Whenever CESL is validly chosen Article 6 (2) is suspended. Even where national consumer protection law is more favourable than the CESL, does CESL, when chosen, prevail. If this interpretation is accepted – finally by the ECJ – then CESL can in fact provide one single regime for consumer sales, even in cases with third states. A clear formulation in Article 6 (2) Rome I Regulation that this provision does not apply in case of a valid choice of CESL would however be certainly preferable.

4. Comparison between substantive CISG and CESL provisions

4.1. Structure

To some extent it is no surprise that CESL's structure is more complex and complicated than CISG's because CESL regulates consumer sales as well as business sales and in addition contains several issues not covered by the CISG. Nonetheless, the CESL follows in its overall structure that of the CISG. But whereas the CISG has four easy distinguishable parts (sphere of

85. Recital 10 sent. 3: "This Regulation will therefore not affect any of the existing conflict of law rules."
86. Explanatory Memorandum, COM (2011) 635 final, p. 6.

application, formation, rights and obligations of parties, final provisions), the CESL has eight parts whose order is less transparent: for instance, the relation between CESL's Part II (Making a binding contract) and Part III (Assessing what is in the contract) is not entirely clear nor the relation of Part VII (Restitution) to the other Parts. Another example is Article 8 CESL which defines termination but mainly regulates its consequences. It is easy to overlook this provision when dealing with the right of termination. The same is true for Article 90 (2) CESL which contains the general rule on the parties' duty to preserve the goods in their possession although the other party is responsible for them. Again, this provision can only too easily be overlooked. It does also not serve transparency that the whole CESL text is further divided into 18 Chapters whose numbering is running through the different parts. The structure of the CISG appears to be much more transparent and straightforward.

4.2. Style of regulation

The style in which the proposed CESL is drafted is typical European. The drafters' intention is evidently precision but CESL often uses a plethora of words and phrases to explain its aim and content which sometimes obscures the meaning. It is for instance difficult to understand Article 23 (1) CESL, when it provides that "the supplier has a duty to disclose to the other trader any information… which the supplier has or can be expected to have…". A person can only disclose information of which s/he is aware; it is hardly imaginable to disclose information that a person should have but does not have. What probably is meant is that a person should also be liable in that case because s/he did not provide himself or herself with the necessary information.

In comparison to the CESL the style of the CISG appears clearer and easier understandable to lay-people and even lawyers. An example that stands for others is the introductory phrase to Article 32 (3) CESL ("A revocation of an offer is ineffective if…") in comparison to Article 16 (2) CISG ("However, an offer cannot be revoked:…").

4.3. Formation of contract

The following comparison of the provisions on formation of contract in CISG and CESL concentrates on the rules for businesses whose regulation is the essential aim of the CISG.

The substance of most of CESL's provisions on the formation of contract[87] corresponds to the comparable provisions of the CISG.[88] Partly, the formulation of the CESL provisions is very close to, or even identical with, the respective CISG formulation.[89]

4.3.1. Open price

A difference is that Article 31 (1) (b) CESL requires only "sufficient content and certainty for there to be a contract", while according to Article 14 (1) sent. 2 CISG an offer "is sufficiently definite if it…expressly or implicitly fixes or makes provision for determining the quantity and the price." There is no doubt that under the CESL an offer with an open price can be a valid offer.[90] Under the CISG this question was disputed. But since the parties can derogate from Article 14 CISG they can validly conclude a contract even if the offer leaves the price open. Then, according to Article 55 CISG the market-price fills the gap.[91] Thus, despite differences in formulation both regulations here accord in substance.

4.3.2. Incorporation of standard contract terms

The CISG lacks any specific provision on when standard contract terms become incorporated into the contract. However, the courts regularly require the party using such terms to send them to the other party.[92] A mere reference to standard terms does generally not suffice. The reason is the differences between standard contract terms in international sales. Parties mostly are not, and need not be, familiar with all these differences and should not be taken by surprise.

