Article

The parties' choice of the Common European Sales Law – which governing law?

by Maren Heidemann

A. INTRODUCTION

The proposed Regulation of the European Parliament and the Council on a Common European Sales Law, (COM (2011) 635 final) (hereinafter CESL), introduces a very interesting choice of law structure. It creates a novelty among European legislative instruments and certainly among other traditional choice of law instruments.

It seeks to implement the choice made by the European Commission to provide for a second contract law regime, not the "29th regime" following the results gleaned from the Green Paper in January 2011 (The European Commission, Green Paper from the Commission on policy options for progress towards a European Contract Law for Consumers and Businesses, COM(2010)348 final (2010)). As a result, how does the CESL relate to pre-existing international substantive contract law such as the 1980 Vienna Convention on the International Sale of Goods (hereinafter CISG) and other substantive international contract law instruments? Does it successfully cast aside choice of law problems or does it risk isolating itself and with it the European community of traders and consumers from the rest of the world? How can coherence between international and EU common market law be achieved?

Many authors have commented on aspects of these questions both before and after the publication of the current Commission proposal. Recommendations *ex post*, ie upon examination of the published outcome of the year-long drafting process, have included the limitation of the scope of the CESL to electronic contracts (as proposed by the Law Commissions of England and Scotland in 2012 as well as the Legal Affairs Committee of the European Parliament in September 2013, although under the heading of distance selling, see http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bIM-PRESS%2b20130916IPR20025%2b0%2bDOC%2bPDF%2bV0%2f%2fEN, accessed on December 8, 2013). Other recommendations seek to limit the scope to consumer contracts only (see Sixto A Sanchez-Lorenzo, "Common European Sales Law: Some Critical Remarks" 9 *Journal of Private International Law* (2013) 191-217, 216; M Heidemann, "The Common European Sales Law Proposal - European Private Law at the Crossroads?" (2012) 91 *Amicus Curiae* 2-11; The Law Commission and Scottish Law Commission, An Optional Common European Sales Law: Advantages and Problems. Advice to the UK Government (The Law Commission, Scottish Law Commission, 2011), 39).

Authors have also examined the impact on non-European traders, as well as the general private international law (PIL) setting of the CESL and in relation to the role of other EU legislation. The picture remains fragmented.

This paper seeks answers and suggests solutions, especially in respect of the *lex contractus* status of a potential sales law instrument. It looks at the possibilities of an express choice of the CESL by the parties to a potential contract employing the CESL. The first part of the paper (A-C) briefly sets out the proposed structure and content of the CESL in order to provide a basis for an analysis and recommendation in the second part (D-F). The aim of this research is to suggest a consistent solution to the problems arising on the one hand from the (widely detected) defective drafting of this proposal, as well as from the underlying status quo of current European private international law doctrines relating to *lex contractus*, both on an EU level and within the national laws.

Reflected by the current Rome I choice of law system, which is based on the premise that only state law can be *lex contractus*, traditional antagonism has unfolded around the issue of the role of the state in current private law so that there is a debate over the role of private actors in lawmaking and that of the public sphere and the public interest as an opposing and restricting force (see for further discussion D Schiek, "Private Rule-making and European Governance-Issues of Legitimacy" (2007) 32 *European Law Review* 443–66 and M Heidemann, "Private Law in Europe – The Public/Private Dichotomy Revisited", (2009) 20 *European Business Law Review* 119-39).

This debate is unresolved and therefore does not allow an easy transition from the current status quo of EU and Member States' (MS) PIL into what some authors see as a modern and

more appropriate choice of law model, with instruments like the CESL or the CISG being available to be made *lex contractus* of an international, "cross-border" contract. Any method of achieving this must respond to concerns of the opponents of such a solution rather than insisting on controversial models of justification and explanation derived from political or sociological theories, for instance those suggesting a global delocalized society, partly based in cyberspace – as in the case of participants in e-commerce and "social media" seeking a *lex electronica* comprising mainly self- regulation but raising concerns as to the effects of abuse and transgressions ranging from breach of intellectual property law to physical and personal injury on the remaining "analogue"' society.

Such a society would preferably be self-regulated. Traditionally led by national and international merchants and their commercial organisations and dispute settlement mechanisms, this example is followed in the so-called digital age by the above-mentioned cyberspace community (this perception is illustrated by G-P Callies, "Transnationales Verbrauchervertragsrecht" (2004) 68 *Rabels Zeitschrift* 244–87 and also by J H Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law* (Oxford, 4th edn, Hart, 2010), 205). Nation states may perceive this form of self-regulation as secretive and anarchic and thereby a threat to sovereignty and public order.

Further reservations against the use of conventions, model laws, "general principles" or indeed the CESL as *lex contractus* also arise from other legal considerations such as vagueness, incompleteness and an absence of central adjudication – or indeed as an interpretation standard in the course of applying international substantive contract law beyond the limitations expressed in Article 7, CISG and other contract law conventions which revert to national law via conflict rules once the uniform instrument has been fully explored.

These latter concerns can equally be resolved using a method based on a thorough review of the underlying motivations for such choices. What follows will not address the full range of possible choices of law clauses or suggest a draft wording of a choice of law rule enabling such choices. The focus here is on the express choice of law made by the parties to a potential European or third party sales contract and the legal nature of uniform international law as a basis for a way forward.

B. EXISTING CHOICE OF LAW RULES IN THE CESL – STRUCTURE AND CONTENT

1. Structure

The choice of law rules in the CESL are spread over different sections of the instrument. Reference to choice of law can be found in the Explanatory Memorandum (EM), the Preamble and in the Regulation itself. Annex I, which contains the actual sales law, does not include any choice of law rules.

This may be modelled on a civil law practice to maintain separate codes or an "introductory" code as in Germany in relation to the substantive civil law and to separate the legal nature of such rules from each other. In the CESL, however, it is not simply the structure that is unusual but also the content and wording of the rules.

In line with the role that a Preamble plays within EU legislation or indeed the more rarely found Explanatory Memorandum (EM), the rules referring to choice of law occasionally seem to be suggestions rather than instructions (should... may be....). Where they are not, but worded in a definitive mode (will..., does not amount..., is..., is to be...) the question is why they are not part of the Regulation itself or Annex I.

