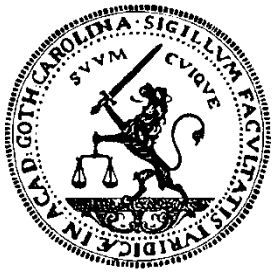

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Clash and Collide

Conflict of Law Issues if the Common European Sales Law Enters Into Force

JURM02 Graduate Thesis

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Contents

Summary

In October 2011, the Commission presented a proposal for a *Common European Sales Law* (CESL), an optional regulatory framework available to both consumers and professional traders within the EU. The objective of the proposal is to facilitate engagement in cross-border commerce for consumers and small traders. All provisions relevant for an international transaction are included, as well as a complete set of consumer protection rules.

If the CESL becomes adopted, it will enter into force in the complex area of international trade law. Here, several frameworks similar to the CESL already exist. The CISG, the PECL, the PICC and the DCFR are some examples. However, this type of transaction is mainly covered by the contracting parties' domestic laws. Whenever more than one domestic law applies, conflict rules are used to decide which one is applicable. Within the EU, the Rome I Regulation and the Rome II Regulation are the main regulations dealing with conflict.

In order for the CESL to function within the area of private international law, the proposal must address both current conflict rules and substantive provisions with which it may collide. Although this has allegedly been achieved with the CESL, critics have not been satisfied, claiming that this lack of clarity would result in clashes of conflicting laws if the CESL were to be adopted.

In this thesis, the following areas have been examined: current EU conflict rules, substantive provisions similar to the CESL, the CESL proposal and the three most debated conflict issues regarding the CESL. The following can thus be concluded regarding the most central conflict of law issues expected to arise if the CESL enters into force:

Regarding the relationship between the CESL and current conflict rules, it can be stated that the CESL applies via the Rome Regulations or other conflict rules that apply. This application will create two main conflict issues. The *first* is if a third state becomes involved in a situation where the CESL applies, the parties' choice to use the CESL will risk becoming void. This is how private international law is structured. The CESL is thereby not fully compliant with current conflict rules. The *second* problem is the uncertainty regarding how the CESL relates to different mandatory provisions in the EU. In the Rome Regulations, these mandatory provisions are stated as superior to the law that otherwise applies to situation, however, this is not stated in the CESL. Nevertheless, the CESL declares that the Rome Regulations should apply within its scope. Here, the proposal contradicts itself.

Concerning the CESL and similar substantive provisions, it is evident that there will be relatively little incompatibility if the CESL enters into force. The reason for this is that the majority of these provisions are *optional*. Therefore, it does not matter if they have the same scope of application as the CESL nor contain the same rules. No conflicts will occur as long as the parties do not actively opt-in to these substantive rules. The only substantive law likely to cause conflicts with the CESL is the CISG. The main issue in the relationship between the CESL and CISG is the declaration in the CESL stating that whenever the CESL applies, the CISG no longer does. This opt-out of the CISG has been argued to be invalid. If it were to indeed be invalid, the question would be as to which framework would be superior. However, if the opt-out provision is *valid* the question is rather as to what extent the CISG is eliminated.

From a wider perspective, it can be concluded that several conflict of law issues are likely occur if the CESL enters into force. Many suggestions have been presented in the academic discourse on how to solve them. Several alterations could be made to the CESL in order to minimise the creation of conflict issues. However, conflicts will most likely still occur. This is unavoidable when adding legislation to an already well-regulated and highly complex area of law. The question is therefore whether the benefits of adopting the CESL will outweigh the conflict issues its adoption will create. The answer to this is most likely negative.

Sammanfattning

I oktober 2011 presenterade Europeiska kommissionen förslag till en ny gemensam europeisk köplag, *Common European Sales Law* (CESL). Lagen är tänkt att frivilligt kunna användas av konsumenter och mindre näringsidkare när de handlar över nationsgränserna. Målsättningen med CESL är att reglera de flesta tänkbara situationer som kan uppkomma vid ett internationellt köp samt innehålla alla nödvändiga konsumentskyddsregler.

