International Sales Law in Europe: Pitfalls & Opportunities

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This Article examines the latest international uniform law initiative on the creation of an International Sales Law for Europe, namely the Common European Sales Law (CESL). It comprises four parts, which correspond to the most complex and important aspects of the project's novel legal response to the problem of creating a transnational uniform legal instrument. These reflect the four operations at the heart of the CESL's "activation" and application: (1) the selection of the uniform law regime by the parties as the legal framework of their sales agreement; (2) the ascertainment of the instrument's provisions by the adjudicatory authority; (3) the impact of overriding mandatory rules and international public policy considerations on the application of European sales law; and, finally, (4) the interplay between the CESL and other uniform conflicts and substantive law regimes governing international sale of goods contracts. In light of this linear examination of the instrument, the analysis exposes the advantages and disadvantages of a distinctive model of harmonization as well as the conceptual difficulties of such an approach. Furthermore, the advanced "legal technology" that the CESL represents renders it the starting point when considering further attempts at unifying substantive law. It constitutes a reference point in the study of European legal integration, the law relating to international commercial transactions, and, of particular concern, private international law. Hence, this Article attempts to offer important practical lessons for the future of international uniform law, provoke discussion of conceptual issues of wider interest and importance, and anticipate legal developments by delineating a new path for future European and global contract law initiatives.

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

1. JOSEPH FOUCHÉ, THE MEMOIRS OF JOSEPH FOUCHÉ: DUKE OF OTRANTO, MINISTER OF THE GENERAL POLICE OF FRANCE 316 (1825) (quoting Napoleon Bonaparte).

Introduction

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

As on the global level, the regulatory differences between the various European Union (EU) Member States jeopardize legal certainty and predictability, increase transaction costs, and dissuade prospective contracting parties from trading in the internal market.[5] In addressing these shortcom-

2. For the costs incurred due to legal diversity, see, e.g., Gary Low, *The (Ir)Relevance of Harmonization and Legal Diversity to European Contract Law: A Perspective from Psychology*, 18 EUR. REV. PRIV. L. 285, 287–89 (2010).

3. *See* JAN DALHUISEN, DALHUISEN ON TRANSNATIONAL COMPARATIVE, COMMERCIAL, FINANCIAL AND TRADE LAW VOLUME 2 at 188 (6th ed. 2016); Maren Heidemann, *European Private Law at the Crossroads: The Proposed European Sales Law*, 20 EUR. REV. PRIV. L. 1119, 1124 (2012).

4. Institut de Droit International, *Session de Turin–1882: Conflits des Lois Commerciales* ¶ 1 (Sept. 12, 1882) ("Several parts of commercial law should be regulated by uniform law, the most radical and effective means of eliminating conflicts of law.") (translated from original French); FRANCO FERRARI, CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: APPLICABILITY AND APPLICATIONS OF THE 1980 UNITED NATIONS SALES CONVENTION 1–2 (2012) (with further references to legal scholarship); Kurt H. Nadelmann, *The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglio*, 74 YALE L.J. 449, 450 (1964) ("For international sales a uniform substantive law is perhaps the ideal solution. If the ideal is beyond reach, the next best solution is an agreement on conflicts rules . . . ."). For a skeptical approach to the unification and harmonization of international commercial law, see, e.g., Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743 (1999). For Professor Rabel's report, which instigated the international sales law unification efforts in the 20th century, see Ernst M. Rabel, *Bericht von Ernst Rabel über die Nützlichkeit einer Vereinheitlichung des Kaufrechts*, 22 RABELSZ 117 (1957). *But see* JÜRGEN BASEDOW, THE LAW OF OPEN SOCIETIES—PRIVATE ORDERING AND PUBLIC REGULATION OF INTERNATIONAL RELATIONS, 360 RECUEIL DES COURS 9, 41 (2012).

5. For insightful statistics regarding the factors impeding cross-border transactions in the EU, see Stefan Vogenauer & Stephen Weatherill, *The European Community's Competence to Pursue the Harmonisation of Contract Law–An Empirical Contribution to the Debate*, *in* THE HARMONISATION OF EUROPEAN CONTRACT LAW: IMPLICATIONS FOR EUROPEAN PRIVATE LAWS, BUSINESS AND LEGAL PRACTICE 105, 105 (Stefan Vogenauer & Stephen Weatherill eds., 2006). *But see* DALHUISEN, *supra* note 3, at 178 ("[L]ittle suggests that diversity of private law is an important impediment to trade in the EU. . . . Tax, regula-

ings of legal diversity, private law harmonization was placed at the core of the European integration project.[6] As a result, numerous private law instruments have been drafted, and several legislative proposals have been undertaken towards the establishment of a common legal framework across the EU.[7] Among these projects, the Principles of European Contract Law (PECL), the Pavia Draft of a European Contract Code, the Study Group for a European Civil Code, the Principles of the existing EC Private Law (Acquis Group), the far-reaching Draft Common Frame of Reference (DCFR), and the Feasibility Study for a Future Instrument in European Contract Law, should be mentioned. Notably, one of the most recent and ambitious EU private law instruments was the proposed Regulation for a Common European Sales Law (CESL) first released by the EU Commission on October 11, 2011.[8] Drawing rules from past EU projects,[9] this Regulation aspired to introduce a new European legal regime on the international sale of goods, contracts for the supply of digital content, and related services.[10] The proposed regime would tackle legal diversity and address the shortcomings of the EU conflict-of-laws instruments.

The distinguishing difference between the CESL and all other EU con-

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tion, language and other impediments like lack of physical facilities and credit risk of far-away clients are much more likely to limit [Small or Medium-sized Enterprises]."); Horst Eidenmüller, *What Can Be Wrong with an Option? An Optional Common European Sales Law as a Regulatory Tool*, 50 COMMON MKT. L. REV. 69, 71 (2013) ("[O]ther barriers to cross-border transactions, such as language differences, delivery problems, litigation in a foreign forum, and enforcement in a foreign jurisdiction, may be as important impediments to cross-border transactions as differences in contract law.").

6. Stefan Grundmann, *The Structure of European Contract Law*, 9 EUR. REV. PRIV. L. 505, 510 (2001). *See* Hans-W. Micklitz, *The (Un)-Systematics of (Private) Law as an Element of European Culture*, *in* TOWARDS A EUROPEAN LEGAL CULTURE 81, 86–87 (Geneviève Helleringer & Kai Purnhagen eds., 2014) ("The process of European private law building follows the market-driven logic. . . . Private law is subjected to and instrumentalised for market building purposes. The driving impetus does not result from (European) nation building but from Internal Market or markets building."). *See also* Heidemann, *supra* note 3, at 1125 ("[U]niformization of law within the EU is not an accepted end in itself under the current Treaties . . . .").

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

8. *Commission Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final (Oct. 11, 2011) [hereinafter CESL Reg.].

9. *See, e.g.*, Ulrich Magnus, *The Roots and Traces of the CISG in the Draft of a Common European Sales Law*, *in* BOUNDARIES AND INTERSECTIONS: 5TH ANNUAL MAA SCHLECHTRIEM CISG CONFERENCE 1, 6 (Ingeborg Schwenzer & Lisa Spagnolo eds., 2015); Martijn W. Hesselink, *Unfair Prices in the Common European Sales Law*, *in* ENGLISH AND EUROPEAN PERSPECTIVES ON CONTRACT AND COMMERCIAL LAW: ESSAYS IN HONOUR OF HUGH BEALE 225, 227 (Louise Gullifer & Stefan Vogenauer eds., 2014); Stefan Vogenauer, *"General Principles" of Contract Law in Transnational Instruments*, *in* ENGLISH AND EUROPEAN PERSPECTIVES ON CONTRACT AND COMMERCIAL LAW, *supra*, at 291, 310.

10. CESL Reg., *supra* note 8, arts. 1(1), 5.

tract law initiatives lies in the instrument's three-part systematization[11] and its novel structure as an optional parallel legal regime. This latter description suggests two of the instrument's unique features. First, the new European sales law regime would apply only upon a valid selection by the contracting parties.[12] Second, the CESL would not comprise a separate and additional "European" legal order, which could be selected by virtue of a classic choice-of-law agreement. Rather, it would form an integral part of the respective EU Member States' legal orders, existing in parallel with their "ordinary" legal regimes.[13] In essence, the agreement to "activate" the CESL would function as a railroad-switch that enables contracting parties to change "applicable law tracks within the very same legal order," that is, first ordinary legal regime vs. CESL's second parallel legal regime.[14] As one would expect, this innovative legal structure was heavily criticized for its ground-breaking and yet-to-be-tested methodology.[15]

For better or worse, the CESL will not enter into force—at least not as envisaged in the original proposal.[16] Notwithstanding the Legislative Resolution of the EU Parliament, which endorsed the instrument and proposed amendments to the draft Regulation,[17] the political developments in Europe signaled a change in the winds for European sales law. Following the EU Parliament elections and the formation of a new EU Commission in 2014, the proposed CESL was withdrawn—an easy way to avoid the "political shipwreck" of the instrument's rejection by a deeply divided and Eurosceptic Union.[18] Then again, a good number of the instrument's

11. The instrument's three parts are as follows: (1) the CESL Regulation delineates the application requirements of the instrument; (2) CESL Annex I contains the substantive law rules; and (3) CESL Annex II comprises a Standard Information Notice (SIN), which would be required for all consumer sales transactions. For arguments advocating the merger of the CESL Regulation and CESL Anx. I, see, e.g., Ole Lando, *CISG and CESL: Simplicity, Fairness and Social Justice*, *in* ENGLISH AND EUROPEAN PERSPECTIVES ON CONTRACT AND COMMERCIAL LAW, *supra* note 9, at 237, 242; Hans Schulte-Nölke & Reiner Schulze, *CESL Annex I, Article 1*, *in* COMMON EUROPEAN SALES LAW (CESL): COMMENTARY 85, 88 (Reiner Schulze ed., 2012).

12. CESL Reg., *supra* note 8, arts. 3, 8(1).

13. European Parliament Legislative Resolution on the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, P7_TA-PROV(2014)02-26, Amend. 2 (recital 9) (Feb. 26, 2014) [hereinafter European Parliament Legislative Resolution on the CESL].

14. CESL Reg., art. 11.

15. FRANCO FERRARI & MARCO TORSELLO, INTERNATIONAL SALES LAW—CISG IN A NUTSHELL 68 (2d ed. 2018) ("Too much criticism had been levelled against the project, even though the criticism had been levelled more against the sphere and the optional nature of the instrument than against the substantive provisions contained therein, the quality of which was not seriously disputed.").

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

17. European Parliament Legislative Resolution on the CESL, *supra* note 13.

18. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2015 A New Start, COM (2014) 910 final (Dec. 16, 2014), Anx. II, n.60 ("Modified proposal [to be submitted] in order to fully unleash the poten-

substantive law provisions were re-introduced a year later, in 2015, under two new Proposals for EU Directives,[19] which, in 2019, culminated into the Directive of the European Parliament and of the Council on Certain Aspects concerning Contracts for the Sale of Goods[20] and the Directive of the European Parliament and of the Council on Certain Aspects concerning Contracts for the Supply of Digital Content and Digital Services.[21]

In anticipation of a revamped uniform private law project, the instrument's unique legal structure retains its importance for both legal theory and practice.[22] In particular, the CESL's regime requires an in-depth examination for a number of reasons, which may be divided into three broad groups, corresponding to the significance of the CESL for European legal integration, international commercial transactions, and private international law, respectively.

Firstly, it is self-explanatory that the close scrutiny of the CESL—a European contract law instrument itself—is salient for the understanding and development of the European legal integration project. The draft CESL evidences the key role of optional instruments for the future harmonization of private law in the EU, particularly in light of the Commission's Green Paper on policy options towards a European contract law.[23] Given the frequent, Phoenix-like regeneration of EU projects that have been shelved,[24] a "reborn" proposal for an optional contract law instrument should not come as a surprise. Interestingly enough, the CESL's optional nature and its parallel legal structure have been replicated in another important EU project, namely the Principles of European Insurance Contract Law (PEICL).[25]

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tial of e-commerce in the Digital Single Market."). For a translation in German of the joint letter sent by the Ministers of Justice of Austria, Finland, France, Germany, the Netherlands, and the United Kingdom to the new Commissioner for Justice requesting the withdrawal of the CESL, see Jürgen Basedow, *Gemeinsames Europäisches Kaufrecht—Das Ende eines Kommissionsvorschlags*, 23 ZEuP 432, 433–35 (2015).

19. *But see* Arthur Hartkamp, European Law and National Private Law: Effect of EU Law and European Human Rights Law on Legal Relationships between Individuals 275 (2d ed. 2016) ("The key aspects of these proposals are not based on the structure of the draft Regulation, but on the Consumer Sales of Goods Directive.").

20. Directive 2019/771 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contracts for the Sale of Goods, Amending Regulation 2017/2394 and Directive 2009/22/EC, and Repealing Directive 1999/44/EC, 2019 O.J. (L 136) 28.

21. Directive 2019/770 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects concerning Contracts for the Supply of Digital Content and Digital Services, 2019 O.J. (L 136) 1.

22. Matteo Fornasier, *CESL*, 1 *in* Encyclopedia of Private International Law 278, 279 (Jürgen Basedow et al. eds., 2017).

23. Commission Green Paper on Policy Options for Progress towards a European Contract Law for Consumers and Businesses, COM (2010) 348 final (July 1, 2010), at 9–10 ("Option 4: Regulation setting up an optional instrument of European Contract Law").

24. A prominent example of a regenerated EU project is the Treaty establishing a Constitution for Europe of 2004, which was salvaged and re-branded as the Treaty of Lisbon of 2009.

25. *See* Principles of European Insurance Contract Law (PEICL) art. 1:102 (2009) ("The PEICL shall apply when the parties, notwithstanding any limitations of choice of law under private international law, have agreed that their contract shall be governed by

Secondly, the CESL serves as point of reference for international legal unification in the area of contracts. Specifically, the Swiss *Proposal on Possible Future Work by UNCITRAL in the Area of International Contract Law* signaled that further developments are bound to take place in the field of international business transactions.[26] As a renewed, in-depth discussion of the Swiss proposal is quickly moving up on the docket of the United Nations Commission on International Trade Law (UNCITRAL),[27] a call for a new optional instrument—even an optional second parallel legal regime—should not be ruled out.[28] Besides, the unique legal structure of the CESL model may be used as a blueprint for regulatory reforms in other jurisdictions[29] and as an excellent case study for the examination of the interplay

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them."); Jürgen Basedow, *Article 1:102 Optional Application*, *in* PRINCIPLES OF EUROPEAN INSURANCE CONTRACT LAW (PEICL) 63, 64 (Jürgen Basedow et al. eds., 2d expanded ed. 2016) ("The solution implemented by Article 1:102 is a hybrid one. This provision is a substantive rule, namely it presupposes that the law of the European Union or of one of its Member States is applicable under the conflict of laws; thus, choice of law rules must determine at a first stage whether Community law [or the law of one of its Member States] or the law of a third state applies.").

26. Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law, U.N. Doc. A/CN.9/758 (May 8, 2012).

27. *See* Report of the United Nations Commission on International Trade Law, Forty-Fifth Session, U.N. Doc. A/67/17 (2012), ¶ 132 (2012).

28. *See* Pilar Perales Viscasillas, *Applicable Law, the CISG, and the Future Convention on International Commercial Contracts*, 58 VILL. L. REV. 733, 736–37 (2013) ("If finally a working group within UNCITRAL were to be established one of the most important questions would be the specific form the instrument will finally take, an issue which is usually related to the degree of compromise the states are willing to accept in regard to the substance of the instrument.").

29. Jürgen Basedow, *Supranational Codification of Private Law in Europe and Its Significance for Third States*, *in* CODIFICATION IN INTERNATIONAL PERSPECTIVE: SELECTED PAPERS FROM THE 2ND IACL THEMATIC CONFERENCE 47, 54 (Wen-Yeu Wang ed., 2014) ("Given the focus of CESL on consumer contracts it might very well be accepted as a kind of model in non-EU countries which aim at consumer protection."); Daniela Caruso, *The Baby and the Bath Water: The American Critique of European Contract Law*, 61 AM. J. COMP. L. 479, 482 (2013) ("[T]he optional CESL regime may one day serve as a blueprint for a supranational law of contract. Its content—in so far as it endorses a particular blend of autonomy and regulation—may therefore matter more than its current institutional status"); *Id.* at 484 (amplifying the importance of the CESL debate for consumer protection regulation in the United States); Fryderyk Zoll, *Searching the Optimum Way for the Unification and Approximation of the Private Law in Europe—A Discussion in the Light of the Proposal for the Common European Sales Law*, 17 CONTRATTO E IMPRESA/EUROPA 397, 411–12 (2012). For the interest of non-EU scholars in the CESL and the potential influence of the latter on other legislative initiatives worldwide, see, e.g., Petra Butler, *The Perversity of Contract Law Regionalization in a Globalizing World*, *in* GLOBALIZATION VERSUS REGIONALIZATION: 4TH ANNUAL MAA SCHLECHTRIEM CISG CONFERENCE 13, 24, 35 (Ingeborg Schwenzer & Lisa Spagnolo eds., 2013); Luanda Hawthorne, *Contract Law—A Déluge of Norms in Search of Principles: The Common European Sales Law and the South African Consumer Protection Act*, SUBB JURISPRUDENTIA 59 (2013); Lisa Spagnolo, *Law Wars: Australian Contract Law Reform vs. CISG vs. CESL*, 58 VILL. L. REV. 623, 637 *et seq.* (2013). In like manner, see René David, *The International Unification of Private Law*, II.5 *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 1, 53 (Kurt Lipstein ed., 1969) ("[R]egional unification may be useful insofar as it may prepare, for a greater number of states, well thought out laws or conventions, which will form the basis of subsequent efforts; and this even if it does not seem possible for other states to adhere to them unconditionally.").

between various uniform sales law regimes. The timeliness and importance of this latter examination evinces, also, from the recent initiative of the three "sister" organizations, namely the Hague Conference on Private International Law, UNCITRAL, and the International Institute for the Unification of Private Law (UNIDROIT), to clarify the interplay of the sales law instruments drafted under their auspices.[30]

Thirdly, the unique legal structure of the CESL raises inquiries and stirs discussion on several legal topics. This doctrinal and comparative analysis of pervasive private international law issues such as the selection of the applicable regime, the diversified legal treatment of foreign law, the role of public policy considerations in international business transactions, and, of course, the interplay between the numerous international uniform law instruments is valuable in itself even outside the context of a particular instrument or legal structure.

In light of the foregoing, this Article comprises four parts, which correspond to the most complex and important aspects of the CESL's novel legal response to the problem of creating a uniform legal instrument. These reflect the four operations at the heart of the CESL's "activation" and application: (1) the selection of the European sales law regime by the parties as the legal framework of their sales agreement (Part I); (2) the ascertainment of CESL's provisions by the adjudicatory authority (Part II); (3) the impact of overriding mandatory rules and international public policy considerations on the application of the European sales law regime (Part III); and (4) the interplay between the CESL and other uniform conflicts and substantive law instruments governing international sale of goods contracts (Part IV). Finally, this research study seeks to anticipate legal developments in the area by proposing a new path for future European contract law initiatives.

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

30. *Joint Proposal on Co-Operation in the Area of International Commercial Contract Law (with a Focus on Sales)*, Prel. Doc. No. 6 (Feb. 2016), https://assets.hcch.net/docs/76dde3f7-1c46-4875-a06b-7c68042e7e28.pdf [https://perma.cc/T98C-NUWQ].

law. From these perspectives, if it stands as a model for the possibilities of harmonization, it also suggests its own limitations.

I. "*Quasi* Choice-of-Law" Agreement: The New Kid on the Block

This Part sets the foundations for the more elaborate conflict-of-laws and comparative law analysis of the model embodied in the draft CESL Regulation. The importance of successfully accomplishing this task cannot be overstated. Articulating a theory on doctrinal fallacies or on the inaccurate presentation of the law would lead, at best, to opaque conclusions or, at worst, to the collapse of the entire research project into an ensemble of incoherent arguments and confusing legal jargon. For that reason, Part I begins by setting out all key concepts underlying the CESL model, proceeds with a delineation of a clear and structured approach to the highly complex application requirements of the instrument, and, finally, concludes with a rigorous examination of the CESL's opt-in mechanism. In a nutshell, the following paragraphs seek to elucidate the interplay between the CESL model's opt-in mechanism and choice-of-law rules in an attempt to offer insight into the activation and the legal effects of the European sales law instrument.