2. Content

The CESL seems to distinguish the "material, territorial and personal scope" of the sales law (Art 3 of the Regulation) from the more general legal nature and setting of the CESL within a national and international context. The latter is embedded in the narrative of the EM in sections 1 and 3. The EU legislators are adamant that the CESL is to be regarded as national law forming a "second contract law regime" within the domestic law of the MS. This description is to be found within the EM on pages 6 and 8 of the English version pdf, and in sections 1 and 3 concerning the "context" and "legal elements" of the proposal, partly repeating the same words. Apart from the information that the CESL is meant to be a separate national contract law, it can also be understood from these paragraphs that not only is choosing the CESL "by agreement" not a choice of law in the sense to be discussed here, but that commonly understood choice of law is expected to be made prior to the choice of the CESL (s 1 of the EM).

Eventually it emerges from this that a choice of law in the traditional sense has to be made first, prior to the use of the CESL, for it to become operative. This choice is to be made according to the established EU legislation on private international law, the so-called Rome I and II Regulations on the law applicable to contractual and non-contractual obligations (Regs (EC) 593/2008 [2008] OJ L177/6 and (EC) No 864/2007 [2007] OJ L 199/40 respectively). Effectively, this means that parties need to choose the CESL within any given MS law. It is questionable therefore whether the CESL is meant to be one uniform source of law for "cross-border" contracts in the sense described in Article 4(2) and (3) of Annex I, or rather 28 different sources, ie 28 CESLs, each being regarded as an "integral part" of the respective national law. This expression is taken from the ELI statement, Article 3(2) of the drafting proposal. The number 28 is used symbolically here to represent the current number of Member States in the EU but of course the number of contract laws in the 28 Member States is greater (eg in the UK there are three main legal systems: England and Wales, Northern Ireland, and Scotland).

A choice of the CESL would therefore be the CESL of state X, or the law of state X and its CESL, or the X CESL, eg the German, French or Spanish CESL. This description of the CESL's legal nature entails a great amount of ensuing questions, some of them very similar to those arising in the context of traditional uniform law such as the CISG, even after adoption, ratification and implementation into national laws (see below at D.5. (a)). P Mankowski: "Rechtswahl für Verträge des internationalen Wirtschaftsverkehrs" (2003) *Recht der Internationalen Wirtschaft* 1, 2-15 illustrates how the CISG, even though implemented into German civil law by way of the EGBGB (Introductory Law to the Civil Code) is still regarded as an alien item remaining subject to German mandatory laws. How bizarre that a state should sign up to a treaty that might violate or undercut its own laws. His views are not in line with the award of December 29, 1998 rendered by the Schiedsgericht Hamburger Freundschaftliche Arbitrage in Hamburg, *Recht der Internationalen Wirtschaft* vol 5 1999, pp 394-96, p 395 (II.3), which applied German law complementary to the CISG clearly accepting the CISG as *lex contractus*.

The elements of the above-mentioned "material, territorial and personal scope" are thus not to be regarded as connecting factors in the sense of private international law but rather application criteria with the effect of excluding the domestic law to the extent that the CESL will then apply. In addition to the territorial scope formed by the location of the habitual residence of the trader, subdivided into place of business and central administration in Article 4(4) of the Regulation, and the "address indicated by the consumer", delivery address and billing address (Arts 3 (a) and 4 of the Regulation) these include the identity of the contracting parties as consumers, traders or SMEs as well as the content of the contract. Out of these formative elements of the CESL's scope, the first is certainly the most complex and unusual. The territorial scope uses the term "cross-border" contract' as a definition which is itself defined by those elements contained in Article 4(2) and (3) (a) and (4), and the further element of one of these locations being in a MS, Article 4(2) and (3) (b).

C. COMPARISON WITH INTERNATIONAL UNIFORM LAW AND EUROPEAN LAW INSTITUTE STATEMENT

In the following paragraphs I will make reference to the solutions suggested by the European Law Institute (ELI), a recently formed academic organisation with its secretariat based in Vienna. This is by way of selecting just one out of the numerous contributions that have been made by the Committees of the European Parliament and in the wake of their consultations, as well as academic contributions. The ELI has contributed a black letter draft to accompany their statement which also shows a tabled synopsis of their suggested amendments (Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law COM (2011) 635 final, ISBN: 978-3-9503458-1-0, officially "endorsed" in September 2012 and presented at the Inter-Parliamentary Committee Meeting of the European Parliament Legal Affairs Committee (JURI) on November 27, 2012. The working party on the CESL is chaired by Sir John Thomas. The statement is freely available from the publications section of the ELI at http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Regulation_on__a_Common_European_Sales_Law.pdf).

A comparison lends itself particularly to the 1980 Vienna Convention on the International Sale of Goods (CISG - Text available from UNCITRAL at http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf , accessed on December 8, 2013). This convention also receives special attention within the EU proposal at the Preamble, Recital 25. Here, the EU drafters recommend that where the scope of the CESL and the CISG overlap, "the choice of the Common European Sales Law should imply an agreement of the contractual parties to exclude that Convention". The choice of language suggests that this is a recommendation, but since it is not obvious to whom this may be addressed it could also be read as an interpretation rule for the contractual agreement once concluded, or even an implied term. The absence of reasons given for this choice does assist the clarification of this point. Another paragraph on the CISG in the EM merely states that the CISG had no overarching adjudicating body and therefore lacks uniform interpretation without linking this expressly to Recital 25 and suggesting this as a reason. The fact, however, that a case database collecting national decisions on the CESL is required for the CESL (EM s 4 (Budgetary implications, Rec 34, Art 14 CESL) shows that the creators do want to draw on the experience with the CISG and indeed other instances where this method has been used, such as by UNIDROIT (CLOUT, UNILEX).

Three aspects of the CISG should be observed here in comparison with the CESL – its scope, its objectives and some of its interpretation and method rules.

1. Scope of the CISG

Article 1, CISG defines the scope in two steps. Paragraph 1 describes international or "cross-border" contracts without using the actual term "contracts for the sale of goods between two parties whose place of business is in different States". Paragraph 2 specifies that these different states need to be either both contracting states or that the law of at least one contracting state must be applicable by way of conflict rules. The "cross-border" element can be disregarded if the conflict rules point to a contracting state (Art 1(2)), so the second element is conditional on the first. In the CESL, the first element, the "cross-border" nature of the second, is defined by the second. The CESL describes a "cross-border" contract as being one where at least one party has their place of business

etc in an MS. This obvious deviation from the use of this expression in ordinary language is explicitly justified by using it "for the purposes of this Regulation" (Art 4(2)).

