The Evolution of Global Trade Over the Last Thirty Years

ELVIA ARCELIA
Quintana
Adriano

UNIVERSIDAD NACIONAL
AUTÓNOMA DE MÉXICO

INSTITUTO DE INVESTIGACIONES JURÍDICAS
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THE EVOLUTION OF THE GLOBAL TRADE OVER THE LAST THIRTY YEARS

INTERNATIONAL ACADEMY OF COMMERCIAL AND CONSUMER LAW

ELVIA ARCELIA QUINTANA ADRIANO

Coordinator

UNIVERSIDAD NACIONAL AUTÓNOMA DE MÉXICO

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ORAL LECTURES

CESL AND CISG

Ingeborg SCHWENZER*

SUMMARY: I. *Introduction.* II. *Scope of application.* III. *The Tension Between Certainty and Fairness.* IV. *Amended rules.* V. *Filling the gaps.* VI. *Codifying style and techniques.* VII. *Conclusion.*

I. INTRODUCTION

On 11 October 2011, the European Commission published the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. This Common European Sales Law[1] —CESL— is based on the Draft Common Frame of Reference (DCFR),[2] which in turn drew heavily on the Principles of European Contract Law (PECL).[3] CESL contains provisions on contract formation, contract interpretation including unfair contract terms and —as its core part— obligations and remedies of the parties to a sales contract.[4] Furthermore, provisions on damages and interest, restitution as well as prescription can be found. Thus, the sphere of application of the CESL is more or less identical with the UN Convention on

* Dr. iur. (Freiburg, germany), L.L.M. (Berckeley, USA), Professor for Private Law, University of Basel, Switzerland. The author is deeply indebted to Mr. Phillippe Monnier, MLaw, attorney at law, for his assistance in the preparation of this article. All web pages were the last accessed on March 31st 2012.

[1] The CESL forms Annex I of the Regulation. After the publication of the Proposal, the European authorities received reasoned opinions from the Austrian Federal Council, the Belgian Senate, the German Bundestag and the United Kingdom House of Commons, respectively, objecting to CESL on the grounds that it infringed the subsidiarity principle. The threshold for an automatic review of the draft was, however, not met (*see http://www.ipex.eu/IPEXL-WEB/dossier/dossier.do?code=COD&year=2011&number=0284&appLng=EN*).

[2] Von Bar, C. *et al.* (eds.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*, Sellier European Law Publishers, Munich, 2009.

[3] Principles of European Contract Law (PECL) (1999), available at *http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm.*

[4] For a general overview of CESL *see* D. Staudenmayer, 'Der Kommissionsvorschlag für eine Verordnung zum Gemeinsamen Europäischen Kaufrecht', *NJW*, Vol. 64, 2011, pp. 3491 *et seq.*

2. *Sales of Goods Contracts Defined*

Both instruments govern sales of goods contracts. However, their respective scopes differ substantially.

The CISG does not define the term "goods" itself. Thus, the scope of this notion must be interpreted autonomously. From the very beginning, it has been highly debated whether the sale of software is governed by the CISG or not.[10] The now prevailing view holds that the CISG applies if software is permanently transferred to the buyer, irrespective of the mode in which the software is delivered, *e.g.* via disc or, as usually today, via the internet.[11] Thus, the CISG has been able to easily adjust to ever-changing modern electronic developments.

The CESL, in contrast, still defines goods as "*any tangible movable items*",[12] thus explicitly excluding software. This narrow and rather outdated definition of goods requires that, in addition to "sale of goods", the "supply of digital content" has to be mentioned separately in all relevant provisions.[13]

Another difference relates to so-called mixed contracts. In this respect, the CISG follows a rather pragmatic approach.

According to article 3(2) CISG, the CISG applies to a mixed contract if the supply of labour or other services does not form the preponderant part of the obligations. If the whole contract is governed by the CISG, its provisions also apply to the service part. Thus, a judge or arbitrator does not have to decide whether the fact that the goods do not live up to the contractual requirements results from their own features or from a possible breach of a service obligation.

Again, the approach taken by the CESL is different.[14] It only applies to so-called related services, *i.e.* any service related to the goods or digital con-

Press, Oxford, 2010, article 6, para. 4; *see also* Hesselink, M., "How to Opt into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation", *European Review of Private Law*, Vol. 20, 2012, p. 201.

[10] Schwenzer, I. and Hachem, P., *in* Schwenzer 2010, supra note 9, Art. 1, Para. 18.

[11] *Idem*; see also Kee, C., 'Rethinking the Common Law Definition of Goods', *in* Büchler, A. and Müller-Chen, M. (eds.), *Private Law, national—global— comparative, Festschrift für Ingeborg Schwenzer zum 60. Geburtstag*, Stämpfli, Bern, 2011, pp. 930 *et seq.*

[12] See article 2(h) Regulation.

[13] For the definition of digital content see article 2(j) Regulation; see further Feltkamp, R. and Vanbossele, F., "The Optional Common European Sales Law: Better Buyer's Remedies for Seller's Non-performance in Sales of Goods?", *European Review of Private Law*, Vol. 19, 2011, pp. 879 *et seq.*

[14] See *also* Micklitz, H. W. and Reich, N., "The Commission Proposal for a *Regulation on a Common European Sales Law (CESL)* – Too Broad or Not Broad Enough?", *in* Micklitz, H. W. and Reich, N. (eds.), *The Commission Proposal for a "Regulation on a Common European Sales*

tent such as installation, maintenance, repair or processing, but explicitly excludes training services[15] that ordinarily play an important role in more complex sales contracts on the international level.[16] Furthermore, even if the mixed contract is covered by the CESL, there is a distinct liability scheme for the breach of a service obligation. Whereas liability for breach of the delivery obligation under the CESL is strict, liability for breach of a service obligation depends on fault.[17] This means that the adjudicator faces the often unresolvable task of exactly attributing the consequences of non-conformity to the goods themselves or the services part of the contract.