A. The Sale of Goods Contract under the CESL

The Common European Sales Law (CESL) is the most progressive instrument promulgated to unify private law across the EU. The regulatory scope of the draft Regulation is demarcated by an intricate system of provisions, which, regrettably, renders the subject-matter of the CESL anything but readily ascertainable. As delineated in CESL Reg., art. 5,

> the Common European Sales Law may be used for:
> (a) Sales contracts;
> (b) Contracts for the supply of digital content whether or not supplied on a tangible medium which can be stored, processed or accessed, and re-used by the user, irrespective of whether the digital content is supplied in exchange for the payment of a price or in exchange for a counter-performance other than the payment of a price;
> (c) Related service contracts, irrespective of whether a separate price was agreed for the related service.[31]

Setting aside the contracts for the supply of digital content and related service contracts, which, in the interest of brevity, this study does not discuss, the CESL defines sales contracts as, "[A]ny contract under which the trader ('the seller') transfers or undertakes to transfer the ownership of the goods to another person ('the buyer'), and the buyer pays or undertakes to pay the price thereof . . . ."[32]

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31. *See* European Parliament Legislative Resolution on the CESL, *supra* note 13, Amend. 61 (restricting the scope of the instrument to "distance contracts" only); *see also* CESL Reg., *supra* note 8, art. 6.

32. CESL Reg., art. 2(k); *see* Case C-381/08, Car Trim v. KeySafety Systems, 2010 E.C.R. I-01255, ¶¶ 27–43.

The CESL covers both commercial and consumer transactions. For commercial transactions, the instrument sets two prerequisites, namely the bilateral commerciality of the sale of goods (business-to-business) and the qualification of at least one of the parties as a Small or Medium-sized Enterprise (SME).[33] Notwithstanding this limitation, the drafters of the CESL provided for the expansion of its regulatory scope by allowing Member States to make the European sales law available for all commercial transactions, even if neither party would qualify as an SME.[34] On the other hand, "'consumer sales contract' means a sales contract where the seller is a trader and the buyer is a consumer,"[35] the latter being defined as "any natural person who is acting for purposes which are outside that person's trade, business, craft, or profession."[36]

In relation to the subject matter of the transaction, CESL Reg., art. 2(h) stipulates that

> "Goods" means any tangible movable items; it excludes:
> (i) electricity and natural gas; and
> (ii) water and other types of gas unless they are put up for sale in a limited volume or set quantity.[37]

Also, art. 5(b) expands further the regulatory coverage of the Regulation to contracts for the supply of digital content and avoids, as a result, the hotly debated issue of whether software too should be treated as "goods."[38]

As to the obligations of the parties under the sales contract, the CESL introduces no legal novelties.[39] The two key obligations, namely the transfer of or the undertaking to transfer ownership in the goods in exchange for the payment of the agreed price, remain intact.[40] That being said, the requirement for the transfer of ownership in the goods is not regulated by the CESL. Instead, the Regulation sets out the obligation, but defers to the

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33. CESL Reg., art. 7(2) ("For the purposes of this Regulation, an SME is a trader which: (a) employs fewer than 250 persons; and (b) has an annual turnover not exceeding EUR 50 million or an annual balance sheet total not exceeding EUR 43 million, or, for an SME which has its habitual residence in a Member State whose currency is not the euro or in a third country, the equivalent amounts in the currency of that Member State or third country."); *see* CESL Reg., *supra* note 8, Recital 21 (2013); Commission Recommendation of 6 May 2003 Concerning the Definition of Micro, Small and Medium-Sized Enterprises, 2003 O.J. (L124) 36.

34. CESL Reg., *supra* note 8, art. 13(b).

35. *Id.*, art. 2(l).

36. *Id.*, art. 2(f); *cf.* 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), 2008 O.J. (L177) at art. 6(1) [hereinafter Rome I Reg.]; Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012 O.J. *Id.*, art. 17(1) [hereinafter Brussels I Reg. *bis*].

37. CESL Reg., *supra* note 8, art. 2(h).

38. *Id.*, art. 5(b); CESL recital 17.

39. *See* Philippe Kahn, *La Convention de La Haye sur la Loi Applicable aux Ventes à Caractère International d'Objets Mobiliers Corporels*, 93 J. DROIT INT'L 301, 307 (1966) ("The sale of goods is a universal concept and in all countries of the world the seller must deliver something for a price.").

40. CESL Reg., *supra* note 8, art. 2(k).

applicable national law for the materialization of the transfer.[41] With regard to the buyer's obligation to pay the agreed price,[42] the CESL does not set any value threshold for the activation of the instrument. As long as the price could be determined, the actual value of the goods would be irrelevant. In addition to these main obligations, the seller is required to deliver conforming goods and any accompanying documents at the agreed place and time,[43] and the buyer is required to take delivery of the goods and documents.[44] This distinction between "key" and "secondary" obligations in the CESL is mandated by the nature of the sales contract. Whereas the instrument permits an agreement of the parties to amend or exclude altogether any of the secondary obligations, no key obligation may be excluded without altering the type of the transaction as a "sale of goods."

Nevertheless, the CESL does not govern all sales transactions falling under CESL Reg., art. 5. Rather, it governs only "cross-border"—more appropriately, "international"[45]—sales contracts. As per CESL Reg., art. 4, a commercial sale of goods would be "cross-border" if the contracting parties maintain their habitual residence in different countries.[46] By the same token, a consumer sales agreements would be cross-border if either the address indicated by the consumer, the delivery address for the goods, or the billing address is located in a country other than that of the trader's habitual residence.[47] Be that as it may, CESL Reg., art. 13(a), allows EU Member States to extend the application of the optional instrument to sale of goods contracts that would not qualify as cross-border under CESL Reg., art. 4.[48]

Furthermore, in line with the particularities of the EU market, the unique legal structure, and the optional nature of the instrument, the CESL contains three additional application criteria, which require that (1) key territorial aspects of the sales transaction be located in an EU Member State, (2) the law applicable to the sale of goods contract be that of a Member State, and (3) the contracting parties have selected the CESL as the regime governing their sales agreement.

41. CESL Reg., *supra* note 8, recital 27. The applicable property law rules would be found, typically, in the national law of the country, where the goods be located—amounting to the so-called *lex loci rei sitae* rule.

42. *Cf.* CESL Reg., *supra* note 8, recital 18; CESL Reg., *supra* note 8, art. 5(b); European Parliament Legislative Resolution on the CESL, *supra* note 13, at Amend. 62; CESL Reg., *supra* note 8, Anx. I, art. 123(2).

43. CESL Reg., *supra* note 8, Anx. I, arts. 91–105.

44. *Id.*, Anx. I, arts. 123–130.

45. Notwithstanding the use of the term "cross-border," CESL Reg., art. 4, does not require any crossing of borders.

46. CESL Reg., *supra* note 8, arts. 4(2), 4(6); *see also* CESL Reg., *supra* note 8, arts. 4(4), 4(5).

47. *Id.*, art. 4(3), 4(6).

48. *Cf.* David, *supra* note 29, at 48 ("[U]nification carried out at international level will often be merely the politically necessary first stage in a general unification of the law. Of their own accord, independently of any international obligation, the various national legislatures will extend the rules adopted for international relationships to legal relations of all sorts, even those which are purely domestic (*Sogwirkung*).").

1. Territorial Connection with the EU

The first criterion requires that at least one of the territorial aspects used for the determination of the cross-border nature of the sales contract be located in the EU. Specifically, for commercial sales transactions, at least one of the contracting parties must maintain her habitual residence in a Member State.[49] For consumer sales agreements, on the other hand, either the address indicated by the consumer, the delivery address for goods, or the billing address must be located in an EU Member State.[50] The inclusion of this applicability requirement was mandated by political considerations in the legislative process. By prescribing territorial links with the EU, the Commission sought to amplify the regional—Union-bound—nature of the CESL, in turn accentuating the "proportional" effects of this legal harmonization project and its limited effects on national legal orders.[51]

2. EU Member State Law as the Matrix Governing Law

The second applicability criterion of the CESL requires that an EU Member State's law be identified as the law governing the international sales agreement.[52] Although not articulated expressly in the Regulation,[53] this requirement for a "gateway law"[54] stems from the structure of the instrument as a second parallel legal regime;[55] that is, as a set of rules,

49. CESL Reg., *supra* note 8, art. 4(2).

50. *Id.*, art. 4(3); *id.*, recital 13.

51. Consolidated Version of the Treaty on European Union art. 5(4), 2012 O.J. (C 326) 18 (2012) [hereinafter TEU]; Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality, 2010 O.J. (C 83) 206 (annexed to the Treaties).

52. *See* Christopher Bisping, *The Common European Sales Law, Consumer Protection and Overriding Mandatory Provisions in Private International Law*, 62 INT'L & COMP. L. Q. 463, 469 (2013); Horst Eidenmüller et al., *The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law*, 16 EDINBURGH L. REV. 301, 312 (2012); Sixto A. Sánchez-Lorenzo, *Common European Sales Law and Private International Law: Some Critical Remarks*, 9 J. PRIV. INT'L L. 191, 193 (2013); Simon Whittaker, *Identifying the Legal Costs of Operation of the Common European Sales Law*, 50 COMMON MKT. L. REV. 85, 89 (2013); *see also* Paul Lagarde, *Instrument Optionnel International et Droit International Privé—Subordination ou Indépendance?*, *in* A COMMITMENT TO PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOUR OF HANS VAN LOON 287, 294 (The Permanent Bureau of the Hague Conference on Private International Law ed., 2013).

53. Sánchez-Lorenzo, *supra* note 52, at 194–95; *see* Gerhard Dannemann, *Choice of CESL and Conflict of Laws*, *in* THE COMMON EUROPEAN SALES LAW IN CONTEXT, *supra* note 7, at 21, 32 (noting that, because it is not spelled out clearly in the CESL, this requirement "would amount to a major legislative trap for the unwary . . . ."); *see also* Gilles Cuniberti, *Common European Sales Law and Third State Sellers*, CONFLICTOFLAWS.NET (Feb. 14, 2012), conflictoflaws.net/2012/common-european-sales-law-and-third-state-sellers/ [https://perma.cc/P3B5-6962] ("For many, if not the majority, of [SMEs], it will be very hard to understand why choosing the CESL is not enough, and why the law of a member state must also be chosen. Indeed, at first sight, this does not look quite logical to choose the law of a particular member state after choosing European law.").

54. Christiane Wendehorst, *CESL Regulation, Article 3*, *in* COMMON EUROPEAN SALES LAW (CESL): COMMENTARY, *supra* note 11, at 30, 32.

55. European Parliament Legislative Resolution on the CESL, *supra* note 13, at Amendment 2 (CESL recital 9); *see* Martijn W. Hesselink, *How to Opt Into the Common*

which forms an integral part of each respective Member State's legal order and exists in parallel to the "traditional" national law regime, and which is called into application on the basis of certain applicability criteria. This bizarre legal structure was necessitated, first, by the limited legislative competence of the EU and, second, by the far-reaching effects of the Rome I Reg., art. 6(2).

It is well-known that the EU enjoys only limited legislative competence, which is exhaustively delineated in the Founding Treaties.[56] Hence, given the lack of special competence bases for contract law harmonization, the EU legislator had to fall back on the general competence bases of the Treaty on the Functioning of the European Union (TFEU) arts. 81, 114, and 352.[57] These provisions differ in both their regulatory effects and the prescribed decision-making process in the EU Council.

In particular, TFEU art. 81 allows the amendment of the European conflicts regimes so that they admit the selection of non-state norms, including the selection of an additional embedded sales law regime.[58] This basis, however, comes with three major drawbacks. First, embedding the EU sales law instrument into European conflict-of-laws would not be automatically binding on Denmark and Ireland.[59] Second, it would have limited effects on Member States, which have enacted other uniform conflicts rules for international sale of goods contracts, such as the 1955 Hague Sales Convention.[60] And, most importantly, a choice of the instrument by the parties would be subject to all limitations envisaged in the conflicts regimes of the forum.[61]

European Sales Law? Brief Comments on the Commission's Proposal for a Regulation, 20 EUR. REV. PRIV. L. 195, 199 (2012).

56. TEU, *supra* note 51, arts. 5(1), 5(2). For a rigorous review of the possible legislative competence bases of EU contract law, see KATHLEEN GUTMAN, THE CONSTITUTIONAL FOUNDATIONS OF EUROPEAN CONTRACT LAW: A COMPARATIVE ANALYSIS (2014).

57. *See also* Consolidated Version of the Treaty on the Functioning of the European Union art. 169, 2012 O.J. (C 326) 124 (2012) [hereinafter TFEU]. For analysis on the appropriate legislative competence basis for an optional European contract law instrument, see MAX PLANCK INSTITUTE FOR COMPARATIVE AND INTERNATIONAL PRIVATE LAW, *Policy Options for Progress towards a European Contract Law: Comments on the Issues Raised in the Green Paper from the Commission of 1 July 2010, COM(2010) 348 final*, 75 RABELSZ 371, 386–96, 436 (2011); Martijn W. Hesselink, Jacobien W. Rutgers & Tim De Booys, *The Legal Basis for an Optional Instrument on European Contract Law*, CENTER FOR THE STUDY OF EUROPEAN CONTRACT LAW WORKING PAPER SERIES No. 2007/04, 38–65 (2007); Jan-Jaap Kuipers, *The Legal Basis for a European Optional Instrument*, 19 EUR. REV. PRIV. L. 545 (2011); Hans-W. Micklitz & Norbert Reich, *The Commission Proposal for a "Regulation on a Common European Sales Law (CESL)"– Too Broad or Not Broad Enough?*, *in* THE MAKING OF EUROPEAN PRIVATE LAW: WHY, HOW, WHAT, WHO 21, 23–32 (Luigi Moccia ed., 2013).

58. *See* Giesela Rühl, *The Common European Sales Law: 28th Regime, 2nd Regime or 1st Regime?*, 19 MAASTRICHT J. EUR. & COMP. L. 148, 148–49 (2012) (calling this structure "28th regime-model").

59. Christian Kohler, *La Proposition de la Commission Européenne pour Un "Droit Commun Européen de la Vente" Vue sous l'Angle des Conflits de Lois*, *in* A COMMITMENT TO PRIVATE INTERNATIONAL LAW, *supra* note 52, at 259, 267.

60. Denmark, Finland, France, Italy, and Sweden. *See* Rühl, *supra* note 58, at 154.

61. *Id.* at 154–55.

Further, TFEU art. 352 enables the creation of an additional supranational "European" legal order for sales transactions, which would be free from any such conflicts limitations—truly, a "pan-European" instrument.[62] This basis, however, requires unanimity in the European Council.[63] Because several Member States were skeptical towards the CESL project, the EU Commission jettisoned TFEU art. 352 in favor of the simple and uncontested legislative basis of TFEU art. 114.[64]

Accordingly, TFEU art. 114 requires only qualified majority in the Council.[65] Hence, the Commission preferred the second parallel legal regime structure, which envisages the introduction of nearly-identical parallel sales law regimes in the clearly demarcated legal order of each EU Member State. This regulatory synchronization of the Member State sales laws together with the operation of the parallel regime within the very same legal order would, purportedly, have circumvented the limitations of European private international law and, importantly, required a lower voting threshold in the legislative process.

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

In the EU, the law applicable to commercial sales transactions is determined pursuant to either the Rome I Regulation or the 1955 Hague Sales Convention. With regard to consumer sales transactions, the regulatory competition of the European conflict-of-laws regimes and the 1955 Hague Sales Convention has no practical ramifications. Although the latter determines the law governing *all* international sales agreements,[66] the Hague

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

63. TFEU, *supra* note 57, art. 352(1).

64. Preamble of the CESL; *see* Giuseppe Conte, *The Proposed Regulation on a Common European Sales Law—An Italian Perspective*, *in* THE PROPOSED COMMON EUROPEAN SALES LAW—THE LAWYER'S VIEW 61, 65-66 (Guido Alpa et al. eds., 2013); Eidenmüller et al., *supra* note 52, at 317-18; *see also* Stephen Weatherill, *Constitutional Issues—How Much is Best Left Unsaid?*, *in* THE HARMONISATION OF EUROPEAN CONTRACT LAW, *supra* note 5, at 89, 92 ("Harmonisation, today pursuant to Article 95 EC [now TFEU art. 114], remains the flagship of the European contract law fleet."). For an informative comparison of TFEU art. 114 and the Commerce Clause of the United States Constitution, see Robert Schütze, *Limits to the Union's "Internal Market" Competence(s)*, *in* THE QUESTION OF COMPETENCE IN THE EUROPEAN UNION 215, 216 (Loïc Azoulai ed., 2014).

65. TFEU, *supra* note 57, arts. 114, 289(1), 294.

66. Michel Pelichet, *Report on the Law Applicable to International Sales of Goods (Revision of the Convention of June 15, 1955 on the Law Applicable to International Sales of*

Conference on Private International Law issued a Declaration limiting the scope of the Convention *vis-à-vis* consumer contracts. As a result, before EU Member State courts, the relevant conflicts rules of the Rome I Regulation—and, for Denmark,[67] the 1980 Rome Convention—determine the law governing consumer sales transactions. Furthermore, constituting a regulatory oddity for a sales law instrument, the CESL also contains rules on non-contractual obligations, such as pre-contractual information duties and the restitution of performance received.[68] Nevertheless, since the European conflicts rules for such matters have been enshrined in Rome II Reg.,[69] arts. 12(1) and 10(1),[70] which point to the putatively applicable law, contractual and non-contractual obligations are brought under the same normative "umbrella."

3. Agreement to Use the CESL as the Governing Regime

The third applicability criterion of the CESL is the selection of the European sales law regime by the contracting parties.[71] An implementation of *Option 4* of the Commission's Green Paper on Policy Options for Progress towards a European Contract Law,[72] the optional nature of the CESL model constitutes one of the most innovative elements,[73] because it entails the conclusion of a special agreement to use the CESL as the legal framework of the sale of goods contract.[74] This model accumulates three advantages for the harmonization of contract law. It allows for regulatory competition by preserving the national sales law regimes,[75]confines transaction costs to parties using the instrument,[76] and surpasses any hurdles

Goods): Preliminary Document No. 1 of September 1982, *in* PROCEEDINGS OF THE EXTRAORDINARY SESSION 14 TO 30 OCTOBER 1985: DIPLOMATIC CONFERENCE ON THE LAW APPLICABLE TO CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 17, 53 (Hague Conference on Private International Law, Bureau Permanent de la Conférence ed., 1987).

67. Rome I Reg., *supra* note 36, recital 46.

68. CESL Reg., *supra* note 8, Anx. I, arts. 13–29, 172–77.

69. Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L199) 40 [hereinafter Rome II Reg.]; *cf.* Rome I Reg., *supra* note 36, art. 1(2)(i).

70. With the proviso that the parties have not entered into a choice-of-law agreement under Rome II Reg., *supra* note 69, art. 14; Rome II Reg. *supra* note 69, arts. 12(1), 10(1).

71. CESL Reg., *supra* note 8, arts. 3, 8.

72. Commission Green Paper, *supra* note 23.

73. Dannemann, *supra* note 53, at 21 ("[T]he rules on choice of CESL are without any true predecessor.").

74. Hesselink, *supra* note 55, at 207; Olaf Meyer, *Promoting Uniform Sales Law*, 24 EUR. BUS. L. REV. 389, 391 (2013).

75. *See* Eidenmüller et al., *supra* note 52, at 347. *But see* Thomas Ackermann, *Public Supply of Optional Standardized Consumer Contracts: A Rationale for the Common European Sales Law*, 50 COMMON MKT. L. REV. 11, 26 (2013); Chantal Mak, *Unweaving the CESL: Legal-Economic Reason and Institutional Imagination in European Contract Law*, 50 COMMON MKT. L. REV. 277, 280–81 (2013). For a critical stance on the very existence of regulatory competition in the field of contract law, see Stefan Vogenauer, *Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence*, 21 EUR. REV. PRIV. L. 13 (2013).

76. Dirk Staudenmayer, *The Common European Sales Law—Why Do We Need It and How Should It Be Designed?*, *in* THE PROPOSED COMMON EUROPEAN SALES LAW—THE LAWYER'S VIEW, *supra* note 64, at 17, 26.

arising from political concerns and legal competence challenges associated with the project.[77]

The requirements for such an agreement have been delineated in CESL Reg. art. 8. In a "boot-strapping" manner that echoes Rome I Reg., art. 3(5) and 1980 Rome Conv., art. 3(4), CESL Reg., art. 8(1) acknowledges the "separability" of the sale of goods from the opt-in agreement and provides that the existence and validity of the latter be determined pursuant to the pertinent provisions in the CESL.[78] The applicable Member State law would determine all relevant issues falling outside the scope of the instrument. This provision then distinguishes further between commercial and consumer transactions.

CESL Reg., art. 8 enshrines the principles of party autonomy and freedom from form requirements for commercial sale of goods contracts.[79] Traders are allowed to select the entirety or only a part of the CESL, except for certain provisions of CESL Anx. I, which cannot be excluded, varied, or derogated from under an agreement between the parties.[80] Further, the opt-in agreement could be either express or implicit but unequivocal.[81] All in all, traders would enjoy almost absolute freedom with respect to both the extent of the CESL's selection and the form of the opt-in agreement.