The CISG also expressly excludes the use of positively or expressly defined personal or material criteria for the determination of its scope (Art 1(3)), and instead moves on to defining the limitations of its scope in the negative, by way of discounting or excluding certain contractual purposes ("personal, family or household use"), types of goods and manner of acquisition in Article 2 (a) to (f).

CESL takes a contrasting approach to the CISG by making the identity or personal criteria of the contracting parties the main point of reference (consumers, traders, SMEs).

2. The objectives

The objectives of the CISG are described in a brief Preamble, those of the CESL in the very extensive EM and Preamble. Both instruments share the need to justify their existence against the general doctrine of sovereignty as they deal with uniform law for use in several independent jurisdictions. The CISG, however, uses the established platform of an international diplomatic conference at a stage in the drafting process where state representatives are authorised to sign a convention. The convention then follows its life cycle from adoption to ratification and implementation. The CESL, peculiarly, has to overcome an obstacle that lies in the way of its adoption which is coming from the very treaty authorising its drafters.

The legal basis for the CESL is contentious, even though only four MS filed objections against the choice of Article 114 TFEU (Treaty on the Functioning of the European Union) as a legal basis (approximation of MS laws) thereby not halting the legislative process. Therefore, not only the CESL's legal nature but also its objectives receive extensive attention in the proposal. Only certain objectives (harmonisation, uniformity only in certain specified areas) are acceptable under the Treaty for the CESL – all Union objectives are listed in Title 1 of the TFEU – but not for the drafters of the CISG. This is so despite the EU claiming to be a jurisdiction of its own. The legal order *sui generis* may not be explanation enough, though, to convey the legal effect of the CESL (see Martijn W Hesselink, "How to opt into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation", *Centre for the Study of European Contract Law Working Paper, Series No* 2011-15, (Conclusion), available at http://ssrn.com/abstract=1950107, accessed on December 8, 2013).

At this point the first manifest difference between the two instruments shows its significance – the CISG is an international treaty, the CESL is secondary law prepared by an executive body within a supranational organisation. Both instruments are of a public law nature carrying substantive private law rules addressed to private parties. While this is certainly a pioneering quality, it begs the question about the aims and objectives of such instruments. Both instruments may also pursue the same objectives.

The CESL lists its objectives most concisely in Article 1 of the Regulation. It reads as follows:

Objective and subject matter

1. The purpose of this Regulation is to improve the conditions for the establishment and the functioning of the internal market by making available a uniform set of contract law rules as set out in Annex I ('the Common European Sales Law'). These rules can be used for cross-border transactions for the sale of goods, for the supply of digital content and for related services where the parties to a contract agree to do so.

2. This Regulation enables traders to rely on a common set of rules and use the same contract terms for all their cross-border transactions thereby reducing unnecessary costs while providing a high degree of legal certainty.

In relation to contracts between traders and consumers, this Regulation comprises a comprehensive set of consumer protection rules to ensure a high level of consumer protection, to enhance consumer confidence in the internal market and encourage consumers to shop across borders.

The CISG outlines its objective in the Preamble:

PREAMBLE

The States Parties to this Convention,

Bearing in mind the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

Considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,...

Both instruments are aimed at removing barriers in international markets, even though the EU market is referred to as the "internal market". As this market place stretches across a number of independent states, it is an international market. Both instruments want to provide a uniform source of law, or "set of rules". The CESL also uses the word "common" in para 2 of the article. While the CISG wants to "promote international trade", the CESL also adds "a high level of consumer protection" to its objectives.

These objectives seem to be largely overlapping, except of course that of consumer protection. The objectives are realised by the respective scope of both instruments but also by interpretation and application rules. The desired uniformity

results both from using a single uniform source of law and applying it in a uniform way. This latter aim is promoted by the interpretation rule of Article 7 CISG:

> *Article 7*
>
> *(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.*

The creators of the CESL seem to doubt the workability of this solution though:

> *"…and there is no mechanism which could ensure its uniform interpretation"* (EM, p 5).

The CESL itself, however, does not offer any "mechanism" to ensure a uniform interpretation. The word uniformity is used only in regard of the uniformity of the single source, the uniform set of contract law rules. The creators of the CESL most likely did not see a necessity to emphasise the intended role of the CJEU to ensure uniformity of the CESL's interpretation. They did however copy the idea of a national case database which is current practice in respect of the CISG and other uniform instruments, as mentioned above. The reason for this is not clear. The national cases within these databases do not have a legally binding relationship with each other. If they are consulted by national judges it is in the spirit of Article 7(1) CISG, but arguably voluntarily. The CESL does not include a provision comparable to Article 7 CISG, so the reason for the database remains at best unaddressed at worst not understood. Recital 34 of the Preamble mentions legal certainty as the aim of this database but does not explain what the role of the national ("final") judgments would be.

The ELI statement allocates a whole section to the database (Part B, s 2, Implementation). It sets out in great detail what the setting should be (accompanied by a digest, allocating cases to specific courts, etc). The crucial point however of exactly what would be the legal basis for any national judge to refer to a case of another national court is not spelled out there either, rather it is only indirectly identified as a problem. Paragraph 69 comes closest by using the expression "authoritative", stating that: "First, if the database is to be a properly authoritative record of judicial decisions from across the EU only properly authoritative judgments should be placed on it." The "Executive Summary" (p 16) uses the expression "uniform interpretation" as an aim and "judicial co-operation" as a means to achieve this. This expression may be less general as it appears in the absence of any detailed measures of such co-operation because the term has of course a place in established EU terminology (Art 81, TFEU) and is associated with specific activity that originated as part of the "third pillar".

The CISG further contains the reference to the "international character" of the convention as guidance for its application and interpretation, and it contains a method in section 2, Article 7 addressing so-called internal gaps of the convention.