3. *B2B and B2C Contracts*

In regard to the personal scope, the CISG is pretty straightforward: it is concerned with international B2B sales contracts, B2C transactions are practically excluded.[18]

Again, the approach taken by the CESL is different. The starting point is the cross-border European B2C sales contract, and indeed the whole instrument exudes the underlying policy of consumer protection, which is one of the main goals of unification of private law at the European level. The Explanatory Memorandum explicitly states that the Proposal "*is consistent with the objective of attaining a high level of consumer protection*"[19] The second aim is to help small or medium-sized enterprises (SME) to benefit more from opportunities offered by the internal market.[20] According to article 7 Regulation, the CESL may be used in B2B contracts only if at least one of the parties is a SME.[21] It remains an open question why the CESL, as an opting-in instrument, cannot be chosen by two commercial entities if neither qualifies as

Law (CESL)" – Too Broad or Not Broad Enough?, EUI Working Paper LAW 2012/04, European University Institute, San Domenico di Fiesole, 2012, pp. 12 *et seq.*

15 *See* article 2(m) Regulation; *see also* article 6 Regulation: exclusion of mixed-purpose contracts.

16 *See further* N. Reich, "An Optional Sales Law Instrument for European Business and Consumers?", *in* Micklitz, H. W. and Reich, N., *supra* note 14, 2012, pp. 85 *et seq.*, p. 89: "The scope and content of part V on *Services related to a sales contract* seem to be incomplete, contradictory and will not provide legal certainty of cross-border B2C transactions (...)".

17 Article 148(2) CESL.

18 Article 2(a) CISG; see Schwenzer, I. and Hachem, P., *in* Schwenzer, *supra* note 9, 2010, article 2, paras. 4 *et seq.*

19 P. 6.

20 See Explanatory Memorandum, p. 7.

21 According to Art. 7(2) Regulation, a SME is a trader with less than 250 employees and an annual turnover not exceeding 50 million Euros.

a SME.[22] Furthermore, the CESL seems to assume that, in B2B sales contracts, the SME —like the consumer— is always on the side of the buyer, which certainly is not the case in reality.

4. *Subjects Covered*

As we all know, the CISG is only concerned with the formation of the contract, the rights and duties of the parties and the remedies in case of breach of contract. Issues of limitation of actions are covered by the CISG's sister UN Convention on the Limitation Period in the International Sale of Goods, which, however, has not gained wide approval. There are significant areas not covered by the CISG, especially validity issues.[23]

The CESL, in addition to the areas covered by the CISG and the Limitation Convention, fills some of the open or at least perceived gaps left by the CISG. Apart from the right to withdraw in B2C contracts,[24] it deals with mistake, fraud, threat and exploitation,[25] addresses unfair contract terms,[26] and prolifically regulates pre-contractual information duties.[27] Still, significant areas of general contract law are not covered by the CESL and thus are left to the otherwise applicable domestic law.[28]

III. The Tension Between Certainty and Fairness

One of the major problems each commercial contract law system has to face is the tension between certainty and predictability on the one side and

[22] However, the Member States may open the CESL for other parties than SME; see also Mankowski, P., "Der Vorschlag für ein Gemeinsames Europäisches Kaufrecht (CESL) ", *Internationales Handelsrecht*, Vol. 12, 2012, p. 3; Eidenmüller, H. *et al.*, "Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht", *Juristen Zeitung*, Vol. 67, 2012, pp. 273 *et seq.*; Scottish Law Commission, 'An Optional Common European Sales Law: Advantages and Problems', November 2011, available at *http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf*, p. 88.

[23] Article 4, sentence 2(a) CISG; see in detail Schwenzer, I. and Hachem, P., *in* Schwenzer 2010, supra note 9, article 4, paras. 29 *et seq.*

[24] Articles 40-47 CESL.

[25] Articles 48-57 CESL; see on these issues Martens, A. E., "Die Regelung der Willensmängel im Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht", *Archiv für die civilistische Praxis*, Vol. 211, 2011, pp. 845 *et seq.*

[26] Articles 82-86 CESL.

[27] Articles 13-22 CESL; see De Boeck, A., "B2B Information Duties in the Feasibility Study: Analysis of Article 23", *European Review of Private Law*, Vol. 19, 2011, pp. 790 *et seq.*

[28] For further criticism see Eidenmüller *et al.*, supra note 22, 2012, pp. 271 *et seq.*

fairness on the other side. Shall the parties be bound to what they agreed or shall the adjudicator be granted the power to interfere with their agreement on grounds of fairness and conscionability? Already in 1598, Shakespeare put this question in the centre of his play "The merchant of Venice". Is Antonio bound to his promise of "a pound of flesh" in case of not being able to repay the loan or is this an unfair contract term to be disregarded under the circumstances?[29]

It is one of the most salient features of English commercial law that it strongly favours certainty over fairness whereas many civil law legal systems tend to rely on notions of good faith and fair dealing. It was against this background that in the CISG "*the observance of good faith in international trade*" was only inserted in article 7(1) CISG as one criterion among others to be taken into consideration in interpreting the Convention. However, the drafters of the CISG explicitly decided against any provision imposing a duty of good faith on the parties themselves. Thus, in particular, the German notion of *Treu und Glauben* cannot be applied under the CISG although German courts and authors seem to sometimes disregard this fact.[30] By contrast, the CESL explicitly states that each party has a duty to act in accordance with good faith and fair dealing.[31] Any breach of this duty may not only preclude the breaching party from exercising or relying on a right, remedy or defence which it would otherwise have but may in and of itself give rise to liability for any loss thereby caused to the other party.[32] This far reaching principle is hardly reconcilable with the necessity of certainty and predictability in commercial transactions and thus will certainly not be acceptable at least to most Common Law lawyers.[33]

IV. Amended rules

Let us now turn to some core areas of any sales legislation where the CESL chose to deviate from the CISG.

29 See Scottish Law Commission, *supra* note 22, 2011, p. 106.

30 See Schwenzer I. and Hachem, P., *in* Schwenzer, supra note 9, 2010, Art. 7, Para. 17.

31 Article 2(1) CESL.

32 Article 2(2) CESL.

33 See Scottish Law Commission, supra note 22, 2011, pp. 106 *et seq.*, p. 113; see further Hofmann, N., "Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe", *Pace Int'l L. Rev.*, Vol. 22, 2010, pp. 159 *et seq.*

1. *Non-conformity of the Goods*

The litmus test for any sales law are the rules on non-conformity of the goods.[34]

The CISG offers clear and convincing solutions in this regard which have in many instances proven to yield satisfactory results. Consequently, these provisions have served as a role model for domestic[35] as well as the European legislator.[36] The CISG rules emphasise the importance of the contract being the first and foremost reference point for the conformity of the goods.[37] Only if the parties have not made contractual provisions for any specific features of the goods does the CISG establish subsidiary presumptions to decide whether the goods conform to the contract.[38]

Without any obvious necessity, the CESL has deviated from the convincing concept of the CISG.[39] In particular, it should be noted that deviations were not dictated by consumer protection. Firstly, the CESL does not recognise the important distinction between contractual designation of conformity and the statutory default rule.[40] Instead, it requires the goods to comply with contractual requirements as well as the default criteria for non-conformity,[41] thus relying on a mixed subjective/objective approach.[42] This may well lead to absurd results as goods may be perfectly conforming to contractual requirements but not pass the objective test. Foodstuff that is no longer fit for human consumption may well be sold as animal food.