The CESL addresses the problem in its Article 70. According to Article 70 (1) CESL the party using the terms must take "reasonable steps to draw

87. Arts. 30-39 CESL.
88. Arts. 14-24 CISG.
89. For almost entire identity see for instance Art. 18 (1) sent. 2 CISG and Art. 34 (2) CESL or Art. 19 (3) CISG and Art. 38 (2) CESL.
90. See Art. 73 CESL which refers to the price normally charged or as a last resort to a reasonable price where an open price must be fixed.
91. See for instance LG Neubrandenburg 3 August 2005, CISG-online Nr 1190; F. Ferrari, in St. Kröll/L. Mistelis/P. Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary,* Art 14 para. 28.
92. See in particular BGH IHR 2002, 12; also OLG München IHR 2009, 201 (203); OLG Celle IHR 2010, 81 (83); OLG Jena IHR 2011, 79 (81); Cour d'appel Paris JCP 1997 II 22772; Hof 's-Hertogenbosch NIPR 2003 Nr 192; Trib. Rovereto CISG-online Nr 1590; contra however OGH CISG-online Nr. 828; OLG Linz CISG-online Nr. 1087.

the other party's attention to them, before or when the contract was concluded." Article 70 (2) CESL states that with respect to consumers a mere reference in a contract document, even if signed, does not suffice. By way of *argumentum e contrario* this could be understood to mean that between businesses a mere reference does suffice. This would conflict with the practice under the CISG.

4.3.3. Battle of forms

Almost the same is true with respect to the solution of the so-called battle of forms. In the CISG an explicit provision on conflicting standard contract terms is lacking whereas Article 39 CESL expressly addresses the problem. According to Article 39 (1) CESL, despite conflicting standard terms a contract is concluded if the parties reach agreement. The standard terms become "part of the contract to the extent that they are common in substance."[93] This solution corresponds to the DCFR[94] and also to the UNIDROIT Principles.[95] It differs however from the solution the courts developed under the CISG. Here, the prevailing view of courts and writers neutralises the conflicting terms whereas the rest of the standard terms – to the extent that they do not conflict – remains applicable ("knock out rule").[96] It is doubtful whether a knock out rule is preferable that leaves the non-conflicting rest of standard terms intact or that only accepts the terms common in substance. One could imagine that businesses would prefer as much as possible of their standard conditions being maintained.

4.3.4. Letter of confirmation

Neither the CISG nor the CESL contains a specific provision on letters of confirmation. Under the CISG the provision on usages[97] is regarded to

93. Art. 39 (1) sent. 2 CESL.
94. See Art. II.-4:209 DCFR.
95. Art. 2.1.22 UNIDROIT Principles.
96. See BGH IHR 2002, 16 (18); U.P. Gruber, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch* Art. 19 CISG para. 24; U. Magnus, in *Commercial Challenges in the 21st Century – Jan Hellner in memoriam* (2007) 195; P. Mankowski, in F. Ferrari et al., *Internationales Vertragsrecht* (2nd ed., 2012) Art. 19 CISG para. 35 et seq. contra however for instance F. Ferrari, in St. Kröll/L. Mistelis/P. Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary,* Art. 19 para. 15.
97. Art. 9 CISG.

cover this case.[98] Any specific usage concerning letters of confirmation, in particular concerning the effect of silence on such a letter, can become binding on the parties if the usage is an international one which the parties could know. Under the CESL its Article 67 could be interpreted in the same way.

4.3.5. Incorporation of pre-contractual statements

The CESL goes much further than the CISG with the incorporation (and binding character) of pre-contractual statements. Article 69 (1) CESL provides that statements "about the characteristics of what is to be supplied" generally become part of the contract irrespective whether made to the other party or publicly. Only two exceptions apply: "the other party was aware, or could be expected to have been aware when the contract was concluded that the statement was incorrect or could not otherwise be relied on…or the other party's decision to conclude the contract could not have been influenced by the statement".[99] Respective statements made by third persons whom a business engages in advertising or marketing bind the business.[100] These provisions, coupled with Article 100 (f) CESL establish a far-reaching liability of sellers for pre-contractual statements even in sales between businesses. Further, the many vague requirements (statements "about the characteristics" of the goods, a party "expected to have been aware", the statement "could not otherwise be relied on", the decision to contract "could not have been influenced") may give rise to disputes and lawsuits.

The CISG does not know of a similar liability for pre-contractual statements. Article 35 (2) (b) CISG incorporate statements by which the *buyer* made known to the seller a particular purpose for which the goods are intended to be used. This is incomparable to Article 69 CESL. Article 69 CESL is evidently influenced by Article 2 (2) (d) Consumer Sales Directive which much more modestly provided that goods must show the qualities "normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods…". Here, the statement is not automatically incorporated into the contract but only an element for the interpretation of the qualities of the goods the consumer may reasonably expect.