In juxtaposition with commercial sales, the CESL delineates two-plus-one further steps for the valid conclusion of opt-in agreements in consumer sales transactions:[82] (1) the provision of a Standard Information Notice (SIN) to the consumer, (2) the conclusion of the opt-in agreement *per se*, and (3) the dispatch of a notice confirming the conclusion of the agreement to use the CESL. While the Standard Information Notice and the confirmation notice are additional documentary formalities to advise the consumer about the selected applicable regime, her rights, and the remedies available under the CESL,[83] the second step focuses on the conclusion of the opt-in agreement.

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77. *See* Hugh Collins, *Why Europe Needs a Civil Code*, 21 EUR. REV. PRIV. L. 907, 910 (2013); Helmut Heiss & Noemí Downes, *Non-Optional Elements in an Optional European Contract Law. Reflections from a Private International Law Perspective*, 13 EUR. REV. PRIV. L. 693, 696 (2005).

78. *See* CESL Reg., *supra* note 8, arts. 8(2), 8(3), 9; *id.*, Anx. I, arts. 1–12, 30–39.

79. *Id.*, art. 8(1); *id.* Anx. I, art. 6.

80. *Id.*, art. 8(3) (*a contrario*); *id.*, Anx. I, arts. 1(2), 2, 49–51, 56(1), 70, 74, 79–86, 168–71; European Parliament Legislative Resolution on the CESL, *supra* note 13, Amend. 72 (CESL Reg., art. 8(3)).

81. Conte, *supra* note 64, at 77; Morten M. Fogt, *Private International Law Issues in Opt-Out and Opt-In Instruments of Harmonization: The CISG and the Proposal for a Common European Sales Law*, 19 COLUM. J. EUR. L. 83, 123 (2012); Hesselink, *supra* note 55, at 207. *But see* CESL Reg., *supra* note 8, recital 9 ("upon an *express* agreement of the parties") (emphasis added); Michael Schillig & Caroline Harvey, *Consequences of an Ineffective Agreement to Use the Common European Sales Law*, 9 EUR. REV. CONT. L. 143, 146, 154 (2013).

82. CESL Reg., *supra* note 8, art. 8(1), with further references to arts. 8(2), 8(3), and 9.

83. CESL Reg., *supra* note 8, recital 23; *id.*, arts. 9(1), 8(2); *id.*, Anx. II; *see id.*, Anx. I, art. 10.

Specifically, art. 8(2) requires that the consumer's consent to enter into the opt-in agreement be given by a statement that is "explicit" and "separate" from the consent to conclude the sale of goods contract.[84] Put differently, the CESL cannot validly be selected by consumer conduct[85] or by virtue of the sale's boilerplate terms.[86] Furthermore, CESL Reg., art. 8(3) does not allow the partial selection of the regime.[87] Thus, sellers would not be able to cherry-pick CESL provisions, or to create a patchwork of low-burden national and CESL rules to their benefit but at the consumer's expense.[88] This limitation of party autonomy is buttressed by the extensive limits to contractual freedom under CESL Anx. I, art. 1(2). As a result, subjecting the contract to the high level of consumer protection under the CESL could render the instrument a mark of quality goods and trustworthy sellers.[89] In terms of e-commerce, the CESL could become a "clickable Europe flag,"[90] or, in the words of Schulte-Nölke, a "Blue Button"[91] signaling the traders' confidence in the quality of their products.[92]

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

Having identified the formation requirements of the CESL opt-in agreement, the analysis turns to the nature of the CESL opt-in agreement and its effects on the law governing the international sale of goods contract. At the outset, it is important to note that the admissibility, classification, and effects of the rules-selection agreement used by the contracting parties depend entirely on the conflict-of-laws regime of the forum, and specifically, on the threshold of party autonomy enshrined therein, whether low or high.[93] This attests to the "chameleon" nature of the CESL opt-in agreement, which, as shown in the following paragraphs, adapts to the surrounding private international law "environment" and substantiates

84. *Id.*, art. 8(2).

85. *Id.*, art. 8(2) (*a contrario*).

86. *Id.*, recital 22.

87. *Id.*, art. 8(3); *see also id.*, recital 24.

88. *See* Ackermann, *supra* note 75, at 18; Hugh Beale, *A Common European Sales Law (CESL) for Business-to-Business Contracts*, *in* THE MAKING OF EUROPEAN PRIVATE LAW: WHY, HOW, WHAT, WHO 65, 75 (Luigi Moccia ed., 2013); Hesselink, *supra* note 55, at 207–08.

89. Beale, *supra* note 88, at 147; Guillermo Palao Moreno, *Some Private International Law Issues*, *in* EUROPEAN PERSPECTIVES ON THE COMMON EUROPEAN SALES LAW 17, 26 (Javier Plaza Penadés & Luz M. Martínez Velencoso eds., 2015). *See* TFEU arts. 114(3), 169; CESL Reg., *supra* note 8, recital 11.

90. Meyer, *supra* note 74, at 393.

91. Hans Schulte-Nölke, *EC Law on the Formation of Contract—From the Common Frame of Reference to the "Blue Button"*, 3 EUR. REV. CONT. L. 332, 349 (2007) ("When buying goods in an e-shop the client could easily choose the application of the Optional Instrument by clicking on a 'Blue Button' on the screen showing his or her acceptance of the optional European Law. The 'Blue Button' could be designed as the European blue flag with the twelve stars, possibly with an inscription like 'Sale under EU Law'.").

92. Eidenmüller et al., *supra* note 52, at 350–51; *see also* Staudenmayer, *supra* note 76, at 20. *But see* Collins, *supra* note 77, at 913.

93. *See* PETER NYGH, AUTONOMY IN INTERNATIONAL CONTRACTS 72, 86–87 (1999); ALEX MILLS, PARTY AUTONOMY IN PRIVATE INTERNATIONAL LAW 314 (2018).

the formulation of a new fourth type of rules-selection agreements, namely the "*quasi* choice-of-law" agreement.

In the context of European sales law, the direct choice of the CESL as a self-standing instrument would not constitute a classic *choice-of-law* agreement.[94] Measured against the three distinguishing features of choice-of-law agreements as delineated in jurisprudence—namely (1) a selection of state law,[95] (2) which is "universal" and "systematic," in that it has been designed to cover and regulate all relationships that could possibly develop in a legal order,[96] and (3) which has come and remains in force at the time of the conclusion of the agreement[97]—the opt-in agreement would constitute, indeed, a selection of state law entered into force at the time of the conclusion of the opt-in agreement, but it would not be broad enough to regulate all disputes that could possibly arise within a legal order. Nevertheless, that would not preclude the CESL from being perceived as a *choice-of-rules* agreement by courts and arbitral tribunals that allow the selection of "rules of law," i.e., a-national law, limited regimes, or soft-law instruments.[98] In all other instances, the selection of the CESL as a self-standing instrument would be salvaged as a contractual add-on facility, that is, a plain incorporation-by-reference clause.

Be that as it may, if the CESL were to apply, this time, as a second parallel legal regime—the way envisaged by the European Commission—the classification of the opt-in instrument as a choice-of-law/rules agreement would have to be rejected from the start, because the legal conflicts inquiry would arise within the same legal order, not between the various jurisdictions or territorial units of a state.[99] Thus, the question of the

94. Maud Piers & Cedric Vanleenhove, *The Common European Sales Law: A Critical Assessment of a Valuable Initiative*, 17 CONTRATTO E IMPRESA/EUROPA 427, 442 (2012). *Contra* Ole Lando, *CESL and Its Precursors*, *in* UNIFICATION AND HARMONIZATION OF INTERNATIONAL COMMERCIAL LAW: INTERACTION OR DEHARMONIZATION? 239, 241 (Morten M. Fogt ed., 2012) ("The CESL is meant to be adopted as a Regulation. If the parties choose the CESL, it will replace the national laws. The choice of the CESL will be a genuine choice of law under the Rome I Regulation. CESL will therefore not be soft law.").

95. This feature was fostered as a result of the new world order that followed the Peace of Westphalia in 1648. *See* MILLS, *supra* note 93, at 494–97.

96. *See* NYGH, *supra* note 93, at 61.

97. *See* Gralf-Peter Calliess, *Rome I: Article 3*, *in* ROME REGULATIONS: COMMENTARY 76, 96 (Gralf-Peter Calliess ed., 2d ed. 2015); JAMES J. FAWCETT, JONATHAN M. HARRIS & MICHAEL BRIDGE, INTERNATIONAL SALE OF GOODS IN THE CONFLICT OF LAWS 678 (2005). *See, e.g.*, Rome I Reg., *supra* note 36, art. 20; Convention on the Law Applicable to Contractual Obligations, art. 15, June 19, 1980, 1605 U.N.T.S. 82 [hereinafter 1980 Rome Conv.].

98. *See, e.g.*, HAGUE CONFERENCE ON PRIVATE INT'L LAW, PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS, art. 3 (2015) [hereinafter 2015 Hague Principles]; UNITED NATIONS COMM'N ON INT'L COMMERCIAL TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, art. 28 (1985) [hereinafter UNICITRAL MODEL LAW].

99. CESL Reg., *supra* note 8, recital 10 ("The agreement to use the Common European Sales Law should be a choice exercised within the scope of the respective national law which is applicable . . . . The agreement to use the Common European Sales Law should therefore not amount to, and not be confused with, a choice of the applicable law within the meaning of the conflict-of-law rules . . . ."); EU Parliament Legislative Resolution on the CESL, *supra* note 13, Amend. 3, (CESL recital 10) ("That choice . . . does not

CESL opt-in agreement's nature and effects remains. In addressing this issue, a closer look at the characteristics of the opt-in instrument may be of assistance. In particular, it has already been noted that, under CESL Reg., art. 8(1), the existence and validity of the CESL opt-in agreement would be independent of the existence and validity of the underlying sales transaction. This application of the separability doctrine in the context of opt-in instruments brings the latter closer to choice-of-law agreements.[100] In the same spirit, it has also been noted that the existence and validity of the opt-in agreement would be governed by the pertinent provisions in the CESL. This reference to the putative applicable law is frequently found in conflicts rules determining the existence and validity of choice-of-law agreements.[101] Bearing these two features in mind, CESL opt-in agreements should be distinguished from incorporation-by-reference clauses, whose formation and validity are determined by the relevant rules of the applicable law—not the incorporated regime.[102] Furthermore, as in choice-of-law agreements, the opt-in instruments would bear both the positive effect of identifying the rules governing the sale of goods contract and the negative effect of excluding the dispositive and mandatory rules of the applicable Member State law.[103] That incorporation clauses do not bear the latter negative effect distinguishes them further from agreements to use the CESL. In light of the foregoing, if the CESL were to apply as a second parallel legal regime, the *sui generis* selection of the CESL would emulate choice-of-law agreements.[104] Therefore, considering the great similarities between these two rules-selection agreements, as well as their main difference of operating on different regulatory levels (internal vs. international), the CESL opt-in agreement could be classified, if a term need be coined here, as a "*quasi* choice-of-law" agreement.

Justifying the informational complexity that comes with the addition of a new category of rules-selection agreements is not an easy endeavor. Nevertheless, acknowledging the novelty that comes with the normative framework of second parallel legal regimes, the introduction of a new type

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amount to, and should not be confused with, a choice *between two national legal orders* [emphasis added] within the meaning of the conflict-of-law rules and should be without prejudice to them.").

100. *See, e.g.*, 2015 Hague Principles, *supra* note 98, art. 7. For the implicit adoption of the separability doctrine, see, *e.g.*, Rome I Reg., *supra* note 36, art. 3(5); 1980 Rome Conv., *supra* note 97, art. 3(4); HAGUE CONFERENCE ON PRIVATE INT'L LAW, CONVENTION ON THE LAW APPLICABLE TO INTERNATIONAL SALE OF GOODS—THE HAGUE 1955, art. 2(3) (1955) [hereinafter 1955 Hague Sales Conv.].

101. *See, e.g.*, Rome I Reg., *supra* note 36, art. 3(5); 1980 Rome Conv., *supra* note 97, art. 3(4); 1955 Hague Sales Conv., *supra* note 100, arts. 2(3); 2015 Hague Principles, *supra* note 98, art. 6(1)(a).

102. Ole Lando, *Contracts*, III.2 *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, *supra* note 29, at 1, 46.

103. CESL Reg., *supra* note 8, art. 11. *Accord* Ulrich Magnus, *CISG vs. CESL*, *in* CISG VS. REGIONAL SALES LAW UNIFICATION 97, 100 (Ulrich Magnus ed., 2012).

104. *See* Piers & Vanleenhove, *supra* note 94, at 446 ("[T]he parties' agreement on the application of the CESL is neither a choice of law, nor an incorporation by reference. It should rather be regarded as a *sui generis* mechanism that has no equal in European private international law.").

of rules-selection agreements would offer clarity with regard to a number of issues. In particular, the *quasi* choice-of-law agreement concept would contribute to the integration of the new legal harmonization technique, that is, second parallel legal regimes, into private international law theory. Simultaneously, in practice, this new designation would not only denote that a selection of a substantive law regime must be made by the parties, but also that this selection would require the simultaneous application of and take effect within a particular legal order—for the purposes of the CESL, that would be an EU Member State law. Furthermore, the use of this new concept would highlight that other very important practical issues, such as the formation, validity, and interpretation of the opt-in agreement, would be determined pursuant to the rules of the selected instrument itself—not the relevant rules of the underlying applicable law. It would also indicate the separation of the opt-in agreement from both the matrix contract and other dispute resolution arrangements. Last but not least, this concept would make abundantly clear that the selection of the optional parallel regime would result in the exclusion of the mandatory rules of any laws that could claim application, unlike most optional, soft, or model law instruments, which usually have limited negative effects in this respect. In essence, deploying a new term to describe the regulatory phenomenon of the parties' selection of a parallel legal regime could serve as a flag for the application preconditions of the instrument and a shorthand for all features distinguishing the CESL, and second parallel regimes in general, from other optional uniform law projects.

C. The CESL and Rome I Regulation

Following this theoretical analysis of the opt-in agreement's nature and effects, it is apposite to explore the same inquiry in the EU conflict-of-laws regimes and to delve into the interplay between the draft CESL Regulation and the Rome I Regulation provisions. In particular, two issues need to be addressed: (1) the standing of CESL opt-in agreements before EU courts, and (2) the impact—if any at all—of the CESL on the "heart" of European private international law, namely the choice-of-law and consumer protection rules enshrined in Rome I Reg., arts. 3 and 6, respectively.

1. The CESL Opt-In Agreement before EU Member State Courts

The Rome I Regulation constitutes a classic example of a conflict-of-laws regime allowing only choice-of-law agreements. Notwithstanding the rather clear wording of arts. 2, 3 and 20 of the Regulation, it has been argued that, by virtue of Rome I Reg., recital 14, contracting parties are free to also select a-national rules for their contractual obligations. Thus, pursuant to this opinion, the CESL Regulation introduced a European contract law instrument, which fell within the "exception" of Rome I Reg., recital 14, and, therefore, it could be selected by the contracting parties as a self-

standing set of rules.[105] This position, however, is not tenable. As aptly evidenced in the drafting history of Rome I Regulation, the ability of the parties to select a-national rules was originally proposed by the Commission,[106] but did not find its way into the final text of the instrument. This is reflected in Rome I Reg., recital 13, which preserves the ability of contracting parties to "incorporat[e] by reference into their contract a non-State body of law or an international convention."[107] Furthermore, Rome I Reg., recital 14 defers the issue of selecting non-state law to the future EU contract law instruments. Specifically, it provides, "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*."[108]

On this point, CESL recital 10 reads as follows:

> The agreement to use the Common European Sales Law results from a choice between two different regimes within the same national legal order. That choice, therefore, does not amount to, and should not be confused with, a choice between two national legal orders within the meaning of the conflict-of-law rules and *should be without prejudice to them. This Regulation will therefore not affect any of the existing conflict of law rules such as those contained in Regulation (EC) No 593/2008.*[109]

Therefore, before Member State courts applying the Rome I Regulation for international sales disputes, a fully-fledged CESL opt-in agreement would not operate as a choice-of-rules, but, rather, as a *quasi* choice-of-law agreement within the very same legal order of a Member State. The same result would be reached also in Denmark, Finland, France, Italy, and Sweden, where the 1955 Hague Sales Convention determines the law governing international sale of goods contracts.[110]

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105. Fogt, *supra* note 81, at 109, 110; Mel Kenny, Lorna Gillies & James Devenney, *The EU Optional Instrument: Absorbing the Private International Law Implications of a Common European Sales Law*, 13 Y.B. PRIV. INT'L L. 315, 338 (2011); Ubaldo Perfetti, *Draft Optional Regulation on a Common European Sales Law– First Considerations*, *in* THE PROPOSED COMMON EUROPEAN SALES LAW–THE LAWYER'S VIEW, *supra* note 64, at 49, 54; Piers & Vanleenhove, *supra* note 94, at 446; *cf.* Rome I Reg., *supra* note 36, art. 23.

106. *Commission Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)*, at art. 3(2), COM (2005) 650 final (Dec. 15, 2005) [hereinafter Rome I Regulation Proposal].

107. Rome I Reg., *supra* note 36, recital 13; *see* Pieter De Tavernier, *Le Droit Commun Européen Optionnel de la Vente: Réaction d'Un Privatiste du "Plat Pays"*, 17 CONTRATTO E IMPRESA/EUROPA 413, 421–22, 423 (2012) (arguing that the selection of the CESL would amount to an incorporation-by-reference under Rome I Reg., recital 13); Palao Moreno, *supra* note 89, at 28.

108. Rome I Reg., *supra* note 36, recital 14. For a model rule expanding the ambit of Rome I Reg., art. 3, see Helmut Heiss, *Party Autonomy*, *in* ROME I REGULATION: THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS IN EUROPE 1, 14 (Franco Ferrari & Stefan Leible eds., 2009) (emphasis added); *cf.* Rome I Regulation Proposal, *supra* note 106, at art. 22(b).

109. European Parliament Legislative Resolution on the CESL, *supra* note 13, Amend. 3 (CESL recital 10) (emphasis added).

110. 1980 Rome Conv., *supra* note 97, art. 21; Rome I Reg., *supra* note 36, art. 25.

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

One of the most troubling private international law issues would arise from the interplay between the CESL model and the conflicts rules on consumer transactions enshrined in Rome I Reg., art. 6. As illustrated in the following paragraphs, the proclamation of the EU Commission that the Rome I Regulation—including art. 6—would remain intact should not be taken at face value.[111]

Succinctly, art. 6 provides that in the event of a choice-of-law agreement between a "professional" seller and a consumer, the latter shall not be deprived of the level of protection afforded under the mandatory rules of the country of her habitual residence at the time of the conclusion of the contract.[112] The rationale of this so-called "preferential-law approach" is to protect consumers from the choice-of-law practices of merchants, who select the least burdensome consumer protection regimes for the regulation of their transactions.[113] This limitation, however, raises transaction costs, amplifies legal uncertainty, and discourages merchants and consumers alike from conducting business or getting their supplies from other Member States.[114] Hence, the question that arises is whether the selection of the CESL would be sufficient to circumvent the application of art. 6 and the diversified consumer protection regimes across the Single Market.[115]

It was shown that, under the Rome I Regulation, the CESL opt-in agreement would represent a *quasi* choice-of-law agreement between the parties. Since art. 6(2) requires a choice of state law, the selection of the CESL alone would not suffice to trigger the protective regime of the Regulation.[116] Importantly, as stated in CESL recital 12, even if art. 6(2) were to apply, the selected EU sales law regime would prevail again.[117] This is

111. CESL Reg., *supra* note 8, recitals 10, 12.

112. Rome I Reg., *supra* note 36, recitals 24, 25. *Cf.* Case C-218/12, *Emrek* v *Sabranovic*, ECLI:EU:C:2013:666 (2013); Joint Cases C-585/08 & 144/09, *Pammer and Hotel Alpenhof*, 2010 E.C.R. I-12527.

113. James W. Wolffe, *The Proposed Common European Sales Law—Scope and Choice of Law*, *in* THE PROPOSED COMMON EUROPEAN SALES LAW—THE LAWYER'S VIEW 93, 102; *cf.* Rome I Regulation Proposal, *supra* note 106, at arts. 3(1), 5.

114. *See* CESL Reg., *supra* note 8, recital 3.

115. *See* Collins, *supra* note 77, at 911 ("[T]he problem is caused not by divergence in national contract laws but by the Rome I Regulation of the EU itself, which protects reliance by consumers on that divergence.").

116. Gary Low, *Unitas via Diversitas: Can the Common European Sales Law Harmonize through Diversity?*, 19 MAASTRICHT J. EUR. & COMP. L. 132, 145 (2012) ("Cloaking the CESL as a second national regime cleverly avoids [all Rome I Reg., art. 6 issues]—since Article 3 of the Rome I Regulation is not triggered."). *Contra* Rühl, *supra* note 58, at 158–60.