34 For a comparative overview of the different approaches to non-conformity see Schwenzer, I. *et al.*, *Global Sales and Contract Law*, Oxford University Press, Oxford, 2012, Paras. 31.26 *et seq.*

35 The approach taken by the CISG has been followed by modern and recently modernized legal systems in Central Europe, the Nordic systems as well as Eastern Europe and Central Asia; see Schwenzer *et al.*, supra note 34, 2012, para. 31.45, with further references.

36 In particular, article 2 of the Directive 99/44/EC of the European Parliament and of the Council of 25 May 1999 on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees was based on article 35 CISG, which has thus found its way into all domestic legal systems which have implemented the Directive.

37 See Article 35(1) CISG.

38 See Article 35(2) CISG.

39 See also Eidenmüller *et al.*, supra note 22, 2012, p. 280, according to whom the drafters of CESL should have adopted the provisions of article 35 CISG rather than experimenting with the notion of conformity.

40 This is also evidenced by the very order in article 66 CESL that suggests that the non-mandatory rules of CESL prevail over implied terms of the contract.

41 See Articles 99, 100 CESL; see also Feltkamp and Vanbossele, supra note 13, 2011, pp. 886 *et seq.*

42 Feltkamp and Vanbossele, *idem.*

Goods without a CE label that may not be sold in the EU may perfectly be fit for export to other regions in the world.[43] Furthermore, in addition to the long list of subjective and objective criteria, Art. 100(g) CESL contains a catch-all provision requiring the goods to "*possess such qualities and performance capabilities as the buyer may expect*". How these expectations are to be assessed remains largely obscure.[44]

Both the CISG and the CESL require the goods to be free from any right or claim of a third party including those that are based on industrial or other intellectual property.[45] However, whereas under the CISG it is nowadays unanimously held[46] that any claim by a third party triggers the seller's liability, the CESL limits the seller's liability to cases where the claims are not obviously unfounded.[47]

In a B2B contract both under the CISG and under the CESL, the buyer can only rely on any lack of conformity if it gave notice to the seller after a proper examination of the goods.[48] At the Vienna Conference these provisions were highly debated leading to the well-known compromise that if the buyer has an excuse for not having examined the goods or giving proper notice it may still reduce the price or claim damages except for loss of profit.[49] Under the CESL, instead of offering a better protection to SME buyers —as envisaged— the prerequisites for examination and notice are even higher.[50] Examination must be undertaken within a rigid 14 days from the date of delivery of the goods[51] and there is no exception in case of reasonable excuse. A further change for the worse as regards the position of the buyer is the fact that the notice in any case must reach the seller to become effective[52] whereas under the CISG[53] the seller bears the risk that the notice is lost or delayed in transit.

[43] See for the interplay of the CE mark and conformity of the goods Schwenzer, I., supra note 9, article 35, para. 14.

[44] For similar criticism see Feltkamp and Vanbossele, supra note 13, 2011, p. 887.

[45] See article 42 CISG; article 102 CESL.

[46] See Schwenzer, I., supra note 9, article 41, para. 10, article 42, para. 6.

[47] Article 102(1) CESL; see also Feltkamp and Vanbossele, supra note 13, p. 888.

[48] Articles 38, 39, 43 CISG; Articles 121, 122 CESL.

[49] Article 44 CISG.

[50] Articles 121, 122 CESL; see also Feltkamp and Vanbossele, supra note 13, pp. 895 *et seq.*

[51] Article 121(1) CESL.

[52] Article 10(3) CESL.

[53] Article 27 CISG.

2. *Remedies*

The second core area of any sales law codification is the issue of remedies in case of breach of contract.[54] The CISG and CESL agree on the basic structure of remedies, as they apply the remedy-oriented approach rather than the old Roman cause-oriented approach.[55] Upon closer analysis of the remedies, however, remarkable differences appear.

A. *Specific Performance*

The first remedy to discuss is specific performance.[56] It is well known that the CISG has not bridged the gap between Common Law[57] and Civil Law[58] legal systems concerning the general remedy of specific performance. Instead, it leaves it to the court or arbitral tribunal to decide whether it enters a judgment for specific performance.[59] It has to be emphasised that this compromise has not given rise to difficulties in practice.[60] In accord with continental legal thinking, the CESL, from a systematic perspective, instead seems to envisage specific performance as the primary remedy.[61] Thus, the principal provision for the buyer's right to specific performance does not

[54] See Wilhelm, C., "Die Rechtsbehelfe des Käufers bei Nichterfüllung nach dem Vorschlag der Europäischen Kommission für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht (KOM, 2011, 635 endg.)", *Internationales Handelsrecht*, Vol. 11, 2011, p. 226; Eidenmüller *et al.*, supra note 22, 2012, pp. 280 *et seq.*; Feltkamp and Vanbossele, supra note 13, 2011, pp. 897 *et seq.;* Scottish Law Commission, supra note 22, 2011, pp. 59 *et seq.*; see further, for a comparative overview, Schwenzer *et al.*, *supra* note 34, 2012, Paras. 41.01 *et seq.*

[55] See Samoy, I. *et al.*, "Don't Find Fault, Find a Remedy", *European Review of Private Law*, Vol. 19, 2011, pp. 862 *et seq.*; Schwenzer *et al.*, supra note 34, paras. 41.45 *et seq.*; for a comparison of CISG and CESL regarding the seller's right to cure see Kruisinga, S., "The Seller's Right to Cure in the CISG and the Common European Sales Law", *European Review of Private Law*, Vol. 19, 2011, pp. 911 *et seq.*

[56] See generally Schwenzer *et al.*, supra note 34, paras. 43.01 *et seq.*

[57] *Ibidem*, 43.24 *et seq.*

[58] *Ibidem*, paras. 43.11 *et seq.*

[59] See article 28 CISG: "If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention".