98. See OLG Saarbrücken IHR 2001, 64; OLG Dresden IHR 2001, 18; U. Magnus, "Wiener UN-Kaufrecht (CISG)", in J. von Staudinger, Art. 9 para. 27; M. Schmidt-Kessel, in P. Schlechtriem/I. Schwenzer, Art. 9 para. 22 et seq.
99. Art. 69 (1) (a) and (b) CESL.
100. Art. 69 (2) CESL.

4.3.6. Assessment

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

4.4. Rights and obligations of the parties

Also with respect to the parties' rights and obligations, the comparison between CISG and CESL only includes the regulations for businesses which are the CISG's central addressees.

4.4.1. Seller's obligations

The general duties of the seller are largely identical under CISG and CESL: the place of delivery is, absent any differing agreement, the place where the goods have to be handed over to the first (independent) carrier if a carriage is involved, otherwise the seller's place of business.[101] The time for delivery is, if not otherwise agreed, either a reasonable time (CISG)[102] or a not undue delay (CESL)[103] after the conclusion of the contract. In this respect, the CISG rule appears more generous to the seller.

Further, the seller is obliged to deliver goods which conform with the contract. This means that the goods are free of any defects and free of rights or claims of third parties. The CISG uses the term "conformity" only for corporeal defects of the goods, such as defects of quality, quantity, description or package of the goods,[104] while defects of the legal title in the goods are termed "third party rights and claims."[105] The CESL is less stringent with this terminology. Article 91 (c) CESL and the heading of Section 3 of Chapter 10 ("Conformity of the Goods and Digital Content") apparently include both kinds of defects whereas Articles 99-101 on the one side and Article 102 CESL clearly distinguish between them; for Articles 103-105 CESL it is open whether these provisions concern both kinds of defects.

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101. See Art. 31 CISG and Arts. 93, 94 CESL.
102. Art. 33 (c) CISG.
103. Art. 95 (1) CESL.
104. See Art. 35 CISG.
105. See Heading to Part III Ch. II Sect. II CISG: "Conformity of the goods and third party claims" and Arts. 35-40 on the one hand and Arts. 41-43 CISG on the other.

The basic substance of the CISG's and the CESL's rules on non-conformity and third party rights is largely identical. However, as already mentioned,[106] Article 100 (f) CESL extends the seller's liability considerably: In contrast to the CISG, under CESL the seller is liable for pre-contractual statements on the characteristics of the goods. Moreover, Article 100 (g) CESL provides that the goods must "possess such qualities and performance capabilities as the buyer may expect." Such a provision leaves too much room for interpretation: It is unclear whether a subjective or objective standard applies; both a very narrow as well as a very wide interpretation is possible; among businesses it is unconvincing to prefer only the buyer's expectations.

In sum, the CESL extends the seller's obligations considerably beyond those existing under the CISG. CESL tips the balance to the buyer. It is more than doubtful whether there are justified reasons to readjust this balance in comparison to the CISG.

4.4.2. Remedies of the buyer

If the seller has violated an obligation and is not excused, both instruments grant the buyer the same remedies:[107] a claim for performance,[108] damages,[109] termination,[110] price reduction[111] and the right to withhold the own performance.[112] With respect to the requirements which must be met for each single remedy there are some differences between the CISG and the CESL:

4.4.2.1. Performance claim

The CISG grants a performance claim not in any event but only if the court seized would grant specific performance under its national law.[113] CESL on the contrary recognises performance claims in general without any national limitation.

If specific performance is available, under the CISG, the buyer of non-conforming goods can claim "delivery of substitute goods only if the lack of conformity constitutes a fundamental breach".[114] CESL allows such per-

106. See *supra* under 4.3.5 and 6.
107. To the buyer's remedies under CESL see in particular Ch. Wilhelm, IHR 2011, 225 ff.
108. Art. 46 CISG and Art. 106 (1) (a), 110-112 CESL.
109. Art. 45 (1) (b) CISG and Art. 106 (1) (e) CESL.
110. Art. 49 CISG and Art. 106 (1) (c), 114-119 CESL.
111. Art. 50 CISG and Art. 106 (1) (d), 120 CESL.
112. Art. 71 CISG and Art. 106 (1) (b), 113 CESL.
113. Art. 28 CISG.
114. Art. 46 (2) CISG.

formance claim irrespective whether or not the breach was fundamental.[115] Only if impossible, unlawful or uneconomical can performance no longer be required.[116] Since the delivery of a replacement comes close to a termination and new delivery, CESL's performance solution is in certain contrast to CESL's right of termination which generally presupposes a fundamental breach.[117] In comparison to the CISG, the CESL here favours the buyer.