117. EU Parliament Legislative Resolution on the CESL, *supra* note 13, at Amendment 6 (recital 12) ("Since the Common European Sales Law contains a comprehensive set of uniform harmonised mandatory consumer protection rules, there will be no disparities between the laws of the Member States in this area, where the parties have chosen to use the Common European Sales Law. Consequently, Article 6(2) Regulation [EC] No 593/2008, which is predicated on the existence of differing levels of consumer protection in the Member States, has no practical relevance to the issues covered by the Common European Sales Law, as it would amount to a comparison between the mandatory provisions of two identical second contract-law regimes.").

premised on an "as if" argument: the legal comparison under art. 6(2) would be between the CESL as part of the selected Member State law and the CESL as part of the otherwise applicable law—the latter being determined *as if* the facts of the case, including the conclusion of the CESL opt-in agreement, had been examined in reference to the otherwise applicable law.[118]

Nevertheless, this synchronicity of selected law and otherwise applicable law would be achieved only in a Member State setting, that is, when the consumer maintained her habitual residence in a Member State or when the seller directed her activities in the Single Market.[119] In particular, when the consumer maintained her habitual residence in a Member State, the CESL would be fully applicable in intra-EU trades and consumer imports from third countries alike.[120] Conversely, when the consumer maintained her habitual residence in a third country, the benefits from the CESL's innovative structure would not be available.[121] Hence, it appears that the CESL's innovative structure would largely work *in tandem* with the Rome I Regulation regime *vis-à-vis* intra-EU commerce. The price of fostering trade in the Single Market, however, would come in the form of unprecedented legal complexity and an ably covered—yet de facto and Treaty-wise impermissible—dilution of consumer protection under Rome I Reg., art. 6(2).[122]

118. *See* Heiss & Downes, *supra* note 77, at 708; Staudenmayer, *supra* note 76, at 24; Wendehorst, *supra* note 54, at 33. For skeptical reviews of this solution, see Conte, *supra* note 64, at 70; Eidenmüller, *supra* note 5, at 79–80; Eidenmüller et al., *supra* note 52, at 314; Fogt, *supra* note 81, at 115; Fornasier, *supra* note 22, at 284–85; Stefan Wrbka, European Consumer Access to Justice Revisited 248 (2014). *See also* Trevor C. Hartley, *Conflict of Laws and the Common European Sales Law*, *in* Entre Bruselas y La Haya: Estudios Sobre la Unificación Internacional y Regional del Derecho Internacional Privado, Liber Amicorum Alegría Borrás 525, 530 (Joaquim-Joan Forner Delaygua, Christina González Beilfuss, & Ramón Viñas Farré eds., 2013) (arguing that, because of the optional nature of the CESL, all Member State law provisions covered by the instrument's regulatory scope would become "non-mandatory," thus avoiding the troublesome limitations of Rome I Reg., art. 6(2)).

119. *See* Ackermann, *supra* note 75, at 26; Hesselink, *supra* note 55, at 200; Fogt, *supra* note 81, at 129 (highlighting the "unequal treatment" of EU and third-country consumers).

120. *See* Heiss & Downes, *supra* note 77, at 704.

121. *See* Jürgen Basedow, *An EU Law for Cross-Border Sales Only—Its Meaning and Implications in Open Markets*, *in* Liber Amicorum Ole Lando 27, 38–39 (Michael Joachim Bonell, Marie-Louise Holle, & Pieter Arnt Nielsen eds., 2012). *See also* CESL Reg., *supra* note 8, recital 14. *But see* CESL Reg., *supra* note 8, arts. 4(2), 4(3)(b) (significantly limiting the likelihood of such cases).

122. *See* Jan H. Dalhuisen, *Some Realism about a Common European Sales Law*, 24 Eur. Bus. L. Rev. 299, 317 (2013); *see also* Gerhard Dannemann, *The CESL as Optional Sales Law: Interactions with English and German Law*, *in* The Common European Sales Law in Context, *supra* note 7, at 708, 731 (proposing an express derogation from the effects of Rome I Reg., art. 6(2)); Ulrich Magnus, *CISG and CESL*, *in* Liber Amicorum Ole Lando 225, 241 ("The only way to resolve [the legal issues arising under art. 6(2)] is to understand Article 11 Proposal as an exception to Article 6(2) Rome I Regulation. Whenever CESL is validly chosen Article 6(2) is suspended.").

D. Conclusion

This Part sought to establish legal certainty in both the application of the optional model embodied in the European sales law and its interplay with the private international law rules of the respective forum. In particular, it explored the scope and the maze-like applicability rules of the instrument, systematized in a clear manner its application requirements, and, finally, situated the second parallel legal regime vehicle in the private international law doctrine. Against this background, it was shown that the CESL would constitute anything but a "select-and-forget" optional instrument. The second parallel legal regime solution not only requires the alignment of an inordinate number of variables in order to unlock its potential, but also fails to harmonize the regulatory framework *vis-à-vis* transactions linked to third countries. Any ingenious constructions and legal sophistries would prove inadequate to overcome the obstacles raised by the truly "Gordian" EU legal integration project. "Cutting through" legal complexity might be the answer after all.

II. Ascertaining the Content of the CESL: The Enemy Within

At this point, the analysis turns to the interplay between the EU sales law instrument and the national rules on the legal treatment of foreign law. This inquiry stems from the structure of the instrument as a second parallel legal regime, which would apply as part of an EU Member State law. Specifically, this requirement warrants that the very same CESL could be treated, *in casu*, as either domestic or foreign law even by EU Member State courts. Thus, the following paragraphs explore whether the differentiated legal treatment of foreign law across the Single Market could affect the application of the instrument by introducing an additional de facto application requirement, that is, the pleading and proof of the CESL rules—an application requirement that has been neither delineated in the Regulation nor contemplated during the drafting process. Specifically, it is argued that the diversified treatment of foreign law jeopardizes the legal synchronization achieved by uniform conflicts and substantive law instruments and nullifies the prospect of legal unification under second parallel legal regimes.

A. CESL: Lex Fori or Lex Aliena?

It is common grounds that, when the private international law rules of the forum point to the laws of another state, the identified foreign law must be applied in its entirety irrespective of the source of its rules—be it a statute, binding case-law, rules of a regional or international organization, or international law and customs. Therefore, when private international law points to an EU Member State, EU law applies as part of that governing regime. The complication under such scenarios is that EU law is not "foreign" for other Member State fora. This observation begs the question of whether national legislation based on or implementing EU law should be treated as domestic or foreign law by courts located in other Member

States. In answering this question, it is critical to examine the nature and effects of the two key legal instruments of the European Union, namely Directives and Regulations.[123]

Through Directives, the EU legislator identifies the result that must be achieved but allows Member States to choose the form and method of transposing the Directive into their respective legal orders.[124] As a consequence, this piece of EU law is necessarily reformulated into national legal acts, having been "baptized" in the first place in national legislative procedures. This latitude in selecting the means of integrating EU law into national law together with the minimum harmonization character of numerous Directives have resulted in legal diversity across the Single Market. Hence, the legal differences that ensued between the various Member States justify any "domestic vs. foreign law" inquiries.

Conversely, the identical text of Regulations—albeit drafted in twenty-four authoritative versions—and the requirement for autonomous interpretation of the rules enshrined therein negate the "domestic law vs. foreign law" conundrum.[125] Since Member State courts are presumed to know the content of their own domestic laws, including Regulations, it follows logically that they also know that part of foreign law, which has been unified under EU Regulations. Besides, TFEU art. 288 refers to *one directly applicable* Regulation across the EU.[126] Therefore, in the context of this study, if Member State courts would be presumed to know the content of the CESL, as it would form part of domestic law, they should also be presumed to be cognizant also of any "foreign" CESL—when the instrument would apply as part of another Member State's legal order. Notwithstanding the superficial accordance of this argument with the wording of TFEU art. 288 and the practical advantages of adopting this interpretation for second parallel regimes, this position is doctrinally flawed and must be rejected on two grounds: (1) the legislative basis of the CESL, and (2) the introduction of non-uniform rules in the uniform sales law instrument.

The decision of the European Commission to enact the CESL on the competence basis of TFEU art. 114 alone—instead of TFEU art. 352 or TFEU art. 114 *plus* 81[127]—is directly relevant to the "content-of-laws" inquiry examined herein.[128] Whereas TFEU art. 81 is the sole legal basis for conflict-of-laws matters and TFEU art. 352 for the creation of a pan-

123. TFEU, *supra* note 57, art. 288.

124. *Id.*, art. 288(3) ("A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.").

125. CESL Reg., *supra* note 8, Anx. I, art. 4 ("The Common European Sales Law is to be interpreted autonomously and in accordance with its objectives and the principles underlying it.").

126. TFEU, *supra* note 57, art. 288(2) ("A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.").

127. Note that, in relation to EU contract law initiatives, TFEU art. 81 requires the cumulative application of a substantive competence basis.

128. Note the distinction between "*conflict*-of-laws" inquiries whereby the adjudicator explores *which law is applicable*, and "*content*-of-laws" inquiries whereby the adjudicatory authority strives to ascertain *what the identified applicable law provides for*.

European legal regime,[129] TFEU art. 114 allows only for the approximation of national legislations. As a result, the enactment of the CESL under TFEU art. 114 would bring closer the sales law regimes of the Member States but would not accumulate all legal orders under a common sales law umbrella.

Although forming an integral part of all EU Member State laws, an instrument promulgated under either TFEU art. 352 or TFEU arts. 114 *plus* 81 is "elevated" on a separate supra-national European level that exists in addition to the national legal orders.[130] Hence, any reference to a pan-European regime or to an additional EU regime embedded in the EU conflicts rules should be made to *one* set of rules, constituting *one* supra-national legal order, which lies over and above the distinct legal orders of the Member States. As a result, when EU Member State courts are called to apply the rules of such overarching regimes, they should do so on their own motion, because they will be applying a truly European instrument that may be described as neither domestic nor foreign law.[131]

On the other hand, the approximation of national legislations under TFEU art. 114 alone preserves the dividing lines between the various legal orders. A TFEU art. 114 instrument merely co-ordinates national legal systems by introducing identical, albeit distinct, national sales law regimes.[132] Thus, the CESL Regulation, as envisaged in the European Commission's proposal, would merely introduce *singulo actu* uniform substantive sales law rules in all Member States.[133] That would amount to the creation of various CESL.[MS], such as CESL.Fr, CESL.It, CESL.Sp, CESL.De, etc.[134] Since the conflict-of-laws rules of the forum would point to one of the

129. *See, e.g.*, Case C-436/03, Parliament v. Council, 2006 E.C.R. I-03733, ¶ 37; Case C-377/98, Netherlands v. Parliament and Commission, 2001 E.C.R. I-07079, ¶ 25.

130. This should not be confused with the constitutional or public international law characterization of the EU as a separate "legal order." On this point, see, e.g., Joint Cases 6 & 9/90, Francovich v. Italian Republic, 1991 E.C.R. I-05357, ¶ 31; Case 6/64, Costa v. E.N.E.L., 1964 E.C.R. 585, 593; Case 26-62, Van Gend en Loos, 1963 E.C.R. 1, 12; Case 13/61, Bosch v. van Rijn, 1962 E.C.R. 45, 49–50. *See, e.g.*, *Proposal for a Council Regulation on the Statute for a European Foundation*, COM (2012) 35 final (Feb. 8, 2012); *Proposal for a Council Regulation on the Statute for a European Private Company*, COM (2008) 396 final (June 25, 2008); Council Regulation 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society, 2003 O.J. (L207) 1; Council Regulation 2157/2001 of 8 October 2001 on the Statute for a European Company, 2001 O.J. (L294) 1; Council Regulation 207/2009 of 26 February 2009 on the Community Trade Mark, 2009 O.J. (L78) 1; Council Regulation 6/2002 of 12 December 2001 on Community Designs, 2002 O.J. (L003) 1; *Proposal for a Council Regulation on the Community Patent*, COM (2000) 412 final (Aug. 1, 2000); Council Regulation 2100/94 of 27 July 1994 on Community Plant Variety Rights, 1994 O.J. (L227) 1; Council Regulation 2137/85 of 25 July 1985 on the European Economic Interest Grouping, 1985 O.J. (L199) 1.

131. *See* Eric Gastinel & Mark Milford, The Legal Aspects of the Community Trade Mark 5 (2001); Gordian N. Hasselblatt, *Article 1: Community Trade Mark*, *in* Community Trade Mark Regulation (EC) No 207/2009: A Commentary 4, 28 (Gordian N. Hasselblatt ed., 2015).

132. *See* Low, *supra* note 116, at 145.

133. Simon Whittaker, *The Proposed 'Common European Sales Law': Legal Framework and the Agreement of the Parties*, 75 Mod. L. Rev. 578, 588 (2012).

134. Heidemann, *supra* note 3, at 1127.

many approximated laws but not to a pan-European regime, the rules of the applicable CESL would be colored as either domestic or foreign law. Thus, Member State courts might not take judicial notice of the European sales law instrument, albeit the latter would stem from an EU Regulation.

Furthermore, notwithstanding the high degree of uniformity achieved under the CESL, a series of important issues fall outside the scope of the instrument,[135] while a good number of CESL provisions were deliberately left open or incomplete. Such rules have been enshrined in CESL Reg., arts. 13(a) and 13(b), which allow the expansion of the instrument's application to non-cross-border sale of goods and to business-to-business contracts respectively, as well as in CESL Reg., art. 10, which requires Member States to "lay down penalties for breaches by traders in relations with consumers of the requirements set out in [CESL Reg.,] Articles 8 and 9 . . . ."[136]

Hence, it follows from the foregoing analysis that, although the origins of the individual parallel legal regimes would be traced in a single Regulation, the content of the CESL would inevitably differ from state to state. Accordingly, there could be as many a version of the CESL as the EU Member States. Therefore, since the enactment of the CESL on the basis of TFEU art. 114 would unify neither the substantive sales law nor the conflicts rules on "domestic vs. foreign laws," it would be crucial to determine which state's regime would govern the particular contract in dispute. In light of this, depending on the forum of the dispute and the matrix applicable law, the CESL could apply as foreign law even before courts of a Member State—truly an alien at home.[137] Having showcased the relevance of the "domestic vs. foreign law" inquiry to the application of the proposed CESL, the following paragraphs focus on the differentiated legal treatment of foreign law in international litigation and explore the effects of the various approaches to the content-of-laws inquiry on the application of the European sales law instrument.

B. The Legal Treatment of Foreign Law in the EU

Given the extensive unification of both private international law and substantive sales law in Europe, one would expect that the same rules would govern all international sales contracts across the Single Market. Contrary to such expectations, however, this Part showcases that the drafting of the CESL as a second parallel legal regime and the shattered approach of the Member States to the application of foreign law could affect the legal framework of the dispute, thus opening the backdoor to forum shopping.

To begin with, the initiatives for the unification of the various Member States' regimes on the application of foreign law have been rather anemic. Setting aside the attempts of the European Parliament to introduce the *iura*

135. *See* CESL Reg., *supra* note 8, recital 27.
136. CESL Reg., *supra* note 8, art. 10.
137. *See* Whittaker, *supra* note 133, at 591–92.

novit curia principle into the Rome II Regulation,[138] no other initiatives have been undertaken towards the unification or, at least, the harmonization of the legal treatment of foreign law in the EU. The sole exceptions were the Valencia report,[139] which merely restates the approaches adopted by the Member States, and the Madrid Principles accompanying the report.[140] As a consequence, the ascertainment of the content and the application of foreign law remain largely inconsistent in the Member States. Succinctly, it may be argued that there is a wide spectrum of approaches to the ascertainment of the content and the application of foreign law by national courts. At the two extremes of the spectrum, one may find "[fora whereby] the court has considerable powers to apply foreign law and to ascertain its contents on its own motion . . . [and fora whereby] the court is required essentially to rely on the initiative of the parties to plead and prove foreign law as if it were a factual matter."[141] In between these two positions, there is a "*tertium genus*," namely, intermediate systems, which follow *in casu* one of the aforementioned two approaches.[142] Let us, now, examine how each respective approach could impact the application of the CESL model.

Followed, typically, by Member States of the civil law tradition,[143] courts of the first group do not distinguish between domestic and foreign rules.[144] Rather, they treat both as legal norms of the same stature independent of the regulatory source. Hence, so long as either litigant has illustrated the internationality of the dispute,[145] courts are required to apply

138. Position of the European Parliament adopted at First Reading on 6 July 2005 with a view to the Adoption of Regulation (EC) No . . ./2005 of the European Parliament and of the Council on the Law Applicable to Non-Contractual Obligations ("Rome II"), 2006 O.J. (C157E) 371 (Amendment 43, introducing art. 13).

139. Carlos Esplugues (Rapporteur-General), *General Report on the Application of Foreign Law by Judicial and Non-Judicial Authorities in Europe (Project JLS/CJ/2007-1/03)*, *in* APPLICATION OF FOREIGN LAW 3 (Carlos Esplugues, José Luis Iglesias, & Guillermo Palao eds., 2011) [hereinafter The Valencia Report].

140. European Union Action Grant Project, *Principles for a Future EU Regulation on the Application of Foreign Law ("The Madrid Principles")*, *in* APPLICATION OF FOREIGN LAW, *supra* note 139, at 95–97 [hereinafter *The Madrid Principles*].

141. International Law Association [ILA], *International Commercial Arbitration Committee's Report and Recommendations on "Ascertaining the Contents of the Applicable Law in International Commercial Arbitration"*, 73 INT'L L. ASS'N REP. CONF. 850, 861 (2008).

142. *Id.* EU Member States following the intermediate approach are Latvia, Lithuania, and the Netherlands. The Valencia Report, *supra* note 139, at 16–17.

143. Urs Peter Gruber & Ivo Bach, *The Application of Foreign Law: A Progress Report on a New European Project*, 11 Y.B. PRIV. INT'L L. 157, 161 (2009); Clemens Trautmann, *Foreign Law (Application)*, I *in* THE MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW 711, 711 (Jürgen Basedow et al. eds., 2012).

144. The Valencia Report, *supra* note 139, at 10 (noting Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Poland, Portugal, Romania, Slovakia, Slovenia, and Sweden as EU Member States of this category); Davor Babiæ, *Private International Law*, *in* INTRODUCTION TO THE LAW OF CROATIA 439, 443 (Tatjana Josipoviæ ed., 2014) (adding Croatia to the list).

145. Litigants need to introduce sufficient evidence of the dispute's international character. They can, of course, "hide" the international nature of their dispute by not establishing the relevant links to foreign legal orders. *But see* Axel Flessner, *Optional (Facultative) Choice of Law*, 1 *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW, *supra* note

their respective conflict-of-laws provisions, ascertain the content of the applicable legal regime, and, ultimately, resolve the dispute pursuant to the relevant substantive law rules.[146] Nevertheless, in establishing the content of the applicable foreign law, courts may request legal assistance from the litigating parties, competent state authorities, and universities or other academic institutions. Should the judge, notwithstanding her efforts, fail to ascertain the content of the applicable foreign rules, she will generally be allowed to apply the laws of another country—typically those found in her own domestic law.[147]

On that basis, the court would be required to examine, on its own motion, whether the application requirements of the CESL are met, and, at a second stage, to resolve the dispute pursuant to the applicable version of the CESL. Put differently, before courts that are required to establish *ex officio* the content of the applicable law, there would be no additional requirements for the activation of the CESL's parallel legal regime. Provided that the parties have not excluded *ex post* the application of the instrument, the CESL would govern the issues in dispute exactly as envisaged in the sale of goods contract.

Conversely, in courts of the second group,[148] the litigants must establish both the factual and the legal basis of their dispute. This duty includes pleading the relevant facts of the case, that is, requesting the application of a foreign legal regime,[149] irrespective of how conspicuous the links with

22, at 1324, 1329 ("[T]he dressing 'option' seems to be largely theoretical. In practice the parties will rarely be able to conceal from the court the international elements of their case.").

146. *Cf. The Madrid Principles*, *supra* note 140 Principle IV ("Application of foreign law should be made *ex officio* by the national authority, which must use its best endeavours to ascertain the content of foreign law."); American Law Institute and UNIDROIT, ALI/UNIDROIT Principles of Transnational Civil Procedure (2006), Principle 22(1) ("The court is responsible for considering all relevant facts and evidence and for determining the correct legal basis for its decisions, including matters determined on the basis of foreign law.") and Principle 22(2)(3) ("The court may, while affording the parties opportunity to respond: Rely upon a legal theory or an interpretation of the facts or of the evidence that has not been advanced by a party.").

147. Gruber & Bach, *supra* note 143, at 163; *cf. The Madrid Principles*, *supra* note 140, Principle IX ("If in the view of the national authority, a) there has been no adequate ascertainment of the content of foreign law in a reasonable time, or b) it is found that upon ascertainment of foreign law it is inadequate to address the issue in question, the *lex fori* shall be applied.").

148. The Valencia Report, *supra* note 139, at 13–14 (noting the United Kingdom, Cyprus, Ireland, and Malta as Member States following the "foreign law as facts" approach, as well as Luxemburg and Spain, albeit the last two are classified as "civil law" jurisdictions).