[60] Müller-Chen, M., in Schwenzer, supra note 10, 2010, article 28, para. 4.

[61] Wilhelm, supra note 54, 2011, p. 226; see also Scottish Law Commission 2011 (*supra* note 22), pp. 65 *et seq.*; Samoy & Dang Vu & Jansen, supra note 55, 2011, p. 869; see further, on the DCFR, De Vries, G., "Right to Specific Performance: Is There a Divergence between Civil- and Common-Law Systems and, If So, How Has It Been Bridged in the DCFR?", *European Review of Private Law*, Vol. 17, 2009, pp. 596 *et seq.*; Stürner, M., "Die Grenzen der

contain any truly relevant restrictions.[62] A reasonable restriction of the remedy of specific performance in cases where the creditor should resort to a substitute transaction is not provided in the context of the buyer's right to specific performance, but only for the respective right of the seller in case of breach of contract by the buyer.[63] It appears doubtful whether such an approach is acceptable to any Common Law lawyer.

A special form of specific performance in case of non-conformity of the goods is repair and replacement.[64] The CISG restricts the seller's obligation to replace non-conforming goods to cases where non-conformity amounts to a fundamental breach of contract in order to avoid costly and unreasonable transportation of the goods.[65] This restriction is not found in the CESL, not even for a B2B contract. It may be questionable whether this makes commercial sense between a Lithuanian seller and a Portuguese buyer. It certainly cannot serve as a model on the global scale.

B. *Avoidance of Contract*

In B2B contracts, both the CISG as well as the CESL in principle allow avoidance of contract in case of a fundamental breach of contract supplemented by the so-called *Nachfrist*-principle.[66] In B2C contracts, however, under the CESL the consumer may avoid the contract for any non-conformity unless the lack of conformity is insignificant.[67]

Primärleistungspflicht im Europäischen Vertragsrecht", *European Review of Private Law*, Vol. 19, 2011, pp. 180 *et seq.*

62 See article 110(3) CESL: exclusion of specific performance only where it is impossible or unlawful or where the burden to the seller is disproportionate to the benefit for the buyer; see further Feltkamp and Vanbossele, *supra* note 13, 2011, p. 897. For the general exceptions from specific performance in Civil Law legal systems see Schwenzer *et al.*, supra note 34, paras. 43.20 *et seq.*

63 Article 132(2) CESL.

64 See Feltkamp and Vanbossele, supra note 13, 2011, p. 898; Samoy *et al.*, supra note 55, 2011, p. 869.

65 See article 46(2) CISG; see further Schwenzer *et al.*, supra note 34, paras. 49.15 *et seq.*

66 Buyer: article 49 CISG, articles 114(1), 115 CESL; seller: article 64 CISG, articles 134, 135 CESL; see further Wilhelm, supra note 54, 2011, p. 230; Feltkamp and Vanbossele, supra note 13, 2011, pp. 899 *et seq.*; Schwenzer *et al.*, supra note 34, Paras. 47.112 *et seq.*

67 Article 114(2) CESL; see Eidenmüller *et al.*, supra note 22, 2012, p. 282; Feltkamp and Vanbossele, supra note 13, 2011, p. 901; Wilhelm, supra note 54, 2011, p. 231; see further Scottish Law Commission, supra note 22, 2011, pp. 60 *et seq.*, criticizing that the consumer's right to avoid the contract is too long and too uncertain.

Both sets of rules use an essentially identical definition for the fundamentality of the breach.[68] However, the CESL goes one step further by holding that fundamentality is also given where the breach of contract is of such a nature as to make it clear that the non-performing party's future performance cannot be relied on.[69] Whether such a future breach itself amounts to a fundamental one is immaterial.

C. *Damages*

The rules on damages in the CESL[70] by and large follow those of the CISG.[71] However, the CESL now contains an explicit provision that non-economic loss may only be compensated for as far as it results from pain and suffering. Other non-economic losses are excluded.[72] The CISG, in contrast, does not contain a similar restriction, leaving it to further legal development whether and which non-economic loss may be compensated.[73]

3. *Force Majeure and Hardship*

Both the CISG as well as the CESL provide that the debtor is exempted from liability for damages in case of an impediment beyond its control.[74] The CESL *force majeure* provision can be regarded as being more or less equivalent to that of the CISG. However, the CESL does not discuss *force majeure* in the chapter on damages but rather in a Chapter dealing with "General provisions".[75]

[68] See article 25 CISG; article 87(2)(a) CESL.

[69] Article 87(2)(b) CESL.

[70] Articles 159-165 CESL, supplemented by article 2(c) Regulation; see further Eidenmüller *et al.*, supra note 22, 2012, pp. 282 *et seq.*; Feltkamp and Vanbossele, supra note 13, 2011, p. 903; Wilhelm, supra note 54, 2011, pp. 232 *et seq.*

[71] Articles 74-77 CISG; see generally Schwenzer *et al.*, *supra* note 34, paras. 44.01 *et seq.*

[72] Article 2(c) Regulation; see further Scottish Law Commission, supra note 22, 2011, pp. 64 *et seq.*, criticizing the restriction as a reduction in consumer protection.

[73] See Schwenzer, I., supra note 9, article 74, paras. 18 *et seq.*, para. 39; Schwenzer I. and Hachem, P. "The Scope of the CISG Provisions on Damages", *in* Cunnington, R. and Saidow, D. (eds.), *Contract Damages: Domestic and International Perspectives*, Hart Publishing, Oxford, 2008, p. 100.

[74] Article 79 CISG; article 88(1) CESL; see Wilhelm, *supra* note 54, 2011, pp. 232 *et seq.*; see further Schwenzer *et al.*, *supra* note 34, paras. 45.01 *et seq.*

[75] Chapter 9, articles 87-90 CESL.

Furthermore, it has to be emphasised here once more that, as regards service obligations, the CESL follows the fault-based approach of Roman Law descent. Thus, in these cases, the seller is exempted from liability if there was no fault on its part.