Om CESL träder i kraft kommer den att bli en del av den internationella handelsrätten. Inom rättsområdet finns redan ett flertal internationella regelverk som liknar CESL, till exempel CISG, PECL, PICC och DCFR. Det är dock i huvudsak avtalsparternas nationella lagar som reglerar ett gränsöverskridande köp. När flera nationella lagar är tillämpliga samtidigt måste lagvalsregler bestämma vilken som ska gälla. Inom EU är Rom I- och Rom II-förordningen de centrala lagvalsreglerna.

För att CESL ska kunna vara kompatibel med den internationella privaträtten måste lagen tydligt ange hur den ska förhålla sig dels till nuvarande lagvalsregler, dels till materiella bestämmelser som den riskerar att kollidera med. Även om dessa förhållanden har angivits i CESL, är många kritiska till redogörelsen och hävdar att oklarheter kommer att skapa lagkonflikter om CESL antas.

I denna uppsats har följande undersökts: nuvarande lagvalsregler i EU, materiella bestämmelser som riskerar att kollidera med CESL, förslaget om CESL samt de tre mest omdebatterade potentiella lagkonflikterna avseende CESL. Mot denna bakgrund kan följande konstateras om vilka som är de mest centrala lagkonflikterna som kan uppstå om CESL träder i kraft:

Gällande relationen mellan CESL och nuvarande lagvalsregler kan det fastställas att CESL tillämpas genom lagvalsregler, främst Rom I-förordningen. Denna tillämpning kommer främst att skapa två problem gällande lagkonflikter. Det *första* problemet är om ett icke EU-lands lag blir tillämplig, på grund av lagvalsregler, riskerar avtalsparternas val av CESL att bli ogiltigt. Utfallet beror på de internationella privaträttsliga regler som finns idag och visar att CESL inte är fullt kompatibel med nuvarande lagvalsbestämmelser. Det *andra* problemet uppstår i och med oklarheten hur CESL förhåller sig till diverse tvingande regler inom EU. Rom I- och Rom II-förordningen anger att tvingande regler har företräde framför den lag som förordningarna utser som gällande, men det anser inte CESL. Trots detta anger CESL att Rom-förordningarnas bestämmelser gäller fullt ut inom CESL:s tillämpningsområde, vilket är motsägelsefullt.

Beträffande CESL och materiella bestämmelser som förslaget riskerar att kollidera med, kan det konstateras att de flesta av dessa bestämmelser inte kommer att orsaka lagkonflikter med CESL. Anledningen är att de är

valbara och därmed endast tillämpliga samtidigt som CESL om parterna gjort ett aktivt val att använda dem. Det spelar således ingen roll om de materiella bestämmelserna har samma innehåll eller samma tillämpningsområde som CESL. De kommer inte att kollidera med CESL så länge parterna inte tillämpar dem. Det enda materiella regelverk som förutspås kollidera med CESL är CISG, eftersom CISG tillämpas automatiskt. Problemet är att CESL anger att så fort lagen tillämpas, är CISG inte längre tillämplig. Ståndpunkten har kriterats i den juridiska debatten för att vara ogiltig. Även om den skulle vara giltig, kvarstår frågor om i vilken utsträckning CISG blir bortvald. Lagkonflikter kommer med andra ord att uppstå *oavsett* om CESL:s bestämmelse om CISG är giltig eller inte.

Det kan konstateras att flertalet lagkonflikter sannolikt kommer att uppstå om CESL antas. Många förslag har presenterats i den juridiska debatten om hur dessa konflikter skulle kunna lösas, men troligen kommer de aldrig att kunna lösas fullt ut. Det internationella rättsområde som CESL vill verka inom är alltför komplicerat. Frågan blir därmed om fördelarna med att anta CESL kommer överväga nackdelarna, såsom att lagkonflikter kommer uppstå. Troligtvis kommer nackdelarna att överväga.