> *(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.*

This wording is echoed in the CESL in Article 4, paragraph 2 of Annex I, the actual sales law:

> *(Interpretation) …*
>
> *2. Issues within the scope of the Common European Sales Law but not expressly settled by it are to be settled in accordance with the objectives and the principles underlying it and all its provisions, without recourse to the national law that would be applicable in the absence of an agreement to use the Common European Sales Law or to any other law.*

The Commission introduces a comprehensive set of interpretation rules with the CESL, especially in Article 2, as though concentrating developments in uniform international law and doctrine over the past decades, culminating in the express use of the term autonomous for the interpretation method (Art 2(1), Annex I, "is to be interpreted autonomously"). This article also stipulates the objectives and underlying principles as an interpretation criterion (Art 4(1)) which could be seen as a principle of international legal doctrine as it is contained in the Vienna Convention on the Law of Treaties 1969 (Art 31).

However, the CESL is not international law according to its creators but national law, and so the question arises as to the meaning of the choice of legal instrument and its application method.

D. EVALUATION

1. No desired effect of second domestic contract law regime

The main aspect defining the choice of law rules in the CESL must be seen in its legal nature as national law. This begs the question of whether there is any choice of law rules specific to the CESL at all. The objective of regarding the CESL as national law of the MS seems to be – besides allowing its creation under the TFEU – the avoidance of a need to modify the relevant provisions of the Rome I Regulation ("Unaffected by the proposal", CESL, EM, s 1 (p 6)). This objective applies especially to its Article 6 on consumer protection rules, or indeed any other aspect of established doctrine of private international law, in particular the doctrine of (overriding) mandatory laws, as expressed in Article 6(2) of the Rome I Regulation. The argument reads like this:

> *[Art. 6(2) Rome I Reg] can have no practical importance if the parties have chosen within the applicable national law the Common European Sales Law. The reason is that the provisions*

of the Common European Sales Law of the country's law chosen are identical with the provisions of the Common European Sales Law of the consumer's country. Therefore the level of the mandatory consumer protection laws of the consumer's country is not higher and the consumer is not deprived of the protection of the law of his habitual residence.

Article 6(2) of the Rome I Regulation reads:

2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.

This wording does not seem to make a comparison between individual rules of the CESL and a consumer's law of his or her habitual residence (home law hereinafter for simplicity) dispensable. The rule does not establish a hierarchy between the chosen law and the consumer's home law by level of protection afforded, it is based on the quality of a norm as mandatory. There is no reason why a court would not exercise a value judgement comparing the level of protection afforded to a consumer party to a contract governed by the CESL and the rules of his home law in any individual case. It is highly doubtful that his problem can be solved by making the CESL part of the national laws of each MS.

As the attainment of a high level of consumer protection is one of the objectives pursued by the CESL, this aspect is very important to avoid a conflict with existing Union law without undertaking to change such law.

In this passage the creators of the CESL thus make it very clear that the choice between the law of a country and the choice of the CESL is "the Common European Sales Law of the country chosen". It claims that those provisions are identical with those of the country of the consumer's habitual residence. This, however, is not self-evident.

If the CESL is really 28 CESLs as described above, it must be asked if the rules are identical in each of the MS simply by becoming part of the national legal culture. Secondly, the identity or sameness of those rules is not the criterion under Article 6(2) of the Rome I Regulation which alleviates the prevalence of the mandatory rules in the consumer's home country. Besides, a choice of the CESL of state X does not entail a choice of the CESL in the consumer's home country if that is not state X, and so the judiciary in the home country may be free to undertake exactly that value judgment about the rules of the CESL the EU Commission wants to avoid and declare the CESL incompatible with mandatory home law protecting the consumer party. There is no reference to the legal effect of an unchosen CESL, say the consumer's home CESL, while another MS CESL is part of the law governing the contract. Is CESL dormant when it is not activated by a choice? Obviously, this is an unprecedented model of a legal nature.

Therefore, the passage in the EM explaining this mechanism is futile and can only be rendered workable either by the addition of an express suspension of Article 6(2) of the Rome I Regulation; or by adding a stipulation that the mandatory rules referred to in Article 6(2) are limited only to the CESL of the consumer's home state; or making the CESL truly one source of law directly applicable in 28 MS and not 28 second contract law regimes. This may seem overly sophisticated, but it is crucial for the development of private international law as well as transnational, ie "cross-border" contract law.

The aim of creating a uniform source of "cross-border" contract law ought to be the guideline for the choice of the legal nature of an intended CESL. The proposed Regulation or indeed any law created at EU level such as a Directive, treaty or framework decision is a uniform source of law from the point of view of the MS. So, the second step of declaring the CESL to assume the form of 28 CESLs appears to be very artificial indeed, and would therefore most likely be overlooked by potential contractual parties and lawyers, too. The very use of the extended name CESL of state X or its variations as listed above will be discouraging and flag up the fact that a "choice" of the CESL may not result in the desired legal certainty, simplification and uniformity.

It is against this background that choice of law under the CESL is to be discussed. This consideration does not appear in the ELI statement. The statement does not question the assumed legal nature of the CESL as national law, possibly because the drafters did not undertake to challenge the policy choices made by the EU legislator (see the Preamble of the statement on p 11 of the printed version). However, this is not a policy choice but rather part of the instrument itself.

The fact that the EU legislator has made the choice of creating a second contract law regime seems to explain the position of the choice of law aspects and the description of the legal nature of the CESL in the Preamble and the EM. The actual Regulation and Annex I presuppose this status and accordingly set out the scope and interpretation methods not in the context of international law or in the context of multiple independent jurisdictions but within any one of the MS jurisdictions and in the context of the CESL and the "surrounding" national law of its respective MS.

Such a choice has not been possible before, and seems to be a novel type of choice of law.

It is questionable whether a European or indeed non-EU based consumer would understand the sophisticated nature of this process. If a consumer decides to buy goods from a trader under the CESL, say from his desk top computer, he may be given the choice of the "blue button", the famous image conjured up by the drafters of the CESL and the DCFR (see Study Group on a European Civil Code/Research Group

on EC Private Law (Acquis Group) (ed), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR).* Interim Outline Edition, (München, Sellier, 2008)). What would be the precise content of the agreement to use the CESL? Would it be sufficiently clear to the consumer that he is asked to choose first the law of a country and then that country's CESL (it actually does seem to be the drafters' intention for the consumer or trader to make two choices in chronological order going by the wording of the proposal)? Would this really give the consumer the reassurance to trust that promised uniform source of law? Would the consumer, despite being informed by the Standard Information Notice in Annex II, be fully aware of the nature of the choice he is making and the nature of the law he is choosing? Why, if the choice of law in the traditional sense is just that, would the consumer need extra information? Should not the consumer be given the choice of all 28 CESLs in the form of a list?