4.4.2.2. Termination

Both CESL and CISG grant termination where the non-performance constitutes a fundamental breach;[118] and both define a fundamental breach in rather similar words.[119] The CISG allows termination also in case of non-delivery after the unsuccessful lapse of an additional period of time which the buyer has set.[120] The meaning of "non-delivery" is strict; it does not cover the delivery of non-conforming goods.[121]

Article 115 (1) CESL allows the buyer to terminate the contract "in a case of delay in delivery" if the buyer has fixed an additional – reasonable – period of time during which the seller did not perform. Taken verbally, the formulation is likely to mean the same as the respective CISG provision. The provision would then not cover the delivery of non-conforming goods. However, "delay in delivery" could also be understood to mean "delay in delivery of conforming goods" and then would include the case that the seller delivered non-conforming goods. This would lead to results which prefer the buyer and differ from the CISG. A clearer wording of Article 115 (1) CESL is desirable.

Differences between CISG and CESL exist with respect to the exclusion of the right of termination where the goods cannot be returned in substantially unimpaired condition. If this is the case, under the CISG the buyer loses its right to terminate the contract unless the damage to the goods is not at-

115. Art. 110 CESL.
116. Art. 110 (3) CESL.
117. Art. 114 (1) CESL.
118. See Art. 49 (1) (a) CISG and Art. 114 (1) CESL.
119. Art. 25 CISG and Art. 87 (2) (a) CESL, though Art. 87 (2) (b) CESL adds the case "that the non-performing party's future performance cannot be relied on."
120. Art. 49 (1) (b) CISG.
121. BGHZ 132, 290 (296 s); J. Honnold/H. Flechtner, Uniform Law for International Sales under the 1980 United Nations Convention (4th ed. 2009) Art. 49 para. 305; U. Magnus, "Wiener UN-Kaufrecht (CISG)", in J. von Staudinger, Art. 49 para. 21; M. Müller-Chen, in P. Schlechtriem/I. Schwenzer, Art. 49 para. 15 s; I. Saenger, in F. Ferrari et al., *Internationales Vertragsrecht,* Art. 49 CISG para. 11.

tributable to the buyer.[122] Under the CESL, where the return of the goods is impossible the buyer is not precluded with the termination of the contract but has to pay the goods' monetary value.[123] Since the impossibility of return may be due to defects of the goods or other causes for which the seller bears the risk the CESL provides for the possibility to equitably modify either the duty to return or the duty to pay the monetary value.[124] The CESL provision applies only if the (full) return or payment "would be grossly inequitable."

Again, in comparison to the CISG the CESL solution is slightly more favourable to the buyer than to the seller.

4.4.2.3. Damages

Though there are differences in formulation, the CISG and the CESL regulate the remedy of damages in the same way. The aim of damages is the compensation of the loss including a future loss which the breach of contract caused.[125] Only the foreseeable loss is recoverable.[126] Where the contract has been terminated the loss can be calculated according to the (negative) difference to a reasonable cover transaction or to the market price.[127] The amount of damages has to be reduced if the creditor contributed to the loss or omitted reasonable steps to reduce it.[128] In contrast to the CISG, the CESL expressly provides that the creditor may recover "any expenses reasonably incurred in attempting to reduce the loss."[129] Courts and legal writers have however inferred the same rule under the CISG from its Article 77.[130]

4.4.2.4. Price reduction

The provisions on price reduction in the CISG[131] and the CESL[132] are mainly but not entirely similar in substance. Both provisions allow for a proportionate reduction of the price. However, the CESL provision covers