Unlike the CISG, the CESL contains a specific provision on variation or termination by court in case of a change of circumstances commonly referred to as hardship.[76] For various reasons, this provision is not convincing. First, it seems preferable to deal with both *force majeure* and hardship under the same provision as it is done under the CISG.[77] All too often, drawing the line between *force majeure* and hardship is not possible. Most subsequent events do not render performance impossible and thus do not constitute a veritable impediment; they just render performance more onerous for the debtor. The prerequisites as well as the consequences for both cases should be the same. Especially, contrary to what the CESL suggests,[78] there should be no difference between an initial hardship and hardship caused by a change of circumstances subsequent to the conclusion of the contract. Under the CESL, in case of initial hardship, the debtor would have to rescind the contract for mistake. Finally, the consequences of hardship laid down in the CESL are unsatisfactory - at least with regard to sales contracts. The parties' duty to renegotiate[79] as well as a possible adjustment of the contract[80] to the changed circumstances by a court or arbitral tribunal is of practical use only in long-term relationships but usually not in sales contracts. All in all, here again, the results achievable under the CISG are more satisfactory than those under the CESL.[81]

[76] Article 89 CESL; see further Schwenzer *et al.*, supra note 34, paras. 45.10 *et seq.*, 45.76 *et seq.*

[77] The modernised German law of obligations also contains independent rules on impossibility (§ 275 CC) and hardship (§ 313 CC). In particular, the relationship between the provision on impossibility due to performance having become overly onerous for the debtor (§ 275(2) CC) and the provision on adaptation of the contract to changed circumstances rendering performance overly onerous for the debtor (§ 313(1) CC) has now caused considerable debate as regards their delimitation, see Schlechtriem, P. and Schmidt-Kessel, M., *Schuldrecht – Allgemeiner Teil*, 6th ed., Mohr Siebeck, Tübingen, 2005, para. 485.

[78] See article 89(3)(a) CESL: "apply only if: (a) the change of circumstances occurred after the time when the contract was concluded".

[79] Article 89(1) CESL; see further Schwenzer *et al.*, supra note 34, Paras. 45.111 *et seq.*

[80] Schwenzer, *Ibidem*, Paras. 45.113 *et seq.*

[81] See for the solution offered under the CISG Schwenzer, I. *in* Schwenzer 2010 (supra note 9), Art. 79, Para. 54; I. Schwenzer, 'Force Majeure and Hardship in International Sales Contracts', *Victoria University of Wellington Law Review*, Vol. 39, 2009, pp. 721 *et seq.*, p. 724; Schwenzer, I., 'Die clausula und das CISG', *in* Wiegand, W. *et al.* (Eds.), *Tradition mit Weitsicht – Festschrift für Eugen Bucher zum 80. Geburtstag*, pp. 736 *et seq.*; Schwenzer I. and Hachem, P.

4. *Interplay of Different Remedies*

The relationship between different remedies is of great importance.[82] As has been pointed out, remedies laid down under the CESL just as under the CISG in the special part relating to seller's and buyer's obligations are subject to certain restrictions, such as the examination and notice requirement,[83] the fundamentality of the breach in case of avoidance[84] or the foreseeability test in case of damages.[85] Under the CESL, however, other remedies exist that may conflict with these remedies and their underlying concepts.[86] Most notably, non-conformity of the goods may give rise to other remedies. Certainly, any buyer of non-conforming goods is mistaken as to the goods conforming to the contract.[87] Thus, if the prerequisites of Art. 48 CESL are met, the buyer may avoid the contract notwithstanding whether for example it gave timely notice of the non-conformity or whether the breach amounted to a fundamental one.[88] Article 57 CESL explicitly provides that a party may pursue either one of the possible remedies.[89] Further problems arise if the seller has failed to comply with any of its pre-contractual information duties which presumably usually will be alleged by buyers in case of non-conformity of the goods. This not only triggers the remedy of avoidance due to mistake[90] but furthermore entails liability for any loss caused to the other party by such failure which again may be claimed independently from and additionally to any other remedies for breach of contract.[91] Again, this stands in sharp contrast to the solution found under the CISG. As the CISG

'The CISG – Successes and Pitfalls', *American Journal of Comparative Law*, Vol. 57, 2009, pp. 474, 475.

82 See on the lacking hierarchy of remedies under CESL Samoy & Dang Vu & Jansen 2011 (supra note 55), pp. 869 *et seq.*; Feltkamp & Vanbossele 2011 (*supra* note 13), pp. 891 *et seq.*; *see generally* Schwenzer & Hachem & Kee 2012 (supra note 34), Paras. 49.01 *et seq.*

83 Arts. 38, 39 CISG; Arts. 121 *et seq.* CESL.

84 Arts. 25, 49(1)(a) CISG; Arts. 87(2), 114(1) CESL.

85 Art. 74 CISG; Art. 161 CESL.

86 For general criticism on the lack of structure and coherence in the CESL's system of remedies see Samoy & Dang Vu & Jansen 2011 (supra note 55), pp. 861 *et seq.*

87 See for a comparative overview Schwenzer & Hachem & Kee 2012 (*supra* note 34), Paras. 49.15 *et seq.*

88 The CESL thus follows the position found in the PECL and the DCFR; *see* Schwenzer & Hachem & Kee 2012 (supra note 34), Para. 49.24.

89 For an overview of the different approaches that can be taken in this respect *see* Schwenzer & Hachem & Kee 2012 (supra note 34), Paras. 49.11 *et seq.*

90 Art. 48(1)(b)(ii) CESL.

91 Art. 29(1),(3) CESL.

itself governs neither mistake nor pre-contractual duties, it is a question of the possible relationship between CISG remedies and concurrent domestic remedies. In case law[92] and doctrine,[93] it is now unanimously held that the CISG pre-empts all concurrent domestic remedies in this field.

V. Filling the Gaps

In order to evaluate the appropriateness of the CESL, it is useful to also have a look at those areas of sales law that do not have a counterpart in the CISG. We shall now discuss how the CESL has filled these gaps. Naturally, only a few select subjects can be discussed here.

1. *Pre-contractual Duties and Liability*

The CISG, in principle, does not contain any rules on pre-contractual duties; a proposition to insert a provision on *culpa in contrahendo* was even rejected at the Vienna Conference.[94]

In contrast, the CESL has devoted a whole chapter to pre-contractual information duties.[95] First of all, a variety of information duties are established which apply to B2C transactions only.[96] But also in a B2B contract, the seller has to give any information concerning the main characteristics of the goods which it has or can be expected to have and which would be contrary to good faith and fair dealing not to disclose to the other party.[97] In B2B contracts, such vague and extensive information duties seem to be

[92] *Cf.* for France: Cass. civ. 1re, 14 May 1996, *Jurisclasseur Périodique, Édition Générale*, Vol. 71, 1997, No. I-4009; for Austria: OGH, 13 April 2000, CISG-online 576, with a note by P. Schlechtriem, *IPRax*, Vol. 21, 2001, pp. 161 *et seq.*; *see further* the more recent US case *Electrocraft Arkansas, Inc. v. Super Electric Motors, Ltd.*, US Dist. Ct. E.D. Ark., 23 December 2009, CISG-online 2045.