149. *See* Richard Fentiman, Foreign Law in English Courts: Pleading, Proof and Choice of Law 61–62 (1998) ("[T]o plead foreign law is to allege that the content of foreign law is to a certain effect, which involves giving appropriate particulars of the relevant foreign rules in the statement of claim or defence. What is pleaded is not that foreign law governs a given issue, but the fact that the legal system in question contains a particular rule."). *See also* Sofie Geeroms, Foreign Law in Civil Litigation: A Comparative and Functional Analysis 75 (2004); Alexander Layton & Hugh Mercer, European Civil Practice 214 (2d ed. 2004).

multiple jurisdictions are.[150] At a second stage, either litigant must offer sufficient evidence on the content of the applicable foreign rules. This so-called "proof" of foreign law is required irrespective of the judge's familiarity with the applicable legal regime.[151] The court is presumed to be unaware of all foreign rules; its foreign law expertise is limited to the evidence introduced by the parties. Followed, typically, by Member States of the common law tradition,[152] this approach amounts, essentially, to the treatment of foreign law as factual representations or, as often quoted, as "facts of a peculiar kind."[153] Should the parties fail to establish the content of the foreign rules,[154] the court will typically not dismiss the case,[155] but will apply, instead, domestic law by virtue of either a "default rule"[156] or a variety of legal presumptions.[157]

Focusing on the applicability of the CESL, the application of the instrument before courts of this category would depend on the pleading and proof of its provisions. Absent a request to the court for the activation of the CESL by either of the litigants, the regime would remain dormant, even if its application criteria were met. This implies the existence of an additional de facto application requirement of the CESL, which has not been delineated in the CESL Regulation. In a nutshell, whereas the application of the very same European sales law regime would be the norm in courts of the first group, in courts of the second group the application of the CESL would be the exception.

C. The "Foreign" CESL and Consumer Transactions

A further foreign law complication arises when exploring the application of the CESL in consumer transactions. Unlike the 1980 Rome Convention and the Rome I Regulation, which both contain special conflicts

150. *See, e.g.*, Aluminium Industrie Vaassen BV v. Romalpa Aluminium Ltd, [1976] 1 W.L.R. 676 (Eng.).

151. *See* ADRIAN BRIGGS, THE CONFLICT OF LAWS 10 (4th ed. 2019).

152. Gruber & Bach, *supra* note 143, at 161; Trautmann, *supra* note 143, at 711.

153. *See, e.g.*, Parkasho v. Singh, [1967] 2 W.L.R. 946 (Eng.).

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

155. *See, e.g.*, Global Multimedia International Ltd v Ara Media Services [2006] EWHC 3612 (Ch) [38] (Eng.); Damberg v Damberg (2001) 52 NSWLR 492 [163-164] (Austl.); Walton v Arabian American Oil Co, 233 F. 2d 541, 546 (2d Cir. (NY) 1956), *cert. denied*, 352 US 872 (1956) (USA); Cuba R.R. Co v Crosby, 222 U.S. 473, 479 (1912) (USA). *See also* ADRIAN BRIGGS, PRIVATE INTERNATIONAL LAW IN ENGLISH COURTS 103-04 (2014); FENTIMAN, *supra* note 154, at 690-91 ("[W]here [the default rule] does not apply, the implication is that a claim or defence advanced in reliance on foreign law will fail."); RICHARD GARNETT, SUBSTANCE AND PROCEDURE IN PRIVATE INTERNATIONAL LAW 66 (2012).

156. *See* FENTIMAN, *supra* note 154, at 690-91; JONATHAN HILL & ADELINE CHONG, INTERNATIONAL COMMERCIAL DISPUTES. COMMERCIAL CONFLICT OF LAWS IN ENGLISH COURTS 647 (2010).

157. *See, e.g.*, Leary v Gledhill, 8 N.J. 260, 266-67, 84 A.2d 725, 728 (1951) (USA); PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS 610-611 (5th ed. 2010).

rules for consumer contracts, no distinction between consumer and non-consumer disputes is made in the application of foreign law. Hence, the question that arises is whether consumer protection considerations modify the national rules on the legal treatment of foreign law. Naturally, this enquiry would be irrelevant regarding courts that have a duty to ascertain *ex officio* the content of the applicable foreign law. In such fora, the court must ascertain *all* applicable foreign rules. This enquiry, however, would be of particular importance regarding courts that require the pleading and proof of foreign law by at least one of the litigants. Thus, in the context of the CESL Regulation, the question may be formulated as follows: if neither party has pleaded or proved the content of the foreign CESL, would the judge be required to examine the applicability and ascertain the content of the uniform law on her own motion?

To begin with, it has been argued that the legal treatment of foreign law is a procedural issue, which falls outside the scope of the EU conflicts regimes.[158] As a result, the differentiated legal treatment of foreign law has remained unaffected. This conclusion, however, is inconsistent with the language used by the European legislator,[159] the purpose of unifying private international law,[160] and the rationale of the limitations enshrined in conflict rules for consumer contracts.[161] Importantly, Member States have an obligation to ensure that their national laws do not hinder the application of or otherwise limit the effects of EU legislation. Pursuant to the "primacy" of EU law principle, prevalence should be given to EU law over any conflicting national law provisions, irrespective of the latter's classification as private international law or procedural rules.[162] On that basis, it is submitted that, as of the enactment of the 1980 Rome Convention, all Member State courts have the duty to apply their respective consumer conflict-of-laws rules and to ascertain the content of the applicable foreign law

158. BENJAMIN'S SALE OF GOODS 26–29 (Michael G. Bridge ed., 11th ed. 2021); DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, vol. 1 at 322–323 (15th ed. 2012); FENTIMAN, *supra* note 154, at 206–07 ("How foreign law is pleaded is no doubt procedural, but whether foreign law must be pleaded, and thus whether English law may be substituted as the applicable law, is a choice-of-law issue, and as such is governed by the choice-of-law rules of the Regulation."); Trevor C. Hartley, *Pleading and Proof of Foreign Law: The Major European Systems Compared*, 45 INT'L & COMP. L.Q. 271, 290–91 (1996).

159. Rainer Hausmann, *Pleading and Proof of Foreign Law—A Comparative Analysis*, 8 EU L. F. I(1), I(6) (2008).

160. *See* Harry Duintjer Tebbens, *New Impulses for the Ascertainment of Foreign Law in Civil Proceedings: A Question of (Inter)Networking?*, *in* CONVERGENCE AND DIVERGENCE IN PRIVATE INTERNATIONAL LAW: LIBER AMICORUM KURT SIEHR 635, 644 (Katharina Boele-Woelki et al. eds., 2010).

161. *See* Trautmann, *supra* note 143, at 714. *But see* Hartley, *supra* note 158, at 291 ("[O]nce litigation has begun, [the consumer's] economically weak position would hardly prevent him from pleading foreign law; so there is no reason why the court should be required to apply foreign law *ex officio*.").

162. Declaration No. 17 concerning Primacy, 2012 O.J. (C326) 346. *See, e.g.*, Case C-284/16, Slovakia v Achmea, ECLI:EU:C:2018:158, ¶ 33 (2018); Joined Cases C-295/04 to C-298/04, Manfredi v Lloyd Adriatico, 2006 E.C.R. I-06619, ¶ 39; Case 106/77, *Simmenthal*, 1978 E.C.R. -00629, ¶ 22; Case 48/71, Commission v Italy, ECLI:EU:C:1972:65, ¶ 9 (1972); Case 93/71, Leonesio, ECLI:EU:C:1972:39, ¶ 22 (1972); Case 6/64, Costa v E.N.E.L., ECLI:EU:C:1964:66, at 594 (1964).

on their own motion.[163]

Hence, if the conclusion of a CESL opt-in agreement was successfully introduced as part of the factual basis of the dispute, the court would be required to look at the instrument's applicability on its own motion. Of course, the parties would be able opt out of the CESL,[164] but an informed consumer would hardly agree to a change of the applicable rules to her detriment. In short, for consumer sales contracts falling within the regulatory scope of arts. 5(2) and 6(2) of the 1980 Rome Convention and the Rome I Regulation respectively, courts would be required to apply the CESL on their own motion to the benefit, always, of the consumer.

D. The "Trap" of Applying CESL as Foreign Law

This brief overview of the two representative approaches to the application of foreign law and their interplay with the CESL regime highlights a very important oversight by the European legislator. Whereas courts of the first group apply their conflict-of-laws rules on their own motion, courts of the second group refrain from resorting to private international law unless either litigant has requested the application of foreign law. This divergence persists despite the legal unification achieved under EU private international law. Most importantly, the above analysis illustrates that the legal unification purportedly achieved under the CESL model should be viewed with skepticism. Whereas courts treating foreign law as legal norms would be required to examine the existence of such an agreement against the relevant rules of the Rome I Regulation or the 1955 Hague Sales Convention, courts treating foreign law as facts would be required to adhere to the pleading and proof requirement, which essentially sets forth a presumption of an implicit agreement in favor of applying the domestic law. For consumer transactions, the principles of primacy and effectiveness point towards the setting aside of any national provisions that could impede the consumer protection devised in the European conflict-of-laws and private law instruments.

E. Conclusion

These concerns on the ascertainment of the applicable law might seem to be of doctrinal value only, as the parties can adapt their litigation strategies accordingly. Reality, however, is different. Since the primary user of the CESL model would be SMEs, which often lack premium legal representation, it should be almost certain that such complex conflict-of-laws issues would elude their consideration when conducting business in the Single Market. Thus, a litigation strategy carefully devised to take advantage of the instrument's shortcomings could disturb the equilibrium of the contract to the detriment of the unsuspecting counter-contracting SME.

163. *See* MICHAEL BOGDAN, CONCISE INTRODUCTION TO EU PRIVATE INTERNATIONAL LAW 118–19 (3d ed. 2016).

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

The latter, lured by the possibility of streamlining her contractual obligations under the umbrella of a single uniform sales law, would fall for a "Trojan horse"[165] or into the "trap" of the differentiated legal treatment of foreign law. But this time, the shortcoming of the CESL model would not come from its unique legal structure, from certain mandatory rules or other legal instruments, but from "within"—the limitations of the very EU legislation. These harmonization failings—hidden in plain sight—could jeopardize the uniform application of the instrument and damage the reliability of the European sales law regime, hence it has been proposed that a special content-of-laws rule should be included in the CESL.[166] Added to the already narrow scope of the CESL and its complex structure as second parallel legal regime, this foreign law enquiry reduces further the practicality of the proposed instrument.

III. CESL & Public Policy Considerations: The Enemy that Wasn't

Having covered the activation mechanism of the CESL and the instrument's interplay with the national rules on the legal treatment of foreign laws, the analysis continues with an examination of the effects that national interests might have on the applicability of European sales law. Specifically, the question tackled in this Part is whether fundamental state interests could interfere with the application of the optional sales law instrument. This question boils down to whether overriding mandatory provisions could prevail over the corresponding CESL rules and whether the public policy defense could bar the application of certain CESL provisions.

Overriding mandatory provisions and international public policy are key-elements for the preservation of the good order, constant progress, and peaceful symbiosis of societies in a globalized world. These conflicts devices require or bar respectively the application of certain rules to the issues in dispute. Their common denominator is the protection of important state interests through the introduction of far-reaching exceptions to the comity of nations and conflicts multilateralism. For that reason, the overriding mandatory rules and the public policy defense have been described as two sides of the same coin, which corresponds to the positive and negative functions of a broader public policy concept.[167]

A. Overriding Mandatory Provisions

Going by several names, such as internationally or overriding mandatory provisions, overriding statutes, directly applicable rules, rules

165. Carlos Esplugues Mota, *Harmonization of Private International Law in Europe and Application of Foreign Law: The "Madrid Principles" of 2010*, 13 Y. B. PRIV. INT'L L. 273, 276 (2011).

166. *See, e.g.*, Dannemann, *supra* note 53, at 77.

167. HAGUE CONF. ON PRIV. INT'L L., COMMENTARY ON THE PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS 21, 73 (Hague Conf. on Priv. Int'l L. ed., 2015) [hereinafter Commentary on the 2015 Hague Principles].

of immediate application, *lois de police*, etc.,[168] this type of rules is anything but new to the private international law doctrine. Articulated in mid-19th century in Savigny's grand conflict-of-laws design and Mancini's conflict-of-laws theory,[169] and redefined a century later thanks to the seminal work of Francescakis,[170] these rules have attracted much attention in legal scholarship—perhaps quite disproportionately to their significance in case-law. Pursuant to Rome I Reg., art 9(1), which sets forth the only legislative definition of such rules,[171]

Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract.[172]

This definition amplifies the two fundamental features of these rules: (1) their compulsory application, which translates into the setting aside of the choice-of-law process—*ergo* "overriding" rules—and (2) their close link to important public policy interests—*ergo* "mandatory" rules.

As vividly put in legal theory, overriding mandatory provisions constitute the "sword" of the adjudicator.[173] They bear unilateral effects in that they prescribe, without more, the application of certain substantive rules. They do not contribute to the identification of the applicable law and, certainly, do not invalidate any rules-selection agreements between the parties.[174] Rather, the unilateral effects of such overriding mandatory provisions are limited to their regulatory scope. To the extent that they are applicable, these provisions *override* all conflicts rules and render redundant any other choice-of-law enquiries.[175] All matters falling outside the ambit of the provisions are governed by the applicable law as identified by

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

169. FRIEDRICH CARL VON SAVIGNY, A TREATISE ON THE CONFLICT OF LAWS AND THE LIMITS OF THEIR OPERATION IN RESPECT OF PLACE AND TIME 76–81 (William Guthrie trans., 2nd ed., 1869); Paul Lagarde, *Chapter 11: Public Policy*, *in* 3 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ONLINE 1, 3–4 (Konrad Zweigert & Ulrich Drobnig eds.).

170. Phocion Francescakis, *Quelques Précisions sur les "Lois d'Application Immédiate" et Leurs Rapports avec les Règles de Conflits de Lois*, 55 REV. CRIT. D. I. P. 1 (1966). See Michael Hellner, *Third Country Overriding Mandatory Rules in the Rome I Regulation: Old Wine in New Bottles?*, 5 J. PRIV. INT'L L. 447, 449 (2009), for a different account of legal history.

171. Bonomi, *supra* note 168, at 617.

172. *See* Joined Cases C-369/96 & C-376/96, Arblade v. SARL, 1999 E.C.R. I-8453 (inspiring the definition). *See ?*Mario Giuliano & Paul Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations*, 1980 O.J. (C 282) 26. *See* MICHAEL MCPARLAND, THE ROME I REGULATION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS 689-692 (2015), for a concise legislative history of Rome I Reg., art. 9(1).

173. SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD: AN INTERNATIONAL COMPARATIVE ANALYSIS 311–12 (2014).

174. *See* Commentary on the 2015 Hague Principles, *supra* note 167, at 71.

175. Bonomi, *supra* note 168, at 626; NYGH, *supra* note 93, at 202 ("It is unilateralism triumphant.").

the multilateral private international law rules of the forum.[176] Thus, overriding mandatory provisions do not exclude multilateral conflicts rules altogether, but rather operate alongside the latter and only exceptionally limit their application.[177]

These far-reaching effects of overriding mandatory provisions require strong grounds justifying the deviation from the beaten path of multilateralism. These grounds are found in public policy interests,[178] which are so important to a particular state that the non-application of certain norms could endanger the identity of the state.[179] If the norm expressly stipulates its overriding mandatory nature, no further enquiry is required by the adjudicator. Nevertheless, in the absence of such an express stipulation in the norm itself or list of fundamental public policy interests,[180] there can be no clear answer as to which norms should be classified as overriding mandatory provisions.[181] Granted, a broad spectrum of overriding mandatory rules have been identified in legal theory and jurisprudence, such as market and securities regulations, antitrust laws, international sanctions, import and export prohibitions,[182] tax regulations, currency and foreign exchange regulations, legislation protecting weak contracting

176. NYGH, *supra* note 93, at 203; SYMEONIDES, *supra* note 173, at 301 (calling this limitation "partial unilateralism"). *See* Bonomi, *supra* note 168, at 631.

177. Andrea Bonomi, *Mandatory Rules in Private International Law: The Quest for Uniformity of Decisions in a Global Environment*, 1 Y. B. PRIV. INT'L L. 215, 226–27 (1999); Fransesca Ragno, *Are EU Overriding Mandatory Provisions an Impediment to Arbitral Justice?*, *in* THE IMPACT OF EU LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 139, 147–48 (Franco Ferrari ed., 2017).

178. This consideration of competing public interests brings continental private international law closer to the governmental interest analysis theory of U.S. conflict-of-laws. *See* Thomas G. Guedj, *The Theory of the Lois de Police, A Functional Trend in Continental Private International Law—A Comparative Analysis with Modern American Theories*, 39 AM. J. COMP. L. 661, 681–96 (1991). *See also* Frank Vischer, *Chapter 4: Connecting Factors*, *in* 3 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ONLINE 1, 6 (Konrad Zweigert & Ulrich Drobnig eds.).

179. SYMEONIDES, *supra* note 173, at 301.

180. Even if there be such a governmental interests list, it would constitute only a snapshot of the ever-changing interests of the respective state. Qisheng He, *Interpretation I of the Supreme People's Court on Certain Issues Concerning the Application of the 'Law of the People's Republic of China on Application of law to Foreign-Related Civil Relations'*, 2 CHINESE COMP. L. 175, 178 (2014) (listing five areas that are so important to the state that relevant rules could be considered by courts as overriding mandatory provisions: *i.* protection of the rights and interests of workers; *ii.* safety of food and public healthy; *iii.* environmental safety; *iv.* financial safety, such as foreign exchange controls; and *v.* anti-monopoly and anti-dumping regulations) (China).

181. *See* Giesela Rühl, *Unilateralism (PIL)*, *in* 2 THE MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW 1735, 1738 (Jürgen Basedow et al. eds., 2012). *See* SYMEONIDES, *supra* note 173, at 310, (stating that courts must focus on the purpose and consequences of the rule); GIUDITTA CORDERO-MOSS, INTERNATIONAL COMMERCIAL CONTRACTS: APPLICABLE SOURCES AND ENFORCEABILITY 192 (2014); Moritz Renner, *Rome I: Article 21*, *in* ROME REGULATIONS: COMMENTARY 395, 246–47 (Gralf-Peter Calliess ed., 2nd ed. 2015). *Cf.* Rome I Reg., *supra* note 36, art. 9(3).

182. Ole Lando, *Mandatory Rules and Ordre Public*, *in* HARMONISATION OF SUBSTANTIVE AND INTERNATIONAL PRIVATE LAW 99, 99 (Ole Lando, Ulrich Magnus, & Monika Novak-Stief eds., 2003).

parties (employment and social protection regulations,[183] consumer protection laws,[184] commercial agents and distributors regimes,[185] unfair contract terms regulations,[186] etc.), regulations on war, terrorism, and other hostile events,[187] etc.[188]

B. The Public Policy Defense

If overriding mandatory rules are the adjudicator's "sword," public policy is the "shield."[189] Nascent in both Savigny's and Story's scholarship,[190] the public policy device has become an indispensable part of modern multilateral conflict-of-laws.[191] In stark contrast to *domestic* public policy, which restricts the parties' freedom of contract, *international* public policy operates as a defense mechanism against the application of certain foreign rules that could jeopardize important governmental goals and interests.[192] Public policy neither invalidates a choice-of-law agreement nor indicates which solutions would be acceptable.[193] It merely rejects, in a negative manner, judicial outcomes that are, in the case at hand, repugnant to fundamental societal values. In particular, the applicable foreign rules—not the applicable law in its entirety—which in this case lead to unacceptable results, will be set aside. Further, the adjudicator will have to go through a new conflict-of-laws analysis in order to identify different substantive rules that would not be "manifestly incompatible" with the pertinent public policy considerations.[194] These "fall-back" substantive rules

183. *See* Rome I Reg., *supra* note 36, recital 34.

184. BENJAMIN'S SALE OF GOODS, *supra* note 158, at 26-060, n.446.

185. Case C-338/14, Quenon v. Beobank, ECLI:EU:C:2015:795, ¶ 26 (2015); Case C-184/12, Unamar v. Navigation Maritime Bulgare, ECLI:EU:C:2013:663, ¶ 40 (2013); Case C-348/07, Turgay v. Tamoil, ECLI:EU:C:2009:195, ¶ 17 (2009); Case C-465/04, *H*onyvem v. De Zotti, 2006 E.C.R. I-02879, ¶ 22-23; Case C-381/98, Ingmar v. Eaton, 2000 E.C.R. I-09305, ¶ 24-25.

186. *See, e.g.*, Council Directive 93/13/EEC of Apr. 5, 1993, on Unfair Terms in Consumer Contracts, 1993 O.J. (L95) 29, art. 6(2); Case C-421/14, Banco Primus v Gutiérrez García, ECLI:EU:C:2017:60, ¶ 41 (2017); Joined Cases C-154/15, C-307/15 and C-308/15, Gutiérrez Naranjo v Cajasur Banco, ECLI:EU:C:2016:980, ¶ 53, 55 (2016); Case C-169/14, Sánchez Morcillo v Banco Bilbao, ECLI:EU:C:2014:2099, ¶ 23 (2014).