The scenario seems bizarre and technocratic. But it highlights the weakness of the chosen method of implementation and use of the CESL designed by the EU Commission.

The consumer's imagination of a Common European Sales Law would in my view naturally be that of a single source of law which is directly applicable in all MS. The consumer would be misled under the current model.

2. No implementation

It is also questionable if the desired effect of making the CESL a second contract law regime is actually achieved by the draft proposal. Interestingly, this is not doubted by scholars commenting on the proposal (see M W Hesselink, "How to opt into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation", *Centre for the Study of European Contract Law Working Paper Series* (2011) (available at http://ssrn.com/abstract=1950107, accessed on December 8, 2013) and see also the comprehensive article by S Whittaker "The Proposed 'Common European Sales Law': Legal Framework and the Agreement of the Parties" (2012) 75 *Modern Law Review* 578).

Nevertheless, what the Commission is proposing does not seem a self-evident or previously tested legal mechanism. The legal nature of the CESL as domestic law and a second contract law regime is not contained in the operative text of the Regulation itself as mentioned above. The description of this legal nature is contained in the EM and the Preamble, even using mandatory language. However, whether or not this effect follows from the adoption of the Regulation at EU level and the position of this objective in the preliminaries of the actual legal instrument that the EU has designed to bind its MS directly does not appear unequivocal. An EU Regulation has the legal effect of creating directly applicable separate uniform law effective in all MS. But how, without formal implementation, the content of the Regulation can be made to have the legal effect of a second contract law regime, is not clear. There is no precedent for this mechanism, and there may be, as some authors and MS submit, no legal basis for it. The discussion takes a different course depending on whether the question is pursued as to what can be achieved under TFEU rules or what could be achieved from a general perspective.

Tellingly, the ELI statement includes a section on implementation, while the CESL does not expressly mention this word as it may be a give-away of the latent problem. The ELI statement politely discusses those elements of the CESL that can be regarded as implementation measures, such as the database, an advisory body and a digest. All those are of course informal and not part of the approved and authorised instruments of the EU arsenal of measures to enforce EU policies and laws.

If the desired effect of "introducing" is to be regarded as failing, then the CESL would have to be regarded as a truly uniform instrument, a single source of substantive contract law directly applicable in all MS. The nature of a choice of this instrument does not follow easily from that, though. Can a regulation be "chosen" under existing private international law?

Another indication of the awareness of the drafters of the ambiguity of their model of the CESL as a second national contract law regime could be the use of language which is widely found in international uniform law, conventions and model laws with a private law subject and also in Article 31 (1) of the Vienna Convention of the Law of Treaties (VCLT) of 1969 which provides general rules for interpretation of treaties. It is conceivable that the autonomous interpretation method proposed in Article 4 of Annex I can be employed to interpret a national legal instrument with a view to streamlining its use in one MS with that in the 27 other MS and isolate it from the surrounding national law within its scope. Without the defining factor of this interpretation in the light of the objective and purpose, however, this method may be deprived of its effect because each country has its own doctrinal principles guiding the users, be they the parties or the lawyers adjudicating or advising on their transaction.

Uniformity is not straightforward to achieve in this way, despite the thorough consideration of all elements of established interpretation methods for uniform instruments including the treatment of internal gaps. The decisive criterion must be the one element contained in the CISG which is not repeated in the CESL, "regard... to its international character."

3. Object and objectives

The object and purpose of a convention is commonly used as a factor in the interpretation and application of an international treaty, according to the VCLT 1969 and also a number of modern uniform instruments drafted and promoted by UNIDROIT and UNCITRAL. Article 4 of Annex I refers to them in both paragraphs as an interpretation criterion. Objects

and objectives or purposes have to be distinguished. The object of the CESL is the "cross-border" contract as defined by Article 4 of Annex I. The objectives are the removal of (non-tariff) trade barriers within the EU and the fostering of the internal market as well as a high level of consumer protection.

The "cross-border" contract under the CESL may be limited to an EU related "cross-border" contract but it undoubtedly retains an international element. Cross border activity must involve separate sovereign jurisdictions. The international or transnational element is subdued though by the emphasis on national contract law. This type of uniform law poses a special paradoxical dilemma. The term "international" traditionally describes the interaction of states about public concerns. In the area of substantive contract law, the acting parties are private individuals, usually only two, acting for their own sake only and establishing voluntary temporary relationships. The state traditionally does not act in this format and has not commonly curtailed but rather privileged and benefitted from these relationships throughout history (see for instance M Heidemann, *Methodology of Uniform Contract Law - the UNIDROIT Principles in International Legal Doctrine and Practice* (Berlin, Springer, 2007), 1.1.3.2 and 8; P Grossi, *Das Recht in der Europäischen Geschichte* (Munich, Europa Bauen, C H Beck, 2010), 119/123 and M Schmoeckel, *Rechtsgeschichte der Wirtschaft* (Tuebingen, Mohr Siebeck, 2008), 93 (No 93)).

Party autonomy is the mode of acting of these private parties. The essence of a contract as a voluntary mutual, reciprocal and usually bilateral private agreement escapes state regulation. The state also does not benefit directly from those transactions, only indirectly by way of taxation and general welfare of its population unless of course there is a state party contractor.

It is therefore not straightforward for states to claim sovereign rights in regard to their contract law other than as a "cultural" asset or heritage, and it therefore equally needs an explanation what the motivation for states can be to provide substantive contract law for use at transnational level, such as the CISG. A more refined view on the benefit of an improved infrastructure for international trade as described in the Preamble of the CISG may be such a motivation. But it begs the question of the alignment of objects and purposes with the content of such instruments in their scope and content. Unavoidably, the state negotiators arrive at the limits of their ability to concur with a typical outcome such as the one described in the paragraph about the limitations and deficiencies of the CISG in the EM of the CESL.

4. Effect of legal nature of instrument on choice by third parties

The fact that the EU legislator has chosen a Regulation over a convention must allow conclusions about the object and purpose of the CESL.