[93] I. Schwenzer, *in* Schwenzer 2010 (*supra* note 9), Art. 35, Paras. 46 *et seq.*, Para. 48 with references.

[94] See U.G. Schroeter, *in* Schwenzer 2010 (*supra* note 9), Intro to Arts. 14-24, Paras. 54 *et seq.*

[95] Chapter 2, Arts. 13-29 CESL; see further C. Cravetto & B. Pasa, 'The 'Non-sense' of Pre-contractual Information Duties in Case of Non-concluded Contracts', *European Review of Private Law*, Vol. 19, 2011, pp. 761 *et seq.*; Eidenmüller *et al.* 2012 (supra note 22), pp. 276 *et seq.*; in regard to the Feasibility Study *see* H. Beale & G. Howells, 'Pre-contractual Information Duties in the Optional Instrument', *in* R. Schulze & J. Stuyck, *Towards a European Contract Law*, Sellier European Law Publishers, Munich, 2011, pp. 51 *et seq.*

[96] Arts. 13-22 CESL.

[97] Art. 23(1) CESL.

inappropriate and must necessarily lead to legal uncertainty that cannot be tolerated in international trade.[98] Further pre-contractual information duties are established for contracts concluded by electronic means, especially via websites.[99]

It has already been pointed out that the possibility to concurrently rely on remedies for breach of pre-contractual information duties is particularly problematic.

2. *Non-negotiated Terms*

The use of non-negotiated terms is, especially in international sales contracts, of great practical importance.

The CISG does not even mention this notion. Now, however, due to more than twenty years of practical experience, it has been possible to carve out the essential solutions pertaining to non-negotiated terms.[100]

By contrast, the CESL even distinguishes between non-negotiated terms and standard contract terms.[101] For the latter it practically copies the German Civil Code[102] and defines standard terms as non-negotiated terms which have been formulated in advance for several transactions involving different parties.[103] The necessity for such a subtle distinction at best remains obscure.[104] The dualism of two distinct concepts in this regard is unknown to any legal system, be it on a domestic or on the European level.[105]

98 *See* S. Whittaker, 'The 'Draft Common Frame of Reference' – An Assessment', Report commissioned by the Ministry of Justice, United Kingdom, Oxford, 2008, pp. 100 *et seq.*

99 Art. 24 CESL, applying to B2C and B2B contracts; Art. 25 CESL, unclear whether (3) may also be applied in B2B transactions.

100 *See* U.G. Schroeter, *in* Schwenzer 2010 (*supra* note 9), Intro to Arts. 14-24, Paras. 5 *et seq.*, Art. 14, Paras. 32 *et seq.*

101 Eidenmüller *et al.* 2012 (*supra* note 22), pp. 278 *et seq.*; H.-W. Micklitz, 'An Optional Law on Off-premises, Distance Sales and Unfair Terms for European Business and Consumers?', *in* Micklitz & Reich 2012 (*supra* note 14), pp. 58 *et seq.*; in regard to the Feasibility Study's provisions on unfairness and non-negotiated terms *see* D. Mazeaud, 'Unfairness and Non-Negotiated Terms', *in* Schulze & Stuyck 2011 (*supra* note 95), pp. 123 *et seq.*; M.W. Hesselink, 'Unfair Terms in Contracts Between Businesses', *in* Schulze & Stuyck 2011 (*supra* note 95), pp. 131 *et seq.*

102 § 305(1) sentences 1, 3 CC.

103 Art. 2(d) Regulation.

104 Art. 7(3) CESL seems to imply the presumption that terms in standard contract terms are non-negotiated terms.

105 See Art. 3 Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, which dispenses with the requirement that the terms have been drafted for use in more than one transaction.

The CESL contains a specific regime for non-negotiated terms and standard terms as regards the incorporation of such terms into the contract as well as the judicial control of unfair terms.

a) *Incorporation*

On the level of incorporation, problems arise where non-negotiated terms are to be incorporated by reference. The CESL contents itself with the vague formula that the party supplying the terms must take reasonable steps to draw the other party's attention to them.[106] It remains an open question whether, especially in B2B contracts, a mere reference to standard terms is enough. Furthermore, as the requirement of transparency does not apply in the B2B context,[107] it is unclear what requirements as to language *etc.* exist.

Further difficulties arise with regard to the battle of forms. The provision dealing with this issue only applies to standard terms but not to mere non-negotiated terms.[108] It is hard to see the underlying ratio of this approach. Regardless of this fact, this provision in essence does not add much to what is the prevailing opinion under the CISG.[109]

b) *Substantive Control*

Whereas under the CISG the substantive control of (all) contract terms in principle is a question of validity and thus left to the applicable domestic law,[110] the CESL contains specific provisions for this matter.[111] As regards B2C contracts, in addition to a general clause[112] circumscribing unfairness,

[106] Art. 70(1) CESL.

[107] Art. 82 CESL only refers to B2C contracts.

[108] See the heading and wording of Art. 39 CESL.

[109] Under the Convention, the dispute has narrowed down to two approaches: the so-called last-shot-doctrine and the so-called knock-out-doctrine. Under the first doctrine, the non-negotiated terms which have been sent last become part of the contract. Under the second doctrine, conflicting terms are stricken out and replaced by the default rule. This second view has come to be the prevailing view under the CISG, see Cass. civ. 1re, 16 July 1998, CISG-online 344; BGH, 9 January 2002, CISG-online 651; U.G. Schroeter, *in* Schwenzer 2010 (supra note 9), Art. 19, Para. 36 with numerous references also for domestic laws and uniform projects.

[110] See Art. 4 sentence 2(a) CISG; I. Schwenzer & P. Hachem, *in* Schwenzer 2010 (supra note 9), Art. 4, Para. 30.