Preface

I en av källorna[1] till denna uppsats skriver författaren att en anledning till att genomföra förslaget om den gemensamma europeiska köplagen CESL (och enligt honom en av få) är för att blivande jurister ska få något att studera. Jag läste detta långt efter att jag påbörjade mitt arbete och kan därmed konstatera att jag gick på det. Men samtidigt, så fel han hade! Förslaget kan sysselsätta en juriststudent långt tidigare. CESL har ju inte trätt i kraft ännu.

Jag vill börja med att rikta ett stort tack till min handledare Michael Bogdan som bidragit med idé om ämnesval och vägledning i samband med min uppsats. Därefter vill jag tacka mina föräldrar Ulla och Anders för ert engagemang, stöd och tålamod under alla mina terminer som student! Det är nästan så att ni förtjänar en juristexamen, åtminstone en eloge för att ni alltid orkat lyssna på allt mitt prat!

Tack alla mina vänner jag lärt känna i Lund, det är ni som gjort min studietid fantastisk! När jag tänker tillbaka på min Lundatid kan jag inte komma på en enda av de långa pluggdagarna, även om jag på något sätt vet att de har existerat. Jag tänker bara på alla gånger vi på vårkanten suttit i solen på Juridicums trappa, druckit kaffe, ätit muffins och skrattat oss dubbelvikta åt någon intern egenhet. Sist men inte minst, tack till Chris och Nathan som hjälpt mig med språket i denna uppsats!

Lund, den 6 januari 2014

Therese Quant

I would like to thank my supervisor Michael Bogdan, my parents Ulla and Anders and all my amazing friends that I got to know here in Lund! Also, thanks to Chris and Nathan for your help with this thesis.

[1] Meyer, s. 404-406.

Abbreviations

B2B	Business to Business
B2C	Business to Consumer
B2SME	Business to Small or medium-sized enterprise
CECL	The Commission on European Contract Law
CESL	The Common European Sales Law
CFR	Common Frame of Reference
CISG	The United Nations Convention on Contracts for the International Sale of Goods
The Commission	The European Commission
The Council	The European Council
DCFR	Draft Common Frame of References
EC	The European Community
EEC	The European Economic Community
EU	The European Union
The Parliament	The European Parliament
PECL	Principles of European Contract Law
PICC	Principles of International Commercial Contracts
SGECC	The Study Group on a European Civil Code
SME	Small or medium-sized enterprise
TFEU	Treaty on the Functioning of the European Union
UNCITRAL	The United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law

1 Introduction

1.1 Background

Surveys[2] conducted by the EU reveal that only one in ten traders in the European Union engage in cross-border trade within the common market. The surveys also affirm that out of *all* obstacles related to cross-border trade, contract law-related issues are viewed as one of the major barriers. Lesser concerns include tax regulations, additional costs, language and culture barriers and administrative requirements as well as difficulties related to delivery of goods. [3] The EU has previously attempted to facilitate cross-border trade using its legislative powers. They have, *inter alia*, tried to harmonize private international laws across member states and create directives to ensure a more uniform standard of rights connected to transactions, in order to facilitate transnational trade. [4] Despite these efforts, the issue still remains; the Union comprises 28[5] *different* contract laws. [6]

Over the course of the last few years, trans-border commerce has grown within the common market. This development is mainly due to the increase in trade activity via the Internet. This change has resulted in a greater number of consumers engaging in cross-border trade, a group often *less* competent than professional traders in handling differences in domestic contract laws. Often these consumers are not even aware of the provisions granted by the laws of their home state. [7] Discussions regarding the creation of a common European sales law have prospered in the EU for a long time. Subsequent to such recent developments, in 2011 the Commission presented a proposal for a framework intended to function as a set of contract rules usable for both traders and consumers. The framework was named *the Common European Sales Law* (CESL). [8]

Critics maintain that enforcing legislation as an alternative to 28 domestic laws *and* international provisions regarding trade will result in problems with private international law. This is because law conflict issues are susceptible to appear whenever there is more than one body of law applicable. However, the Commission seems not to share this concern. [9]