187. Boissevain v. Weil [1950] A.C. 327 (Eng.).

188. Giuliano & Lagarde, *supra* note 172, at 28; CORDERO-MOSS, *supra* note 181, at 193-94; James J. Fawcett, *Evasion of Law and Mandatory Rules in Private International Law*, 49 CAMBRIDGE L. J. 44, 60 (1990); Lando, *supra* note 102, at 38; Rühl, note 181, at 1738.

189. SYMEONIDES, *supra* note 173, at 311.

190. VON SAVIGNY, *supra* note 169, at 76-81; JOSEPH STORY & ISAAC F. REDFIELD, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC 26 (6th ed. 1865). *Cf.* BARTOLUS ON THE CONFLICT OF LAWS, 32 (Joseph H. Beale tran., 1914) (§ 33).

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

192. For the misnomer of international—yet truly national—public policy, *see* DENNIS LLOYD, PUBLIC POLICY: A COMPARATIVE STUDY IN ENGLISH AND FRENCH LAW 73 (1953).

193. 2015 Hague Principles: Commentary, *supra* note 167, at 71.

194. Giuliano & Lagarde, *supra* note 172, at 38; Pietro Franzina, *Article 21*, II *in* ECPIL COMMENTARY: ROME I REGULATION 820, 833-35 (Ulrich Magnus & Peter Mankowski eds., 2017); Giuliano & Lagarde, *supra* note 169, at 21, 54; Martiny, *supra* note 191, at 1397. *See* CORDERO-MOSS, *supra* note 181, at 203 (noting that a simple difference

are, usually, found in the laws of the forum,[195] thus streamlining the negative effects of the international public policy with the positive effects of the overriding mandatory rules of the forum.[196] Of course, this observation should hardly be surprising, given the common pool of values and state interests that the two devices share. Legal theory and jurisprudence have delineated a handful of examples that could illuminate this conflicts concept. For instance, rules infringing vital interests of the forum state,[197] fundamental human rights,[198] conceptions of morality and justice,[199] and public international law[200] have all been noted as infringements of public policy, "colouring" the "chameleon" *ordre public*.[201]

It is important to note, at this point, that, notwithstanding the nation-centric character of the concept, the expansion of the EU legislation to a vast array of private and public interest issues has unveiled a new "European" dimension of international public policy.[202] Hence, just as EU law becomes an integral part of the Member States' legal orders, fundamental

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between domestic and foreign law would be insufficient to trigger the public policy defense); DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, vol. 2 at 1871 (15th ed. 2012).

195. Ioanna Thoma, *Public Policy (Ordre Public)*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 1453, 1458 (Jürgen Basedow et al. eds., 2017); Giuliano & Lagarde, *supra* note 169, at 54, 56; SYMEONIDES, *supra* note 173, at 311; MARTIN WOLFF, PRIVATE INTERNATIONAL LAW 183 (2nd ed. 1950) (arguing that resorting to *lex fori* is proper, only absent an acceptable substitute rule in the *lex causae*). *But see* Law of 16 July 2004 Holding the Code of Private International Law, art. 21(3) (Belg.); Private International Law Code, art. 45(3) (Bulg.); Law of 31 May 1995, No. 218, art. 16(2) (It.); Civil Code, art. 22(2) (Port.).

196. Bonomi, *supra* note 168, at 614.

197. WOLFF, *supra* note 195, at 180–82.

198. PIPPA ROGERSON, COLLIER'S CONFLICT OF LAWS 425 (4th ed. 2013).

199. JONATHAN HILL & MÁIRE NÍ SHÚILLEABHÁIN, CLARKSON & HILL'S CONFLICT OF LAWS 53 (5th ed. 2016).

200. *See, e.g.*, Kuwait Airways Corp v. Iraqi Airways Co (Nos 4 and 5) [2002] UKHL 19 (Eng.).

201. *See* CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW 135–39 (Paul Torremans & James J. Fawcett eds., 15th ed. 2017). *See also* Institute of International Law [IIL], *De l'Ordre Public en Droit International Privé*, Resolution, Session of Paris Rapporteur: Pasquale Fiore (Mar. 30, 1910) (¶ 1: "L'Institut exprime le voeu que, pour éviter l'incertitude qui prête à l'arbitraire du juge et compromet, par cela même, l'intérêt des particuliers, chaque législation détermine avec toute la précision possible, celles de ses dispositions qui ne seront jamais écartées par une loi étrangère, quand même celle-ci paraîtrait compétente pour régler le rapport de droit envisagé."). *See* Rome I Reg., *supra* note 36, recital 37 (indicating that the concept of public policy must be interpreted restrictively); *see also* Renner, *supra* note 181, at 399. *Cf.* Case C-559/14, Meroni v. Recoletos, ECLI:EU:C:2016:349, ¶ 38 (2016); Case C-681/13, Diageo v. Simiramida, ECLI:EU:C:2015:471, ¶ 41 (2015); Case C-157/12, Salzgitter Mannesmann v. Laminorul, ECLI:EU:C:2013:597, ¶ 27–28 (2013); Case C-139/10, Prism Investments v. Van der Meer, 2011 E.C.R. I-09511, ¶ 32–33 (2011); Case C-420/07, Apostolides v. Orams, 2009 E.C.R. I-03571, ¶ 55; Case C-38/98, *Renault* v. *Maxicar*, 2000 E.C.R. I-02973, ¶ 26–28; Case C-7/98, Krombach v. Bamberski, 2000 E.C.R. I-01935, ¶ 21–23; Case C-414/92, Kleinmotoren v Boch, 1994 E.C.R. I-02237, ¶ 20.

202. *See* Martiny, *supra* note 191, at 1396. *Cf.* Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations ("Rome II"), COM (2003) 427 final (July 22, 2003) (introducing in recital 19 and art. 24 the concept of "community public policy").

EU interests and policies also become part of the latter's *ordre public*.[203] This evolution of international public policy has three corollaries. First, national courts are required to give effect to and attain the public policy objectives of the EU themselves without recourse to EU organs or courts. Second, when European and national public policy considerations clash, the former prevail by virtue of the general principles of primacy and effectiveness. Third, though inherently national, the outer limits and the operation of the public policy defense are matters of EU law interpretation.[204] Classic examples of EU public policy interests that inform the content of national public policies are those protected under the Four Freedoms, fundamental human rights instruments, antitrust and antidiscrimination regulations, and certain regimes safeguarding the interests of the weak contracting party in the Single Market.[205]

C. The CESL (Un)Leashed

In relation to the European sales law project, the question is whether important state interests could interfere with the application of the uniform sales law provisions. Specifically, whether overriding mandatory provisions would prevail over the default rules of the sales Regulation, and whether public policy considerations could truncate the regulatory effects of the instrument. This threat to the uniform application of the CESL is allowed by the instrument's structure as a second parallel legal regime, which purportedly does not amend private international law,[206] and the lack of relevant provisions explicating the interplay between the CESL model and any public policy considerations of the interested states.[207]

Starting off with international public policy, since the CESL Regulation would form an integral part of all EU Member State legal orders, it is axiomatic that the international public policies of the Member States

203. Giuliano & Lagarde, *supra* note 172, at 38; CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW, *supra* note 201, at 752–53; HANS VAN HOUTTE, *From a National to a European Public Policy*, *in* LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 841, 848 (James A.R. Nafziger & Symeon C. Symeonides eds., 2002) ("In fact, nowadays, public policy in European States consists mostly of common principles, with a few local additions. As time passes and more values and policies are shared, the local content becomes even less important.").

204. FENTIMAN, *supra* note 154, at 173–74. *Cf.* Case C-34/17, Donnellan v The Revenue Commissioners, ECLI:EU:C:2018:282, ¶ 49 (2018); Case C-559/14, Meroni v Recoletos, ECLI:EU:C:2016:349, ¶ 39–40 (2016); Case C-302/13, flyLAL, ECLI:EU:C:2014:2319, ¶ 47 (2014); Case C-420/07, Apostolides v Orams, 2009 E.C.R. I-03571, ¶ 56-57; Case C-394/07, Gambazzi v Daimler Chrysler, 2009 E.C.R. I-02563, ¶ 26; Case C-38/98, Renault v Maxicar, 2000 E.C.R. I-02973, ¶ 27–28; Case C-7/98, Krombach v Bamberski, 2000 E.C.R. I-01935, ¶ 22–23.

205. RENNER, *supra* note 181, at 405. *See, e.g.*, Case C-127/97, Eco Swiss v Benetton, 1999 E.C.R. I-03055.

206. EU Parliament Legislative Resolution on the CESL, *supra* note 13, at Amendment 3 (CESL recital 10).

207. For a rule proposal, see MAX PLANCK INSTITUTE FOR COMPARATIVE AND INTERNATIONAL PRIVATE LAW, *supra* note 57, at 407. *Cf.* Principles of European Contract Law [PECL] art. 1:103(2).

would adapt to the mandates of the new sales law instrument.[208] Simply put, the CESL rules would inform the content of all respective international public policies. Therefore, since the domestic CESL, as an integral part of the forum's laws, would be compatible with the fundamental societal objectives of the forum state, the application of the identical rules of a foreign CESL could not be incompatible, let alone *manifestly* incompatible, with the international public policy of the forum. Essentially, the integration of the European sales law instrument in all EU Member States would "neutralize" the international public policy defense across the Single Market.

Turning to overriding mandatory rules, it should be stressed that the optional nature of the CESL negates *a priori* its classification as mandatory rules.[209] Since the activation of the CESL would depend on a choice by the parties, the CESL rules clearly lack the imperative nature that distinguishes overriding mandatory provisions.[210] Accordingly, there could be no conflict between an overriding mandatory CESL and other overriding mandatory provisions, but only a conflict between overriding provisions and the *ordinary* rules enshrined in the CESL. For example, such a conflict could arise between CESL Anx. I, arts. 82–85 on unfair contract terms in consumer sales and the national legislations transposing the Directive 93/13/EEC on Unfair Terms in Consumer Contracts.[211] Under such scenarios, it is argued that the overriding mandatory provisions would prevail over the uniform sales law regime.[212] The European "DNA" of the instrument, however, does not support such a conclusion. As already noted, the general principles of primacy and effectiveness preclude the application of national rules that could impede the full effects of EU legislation.[213] The

208. Hesselink, *supra* note 55, at 203, note 21. *See* EVA LEIN, *Issues of Private International Law, Jurisdiction and Enforcement of Judgments Linked with the Adoption of An Optional EU Contract Law* 12 (2010).

209. CORDERO-MOSS, *supra* note 181, at 198; Hartley, *supra* note 118, at 528–29.

210. CORDERO-MOSS, *supra* note 181, at 198.

211. Council Directive 93/13/EEC of 5 Apr. 1993, on Unfair Terms in Consumer Contracts, 1993 O.J. (L95) 29. *See* EU Parliament Legislative Resolution on the CESL, *supra* note 13, at Amendment 15 (Proposal for a Regulation recital 27a (new)).

212. HUGH BEALE & WOLF-GEORG RINGE, *Transfer of Rights and Obligations*, *in* THE COMMON EUROPEAN SALES LAW IN CONTEXT: INTERACTIONS WITH ENGLISH AND GERMAN LAW, *supra* note 7, at 521, 547–48 (Gerhard Dannemann & Stefan Vogenauer eds., 2013); Bisping, *supra* note 52, at 477–78; Dannemann, *supra* note 53, at 47; Kenny, Gillies & Devenney, *supra* note 105, at 339; Whittaker, *supra* note 52, at 89. *See also* Dannemann, *supra* note 122, at 731 (proposing an express derogation from the effects of Rome I Reg., art. 9(2)); LEIN, *supra* note 208, at 12.

213. United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare, E.C.R. ¶ 46 (2013). ("[T]he fact that national rules are categorised as public order legislation does not mean that they are exempt from compliance with the provisions of the Treaty; if it did, the primacy and uniform application of European Union law would be undermined. The considerations underlying such national legislation can be taken into account by European Union law only in terms of the exceptions to European Union freedoms expressly provided for by the Treaty and, where appropriate, on the ground that they constitute overriding reasons relating to the public interest . . .") (2013); Joined Cases C-369/96 & 376/96, *Arblade*, 1999 E.C.R., ¶ 31. *See* Andrea Bonomi, *Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts*, 10 Y. B. PRIV. INT'L L. 285, 290 (2008); Martin Schmidt-Kessel, *Article 9 Overriding Mandatory Provisions*, *in* CONCISE COMMENTARY ON THE ROME I REGULATION 236, 245-46 (Franco Fer-

latter would prevail over any rules of the forum, including those that pursue fundamental state interests.[214] Thus, before Member State courts, the CESL would prevail over any other domestic rules, including overriding mandatory provisions of the forum.[215] In the event of a conflict between various EU mandatory rules, as in the example above, the principle of effectiveness determines which rule will prevail. Given the importance of securing the complete and uniform application of the sales law instrument, as well as the high level of consumer protection achieved in the provisions of the CESL, the European sales law regime would prevail over all other EU rules claiming application. Regarding overriding mandatory provisions of third states, which "may" apply under Rome I Reg., art. 9(3) and 1980 Rome Conv., art. 7(1), the principle of effectiveness would call for a restrictive interpretation of arts. 9(3) and 7(1) respectively so that they would preclude European courts from applying third state provisions that could endanger the full application of the CESL. Simply put, the general principles of EU law would safeguard the uniform and complete application of the European sales law regime.

D. Conclusion

Summarily, the foregoing analysis has shown that the frequently noted problem of CESL's interplay with international public policy and overriding mandatory provisions would hardly constitute a problem. On the contrary, the very principles of European law would safeguard the legal unification achieved under the CESL to such an extent that the universally accepted deviations from conflicts multilateralism and party autonomy, the "enemy" of modern conflict-of-laws, would largely be irrelevant to the CESL model problematic. Although issues falling outside the scope of the CESL could be subject to such fundamental state interests, the uniform sales law would remain intact. Key-state interests in non-EU fora could, of course, bar the application of the CESL provisions, but this observation should not diminish the value of the instrument. Rather, it accentuates the Euro-centric focus of the CESL Regulation.

IV. CISG vs. CESL: Sister Instruments or Foes?

In this Part, the study focuses on the legal synchronization of the CESL with the widely-ratified UN Convention on Contracts for the Interna-

rari ed., 2d ed. 2020). *Cf.* Rome I Regulation Proposal, *supra* note 106, at recital ¶ 13 ("Respect for the public policy (*ordre public*) of the Member States requires specific rules concerning mandatory rules and the exception on grounds of public policy. *Such rules must be applied in a manner compatible with the Treaty* [emphasis added].").

214. Bonomi, *supra* note 168, at 628; Schmidt-Kessel, *supra* note 213, at 245–46.

215. Concurring, albeit on different grounds: Bénédicte Fauvarque-Cosson, *Vers un Droit Commun Européen de la Vente*, RECUEIL DALLOZ 34, 41 (2012); Fornasier, *supra* note 22, at 286; Palao Moreno, *supra* note 89, at 31; Matthias E. Storme, *The Young and the Restless: CESL and the Rest of Member State Law*, 23 EUR. REV. PRIV. L. 217, 223 (2015). *Cf.* Jürgen Basedow, *Article 1:105: National Law and General Principles*, *in* PRINCIPLES OF EUROPEAN INSURANCE CONTRACT LAW (PEICL) 73, 75 (Jürgen Basedow et al. eds., 2nd expanded ed. 2016).

tional Sale of Goods (Vienna, 1980). The analysis elucidates the application hierarchy of the two instruments by closely examining the differences in their method of application, the prevalence of regional over international harmonization by virtue of CISG arts. 90 and 94, and, of course, the distinctive opt-in/opt-out nature of the CESL and the CISG. Concisely, Part IV attests to the unnecessary legal complexity that comes with the promulgation of the CESL as a second parallel legal regime and challenges the much-celebrated "added value" of its potential enactment.

The Vienna Sales Convention (CISG)[216] is one of the most successful international uniform law instruments[217] and has frequently been described as a "high expression" of a modern *lex mercatoria*.[218] As indicated in its name, the regulatory scope of the CISG encompasses international sale of goods contracts,[219] although it has been argued that the instrument covers also barter contracts, preliminary agreements, framework agreements, etc.[220] Commentators have estimated that the Conven-

216. *UN Convention on Contracts for the International Sales of Goods* (Vienna, 1980), 1489 U.N.T.S. 3 [hereinafter CISG].

217. The CISG counts more than 95 ratifications, including all major trade states, with the exceptions of India, Indonesia, Saudi Arabia, South Africa, and the United Kingdom (all five are G20 Member States). For a continuously updated list of the CISG contracting states, including the declared Reservations, *see* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&clang=_en#19 [https://perma.cc/T87N-G2GL]. *See* Franco Ferrari, *The CISG and Its Impact on National Legal Systems–General Report*, *in* THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS 413 (Franco Ferrari ed., 2008) (discussing the impact and various measures of success of the CISG).

218. *See, e.g.*, Seller v. Buyer, Case No. ICC-6149 (1990), Interim Award, 20 Y. B. COMM. ARB. 41, 54 (seat of the tribunal in Paris, France); Giuditta Cordero-Moss, *Does the Use of Common Law Contract Models Give Rise to a Tacit Choice of Law or to a Harmonised, Transnational Interpretation?*, *in* BOILERPLATE CLAUSES, INTERNATIONAL COMMERCIAL CONTRACTS AND THE APPLICABLE LAW 37, 56 (Giuditta Cordero-Moss ed., 2011); DALHUISEN, *supra* note 3, at 266; Peter Winship, *The Scope of the Vienna Convention on International Sales Contracts*, *in* INTERNATIONAL SALES: THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 1.1, 1–2 (Nina M. Galston & Hans Smit eds., 1984).

219. CISG, *supra* note 216, arts. 1(1), 30, and 53.

220. For varying views on the Convention's substantive scope of application, *see* MICHAEL G. BRIDGE, THE INTERNATIONAL SALE OF GOODS 577–79 (4th ed. 2018); FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW 28 (1992); CLAYTON P. GILLETTE & STEVEN D. WALT, THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: THEORY AND PRACTICE 55–60, 62–65 (2nd ed. 2016); Loukas Mistelis, *Article 1*, *in* UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG): A COMMENTARY 21, 29–31 (Stefan Kröll, Loukas Mistelis, & Pilar Perales Viscasillas eds., 2nd ed. 2018); María del Pilar Perales Viscasillas, *Extending the Scope of the 1980 Vienna Convention on the International Sale of Goods to Framework Distribution Contracts*, 19 *in* 35 YEARS CISG AND BEYOND 115 (Ingeborg Schwenzer ed., 2016); Ingeborg Schwenzer & Pascal Hachem, *Article 1*, *in* SCHLECHTRIEM & SCHWENZER COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 27, 31–33 (Ingeborg Schwenzer ed., 4th ed. 2016); Marco Torsello, *Preliminary Agreements and CISG Contracts*, *in* DRAFTING CONTRACTS UNDER THE CISG 191 (Harry M. Flechtner, Ronald A. Brand, & Mark S. Walter eds., 2008); Winship, *supra* note 218, at 1–22. For a critique of the "expansionist interpretation" of the CISG, see Joseph Lookofsky, *Persuasive Pamesa: Not Running Wild with the CISG*, *in* EUROPE: THE NEW LEGAL REALISM. ESSAYS IN HONOUR OF HJALTE RASMUSSEN 413 (Henning Koch et al. eds., 2010).

tion governs approximately 80% of all international sale of goods contracts.[221] Drawing more than a quarter of its ratifications from EU Member States,[222] the CISG has been particularly "popular" in Europe.[223] Therefore, it should be expected that upon the enactment of a European sales law instrument, legal issues would arise from their simultaneous applicability.[224] The quintessential question that arises is whether the courts of Member States that have ratified the CISG should favor the application of one instrument over the other. This enquiry would be reduced to plain academic discourse if the CESL and the CISG were identical. They differ, however, in both their regulatory scope and substantive law rules.[225]

This essential "applicability crash-test" of the two instruments develops in three prongs: the temporal hierarchy in their application, the interplay between the CESL and CISG arts. 90 and 94, and the distinctive nature of the two instruments as opt-in and opt-out regimes respectively.

A. Temporal Hierarchy between the CISG and the CESL

It is self-explanatory that the instrument, which is triggered first, sets the parameters of its application and exclusion, determining in turn the (in-)applicability of the instrument coming second in place. Thus, the question raised is which sales law instrument the adjudicatory authority should examine first: the CESL or the CISG?

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221. Ingeborg Schwenzer & Christopher Kee, *International Sales Law—The Actual Practice*, 29 PENN ST. INT'L L. REV. 425, 428 (2010). *But see* Stefan Grundmann, *Costs and Benefits of an Optional European Sales Law (CESL)*, 50 C. M. L. REV. 225, 229 (2013) ("The CISG . . . does not even cover 10 percent of the cases (irrespective of opt-outs).").