[111] For criticism see Eidenmüller *et al.* 2012 (supra note 22), pp. 278 *et seq.*

[112] Art. 83 CESL.

the CESL establishes a so-called black list of contract terms which are always unfair with 11 items[113] and a so-called grey list of terms which are presumed to be unfair with 23 items.[114] As regards B2B contracts, the CESL contains a general clause only.[115] This provision slightly deviates from the concept of unfairness in B2C contracts and only applies to non-negotiated terms.[116] According to this definition, a non-negotiated term is unfair if it grossly deviates from good commercial practice contrary to good faith and fair dealing. This gives rise to scepticism from two perspectives: first, this concept is extremely vague and does not give any orientation on how to draft fair contract terms. Second, this provision insinuates that, in a B2B transaction, an individually negotiated term may never be regarded as being unfair; a solution that would significantly lag behind any domestic and international standard for a control of unfair terms even in B2B contracts.[117]

3. *Interest*

A last lacuna under the CISG which is of great practical importance must be addressed here. Although the CISG provides that interest is due on any sum in arrears,[118] it does not state the applicable interest rate.[119] This has proven to be a real obstacle to achieving uniformity. The CESL contains six provisions on interest on late payments.[120] In essence, it links the interest rate to the one applied by the European Central Bank which is adjusted every six months, or an equivalent rate set by a national central bank.[121] Two percentage points are added to this rate for any delayed payment;[122] eight percentage points are added where a trader delays the payment of the purchase price.[123] All in all, this solution may meet with approval. Still,

[113] Art. 84 CESL.

[114] Art. 85 CESL; see further Micklitz 2012 (supra note 101), pp. 62 *et seq.*

[115] Art. 86 CESL; see Eidenmüller *et al.* 2012 (supra note 22), pp. 278 *et seq.*

[116] Art. 86 CESL.

[117] See Eidenmüller *et al.* 2012 (*supra* note 22), pp. 278 *et seq.*, also voicing criticism.

[118] Art. 78 CISG.

[119] See K. Bacher, *in* Schwenzer 2010 (supra note 9), Art. 78, Para. 2 with references.

[120] Arts. 166-171 CESL. See on the provisions of the DCFR A. Fötschl, 'Zinsen auf ausservertragliche Geldforderungen im Rechtsvergleich und eine Analyse der Zinsnormen des Draft Common Frame of Reference (DCFR)', *European Review of Private Law*, Vol. 17, 2009, pp. 106 *et seq.*; see further Eidenmüller *et al.* 2012 (supra note 22), pp. 283 *et seq.*

[121] Art. 166(2) CESL.

[122] Art. 166(2) CESL.

[123] Art. 168(1)(5) CESL.

two points deserve mentioning. First, there is an explicit provision allowing for compensation for recovery costs, be it in the form of a lump sum of 40 Euros or as damages if the recovery costs exceed this sum.[124] Having special regard to the international discussion whether pre-trial attorney's fees should be compensated for,[125] this provision seems highly problematic. Furthermore, all rules on interest are mandatory[126] which heavily impairs freedom of contract in this area.[127]

VI. Codifying style and techniques

As concerns the different codifying style and techniques of the CISG and the CESL, one is first struck by the sheer length of the CESL compared to the relatively short CISG.[128] This is partly due to the approach taken towards definitions. Under the CISG, definitions are a rare exception. Their absence has not led to any problems. Contrary to the CISG, the Regulation itself contains a long list of definitions.[129] While it is laudable that the drafters have attempted to achieve a common understanding of legal terms, it is hardly understandable why the text of the CESL again is packed with sometimes repetitive and sometimes further definitions.[130]

[124] Art. 169 CESL.

[125] *Zapata Hermanons Sucessores, S.A. v. Hearthside Baking Company, Inc.*, US Ct. App. (7th Cir.), 19 November 2002, CISG-online 684; see further Schwenzer & Hachem & Kee 2012 (supra note 34), Paras. 44.166 *et seq.*; I. Schwenzer, *in* Schwenzer 2010 (supra note 9), Art. 74, Paras. 28 *et seq.*; CISG AC Opinion No. 6, 'Calculation of Damages under CISG Article 74', Rapporteur J. Gotanda, 2006, available at *http://www.cisgac.com/default.php?ipkCat=128&ifkCat=148&sid=148*, Comments 5.1 *et seq.*

[126] Art. 171 CESL. There seems to be a contradiction between Art. 170 CESL that deals with unfair terms relating to interest and Art. 171 CESL that prohibits any deviation from the statutory scheme.

[127] *See also* Eidenmüller *et al.* 2012 (supra note 22), pp. 283 *et seq.*

[128] Harsh criticism from U. Huber, 'Modellregeln für ein Europäisches Kaufrecht', *ZEuP*, Vol. 16, 2008, p. 742: "The provisions on sales law have to be completely reformulated. [...] The reader should not be given the impression that the drafters think it to be slow-witted". See also Eidenmüller *et al.*, 'Der Gemeinsame Referenzrahmen für das Europäische Privatrecht - Wertungsfragen und Kodifikationsprobleme', *Juristen Zeitung*, Vol. 63, 2008, p. 549: "Reading the DCFR is tiring, because so much of its content is superfluous and because it contains numerous repetitions".

[129] Art. 2 Regulation.

[130] See for example Art. 7(1) CESL in addition to Art. 2(d) Regulation. See also Eidenmüller *et al.* 2012 (supra note 22), p. 272, with further examples of repetitive clauses.

The sheer length of the CESL does not, however, contribute to clarity.[131] Although, in comparison to the DCFR, the CESL has been shortened considerably, the attempt to include as many scenarios as possible into the wording of the CESL has considerably inflated the text. This prolixity, however, has not prevented the drafters from an exorbitant[132] use of general clauses. The CISG, although using much less general clauses, already has been criticized for its vagueness.[133] The CESL, from this viewpoint, will hardly be acceptable,[134] especially to Common Law lawyers.[135]

Finally, it is regrettable that the CESL does not use the same terminology as the CISG.[136] The drafters of the CISG endeavoured to depart from domestic legal concepts, instead seeking an independent legal language. Indeed, to a large extent, they succeeded. The CESL tries to reinvent the wheel by changing terminology that for almost thirty years now has become the *lingua franca* of international sales law. A prominent example, which is also crucial for trade practice, is the replacement of the term 'avoidance for breach of contract' used by the CISG with the term 'termination' in the CESL. The fact that the very term avoidance is used by the CESL in the context of mistake is hardly helpful to ease communication.[137]

VII. Conclusion

The CESL, as it has been published recently, is hardly an improvement to the CISG that is now in force in 23 states out of the 27 European Union

[131] See Eidenmüller *et al.* 2008 (supra note 128), p. 549; Feltkamp & Vanbossele 2011 (supra note 13), p. 905; Huber 2008 (supra note 128), p. 742.