122. Art. 82 CISG
123. Art. 173 (1) CESL.
124. See Art. 176 CESL.
125. See Art. 74 sent. 1 CISG and Art. 160 CESL.
126. Art. 74 sent. 2 CISG and Art. 161 CESL.
127. See Arts. 75, 76 CISG and Arts. 164, 165 CESL.
128. Arts. 77, 80 CISG and Arts. 162, 163 (1) CESL.
129. Art. 163 (2) CESL.
130. BGH NJW 1997, 3311; U. Magnus, "Wiener UN-Kaufrecht (CISG)", in J. von Staudinger, Art. 77 para. 20; P. Mankowski, in *Münchener Kommentar zum Handelsgesetzbuch vol. 6*, 2nd ed. (2007) Art. 77 CISG para. 9; I. Schwenzer, in P. Schlechtriem/I. Schwenzer, Art. 77 para. 11.
131. Art. 50 CISG.
132. Art. 120 CESL.

all kinds of seller's breaches of contract ("a performance not conforming to the contract")[133] whereas the CISG provision deals only with cases of non-conformity of the goods in the sense of the CISG which covers only defects in corporeal qualities of the goods. It is even disputed whether the CISG provision also covers title defects,[134] let alone other breaches. Further, CESL expressly provides that the buyer who has already paid the price can reclaim the sum by which the price is reduced[135] and can recover damages for any loss exceeding this sum.[136] Though not expressed in the text of the CISG the same solutions are applicable there.[137]

4.4.2.5. Cure

Both the CISG and the CESL grant the seller a right to cure any non-conformity.[138] Under the CISG the seller's right is "subject to article 49" (the right of termination).[139] Under the CESL the seller can even block the buyer's right of termination: "An offer to cure is not precluded by notice of termination"[140] The mere offer of cure ousts the right of termination. Yet, the buyer may refuse the offer of cure if the "delay in performance would amount to a fundamental non-performance."[141] And although the buyer may also refuse such an offer "only if cure cannot be effected promptly",[142] CESL gives the seller "a reasonable period of time to effect cure."[143] This evident contradiction should be corrected. Moreover, the CISG's formulation that

133. Art. 120 (1) CESL.
134. The prevailing view denies the applicability of Art. 50 CISG to title defects: Ch. Benicke, in *Münchener Kommentar zum Handelsgesetzbuch,* Art. 50 CISG para. 2; M. Müller-Chen, in P. Schlechtriem/I. Schwenzer, Art. 50 para. 2; I. Saenger, in F. Ferrari et al., *Internationales Vertragsrecht,* Art. 50 CISG para. 2; contra however Ch. Brunner, *UN-Kaufrecht – CISG* (2004), Art. 50 para. 2; U. Magnus, *Wiener UN-Kaufrecht (CISG),* in J. von Staudinger Art. 50 para. 10.
135. Art. 120 (2) CESL.
136. Art. 120 (3) CESL.
137. See A. K. Schnyder/R. M. Straub, in H. Honsell, *Kommentar zum UN-Kaufrecht* Art. 50 para. 50, 57; I. Bach, in St. Kröll/L. Mistelis/P. Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG) Commentary,* Art. 50 para. 52, 64; U. Magnus, "Wiener UN-Kaufrecht (CISG)", in J. von Staudinger, Art. 50 para. 25, 30.
138. Art. 48 CISG and Art. 109 CESL.
139. Art. 48 (1) CISG.
140. See Art. 109 (3) in connection with (6) and Art. 106 (2) (a) CESL.
141. Art. 109 (4) (c) CESL.
142. Art. 109 (4) (a) CESL.
143. Art. 109 (5) CESL.

cure should be effected "without unreasonable delay"[144] better expresses that the seller must cure rather quickly.

4.4.2.6. Excuse

Both instruments follow a general concept of strict liability with respect to the obligations of the seller and the buyer. CISG and CESL provide however for an exemption from liability if a cause beyond the debtor's risk and influence has led to the non-performance of an obligation. The respective provision on excuse is almost identically drafted.[145] The excuse extends only to damages claims[146] and under the CESL also to performance claims[147] whereas other remedies remain unaffected. Under the CISG the buyer can still claim performance where despite the excuse performance is still possible; only where performance has become objectively impossible the non-performance is excused.[148]