A uniform instrument providing rules of contract law for "cross-border" contracts may have the fostering of international trade and ensuing welfare as an objective, but the object is the international contract itself. The CESL starts by defining this object as being an EU related "cross-border" contract and does not have an international contract in the traditional sense in mind. The CESL is meant to be internal EU law, interpreted by referring to established principles of the interpretation of EU law according to Recital 29, CESL. The CESL's objective is to improve the functioning of the internal market and not global or international trade in general. It is therefore necessary to criticise these aims if one would desire a Chinese and a Swiss trader, as the ELI statement puts it in paragraph (14), to be able to "choose" the CESL.

The ELI statement does of course acknowledge that those non-EU traders would choose the law of a MS and its CESL, but it is not clear why they could be motivated to do that. Secondly, the formulation on page 20 , paragraph (13) of the statement, that traders would be deprived from selling "into the whole EU/EEA under one and the same legal regime", is unfortunately wrong because the CESL provides 28 regimes which are declared to be the same but may not be or remain so.

The Chinese and the Swiss trader would submit themselves to the law of the chosen MS as well as to the "well-established principles on the interpretation of Union legislation" (Rec 29, CESL). Given the motivations behind choice of law, this may not be as desirable as the drafters of the ELI statement think for non-European traders.

The availability of the CESL for non-European parties is most likely not among the objectives of the EU legislator. The multitude of objectives could be analysed to see if the opening of the CESL to third party traders is desired and possible.

Besides providing an improved infrastructure for traders in view of the difficulty that Article 6(2) Rome I Regulation poses to them, two important objectives of the CESL drafters are the achievement of a high level of consumer protection and of course the unchanged status of private international law in the Union. Another objective is to maintain Article 6(2) in order to avoid having to work out a solution in a reform process for the choice of law rules to permit the direct choice of the CESL.

5. Private international law and choice by third parties

The two issues perceived as indispensable for both consumer protection and state sovereignty are the rules about *lex contractus* and the doctrine of mandatory rules in the form of Article 6(2). Both would need changing if a true transnational law was to be provided for "cross-border" contracts that could reasonably be chosen by non-EU parties.

(a) Lex contractus

The question of whether a law can be chosen to be *lex contractus*, the law governing the contract to the exclusion of other laws, has been debated in the past decade, leading to a draft paragraph in the first proposal to the Rome I Regulation

presented by the Commission to the effect that certain types of transnational non-state laws should be allowed to govern an international contract (proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) COM(2005) 650 final, Art 3: "2.The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community").

This rule was not maintained in the final version of the Rome I Regulation. The fact that such sets of rules as, for example, the PECL (Principles of European Contract Law) or the UNIDROIT Principles of Commercial Contracts are non-state laws cannot be the decisive criterion for supporters of this solution. Professor Sanchez-Lorenzo strongly advocates this solution (see "Common European Sales Law: Some Critical Remarks", 9 *Journal of Private International Law* (2013) 191-217 at p 216), however he does not elaborate further to offer a doctrinal way out of the firmly established unity of law and state doctrine. Political and scholarly resistance to a change of the current PIL rules is firm, as the current version of the Rome I Regulation in its change from a convention into a Regulation showed.

Rules such as PECL or the UNIDROIT Principles of Commercial Contracts have been tailor-made for the needs of international traders and their "cross-border" commercial contracts. They are *lex specialis* in relation to domestic contract law, even the law merchant of the nation states. This applies to the CISG as well. The fact that not even the CISG can be made *lex contractus* even though it is not non-state law, unless viewed from a non-signatory state, reinforces the weight of this doctrine (states that are not party to the CISG within the EU are Portugal, Malta, the UK and Ireland, as mentioned in the CESL, EM s 1(p 5)). The CISG can only be used by way of implementation, ie by integrating it into national law.

In Germany, despite having taken this decision, the CISG is still not integrated into national law. It is perceived as a separate set of rules located outside the national legal system and subject to the mandatory rules of the German civil law. It is also not printed in the context of the private international law rules governing the choice of the CISG or implementing it into German law, or indeed in the civil code. The CISG is perceived as directly applicable by default within its scope. The act of implementation serves the purpose of maintaining the doctrine that only state law can govern a contract to the exclusion of other law so that answers are predominantly derived from that *lex contractus*. The aim of seeking a uniform international instrument to take the role of *lex contractus* is to place it at the top of the hierarchy for purposes of the interpretation method. The national law that might then be still applicable via conflict rules in matters outside the scope of the instrument or where internal gaps cannot be filled otherwise will then play a complementary role, not the international instrument.

The aim is not the displacement of the state as regulatory power but to support the cause of the litigating parties which cannot reasonably be assigned to a domestic legal order, ie to have regard to and acknowledge the international character of the underlying situation for which the international law has been created.

(b) Mandatory laws

The doctrine of mandatory laws therefore adds another limitation to the choice of governing law, ie both party autonomy and the role of the chosen national law, by declaring certain rules of yet another domestic law as applicable despite not being chosen. The criteria by which these are applicable are that they "cannot be derogated from" and that, in the case of Article 6(2) of the Rome I Regulation, they are designed for consumer protection. The identification of such rules is left to the courts as it is often debatable whether or not these qualities are assigned to such rules of a given jurisdiction. This must also be true for the rule of the CESL. Ultimately it must be left to the courts to decide if a rule of the CESL affords equal or higher protection for a consumer than his or her own national law. The drafters may therefore not be able to exclude this value judgement in the way proposed in the current draft without modifying Article 6 (2) of the Rome I Regulation.

(c) Lex specialis

The idea of choosing a non-state law as the governing law of an international contract is not motivated purely by the pastime interest of academics pursuing a niche subject (as suggested by P Mankowski, "Rechtswahl für Verträge des internationalen Wirtschaftsverkehrs" *Recht der Internationalen Wirtschaft* (2003) *Recht der Internationalen Wirtschaft (RIW)* 2-15 (13)). It is motivated by making available tailor-made law specifically for the needs of "cross-border", usually commercial, contracts. The rules provided by the CISG, the UNCITRAL and UNIDROIT conventions – for example the Ottawa conventions on leasing and factoring and the 1985 UNCITRAL Model law on international arbitration – and the non-state model laws, the UPICC and the PECL, are *lex specialis* in relation to this type of contract. CESL recognises the *lex specialis* rule along with many jurisdictions (Art 4(3) of Annex I).