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[2] Eurobarometers 320 on European contract law in business-to-business transactions of 2011 and Eurobarometer 321 on European contract law in consumer transactions of 2011.
[3] The CESL, p. 2.
[4] See further chapter 2 and chapter 3.3.
[5] This is the number of EU member states since Croatia joined in 2013. See all: http://europa.eu/about-eu/countries/member-countries/ (2013-12-08).
[6] Eidenmuller (2013), p. 8.
[7] The CESL, recital 17; DiMatteo, p. 226.
[8] See further regarding the CESL and how it has developed in chapter 4.1-4.3.
[9] Mak, p. 328. See further chapter 5.

1.2 Purpose and question formulations

The purpose of this thesis is to examine and present conflict of law issues expected to arise if the CESL enters into force. The focus is to provide an overview, and to examine further into, the potential problems already presented in the legal-academic discourse. Through doing so, we can illustrate the complications involved when new legislation is adopted into an already convoluted area such as that of transnational trade. Although suggestions for changes to the CESL will arise, the main aim of this presentation is to assess the issues so far raised rather than an outright attempt to find corresponding solutions.

Since the CESL is not and perhaps will not enter into force as EU legislation, this study is of a speculative nature. The issues examined are not certain to occur in reality. This thesis will not speculate on, nor consider the chances for the CESL to become law. Regardless of what the future holds for the CESL, the work invested by EU bodies on the proposal cannot be ignored. A framework like the CESL, that approaches the possibility of a European contract law and maybe even a common civil law, is truly what the EU believes to be the future for Europe. EU bodies will therefore most likely have to deal with issues concerning conflict of law in the future, whether through this proposal or another, as common EU law generally collides with both domestic laws and international provisions.

In view of the above, this thesis will revolve around the following questions:

- What are the most central conflict of law issues expected to arise if the CESL enters into force? More specifically:
    - How will the CESL interact with current EU conflict rules?
    - How will the CESL interact with existing sales and contract provisions affecting cross-border trade within the EU?
    - Are there any suggestions presented in the debate on how to solve these predicted conflict issues? If yes, what is the content of these proposals?

1.3 Methodology and materials

The method used for this thesis is, partly, a classic legal dogmatic method and partly an analytical approach to a current debate. The term *legal dogmatic method* refers to the process of systematizing and analysing existing legislation[10]. The legal dogmatic method has been used to describe current laws and provisions potentially related to, or involved in, conceivable uses of the CESL. In examining the debate regarding potential conflict issues, an analytical approach has been applied in order to present

[10] Peczenik, p. 33.

and further explain opinions on the matter. An *analytical approach*, as stated in one of the thesis objectives, has been employed to gather opinions already identified and further develop, explain and compare their contents.

From a more empirical understanding of the method used, it can be initially observed that the essay's topic is narrow and the debate so new that the material available is limited. After examining relevant information on the topic, the most central conflict issues were identified on the basis of the views of academic commentators as to the key problems. Identified issues have then been subjected to deeper analysis, employing the same material used to determine their importance.

Sources of information used in this thesis have been limited to include only those relevant for exploration of a *potential* legal problem regarding legislation that not yet has entered into force. This has resulted in the exclusion of case law and, to some extent, also legal doctrines as sources of information. As of yet, there has been no case law dealing with the issues examined in this thesis, since there is no legislation in force for the courts to consider. Regarding legal doctrine, few printed materials have so far been published discussing the issue since the unveiling of the CESL proposal in 2011. Predominantly, research materials used have been relevant debate articles published in legal journals, often specialist journals dealing with the fields of private international law, contract law or trade law. Official published documents like the CESL proposal and related EU legislation have also been used to a great extent in order to examine the contentious issues. Legal doctrine has primarily been used to find information on current legislation relevant to the issues examined.