Contrary to the CISG the CESL contains a separate provision on change of circumstances.[149] It includes the regulation of hardship cases which under the CISG are regarded to fall within the scope of the general exemption rule of Article 79 CISG.[150] Article 89 (1) sent. 2 CESL obliges the parties to re-negotiate the contract if "performance becomes excessively onerous". If the parties fail to reach an adaptation or termination of the contract a court can do so.[151] Although the CISG does not expressly provide for these possibilities, they have been proposed as well for, and should be accepted in, the interpretation of Article 79 CISG.[152]

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144. Art. 48 (1) CISG.
145. See Art. 79 (1) CISG and Art. 88 (1) CESL.
146. Art. 79 (5) CISG and Art. 106 (4) CESL.
147. Art. 106 (4) CESL.
148. See U. Magnus, "Wiener UN-Kaufrecht (CISG)", in J. von Staudinger, Art. 79 para. 57 s; P. Mankowski, in *Münchener Kommentar zum Handelsgesetzbuch,* Art. 79 CISG para. 7 et seq.; I. Schwenzer, in P. Schlechtriem/I. Schwenzer, Art. 79 para. 52 et seq..
149. Art. 89 CESL.
150. See J. Honnold/H. Flechtner, *Uniform Law for International Sales under the 1980 United Nations Convention*, para. 427 and 432.2; U. Magnus, "Wiener UN-Kaufrecht (CISG)", in J. von Staudinger, Art. 79 para. 24; P. Mankowski, in *Münchener Kommentar zum Handelsgesetzbuch,* Art. 79 CISG para. 38; I. Schwenzer, in P. Schlechtriem/I. Schwenzer, Art. 79 para. 30.
151. Art. 89 (2) CESL.
152. See in this sense P. Huber, in *Münchener Kommentar zum Bürgerlichen Gesetzbuch,* Art. 79 CISG para. 21; U. Magnus, "Wiener UN-Kaufrecht (CISG)", in J. von Staudinger, Art. 79 para. 24; I. Schwenzer, in P. Schlechtriem/I. Schwenzer, Art. 79 para. 31.

4.4.2.7. Examination and notification

CISG and CESL both let the buyer's rights depend on correct examination of the goods and orderly notification of any defect.[153] Again, the regulation of both instruments is almost identical. However, in contrast to the CISG, the proposed CESL prescribes a maximum period of 14 days for the examination which starts with the delivery of the goods.[154] Under the CISG the length of the time for examination and notification is not precisely fixed but depends on the circumstances of the case. The majority of the court follows a thumb-rule that in normal cases (no perishable goods etc.) one month is the maximum.[155]

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

A further difference between CISG and CESL concerns the relief the CISG provides for buyers who actually lost their remedies because they did not observe the examination and notification requirements: If they have a reasonable excuse they are entitled to price reduction and damages (excluding lost profit).[156] The only relaxation CESL foresees is that the buyer need not notify the seller of a lack of quantity "if the buyer has reason to believe that the remaining goods will be delivered."[157]

4.4.2.8. Assessment

In regard of the buyer's remedies the differences between CISG and CESL are moderate. Partly the CISG and partly the CESL is slightly more favourable to the buyer. The CISG appears to be more buyer-friendly than the CESL on two minor aspects: namely cure (where under the CISG termination trumps cure in case of any fundamental breach, not only delay) and with respect to examination and notification (the CISG accepts a reasonable excuse for

153. Arts. 38, 39 CISG and Arts. 106 (2) (b), 121, 122 CESL.
154. Art. 121 (1) CESL.
155. See, e.g., BGH IHR 2004, 201; BGE 130 III 258; OLG Stuttgart RIW 1995, 943 (944); OGer Luzern SZIER 1997, 132 (133).
156. Art. 44 CISG.
157. Art. 122 (5) CESL.

failures). The CESL on the other hand prefers the buyer by evidently granting price reduction for all kinds of non-performance and by maintaining the buyer's right of termination even if the goods cannot be returned substantially unaltered. The overall practical significance of all these differences is nonetheless limited.

4.4.3. Buyer's obligations

The general obligations of the buyer under CISG and CESL correspond to each other.[158] The basic default rules of the place[159] and time of payment[160] are also in accordance although the CESL's formulation "Payment of the price is due at the moment of delivery" may arouse the wrong impression that the parties are not entitled to fix themselves the date of payment.