[132] See, in regard to the DCFR, Eidenmüller *et al.* 2008 (supra note 128), p. 536, who provide an impressive account of the excessive use of general clauses in the DCFR; see further Feltkamp & Vanbossele 2011 (supra note 13), p. 905, voicing concern that the use of open-end clauses in CESL will not lead to a sufficient level of legal certainty.

[133] Against this criticism Schwenzer & Hachem 2009 (supra note 81), p. 467.

[134] *See* Feltkamp & Vanbossele 2011 (supra note 13), p. 905, according to whom the CESL is "not ripe for implementation".

[135] *See* for the concerns raised in the United Kingdom the Report issued by the European Union Committee of the House of Lords, *European Contract Law: The Draft Common Frame of Reference - Report with Evidence*, London, House of Lords, Stationary Office, 2009, Paras. 31 *et seq.*

[136] For criticism regarding the wording of the German version of CESL see Eidenmüller *et al.* 2012 (supra note 22), p. 272.

[137] We are aware that PICC and PECL follow the same terminology as the DCFR. However, both sets of rules do not contain specific provisions on sales law and already their departure from the language of the CISG is most unfortunate.

member states.[138] It has been shown that in many areas the differences cannot satisfy the needs of international trade.[139] Many of these changes were highly inspired by the German Civil Code and its underlying 19th century principles as well as a strong desire for consumer protection, both of which do not provide an adequate framework for B2B transactions.[140] This is especially true for the abundant number of general clauses and vague terms.[141] The recurrently emphasized principle of good faith certainly will not be regarded with favour by anyone coming from a Common Law country and does not add much to clarity and predictability - one of the principal necessities in international trade. But this is not at all due to a stronger protection of commercial buyers under the CESL as alleged by the aim of the Regulation. Instead, as has been shown, there are several instances where —with more clarity— the CISG offers buyers better protection than the CESL.[142]

All in all, the CESL does not provide a viable alternative to the CISG.[143] Practice needs a simple uniform law for all international and domestic sales contracts. This is why many modern legislators, especially in Eastern Europe, modelled their domestic sales law according to the CISG.[144] The CESL being only an optional instrument on the European level, it is —at the very

[138] Ireland, Malta, Portugal and the United Kingdom have not ratified the Convention. A continuously updated overview of the Contracting States can be found at *www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.*

[139] For similar criticism already on the DCFR see Basedow, J., 'Kodifikationsrausch und kollidierende Konzepte -- Notizen zu Marktbezug, Freiheit und System im Draft Common Frame of Reference', *ZEuP*, Vol. 16, 2008, pp. 673 *et seq.*; see further K. Riesenhuber, 'Information über die Verwendung des Gemeinsamen Europäischen Kaufrechts', *Zeitschrift für Gemeinschaftsprivatrecht*, Vol. 9, 2012, p. 5, raising the question whether CESL can achieve its goal of harmonization.

[140] For similar criticism see also Micklitz & Reich 2012 (supra note 14), p. 31, who conclude that the CESL should be limited to B2C transactions, thus excluding B2B contracting from its scope of application.

[141] See, in regard to the DCFR, L. Antoniolli & F. Fiorentini & J. Gordley, 'A Case-based Assessment of the Draft Common Frame of Reference', *Am. J. Comp. L.*, Vol. 58, 2010, p. 351.

[142] See the references to questions of notice, obviously unfounded claims, seller's general right to cure, non-economic loss etc.

[143] See Eidenmüller *et al.* 2012 (*supra* note 22), p. 285, who come to the same conclusion; see further Scottish Law Commission 2011 (*supra* note 22), p. 102.

[144] See Schlechtriem, P., '25 Years of the CISG: An International lingua franca for Drafting Uniform Laws, Legal Principles, Domestic Legislation and Transnational Contracts', in Flechtner, H. *et al.* (Eds.), *Drafting Contracts Under the CISG*, Oxford University Press, Oxford, 2008, pp. 167, 174, 177; Zoll, F., 'The Impact of CISG on Polish Law', *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 71, 2007, pp. 81 *et seq.*

least— doubtful whether any sensible trader will opt for it.[145] In essence, this would mean that sellers and buyers would need to adapt their contracts to three different situations: domestic, European and global. Furthermore, the experiences made with the PICC[146] clearly show that parties do not make use of optional instruments in their choice of law clauses.[147] Whereas about 80% of disputes resolved under the auspices of the ICC contain a choice of law clause, opting-in instruments such as the PICC are chosen in only 0.8% of these contracts, although they may be well appropriate to supplement the CISG.[148] It seems all the more improbable that parties would opt out of the CISG and into the CESL which in itself would have to be supplemented by domestic law.

It is regrettable that the European Union chose such a *Sonderweg* instead of maintaining its leading position in the development of the CISG and raising its voice in the global concert. With the CISG becoming more and more important on the global scale, it is important that any harmonisation or unification of laws in Europe ensures that the CISG remains untouched. Hopefully, however, UNCITRAL will take the lead and develop a set of rules of general contract law supplementing the CISG and thus filling the still existing gaps. Such a global contract law should be modelled on the PICC and the PECL, but certainly not on the CESL.

[145] Lando, O., 'Comments and Questions Relating to the European Commission's Proposal for a Regulation on a Common European Sales Law', *European Review of Private Law*, Vol. 19, 2011, p. 720; *see further* C. Herresthal, 'Ein europäisches Vertragsrecht als Optionales Instrument', *EuZW*, Vol. 22, 2011, p. 8.

[146] UNIDROIT Principles of International Commercial Contracts; *see* the newest version of the PICC published in 2010, available at *http://www.unidroit.org/english/principles/contracts/principles2010/blackletter2010-english.pdf*.

[147] Mankowski, P., 'CFR und Rechtswahl', *in* M. Schmidt-Kessel (Ed.), *Der Gemeinsame Referenzrahmen - Entstehung, Inhalte, Anwendung*, Sellier European Law Publishers, Munich, 2009, p. 401; Lando 2011 (supra note 145), p. 720.

[148] Mankowski 2009 (supra note 147), p. 401.