1.4 Terminology

This study appraises potential problems regarding conflict of laws in connection with the CESL. Depending on the use of terminology, the expression *conflict of laws* can have different meanings. In this essay, the statement *conflict of laws* (or *conflict of law issues*, *conflict issues, law conflict issues*) is *not* employed as a synonym for the area of law often called *private international law*, but a subgroup within this legal field. Aside from choice of law queries, other subgroups within private international law include questions on jurisdiction of courts and the enforcement of foreign member state court decisions. [11]

In this thesis, the expression *conflict of laws* refers to problems arising from situations where more than one law appears applicable but only one can be. These types of problems often arise if the parties involved are from different countries or if an agreement contains cross-border elements.

[11] See similar distinction in Van Calster, pp. 1-2.

1.5 Delimitations

This thesis does not aim to present nor examine *all* conflict of law issues that might arise from enforcement of the CESL. Only issues considered to be the most pertinent to the debate will be examined[12]. These problems will be categorized into three main issues. The division is designated for pedagogical purposes and thereby does not necessarily reflect how the arguments themselves have been dealt with in the debate.

Aside from the fragments of the debate giving rise to potential law conflict creators, a detailed presentation of the content of the CESL will not be made. The content of other regulatory frameworks, such as the CISG, will also not be examined in greater details. Nevertheless, an overview of the type of provisions contained in the latter frameworks will be presented. This is done in order to demonstrate their similarity to the CESL, since these resemblances can create law conflicts. The thesis will neither analyse the discourse regarding whether there is a *need* for the CESL in the transnational trade market, though we may briefly acknowledge that this debate has been very fierce[13].

The presentation is not addressed to a Swedish audience, but rather to the fictional average citizen of the EU. Swedish and other national regulations that might be relevant within the examined area will therefore not be addressed. For example Swedish legislation *Lag (1987:822) om internationella köp*[14] will not be presented, even if, according to Swedish law, it takes precedence over the Rome I Regulation[15] within its scope of application. The limitation is done in order to focus on central law conflicts that might arise, instead of presenting *all* legislation that could be applicable in relevant cases. This is not needed in order to answer the questions examined in this thesis.

1.6 Disposition

The contents of the thesis include the present, opening chapter (chapter 1) followed by four parts (chapter 2-5) and a final analysis (chapter 6).

In order to understand the context and the content of the conflict issues dealt with in this presentation, regulatory frameworks and provisions that can be involved in a use of the CESL or impinge on the proposal's sphere of

[12] Example of an interesting, but not central, conflict issue regarding the CESL is the priority between the CESL and established *lex mercatoria* provisions. See Dalhuisen, pp. 303-317. Dalhuisen states that *lex mercatoria* should be seen as superior to the CISG.
[13] See, for example, Dalhuisen, p. 300.
[14] The law implements the Hague Convention on the Law Applicable to International Sale of Goods 1995. The same legislation has been implemented in Finland, France and Italy as well. See further Bisping, p. 3.
[15] See further chapter 2.2.1.

application are presented in chapters 2-3. Chapter 2 presents current EU conflict rules, which is legislation that the CESL will necessarily relate to. Chapter 3 introduces current substantive transnational sales and contract provisions applicable to cross-border transactions within the EU. As they exist within the same area that the CESL aspires to cover, conflicts are expected to arise therefrom.

The CESL itself is introduced in chapter 4. A brief introduction is given regarding the background, purpose, scope of application, structure and content of the proposal. Chapter 5 introduces the law conflict issues that in the legal-academic discourse have been considered to be the most pertinent, divided into three categories. Finally, chapter 6 concludes which central conflict of law issues that are expected to arise if the CESL enters into force. Here, conclusions are drawn on how the CESL is anticipated to correlate with existing conflict rules as well as substantive provisions similar to the proposal. Suggestions that have been presented in the debate on how the issues can be solved will also be summarized. The analysis will lastly present my own conclusions regarding the proposal and its future.