The drafters do not seem to recognise though that the CESL itself is, or ought to be, *lex specialis* in relation to the general domestic contract law of the MS. This classification presupposes that the "cross-border" contract or indeed the commercial contract in the case of the CISG and the UPICC (UNIDROIT Principles of International Commercial Contracts, 2010) is a separate contract type and that it has typical requirements which domestic contracts may not have (see M Heidemann, *Does International Trade Need a Doctrine of Transnational Law? Some Thoughts At the Launch of a European Contract Law* (Berlin, Springer, 2012).

The creators of the CESL would need to reassess whether the objectives of the CESL – in addition to simply removing differences – include the identification of and provision for these typical requirements of "cross-border" contracts. As for merchant contracts, these requirements have been at the forefront of decades of drafting specialised rules, first by the Hague Academy, then by UNIDROIT, UNCITRAL and even the EU through some academic groups partly mandated by EU organs with this task. Beyond contracts other requirements of "cross-border" life such as international marriages, adoption, inheritance, law enforcement, taxation and so forth have also been recognised as being typical to living in different countries which after all is being facilitated by the EU with its four freedoms and EU citizenship.

The existence of this permitted "cross-border" life, both commercial and private, generates a need for specialised laws. In the case of contracts – as they are the subjects of this paper – domestic law is not suited to provide a platform for them as a matter of course. National legislators enact law within their territorial boundaries but the "cross-border" contract unfolds in at least two nation states, or in some cases literally nowhere in particular. An anchor has to be deliberately and often quite artificially attached to aspects of those contracts , and these then provide for connecting factors linking the contract which may – going by traditional connecting factors such as the place of performance – be freely floating in cyberspace or across the seas to the law of a particular state. The EU accepts only certain types of these anchors in its private international law, and they have shifted priorities compared to preceding systems of choice of law rules.

Once again, defining these criteria is driven by the objectives behind such legislation and the choice of perceived beneficiary. Giving "cross-border" traders and purchasers both consumers and traders a tailor-made sales law with a high level of consumer protection should be an achievable objective. The added benefit of tying these traders and consumers to the internal market and the EU jurisdiction as well as preserving the existing PIL rules may scupper this aim.

The object of the CESL and of all other tailor-made transnational law is the "cross-border" contract. Even if this "cross-border" contract is qualified by adding the element of the "minimum EU link" (ELI statement, eg (A) (ii), p 13), it would still merit the creation of an independent truly transnational body of rules which could satisfy the high expectations of consumer protection within the EU and therefore be recognised as *lex contractus* to the exclusion of national laws including their mandatory laws within its scope. If it is correct what the CESL drafters claim, that the CESL has a higher level of protection of consumers than the national laws, then there should not be a problem modifying both the doctrine of mandatory laws and Article 6(2) of the Rome I Regulation in order to develop consistent doctrine and practice at transnational level, even if it is limited to the EU. This may even encourage non-EU users such as Chinese and Swiss parties to use the instrument due to its persuasive authority. It would then truly allow traders across the EU to use "one and the same regime", and would also confirm the usefulness of the interpretation rules in the CESL making the autonomous interpretation method and the database mandatory. It would have the potential of contributing to the evolution of a transnational legal doctrine for the sake of international trade by giving the participating EU MS the reassurance that their laws are not undermined by this model, but that the CESL is meant to be an addition to the arsenal of legal instruments providing the infrastructure for "cross-border" trade within the internal market.

For a "cross-border" contract to achieve its objective requires the action of a transnational, "cross-border", supranational legislator. The EU is the only one available at present which has legislative authority most resembling that of the sovereign nation state. Other bodies such as the WTO and UNCITRAL issue rules within their delegated legislative powers. There can be no doubt that EU citizens would benefit from the creation of a uniform instrument governing their sales contracts, and that the EU with its organs and adjudicating body (including the body of case law amassed to date) would be a desirable originator of such law. Currently, there seems to be indeed a lack of delegated, or within the legal order *sui generis,* authorisation to do that. This is one reason why the EU Commission emphasises the pursuit of those objectives that are sanctioned by the TFEU – harmonisation of national laws, consumer protection and removing obstacles to the internal market.

The EU Commission is currently not furnished with the authority freely to provide the people of Europe with their own "cross-border" contract law under the TFEU. There is of course nothing to stop the MS to create and adopt such a uniform instrument in the form a convention which could be granted *lex contractus* status by a modification of the Rome I Regulation.

Martijn Hesselijnk pointed to the limiting effect of the EU Treaty at the beginning of the drafting efforts for the DCFR recalling the alternative way to achieve the aims of a separate convention (see M W Hesselink, "The European Commission's Action Plan: Towards a More Coherent European Contract Law?"(2004) *European Review of Private Law* 397–419 at s 5 and n 77, and referring to W van Gerven's opinion on this matter in n 76 who also thought a separate Treaty would be the better solution for a European Contract Law; Walter van Gerven, "Coherence of Community and national laws; Is there a legal basis for a European Civil Code?" (1997) *European Review of Private Law* 465-69, 468, available at http://ssrn.com/abstract=1098851, accessed on December 8, 2013).

(d) The role of the state in private law

It is the very idea of binding law emanating from a

supranational or indeed non-state source which irritates nation states and traditional legal doctrine. Even so, international treaties are being entered into but the enforcement and interpretation of those is still within a long process of evolution. Successful law enforcement among states at international level remains one of the great ambitions and achievements of our time. In the area of merchant law, transnational adjudication has a much longer tradition and works smoothly and to a large extent by voluntary acceptance of awards and agreements made within private dispute resolution settings such as arbitration centres, or under the auspices of trade associations and chambers of commerce.

In the area of contract law, however, there is very little to fear from transnational law. The voluntary element that the CESL grants its users by making the instrument optional is an essential ingredient of contracting. This distinguishes contract law from other areas of law which may not be suitable to be left to the free disposition of private actors, such as the actual enforcement of the awards achieved through arbitration or ADR, let alone fields like taxation, policing, and health and safety law. There are of course areas in contract law that merit state intervention, such as non-discrimination rules, protection of employees and consumers. These are elements of public policy and for this reason curtailing party autonomy in certain areas may be necessary, either at the point of contracting and contractual content or at the point of enforcement or cancellation. The origin of this necessity is however in civil society and its agreed policies rather than in an anonymous or non-descript "state" exercising sovereign rights over private affairs for its own sake.