222. The CISG has been ratified by 25 out of 27 EU Member States, the two "outliers" being Ireland and Malta.

223. *See Draft Council Report on the Need to Approximate Member States' Legislation in Civil Matters* (Brussels, 29 Oct. 2001 (05.11) (OR.fr), 13017/01), approved on 7.11.2001, at 5 ("We refer in particular to the United Nations Convention on Contracts for the International Sale of Goods, signed in Vienna on 11 April 1980. Member States which are not yet Parties should be encouraged to ratify such instruments."). For the impact of the CISG on various EU law projects, *see* Stefano Troiano, *The CISG's Impact on EU Legislation*, *in* THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS 345 (Franco Ferrari ed., 2008).

224. Ulrich G. Schroeter, *Global Uniform Sales Law—With a European Twist? CISG Interaction with EU Law*, 13 VINDOBONA J. 179, 190 (2009) ("[C]onflicts between EU law and the CISG are always possible. If such a conflict arises, courts in EU States will find themselves in a rather difficult position: on the one hand, they are legally bound to apply the EC Directive or Regulation, because this is an obligation flowing from the European treaties, and on the other hand they are legally bound to apply the CISG, since the CISG is a treaty binding the respective States under public international law."). *Cf.* Vienna Conv. on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331. ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.") [hereinafter 1969 Vienna Conv. on the Law of Treaties].

225. For an overview of the differences between the two instruments, *see, e.g.*, Larry A. DiMatteo, *Common European Sales Law: A Critique of Its Rationales, Functions, and Unanswered Questions*, 11 J. I. T. L. P. 222, 229–30 (2012); Magnus, *supra* note 122; Sánchez-Lorenzo, *supra* note 52, at 200, n.23; Ingeborg Schwenzer, *The Proposed Common European Sales Law and the Convention on the International Sale of Goods*, 44 U. C. C. L.J. 457, 464–77 (2012).

In juxtaposition with the CESL, the CISG is an opt-out uniform law instrument that has been promulgated under a multilateral international treaty. Its application does not depend on a selection by the parties. Rather, if the CISG application requirements are met, the instrument governs by default the international sale of goods contract.[226] Although the method of calling the CISG into application has largely been disregarded in legal scholarship and jurisprudence,[227] three main approaches to the issue can be identified: (1) *primo loco* application of the CISG as international uniform law; (2) classification of CISG art. 1(1) as unilateral or localizing conflict-of-laws rules; and (3) classification of the CISG as an overriding statute that leads to the application of the Convention independently of the otherwise applicable law.

Pursuant to this first approach, the nature of the CISG as an international uniform law instrument entails its application *before* the private international law rules of the forum. This prevalence is justified, firstly, by the specificity of international uniform law, which is usually narrower in scope compared to the all-encompassing conflict-of-laws rules, and, secondly, by the efficiency of uniform law instruments, which essentially remove the intermediate step of identifying the applicable law under the conflicts rules of the forum.[228] The second approach embraces traditional private international law and holds that the provisions of CISG art. 1(1) are ordinary conflict-of-laws rules[229] that identify the CISG as the regime applicable to international sale of goods contracts.[230] Because these conflicts rules select the law applicable to international sales instead of contractual obligations in general, they are more special, thereby prevailing over the generic private international law of the forum. The third approach

226. CISG, *supra* note 216, art. 1(1).

227. Michael Bridge, *A Commentary on Articles 1-13 and 78*, *in* THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 235, 237 (Franco Ferrari, Harry Flechtner, & Ronald A. Brand eds., 2004).

228. *See, e.g.*, Cass., sez. sec., 19 ottobre 2017, n. 1867-18 (It.); Trib. di Forli, 12 novembre 2012, *reported in* Internationales Handelsrecht (IHR) 4/2013, 161, 162 (It.); Trib. di Padova, 25 febbraio 2004, *translation available at* https://cisg-online.org/files/cases/6745/translationFile/819_98356878.pdf [https://perma.cc/8K6K-L7TA](It.); Trib. di Rimini, 26 novembre 2002, *translation available at* https://cisg-online.org/files/cases/6669/translationFile/737_91556523.pdf [https://perma.cc/T2DW-KJX4] (It.); Trib. di Vigevano, 12 luglio 2000, *translation available at* https://cisg-online.org/files/cases/6461/fullTextFile/493_61724720.pdf [https://perma.cc/F49G-WVES] (It.); Trib. di Pavia, 29 dicembre 1999, *translation available at* https://cisg-online.org/files/cases/6620/abstractsFile/678_40746829.pdf [https://perma.cc/CX55-6X7T] (It.). *See also* Franco Ferrari, *Uniform Substantive Law and Private International Law*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW, vol. 2 at 1772, 1774 (Jürgen Basedow et al. eds., 2017).

229. Either unilateral conflicts rules or localizing rules in a substantive law statute.

230. *See, e.g.*, E. Jayme, *Article 1*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 27, 28 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987); Mistelis, *supra* note 220, at 22; Pascal Hachem, *Applicability of the CISG–Articles 1 and 6*, 15 *in* CURRENT ISSUES IN THE CISG AND ARBITRATION 31, 19 (Ingeborg Schwenzer, Yeşim M. Atamer, & Petra Butler eds., 2014). For the rejection of the conflict-of-laws nature of CISG art. 1, *see* ARTHUR TAYLOR VON MEHREN, *Convention on the Law Applicable to Contracts for the International Sale of Goods: Text adopted by the Diplomatic Conference of October 1985–Explanatory Report* 57, 59 (1986).

maintains that international uniform law conventions constitute overriding statutes that mandate their application irrespective of the otherwise applicable law.[231] Initially articulated in English case-law on international conventions for the carriage of goods and passengers,[232] this theory finds its rationale in international public policy considerations that are "inherent in the unification of international [commercial] law."[233]

This quick look at the approaches to the application of the CISG reveals their common feature, that is, the CISG applies *before* the determination of the applicable law by virtue of private international law.[234] Since CESL's parallel legal regime would be triggered *after* the forum's conflicts rules as part of the applicable EU Member State law, the court would have to explore the applicability of the CISG in the first place before looking at the applicability of the CESL—*prior in tempore potior in applicatione*. Having established the temporal methodological prevalence of the CISG over the European sales law regime, the analysis turns to those CISG provisions that could reverse this application priority, namely the "conflict-of-conventions" rule of CISG art. 90, the reservation enshrined in CISG art. 94, and the opt-out rule of CISG art. 6.

B. CISG Part IV: A Second Chance for Regional Harmonization

It is common ground that international conventions are fiercely negotiated. As a result, their final text usually reflects extensive compromises between the positions held during the drafting process. Importantly, the conflicting interests of participating states and the refusal of one or more countries to be bound by particular provisions of a multilateral treaty could undermine the negotiations, and ultimately the treaty's entry into force. These undesirable situations can be avoided by introducing reservations that allow interested states to limit the obligations assumed under the international agreement.[235] The CISG, as a multilateral treaty, was not an

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231. *See, e.g.*, Petra Butler, *Choice of Law*, *in* INTERNATIONAL SALES LAW: CONTRACT, PRINCIPLES & PRACTICE 1025, 1029 (Larry A. DiMatteo et al. eds., 2016); Giorgio Conetti, *Uniform Substantive and Conflicts Rules on the International Sale of Goods and Their Interaction*, *in* INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 385, 392, 397 (Petar Šarčević & Paul Volken eds., 1986); DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, *supra* note 194, at 1890–91.

232. *See, e.g.*, *The Hollandia* [1983] 1 A.C. 565 (HL) (Eng.); Thomas Cook Ltd v. Transportes Agroes Portugoesse [2002] EWHC 2694 (Comm) [39] (Eng.); Kenya Railways v. Antares Pte Ltd [1987] 1 Lloyd's Rep. 424 (Eng.); Rothmans of Pall Mall (Overseas) Ltd and Others v. Saudi Arabian Airlines Corp [1981] Q.B. 368, 377 (Mustil J) (Eng.); Corocraft Ltd v. Pan American Airways Inc. [1969] 1 Q.B. 616, 631 (Donaldson J) (Eng.); DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, *supra* note 154, at 29.

233. DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, *supra* note 154, at 28. *See* Grein v. Imperial Airways Ltd [1937] 1 K.B. 50 at 74–76 (Eng.).

234. For the principle that uniform law applies before the conflict-of-laws rules, *see* Paul Lagarde, *Le Champ d'Application dans l'Espace des Règles Uniformes de Droit Privé Matériel*, *in* ÉTUDES DE DROIT CONTEMPORAIN: VIII[E] CONGRÈS INTERNATIONAL DE DROIT COMPARÉ, PESCARA 1970 at 149, 151 (1970).

235. 1969 Vienna Conv. On the Law of Treaties, *supra* note 224, art. 2(1)(d) ("'Reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty whereby it purports to

exception to this practice. Thus, a limited number of reservations were added in Part IV of the Convention (arts. 89-101).[236] In the context of the CESL Regulation, CISG arts. 90, 92, and 94 could be used as legal bases for dispensing with the application of the CISG in favor of the European sales law.[237]

1. CISG art. 90

CISG art. 90 does not enshrine a "reservation" to certain CISG rules, but a "compatibility clause" or "conflict-of-conventions" rule, which establishes the priority of other international sales law treaties over the CISG.[238]

CISG art. 90 provides, "This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement."

For its application, CISG art. 90 requires: (1) an international agreement; (2) concerning matters governed by the CISG; (3) entered into at any time by the respective states;[239] and (4) contracting parties that maintain their respective place of business in states that have acceded to the international agreement. Since the CESL enshrines substantive law rules governing international sale of goods contracts, and the contracting parties would typically maintain their respective place of business in an EU Member State, the remaining thorny issue *vis-à-vis* the application of CISG art. 90 is whether the CESL could be deemed an "international agreement" that would trump the application of the Convention.[240]

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exclude or to modify the legal effect of certain provisions of the treaty in their application to that State[.]"). *See also id.* at arts. 19–23.

236. CISG, *supra* note 216, art. 98 ("No reservations are permitted except those expressly authorized in this Convention.").

237. Though relevant in its subject matter, the reservation of CISG art. 92 is not examined in this study, because it requires a declaration "at the time of signature, ratification, acceptance, approval or accession" to the CISG. With 25/27 EU Member States already parties to the CISG, further analysis would be all but an academic exercise.

238. *See* ENDERLEIN & MASKOW, *supra* note 220, at 370; Johnny Herre, *Article 90*, *in* UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG): A COMMENTARY 1168, 1168 (Stefan Kröll, Loukas Mistelis, & Pilar Perales Viscasillas eds., 2nd ed. 2018) ("Only the rules in the CISG that concern the same matters will be replaced by rules of other international agreements."); Ingeborg Schwenzer & Pascal Hachem, *Article 90*, *in* SCHLECHTRIEM & SCHWENZER COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 1245, 1249 (Ingeborg Schwenzer ed., 4th ed. 2016).

239. *Cf.* 1969 Vienna Conv. On the Law of Treaties, *supra* note 224, arts. 30, 59.

240. For an overview of the arguments advanced in legal theory, see Herre, *supra* note 238, at 1170–71. Since the CISG does not form part of EU law, it would be unlikely for the Court of Justice to render a judgment on the application requirements of CISG art. 90. *See* Case C-481/13, Qurbani, ECLI:EU:C:2014:2101, ¶ 20–24 (Jul. 17, 2014); Case C-452/12, Nipponkoa Ins. Co. v. Inter-Zuid Transport, ECLI:EU:C:2013:858, ¶ 30 (Dec. 19, 2013); Case C-533/08, TNT v. AXA, 2010 E.C.R. I-04107, ¶ 58-63(Apr. 4, 2012); Case C-301/08, Bogiatzi v. Deutscher Luftpool, 2009 E.C.R. I-10185, ¶ 32-34 (Oct. 22, 2009). *But see* Peter Schlechtriem, *Article 90*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 919, 922 (Peter Schlechtriem &

To begin with, the interplay between EU Directives on contract law and the CISG, of course, has been extensively examined in scholarly writings. In particular, it has been correctly argued that the transposition requirement of EU Directives does not fit with CISG art. 90.[241] The draft CESL, however, achieves a first in that it represents a challenge to the applicability of the CISG by an EU *Regulation* enshrining substantive sales law rules. Adopting a relaxed interpretation of CISG art. 90 that includes also EU Regulations would come at the expense of legal certainty and predictability in international trade,[242] which would be achieved only by restrictively interpreting the rules that limit the application of uniform law.[243] Therefore, EU Regulations should be understood as falling outside the ambit of CISG art. 90.[244] Be that as it may, this interplay between CISG art. 90 and the CESL constitutes a rather esoteric issue of limited practical importance, particularly in light of the more rigorous reservation of CISG art. 94.[245]

2. CISG art. 94

The second basis for negating the application of the CISG in favor of the European sales law is found in CISG art. 94,[246] which provides that

> 1. Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

Ingeborg Schwenzer eds., 2nd (English) ed. 2005). *Cf.* 1969 Vienna Conv. On the Law of Treaties, art. 2(a).

241. Franco Ferrari, *Universal and Regional Sales Law: Can They Coexist?*, 8 UNIF. L. REV. 177, 182 (2003); Ulrich Magnus, *The CISG's Impact on European Legislation*, *in* THE 1980 UNIFORM SALES LAW: OLD ISSUES REVISITED IN THE LIGHT OF RECENT EXPERIENCES (VERONA CONFERENCE 2003) 129, 131 (Franco Ferrari ed., 2003); Schlechtriem, *supra* note 240, at 922, note 8 (with further references to legal scholarship).

242. Herre, *supra* note 238, at 1170–71.

243. Franco Ferrari, *Scope of Application: Articles 4-5*, *in* THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE U.N. SALES CONVENTION 96, 105 (Franco Ferrari, Harry Flechtner, & Ronald A. Brand eds., 2004).

244. Ulrich G. Schroeter, *Backbone or Backyard of the Convention? The CISG's Final Provisions*, *in* SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: FESTSCHRIFT FOR ALBERT H KRITZER ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY 425, 466 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008); Schwenzer & Hachem, *supra* note 238, at 1247. *Contra* Stefan Leible, *Konflikte zwischen CESL und CISG-Zum Verhältnis zwischen Art. 351 AEUV und Art. 90, 94 CISG*, *in* FESTSCHRIFT FÜR ULRICH MAGNUS ZUM 70. GEBURTSTAG 605, 613 (Peter Mankowski & Wolfgang Wurmnest eds., 2014).

245. *See* Peter Schlechtriem, *Article 94*, *in* COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 929, 929 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2nd (English) ed. 2005).

246. *But see* CISG ADVISORY COUNCIL, *CISG-AC Declaration No. 1, The CISG and Regional Harmonization. Rapporteur: Michael Bridge* at 3 (2012) ("The draft Common European Sales Law [CESL] would not as such call for any Article 94 reservations to be entered by Member States of the European Union . . . because contracting parties may opt-out of the CISG under Article 6 and would be subject to CESL only if they opted into it . . . .").

> 2. A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.

Because it allows the coexistence of both international and regional uniform sales law regimes, this reservation reduces the likelihood of limited accession to or subsequent denunciation of the CISG by states that participate or might participate in regional sales law unification or harmonization efforts. Specifically, through CISG art. 94, the CISG gives way to unified or harmonized national sales laws when both the seller and the buyer maintain their respective place of business in states that have enacted other unified or harmonized laws.

Turning to the conditions of the reservation, CISG art. 94 sets no temporal or formal requirements for its application.[247] It only requires: (1) same or closely related legal rules on matters governed by the Convention;[248] (2) both the seller and the buyer maintaining their respective place of business in states of unified or harmonized sales laws; and (3) communication by the interested countries of the identical or very similar content of their legal orders by virtue of a declaration deposited with the United Nations.[249]

For the purposes of this study, it is indisputable that the CESL attains a high degree of legal harmonization *vis-à-vis* sale of goods contracts. Also, since the CESL would enter into force in EU Member States only, CISG art. 94 would be relevant only to purely EU-sales transactions, namely sale of goods contracts whereby both the seller and the buyer maintain their place of business in different Member States. Thus, considering that CESL's application could extend to cases whereby only one of the parties is located in the EU,[250] it becomes apparent that CISG art. 94 would achieve limited success in dispensing with the application priority of the CISG over the CESL.

A further difficulty would arise from the communication of the art. 94

247. Ingeborg Schwenzer & Pascal Hachem, *Article 94*, *in* SCHLECHTRIEM & SCHWENZER COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 1258, 1259 (Ingeborg Schwenzer ed., 4th ed. 2016).

248. Marco Torsello, *The CISG's Impact on Legislators: The Drafting of International Contract Law Conventions*, *in* THE 1980 UNIFORM SALES LAW: OLD ISSUES REVISITED IN THE LIGHT OF RECENT EXPERIENCES (VERONA CONFERENCE 2003) 199, 95 (Franco Ferrari ed., 2003) ("The very notion of 'States which have [. . .] closely related legal rules' is regrettably vague, since it does not give the slightest clue as to the degree of similarity required to determine whether or not two different States have 'closely related legal rules.'").

249. CISG, *supra* note 216, arts. 89, 97(2). *See* UNITED NATIONS, *Treaty Series*, vol. 1489, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-10&chapter=10&clang=_en#19 [https://perma.cc/C876-MZ69] (declarations by Denmark, Finland, Iceland, Norway and Sweden that the CISG shall not govern international sales transactions whereby both the seller and the buyer maintain their respective place of business in any of these countries).

250. CESL Reg., *supra* note 8, art. 4(2).

declaration.[251] Bearing in mind the optional nature of the EU sales law regime, it should be doubted whether the Member States could condition the effects of the CISG art. 94 declaration upon the submission of proof that the parties have entered into a full-fledged CESL opt-in agreement.[252] Such a requirement would amount to an illegitimate amendment of the CISG and would indirectly place on courts—even non-EU courts—the additional burden of examining the validity and effects of CESL opt-in agreements. This is, presumably, the reason commentators have proposed the declaration of the CISG art. 94 reservation by analogy.[253] Above all, it would be very difficult for the European Commission to persuade Member States to give up the CISG in favor of an optional and yet-to-be-tested instrument.[254]

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In light of the foregoing analysis, it should be clear that, even under the reservations of CISG arts. 90 and 94, negating the application of the CISG in favor of the CESL would not be devoid of difficulties. Therefore, the port of last resort and safest—if safe at all—means of clarifying the complex interplay between the CESL and the CISG would be the opt-out rule of CISG art. 6.

C. CESL Opt-In & CISG Opt-Out Agreements: Two Sides of the Same Coin?

Prompted by the dispositive nature of the Vienna Sales Convention, another question that requires an answer is whether an agreement selecting the CESL or any other similar instrument could be interpreted as an implicit agreement to either exclude the application of the Convention or derogate from certain of its rules. The opt-out rule is found in CISG art. 6, which provides, "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."[255]

An enshrinement of the party autonomy principle, CISG art. 6 gives contracting parties significant leeway regarding the applicability of the Convention to their sales transaction. It sets no formal requirements for

251. Complex issues of regulatory competence under the EU Treaties would have arisen too. *See* Case 22/70, Commission v Council [ERTA], 1971 E.C.R. 263. *See also* Alex Mills, *Private International Law and EU External Relations: Think Local Act Global, or Think Global Act Local*, 65 INT'L & COMP. L. Q. 541 (2016).

252. *But see* Zoll, *supra* note 29, at 411 (arguing that such a reservation would, probably, be admissible).

253. Magnus, *supra* note 103, at 107. *But see* CISG *supra* note 216, art. 98.

254. *See* Ole Lando, *CESL or CISG? Should the Proposed EU Regulation on a Common European Sales Law (CESL) Replace the United Nations Convention on International Sales (CISG)?*, *in* GEMEINSAMES EUROPÄISCHES KAUFRECHT FÜR DIE EU? ANALYSE DES VORSCHLAGS DER EUROPÄISCHEN KOMMISSION FÜR EIN OPTIONALES EUROPÄISCHES VERTRAGSRECHT VOM 11. OKTOBER 2011 15, 18 (Oliver Remien, Sebastian Herrler, & Peter Limmer eds., 2012).

255. CISG, *supra* note 216, art. 6.

the opt-out agreement.[256] As a result, in addition to express agreements, implicit but clear exclusions of or derogations from the CISG may be effected.[257] Hence, an express CISG opt-out agreement together with a CESL opt-in agreement would signal the clear and unequivocal intent of the parties to exclude the CISG in favor of the regional instrument. Similarly, a choice-of-law agreement selecting a CISG non-contracting state law,[258] together with a CESL opt-in agreement, would also amount to an implicit exclusion of the CISG in favor of the CESL. In all other circumstances, where it might not be clear whether the parties intended to exclude the application of the Convention, the litmus test should be whether the pertinent rules of the selected CESL be irreconcilable with the corresponding provisions of the CISG. In the event of such incongruity, the CISG would give way to the CESL. Nevertheless, a quick comparative review of the CISG black-letter rules and case-law on the one hand, and the European sales law on the other, uncovers the affinity of the two regimes. Therefore, it would be untenable to argue that a CESL opt-in agreement would imply, without more, a CISG opt-out under CISG art. 6. Besides, the CESL opt-in agreement could be construed as an agreement to merely deviate from or supplement the CISG.