2 EU Conflict of Law Rules

2.1 Historical background

The basic principle in the majority of existing conflict rules is that each private international law relationship should be handled by the legal system of the country where the issue has the closest or most relevant connection. Most countries and states would agree with this statement. What a *relevant connection* is, how it can be defined and whether there is any hierarchy of relevant connections are however issues more debated. Therefore, conflict rules can differ widely between countries. These differences arise because in general and despite their name, private international law is *national* law regulating international relations. [16] Despite this, the area of private international law has increasingly been subject to transnational harmonization. [17]

The EU in particular has put considerable effort into creating harmonious conflict rules applicable in all member states. [18] This action is motivated by the idea that differences in member states' private international laws create great obstacles for trade and movement within the common market. If a conflict occurs between two different member states and diverging conflict rules in their domestic law demonstrate applicability of different states' laws (which, for example, can be the case if different courts have jurisdiction in the matter in accordance with the *lex fori principle*[19]), there is no solution. Both alternatives are "correct" according to each state's domestic legislation. Efforts made by the EU within the area of private international law are in line with the aim that the common market should be a place where goods, people, capital and services can move freely without obstacles (*the four freedoms*[20] of the EU). [21]

Thus, the aim to create common conflict rules has not always been on the EU agenda. It was only recently that private international law regulations became a target for harmonization. [22] The very first EU treaty, *the Rome Treaty*[23] (constructed by the EEC in 1958 which later became the basis for today's EU cooperation[24]) focused on creating a common market. However, questions regarding conflict of law issues that might arise from this development were not mentioned. [25] Despite this, predictions were made

[16] Bogdan, pp. 3-4.
[17] Van Calster, p. 2.
[18] Stone, p. 3.
[19] See discussion on procedural issues in Van Calster, pp. 3-4.
[20] Today, this aim can be found in the TFEU (article 26.2).
[21] Bogdan, pp. 7-8; Stone pp. 3-4.
[22] Van Calster, p. 13.
[23] The Treaty Establishing the European Economic Community (TEEC).
[24] http://europa.eu/about-eu/basic-information/decision-making/treaties/index_en.htm (2013-11-08).
[25] Bogdan, p. 6.

stating that a true common market with no significant trade obstacles would require harmonization of private international law. This opinion was first established in legal discourse; a view that the EU would soon acknowledge. As a result, harmonization gradually began to develop within the field. [26]

Juridical cooperation in civil matters was formally introduced as an objective for the EU with the arrival of *the Maastricht Treaty*[27] in 1993. It was placed under the third pillar in the organization, indicating that the legal field not was a high priority for future harmonization efforts. The categorisation under the third pillar did however ensure that the question became a topic in discussions within the EU cooperation. In the EU covenant *the Amsterdam Treaty*[28], that came into force 1997, the aim to cooperate in civil matters was moved from third to first pillar under the *EC Treaty*[29]*,* indicating that the EU intended to increase its focus on the matter. [30] In article 65 of *the EC Treaty* the significance of such an act was further explained:

> "Measures in the field of judicial cooperation in civil mattes having cross-border implications […] necessary for the proper functioning of the internal market, shall include […] (b) promoting the compatibility of the rules applicable in Member States concerning the conflict of laws and of jurisdiction." [31]

This clarification is found under the title "*Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons*" raising uncertainty over whether the intended harmonization objectives only applied to these areas. [32]

In 2009, *the Treaty on the Functioning of the European Union* (TFEU) entered into force as the new constitutional basis for the EU cooperation. The previous article 65 in the EC Treaty was replaced by article 81 in the TFEU and with this, the objective of harmonizing civil matters through EU legislation expanded. The goal of harmonizing civil matters was now asserted as applicable to all legal areas where law conflicts can occur from cross-border involvement. [33] Article 81 in the TFEU declares that:

> "The Union shall develop judicial cooperation in civil matters having cross-border implications […] For the purpose of paragraph 1, the European Parliament and the Council shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: […] (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;" [34]

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[26] Bogdan, p. 7.
[27] Provisions Amending the Treaty Establishing the European Economic Community with a View to Establish the European Community.
[28] Amending the Treaty of the European Union, the Treaties Establishing the European Communities and Certain Related Acts.
[29] The Amsterdam Treaty introduced changes to then-existing EU constitutional basis the Treaty Establishing the European Community (the EC Treaty).
[30] Bogdan, pp. 8-9.
[31] The EC Treaty, article 65.
[32] Bogdan, pp. 9-10.
[33] Bogdan, pp. 9-10.
[34] The TFEU, article 81.