Private autonomy is an axiom of the modern participatory nation state of which the EU is comprised. The classic term *ordre public* did not originally cover just any mandatory legislation, certainly not in the area of contract law, but certain domains of public policy that serve framework values that society will not dispense with for reasons of comity (the origin of private international law) or trade advantage. This concept has been stretched for the sake of maintaining resistance against the demands of the growing civil society forming across boundaries towards the individual sovereign state claiming co-operation in a form that was unattainable in former centuries. It is the object of the CESL itself – the international contract – that still triggers irritation itself on a subtle level. The EU MS are still not quite sure if they want to allow borderless trade and free movement. They often still fear a loss of income or a loss of control over national assets. International trade is not always seen as a bringer of welfare (see the rather irrational accusations towards Starbucks or Apple recently, or the upset about the acquisition of Mannesmann by Vodafone some years ago).

The private actor as the sole direct beneficiary of a uniform international legal instrument is seen with suspicion and the state – other than a trade association or an academic research forum – may not be motivated simply to provide an infrastructure for such spontaneous, self-serving and low impact use. This explains the need for the integration of public policy objectives such as consumer protection or the EU link into the CESL. For this reason, connecting factors like habitual residence (subdivided as suggested by CESL, Art 3) have become the favourite starting point, followed by a list of other connecting factors and a fall back rule reverting to the traditional "closest connection rule" in Article 4(4) of the Rome I Regulation. This has come about despite the uncertainty caused for the user, who may not be interested because it may not pertain to his contractual objective and benefit. He may also not be in a position to know this information about his contractual partner at the relevant point in time.

Traditional private international law did not focus on the whereabouts, nationality or occupation of the contractual party but on the content of the contract as it is maintained in the CISG (Arts 1 and 2). This is a more neutral and convincing way of finding a law for the contract, which used to be suitably named "the proper law of the contract". No hold was claimed over the person of the contracting party, neither in order to protect them nor in order to patronise them. Certain values and positions can be safeguarded without reversing the roles of the contract and the contracting party.

Whether an EU Regulation itself, rather than the contractual agreement, can be "chosen" or voluntarily agreed to, ie be made "optional" in the language of the EU legislator, and what the precise legal implication of this "choice" or "option" may be, is not straightforward. The Regulation itself is most likely meant to be permanent and binding, not merely effective upon the choice of the CESL of state X by two or more contracting parties. It is the sales law itself which is meant to be "optional". Is its binding force suspended until it has been chosen or is it effective continuously along with the national contract law? The national jurisdiction and judiciary is certainly bound to interpret an EU Regulation according to the established principles of EU law. But is substantive contract law suitable for this, lacking a previous existence within EU law, and can the national jurisdiction successfully be obliged to refrain from interpreting the CESL in the light of its existing contract law and its principles?

E. RECOMMENDATIONS

1. Aligning form and substance

It is really the "cross-border" contract itself that is the object of the CESL. This is a special contract that can be governed by a tailor-made contract law. It is not necessary to make the EU link part of the definition of "cross-border" contract, but it would be possible to limit the scope of the CESL to EU linked contracts due to the limited jurisdiction of the legislator. It is not advisable to use technocratic tricks like "for the purposes of this regulation a chair is a wardrobe" because this alienates

the intended users of the sales law.

The "minimum EU link" is not necessary. It would be possible for EU MS to make a commitment to the CESL but at the same time leave it open to third party states to join the CESL or for third party contractors to choose the CESL as *lex contractus*. For these purposes the CESL ought to be a convention and not part of an EU Regulation.

The CESL must be drafted to be a truly transnational uniform instrument. The character is international by the nature of its object. EU choice of law rules ought to reformed to allow the CESL to be *lex contractus* and Article 6(2) of the Rome I Reg must be suspended within the ambit of the CESL. The legal basis for this is the *lex specialis rule.*

2. The relationship to the CISG

In the area of commercial contracts the CISG clearly fulfils the aim of providing a uniform instrument throughout the EU and beyond. The reluctance to choose the CISG originates from the same problem that these instruments cannot be *lex contractus* and so a national law eventually determines the majority of issues. A consequence of this is a lack of transnational legal doctrine and practice, which leads to uncertainty and ignorance among users. The scope of the CISG does not overlap with the B2C contracts to be governed by the CESL. There is therefore no obvious need generally to exclude the CISG upon a choice of the CESL in this area. The CISG could be complemented by those aspects that are not currently covered. By acknowledging the role of the CISG the EU would contribute to the further evolution and development of international law by integrating the work done by experts worldwide over several decades, rather than creating a purely internal law which has no clearly defined relationship with pre-existing uniform law.

The CISG also provides a good example of defining its scope without creating conflicts with concepts of the law merchant and commercial contracts in domestic laws. It would be possible to add a complementary instrument to the CISG by providing a tailor-made "cross-border" consumer contract law with the EU as an initial group of signatories.

The Rome Convention on the law applicable to international contracts and the Brussels Convention on the enforcement of foreign judgements were an example for such a method. These could have been opened for third states to join or for third states to use as a model. Instead the same inward perspective took hold over these affairs and resulted in the present regulations. The EU seeks to increase the efficiency of its legislation by turning the conventions into regulations because they have a more undiluted legal force in each MS, but they also limit adjudication to the catalogue of principles and accepted doctrine within the EU according to the treaties. In any given case the choice of such principles may even be wider on the international plain, without the restrictions arising from the enabling norms as they are now visible in the case of CESL.

F. CONCLUSION

CESL proposes what is doubtlessly a unique and innovative but overall bizarre solution for the creation and implementation of a Common European Sales Law. The objectives are partly explicit and partly implied, and are not easily compatible with each other. The object itself is distorted by the use of a technocratic definition removing it from the common understanding of its potential users and beneficiaries. The biggest obstacle arises from the reluctance to modify European Union PIL and pursuing the unchanged status of the Rome I Regulation, especially its Article 6(2), as an implied objective of CESL. This leads to the fragmentation of a seemingly uniform instrument or "single regime" into 28 regimes with a peculiar legal nature.

This objective may fail if and when national courts or even the CJEU dissect the details of the chosen position of the CESL within current EU private international law and public international law.

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