Granted, CESL recital 25 stipulates: "Where the United Nations Convention on Contracts for the International Sale of Goods would otherwise

256. *Id.* art. 11. *But see id.* arts. 12, 96.

257. *See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 7, 2017, *available at* https://cisg-online.org/files/cases/8875/fullTextFile/2961_92062066.pdf [https://perma.cc/H7QW-N9NS] [CISG-online no. 2961] (Ger.); Corte Suprema di Cassazione [Cass.], sez. sec., Oct. 19, 2017, n. 1867-18 (It.); Cour de cassation [Cass.] [supreme court for judicial matters] non publié, Sept. 13, 2011, https://cisg-online.org/search-for-cases?caseId=8227 [https://perma.cc/9WAV-742M] [CISG-online no. 2311] (Fr.); Oberster Gerichtshof [OGH] [Supreme Court] Apr. 2, 2009, Docket No. 8 Ob 125/08b, *translation available at* https://cisg-online.org/files/cases/7806/translationFile/1889_94171205.pdf [https://perma.cc/DS6U-CUBV] [CISG-online no. 1889] (Austria); Michael Joachim Bonell, *Article 6*, *in* COMMENTARY ON THE INTERNATIONAL SALES LAW: THE 1980 VIENNA SALES CONVENTION 51, 55 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987); BRIDGE, *supra* note 220, at 609; ENDERLEIN & MASKOW, *supra* note 220, at 48; FERRARI, *supra* note 4, at 161–62; JOHN O. HONNOLD & HARRY M. FLECHTNER, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 106–07 (5th ed. 2021); Loukas Mistelis, *Article 6*, *in* UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG): A COMMENTARY 101, 105–08 (Stefan Kröll, Loukas Mistelis, & Pilar Perales Viscasillas eds., 2nd ed. 2018); Ingeborg Schwenzer & Pascal Hachem, *Article 6*, *in* SCHLECHTRIEM & SCHWENZER COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 101, 102–03 (Ingeborg Schwenzer ed., 4th ed. 2016); Winship, *supra* note 218, at 1.35. For consistent U.S. case-law requiring express exclusion of the CISG, *see, e.g.*, *Roser Technologies, Inc* v *Carl Schreiber GmbH*, No. 11CV302, 2013 WL 4852314 (W.D. Pa. Sept. 10, 2013).

258. *See, e.g.*, Oberster Gerichtshof [OGH] [Supreme Court] Apr. 2, 2009, Docket No. 8 Ob 125/08b, *translation available at* https://cisg-online.org/search-for-cases?caseId=7806 [https://perma.cc/T5WY-V9BM] [CISG-online no. 1889] (Austria); Trib. di Forli, Mar. 26, 2009, *available at* https://cisg-online.org/search-for-cases?caseId=8252 [https://perma.cc/D5XN-BZCH] [CISG-online no. 2336] (It.); Tribunal Cantonal du Jura, Nov. 3, 2004, Docket No. Ap 91/04, *translation available at* https://cisg-online.org/search-for-cases?caseId=6889 [https://perma.cc/6YES-7TM9] [CISG-online no. 965] (Switz.); Ajax Tool Works, Inc. v. Can-Eng Mfg. Ltd., No. 01 C 5938, 2003 WL 223187 (N.D. Ill. Jan. 30, 2003).

apply to the contract in question, the choice of the Common European Sales Law should imply an agreement of the contractual parties to exclude that Convention."

Although this recital cannot amend or otherwise affect the interpretation of CISG art. 6,[259] this over-reaching "shy" rule of the CESL could inform the adjudicatory authority with respect to the acts and statements of contracting parties under CISG art. 8. In particular, sellers and buyers contracting under the CESL would, justifiably, expect that a valid opt-in agreement guarantees the application of the "complete" European sales law regime. The parties have actively selected into the application of the CESL—not the CISG. As a result, a valid CESL opt-in agreement should be deemed *prima facie* an implicit agreement to exclude the application of the Vienna Sales Convention.[260] By the same token, a partial selection of the CESL by virtue of CESL Reg., art. 8(3) should be deemed a partial exclusion of the CISG.[261] Nevertheless, this presumption with regard to the intention of the parties could be rebutted by proving that the selection of the CESL did not amount to a CISG opt-out, but instead operated as a gap-filling mechanism.

In light of the foregoing, parties could attempt to introduce clarity *vis-à-vis* the legal framework of their business deal by expressly excluding the application of the CISG.[262] This express opt-out, however, would come in addition to the required opt-in agreement, and, possibly, in addition to choice-of-law and choice-of-court or arbitration agreements. Considering that dispute resolution clauses are usually agreed by the parties at the last minute of the negotiations as incomprehensible legal formalities, one could only imagine how three applicable law-related agreements would be perceived by the mercantile community.

D. Conclusion

This Part has sought to address difficult issues pertaining to the interplay between the CESL and various uniform law instruments on international sale of goods contracts. The analysis showcased the priority of the CISG over both the generic conflict-of-laws rules of the forum and CESL's second parallel legal regime. This prioritization undermines the harmonization initiative under the European sales law regime, particularly in light of the shortcomings associated with triggering the "second chance" rules of CISG arts. 90 and 94. Similarly, it was shown that an opt-in agreement selecting the CESL or any other similar instrument, alone, would not guarantee the simultaneous implicit exclusion of the CISG, thus upsetting the legitimate interests and expectations of contracting parties. Hence, it would not be an exaggeration to call for an academic uniform law non-

259. *See* Hesselink, *supra* note 55, at 202 (characterizing the claim of CESL recital 25 as "*ultra vires*").

260. Sánchez-Lorenzo, *supra* note 52, at 202. *See* Fogt, *supra* note 81, at 90; Hesselink, *supra* note 55, at 202.

261. CESL Reg., *supra* note 8, art. 8(3) (*a contrario*).

262. Hesselink, *supra* note 55, at 202.

proliferation pact. International uniform law instruments and academic projects have, certainly, contributed to the refinement of law. The relentless instrument-drafting, however, should be jettisoned once and for all. Instead, it is high time for scholars to focus on offering merchants the most efficient and transparent legal framework for conducting business across borders.

Conclusion

The goal of the analysis in this Article was to shed light on CESL's unique legal structure as a second parallel legal regime and highlight its place in the study of private international law and uniform law. It sought to examine the CESL model's role in European legal integration, the law relating to international commercial transactions, and private international law. In this endeavor, the four parts of this study explored the four main private international law enquiries that would arise in the activation and application of the CESL and all instruments adopting a similar model. Specifically, the analysis examined (1) the activation of European sales law; (2) the ascertainment of CESL's provisions by the adjudicatory authority; (3) the impact of public policy considerations on the applicability of the instrument; and (4) the interplay between the CESL and other uniform law instrument governing international sale of goods contracts.

The over-arching conclusion of this study is that the draft CESL would be largely—but not fully—compatible with established conflict-of-laws principles. Because of its inherent shortcomings, the CESL regime would lead only to sub-optimal unification of international sales law in Europe. The drafters of the instrument, however, should not be blamed for its shortcomings. It is precisely the inflexible principles of European law, the limited legislative competence of the Union, and the piecemeal unification of private international law that mandated the unique legal structure and the onerous application requirements of the instrument. Hence, legislative and political courage will be required in order to revive the pro-European contract law sentiment and overcome these limitations. Since any new or revamped project will have to navigate through the clashing rocks of the Treaty on European Union (TEU) and the TFEU, it appears that the EU legislator will have to sacrifice a pebble of uniformity in the Single Market in order to set the steppingstone for further unification of private law in the future.

On that basis, three final and intertwined enquiries need to be explored. Specifically, given the current state of the law as described above, do businesses and consumers need a European sales law—or, even broader, a European contract law—regime? Furthermore, if such a European substantive law instrument is needed, how should this instrument be structured to avoid the shortcomings of the CESL model? Finally, what should the drafting process of such an instrument entail?

To begin with, statistical evidence illustrates the positive disposition of

merchants and consumers towards an optional contract law instrument.[263] Granted, positive disposition should not be equated with a need for a new layer of regulation. Hence, in exploring the first enquiry, the analysis needs to differentiate between consumer and commercial transactions. Whereas the persisting legal divergences *vis-à-vis* consumer protection and the unification "quicksand" rule of Rome I Reg., art. 6(2) call for the promulgation of a single instrument that would accumulate all cross-border consumer transactions under one regulatory "umbrella," it appears that there is no pressing need for an instrument governing international commercial contracts.

The relative success of the Vienna Sales Convention together with the principles of party autonomy and freedom of contract allow contracting parties to structure their business deals as they deem appropriate. In fact, the 101 articles of the Convention and the growing body of CISG case law set a solid normative foundation for international non-consumer sales contracts in Europe. Hence, there seems to be no need for a European instrument in this area.[264] Rather than pursuing the creation of a new instrument, the EU could "free-ride" the unification efforts of UNCITRAL by using the CISG for its internal market-building purposes. This "Europeanization" of the CISG could be realized either with the exertion of pressure on the remaining two Member States, namely Ireland and Malta, to ratify the CISG or, more appropriately, with the introduction of a "Model European Sales Contract" for commercial transactions.[265] Because the overwhelming majority of international sales contracts in the Single Market are governed by the CISG, the model European sales agreement should be drafted with the presumed applicability of the Vienna Sales Convention in mind—drawing, however, inspiration from other projects as well, such as the PECL, the DCFR, the CESL, and the UNIDROIT Principles of International Commercial Contracts, and contractually filling the gaps of the Convention. This model agreement, however, should not encompass exclusively substantive sales clauses that would prevail over the dispositive rules of the applicable law. Rather, it should be accompanied by a concise checklist for merchants, who could readily ascertain whether their transac-

263. Vogenauer & Weatherill, *supra* note 5, at 132 (offering statistical evidence that 83% of respondents noted their favourable or very favourable disposition to the concept of a harmonised European contract law), at 134 (74% of respondents noted their overall preference for an optional—including the opt-out possibility—rather than a mandatory European contract law instrument), at 135 (82% of respondents noted that they would, likely or very likely, make use of a European contract law instrument).

264. Ole Lando, *Comments and Questions Relating to the European Commission's Proposal for a Regulation on a Common European Sales Law*, 19 EUR. REV. PRIV. L. 717, 722 (2011) ("CESL's improvements on CISG are hardly significant enough to justify a CESL as the first regulation governing B2B contracts."). *But see* Beale, *supra* note 88, at 70 ("[W]hy do we need a CESL when we already have the 1980 Vienna Convention on International Sale of Goods [CISG]? [. . .] [M]y answer is simple. It is that elements that are crucial for SMEs—validity and the control of unfair terms—are not covered by the CISG.").

265. *Cf.* EU Parliament Legislative Resolution on the CESL, *supra* note 13, at Amend. 21 (Proposal for a regulation Recital 34c (new)), Amend. 258 (Proposal for a regulation Annex I—Article 186c (new)).

tion meets the applicability requirements of the CISG. This list would allow parties to evaluate *ex ante* the suitability of the European model agreement for their business, thus maximizing the effectiveness of their contractual arrangement. Moreover, because this European standard form would not tamper with the legal frameworks of the Member States, no legislative measure and, hence, no special majorities or procedures would be required for its promulgation. Therefore, the added effort and resources required for the promulgation of a new contract law instrument could be redirected to the wide dissemination and use of the forms, which could further lead to the bottom-up convergence of sales laws.

Granted, the advantages of streamlining both consumer and commercial transactions under one regime should not be overlooked. Legal simplicity would foster legal certainty and predictability in intra-Single Market commerce. This proposition brings us to the second enquiry, that is, if a European sales law instrument is to be promulgated, what should that instrument look like?

For a sales law instrument to be successful, it has to avoid the pitfalls in the CESL model noted in Parts I-IV of this Article. Succinctly, it should be optional and provide for a simple and transparent selection mechanism, which would not depend on a gateway law and which would also avoid the limitations of Rome I Reg., art. 6(2). It should be structured in such a way that it avoids the hurdle of any content-of-laws enquiries in dispute resolution proceedings. Lastly, its content and structure should ensure a smooth interplay with any public policy considerations of the respective Member States. Regarding the interplay between any such instrument and the CISG, this issue cannot be addressed by the instrument itself, but would remain, instead, an issue regulated by CISG arts. 6, 90, and 94. Still, an easy-to-select and widely acceptable instrument would bear a de facto rebuttable presumption against the applicability of any other competing regulation.

Of all optional regulatory structures,[266] the only type of regulation that meets all these prerequisites without uprooting the foundations of EU private international law is the supra-national, pan-European instrument.[267] Such an instrument would set forth a clear opt-in mechanism without asterisks or complicated application criteria: as an integral part of all Member States' domestic laws, it would be readily ascertainable by EU Member State courts; as EU law, it would circumnavigate the public policy considerations hurdle; and, finally, as a transparent and easy-to-select regime, it would manifest the clear intention of the parties to exclude the application of all other instruments governing sale of goods contracts.

266. *E.g.*, a second parallel legal regime, a regime that embeds the optional instrument in the conflict-of-laws system, a pan-European regime, a model European sales agreement, etc. Analysis of the advantages and disadvantages of the potential regulatory avenues for European contract law extends beyond the scope of this Article. *Cf.* Commission Green Paper on Policy Options for Progress towards a European Contract Law for Consumers and Businesses, COM (2010) 348 final (July 1, 2010).

267. *See* Rühl, *supra* note 58, at 162 (proposing the enactment of such a pan-European instrument or, in the words of Rühl, a "1st regime-model").

It has already been noted, however, that the two major drawbacks of such a plan would be the possibility of conflict-of-regimes situations regarding sales transactions and, most importantly, the unanimity required in the Council for its enactment.

With regard to the inevitable overlap of instruments on sales law, a sequence of special rules[268] and general principles, such as the principles of *lex posterior* and *lex specialis*,[269] as well as the principle that uniform substantive law comes before uniform conflicts provisions,[270] could ensure the prevalence of the pan-European instrument over other competing regimes.

With regard to the European Council difficulties, the exit of the United Kingdom from the EU would be tantamount to the removal of the common law stronghold in the legislative process. Without objections from one of the fiercest opponents of EU contract law, initiatives for a European sales law could pick up pace, and unanimity might not be elusive after all. But this much-coveted unanimous vote in the Council cannot be achieved unless the instrument addresses a true problem in the Single Market, amplifying the importance that there must be a need for such a European sales law regime. Possibly, Member States could be persuaded through a "test-it-and-enact-it" approach, which would entail the gradual establishment of a European sales law framework. As suggested above, this could take the form of an optional pan-European legal regime for consumer transactions, which would be supplemented by a model standard form for commercial transactions. With time, the limited or wide use of the model agreement could persuade the mercantile community to either jettison the idea of an EU sales law or seek the enactment of a rigorous "hard" European law covering also commercial transactions. In due course, the EU could further substitute the optional instruments with a binding regime for all sale of goods contracts, thus reviving the political goal of Napoleon to set forth a single law for all Europe.[271]

If such an instrument is to be promulgated, the ultimate question is this: What should the drafting process entail? Bearing in mind the CESL experience, no future project can be successful without a clear regulatory vision and involvement of all interested parties throughout the preparatory and enactment stages.

First and foremost, the instrument needs to be drafted with a clear regulatory objective in mind. Any project that aims to complete the internal market but is disguised under a dubious cloak of "consumer protection" has limited chances of success. Member States would be unwilling to

268. Rome I Reg., *supra* note 36, art. 25; Rome II Reg., *supra* note 69, art. 27.

269. Dannemann, *supra* note 53, at 28.

270. Eidenmüller et al., *supra* note 52, at 318.

271. *See* Collins, *supra* note 77, at 913–14 ("It is of course, possible that the Commission foresees that there is a strong chance that few will use the rules of the optional code. That will provide the Commission with a reason to discard the optional nature of the code and promote instead mandatory full harmonization of consumer sales law in order to complete the internal market.").

promote an undisclosed agenda of the European Commission and private parties would not trust using an instrument that has political impetus but lacks business rationale. Indeed, the proposed CESL appears to lack this clear vision. The draft Regulation was opaque *vis-à-vis* its regulatory goals, which purportedly encompass consumer protection, legal certainty in commercial transactions, and the completion of the Single Market. Although all three goals can theoretically coexist, the structure and content of the instrument clearly reflect the pursuit of the last goal, while the former two were ancillary justifications for its enactment. In other words, the CESL was more of a means to advance a political agenda of nation-building through enhanced legal integration, rather than a legal reform for consumers and merchants.[272] Although the decision on this matter has been postponed as a result of CESL's withdrawal, sooner or later the EU will have to decide whether to proceed with the further integration of the Single Market or to preserve the close, yet not-so-close, cooperation of Member States. Whereas the former would lead to a quasi-federation model of rigorous private law harmonization, the latter avenue would entail a piecemeal harmonization of the law and, possibly, a slow and gradual legal integration through European Court of Justice judgments—the EU truly run by judges.[273] Therefore, political vision and courage would be necessary to determine the future of both European contract law and the European Union itself.

Secondly, whereas the contract law efforts in Europe have extended for decades, the CESL was drafted in a relatively short period of time. This expediency in promulgating a new instrument necessitated minimal involvement of stakeholders, academics, and practitioners, thus repeating the mistake made under the 1964 Hague Sales Conventions whereby developing countries were left out of the drafting and negotiation process and, as a result, boycotted the final Conventions. In like manner, stakeholders, academics, and practitioners, have not been substantially involved in the drafting of European sales law. Unsurprisingly, the excluded parties have become the most ferocious critics of the proposed Regulation.[274] For that

272. *See* DiMatteo, *supra* note 225, at 229 ("The CESL's reliance on the PECL and the DCFR is especially telling—given that these prior instruments are viewed as potential precursors to a European Contract or Civil Code. This leaves one wondering whether the true purpose of the CESL is a tactical one aimed at advancing the cause of a European civil code."); Christiana Fountoulakis, *Sales Law in Europe*, *in* 2 EUROPEAN PRIVATE LAW: A HANDBOOK, vol. II at. 41, 77 (Mauro Bussani & Franz Werro eds., 2014) ("[T]he Proposal extends to general issues of contract law and may thus be perceived as a *first European mini-code*, despite its optional nature. [. . .] [I]n effect, it would constitute a first 'trial run of [a] new *European contract law*.'" (emphasis in original)); Reinhard Zimmermann, *Codification: The Civilian Experience Reconsidered on the Eve of a Common European Sales Law*, *in* CODIFICATION IN INTERNATIONAL PERSPECTIVE: SELECTED PAPERS FROM THE 2ND IACL THEMATIC CONFERENCE 11, 27 (Wen-Yeu Wang ed., 2014) ("[T]he DCESL may be the nucleus of a European code of contract law properly so called, and perhaps even of a European Civil Code . . . ."). For the importance of a European Civil Code in creating a pan-European polity, *see* Collins, *supra* note 77, at 916–17.

273. *See, e.g.*, Case C-281/02, Andrew Owusu v. NB Jackson, 2005 E.C.R. I-01383.

274. *See* Stefan Grundmann, *CESL, Legal Nationalism or a Plea for Appropriate Governance?*, 8 EUR. R. CONT. L. 241, 242 (2012) ("[E]uro-optimists are disappointed that

reason, any new or revamped instrument needs to be drafted in an open manner—not behind the closed doors of the EU Commission. The latter should form a drafting committee of learned scholars, practicing attorneys, and stakeholders, who will produce a doctrinally coherent draft instrument that is also useful in practice. At a second stage, the general public, including universities, research centres, bar associations, learned institutions, and private parties, should have the opportunity to comment on that draft. Upon the conclusion of the consultation process, the drafting committee should prepare a final document, which would serve as the basis for the classic regulatory process under the EU Treaties. Paraphrasing President Lincoln's seminal Gettysburg Address, a quintessential instrument for the archetypal business transaction must be a product "of the people, by the people, for the people."[275]

The stalemate reached in European contract law should not be viewed as the end of a long unsuccessful regulatory endeavor. The CESL should not be viewed as the pinnacle and, simultaneously, the death-bed of regional contract law initiatives. Fifteen years of rigorous comparative work and scholarly analysis cannot be easily cast aside. On the contrary, as eloquently put fifty years ago by René David, "The failure of attempts at unifications [sic] does not necessarily prove that unification is impossible; it may simply be that the attempts in question were premature, or that they were not made with the necessary caution, or with adequate methods and processes.[276]

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the process towards the CESL proposed has been characterised by exclusion and not inclusion, by a situation in which competition of ideas has not been invited but a closed-shop has been organised—all this in good part driven by conflicts of interest.").

275. Sean Conant, *Appendix: The Five Copies of the Gettysburg Address*, *in* THE GETTYSBURG ADDRESS: PERSPECTIVES ON LINCOLN'S GREATEST SPEECH 321, 323, 325, 327, 329, and 332 (Sean Conant ed., 2015).

276. David, *supra* note 29, at 41.