Today, harmonization of conflict rules concerning cross-border relations can be found in several European legal areas. These areas can broadly be divided into five categories, dealing with either: 1) civil jurisdiction and judgments 2) family matters 3) insolvency 4) procedural co-operations or 5) civil obligations. [35] An example of a conflict legislation concerning family matters is *the 1996 Hague Convention*[36], while *the Brussels I Regulation*[37] can be seen as conflict rules under the category of civil jurisdiction and judgments. Regarding law conflicts arising from cross-border trade or international sales situations, the applicable rules are found under the category of civil obligations. Here, there are two main regulatory frameworks: *the Rome I Regulation*[38] and *the Rome II Regulation*[39]. [40] Both of these were implemented in 2009. [41] In brief, the Rome I Regulation consists of conflict rules regarding contractual obligations, while the Rome II Regulation deals with law conflicts in pre-contractual obligations. Across both regulations, the majority of cross-border transactions are covered and thus can be subjected to the rulings within the scope of the provisions. [42]

2.2 Current conflict rules

2.2.1 The Rome I Regulation

When the Rome I Regulation (further referred to as "Rome I") came into force in 2009, it had a great impact on conflict legislation in all EU member states. A new common framework used to decide the governing law for contractual obligations was created. [43] The Rome I provides, in its article 1, conflict of law rules regarding contractual obligations in civil and commercial matters. Even so, its application is excluded in cases such as if a contract relates to tax, customs or administrative matters (article 1.2). This regulatory framework is binding upon the courts of all member states having adopted the regulation. Parties to a contract are therefore not able to decide whether they want the Rome I to govern their contract or not. As long as all requirements for its application are met, it will apply regardless (article 1.1).

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[35] Stone, p. 6.
[36] The Hague Convention of 19th October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the protection of Children. Through EU decisions 2003/93 and 2008/431 the Council authorized, in the interest of the Community, all member states to sign and ratify the convention. However, the EU is not itself part of the convention. See Stone, p. 10.
[37] Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters. See further Stone, pp. 17-19.
[38] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.
[39] Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.
[40] Stone, pp. 6-11.
[41] Stone, p. 287 and p. 369.
[42] Stone, pp. 289-290 and p. 370.
[43] Stone, pp. 287-288.

Its application does not depend on reciprocity[44]. The law dealt with by the regulation will also govern the contract *regardless* of whether it is the law of a member state or not. The application is thereby universal (article 2).

Articles 3-4 in the Rome I contain provisions that decide which law is valid in cases when more than one state's law seems applicable. If the parties have chosen a law to govern their contract, the general rule is that this law is applicable (article 3). This choice of law must be made expressly. Alternatively, it has to be clearly demonstrated by the terms of the contract *or* by the circumstances of the case (see article 3).

If the parties have not agreed upon a law to govern their contract, the provisions for resolving the issue are found in article 4. In this article, different contract types are stated, each of which has a corresponding conflict rule (article 4.1). Each provision decides which relevant domestic law member states should consider as having the closest connection to the contract. This is usually done through identification of the *characteristic performer*. [45] The rule for contracts on the sale of goods asserts that the applicable regulatory framework is the law of the country where the seller has his/her habitual residence (article 4.1.a). The seller is therefore considered to be the characteristic performer in the case. If a contract addresses provision of services, the governing law is the law of the country where the service provider has his/her habitual residence (article 4.1.b). The rule is the same for sales contracts. Contracts concerning rights and obligations for immovable property are, on the other hand, governed by the law of the country where the property is located (article 4.1.c). Aside from these three examples, there are further contract types addressed in article 4.1, for example franchise and distribution contracts. Article 4.2 concludes that if a contract cannot be categorized under any of the previous options, it should be under the law of the state where the considered characteristic performer has his/her habitual residence. Despite the provisions relating to contracts, the main rule regarding *all* types of contracts is found in article 4.3. Here, it is stated that when it is clear from all circumstances in the case that the contract is more closely connected to another country than indicated by paragraphs 1 or 2, that other country's law should apply. The previously presented conflict provisions in the article are therefore not definitive. The designated applicable law can always change under the circumstances of individual cases. The very last sentence of article 4 addresses all types of contracts where the applicable law has not been decided by previous regulations. It declares that these contracts are to be governed by the law of the country with the *closest connection* to the agreement (article 4.4).