The CESL provides also for cases not regulated in the CISG, namely the payment by a third party[161] and the imputation of payment where several payments are due.[162] These are useful additions although of relatively rare application and little practical importance. On the other hand, the CESL does not expressly contain the CISG rule that no request or other formality is necessary that a payment becomes due. This practically important rule should be inserted into CESL.

4.4.4. Remedies of the seller

The CISG and the CESL grant the seller largely the same remedies when the buyer has breached the contract and these are mainly the remedies which the buyer may have in case of the seller's breach of contract: a performance claim[163] (under the CISG with the reservation of acceptance of specific performance by national law),[164] the right of termination,[165] the right to withhold the own performance,[166] damages and/or interest.[167] What has been said *supra* on the buyer's corresponding remedies applies here, too. In addition, it has to be stated that the CESL fixes the interest rate in accordance with the Late Payment Directive for businesses at 8% above the refinancing rate

158. See Art. 53 CISG and Art. 123 CESL.
159. The seller's place of business: Art. 57 (1) (a) CISG and Art. 125 (1) CESL.
160. At the time of placing the goods at the buyer's disposal (Art. 58 (1) CISG) resp. "at the moment of delivery" (Art. 126 (1) CESL).
161. Art. 127 CESL.
162. Art. 128 CESL.
163. Arts. 131 (1) (a), 132 CESL.
164. Art. 62 in connection with Art. 28 CISG.
165. Art. 64 CISG and Art. 131 (1) (c), 134-139 CESL.
166. Art. 71 CISG and Art. 131 (1) (b), 133 CESL.
167. Arts. 61 (1) (b), 74-77 CISG and Art. 131 (1) (d), 159-171 CESL.

of the European Central Bank.[168] By contrast, the CISG leaves the interest rate open.[169]

5. Conclusions

1. It was the aim to compare the CISG and the CESL although only with respect to their regulations for businesses because they are the central addressees of the CISG. Under this perspective, already the objectives of both instruments differ considerably. CESL primarily intends to protect "weak" buyers, in particular consumers but also small and medium enterprises, although at the same time it equally wants to provide rules for international commercial sales. The CISG, on the other hand, aims at a balanced regulation only for international commercial sales. These different objectives influence the whole structure of both instruments.

2. The comparison shows further that an opt-in solution carries many problems and may sentence CESL to dead letter law. There are also at least questions whether and with which effect in B2B sales businesses can partially choose the CESL or choose the CESL beyond its scope of application or separately only for related services or only for the sales part of a mixed contract. Under the CISG these questions are easier to solve and are already answered.

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

4. The CESL has a conflict of laws problem, namely its relation to Article 6 (2) Rome I Regulation. Here, a clear formulation is needed that the choice of the CESL constitutes an exception to the applicability of Article 6 Rome I Regulation. It does not matter that the consumer protection level provided for by the CESL is higher than the level of the present acquis communautaire. For, the EU Member States may introduce an even higher national level; moreover, also third states may maintain a higher level. Without an express exception to Article 6 (2) Rome I Regulation such a higher level had to prevail over the CESL provisions; and at least the choice of the CESL would not avoid the need to examine whether the EU-national or third-state level is higher.

5. Structure and style of the CISG appear more transparent and clearer in comparison to the CESL. This is only partly owed to the necessarily greater

168. Art. 168 (5) CESL.
169. See Art. 78 CISG.

complexity of the CESL due to its mixture of international sales regulation and consumer/SME protection.

6. In regard of the formation rules the CESL provides for a too far-reaching incorporation and resulting liability of sellers for pre-contractual statements. This places a rather heavy burden on sellers the precise extent of which is not even clearly definable due to the use of many vague requirements. Another questionable formation rule which is only relevant for B2B sales is the specific form of the knock-out rule which the proposed CESL has adopted and which reduces conflicting standard terms to their common content.

7. With respect to the rights and obligations of the parties there are many differences between the CISG and the CESL on details. On the whole, however, both instruments are rather close in their basic solutions. Nonetheless, if one takes the differences together the CESL appears to be slightly more buyer-friendly than the CISG. It is however not visible that convincing reasons compel to readjust the balance of obligations and rights between the parties which the CISG has established. On the other hand, it has to be admitted that in comparison to the CISG the CESL contains a number of provisions which constitute useful additions to the CISG although they mainly fix solutions already found, or at least proposed by a majority, for the interpretation of the CISG (like for instance Article 89 CESL on the change of circumstances).

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