Since other conflict rules besides those in the Rome I are in force within EU law, the Rome I must adjust its relation to these, including those that might enter into force in the future. [46] Regarding the correlation with other EU instruments containing conflict provisions, a type of *lex specialis* rule is

[44] Stone, p. 289.
[45] Stone, p. 299 and p. 312.
[46] Bogdan, p. 122.

presented in article 23. The provision asserts that if, in a specific case, a conflict rule addresses the same contractual obligation as the Rome I, then the more specific rule takes priority. The relation to international conventions regarding the same matter is also addressed. Article 25 asserts that if an international convention is, along with the Rome I, also applicable and contains conflict provisions, then this convention should not be affected by the Rome I. The international convention applies as long as the minimum of one member state involved was party to the convention when it was adopted *and* the convention entered into force before the Rome I, i.e. before December 17, 2009 (articles 1, 28-29).

Conflict issues can as well occur when other types of rules than those including conflict provisions are involved. The Rome I must therefore also determine its relation to these. In articles 6-9, the effects on weak-party contract rules and international mandatory provisions are addressed. Regarding weak-party provisions, there are three types protected: consumer contracts (article 6), insurance contracts (article 7) and individual employment contracts (article 8). Concerning a consumer contract, the fundamental rule is that the contract is governed by the law of the state were the consumer has his/her habitual residence (article 6.1). The parties may still agree to apply a different law to the contract, but this act cannot invalidate mandatory consumer provisions in the consumer's home state (article 6.2). Example of such a mandatory consumer provision could be a domestic law stating that a trader must inform an interested consumer, in a clear way, about the effective APR[47] offered for credit in conjunction with a purchase[48]. With article 6.2, the consumer can choose the overall most advantageous domestic law and can at the same time rely on consumer protection rules in his or her habitual state, even if the parties have not chosen the latter law to govern the contract otherwise. [49] The relation between the Rome I and international mandatory law (rules of *ordre public*) is addressed in article 9. Here, *mandatory provisions* are defined as rules protecting national public interests to the extent that the legislation applies in any situation falling within its scope, regardless of whether another law applies to the contract in accordance with the country's private international laws or not (see article 9.2). These provisions often concern a country's political, social or economic organization or interests (article 9.1). [50]

2.2.2 The Rome II Regulation

Despite its name, the Rome II Regulation (further referred to as "Rome II") came into force a few months before the Rome I, in 2009. [51] With the

[47] APR is the abbreviation for *annual percentage rate*. The effective APR is meant to show the real and final cost of a credit loan.
[48] This consumer protection provision can be found in the Swedish law *Konsumentkreditlagen* (2010:1846).
[49] Bogdan, p. 131.
[50] Bogdan, pp. 134-135.
[51] The Rome I article 29, the Rome II article 32.

regulation, new conflict rules used to decide the applicable law for pre-contractual obligations were jointly established in all EU member states. [52]

The idea behind the Rome II was the same as for Rome I; to create a regulatory framework for determining the connecting factor (see chapter 2.2.1) that gives applicability to a particular domestic law. [53] In the preamble of the Rome II, the Commission further develops the importance of adopting the regulation and states that a functioning inner market cannot be created without it. Such a framework enables predictability in a manner not pre-existing concerning the outcome of an unexpected event with damaging consequences that has occurred in a member state. The result is that the applicable law will be the same, regardless of which state's court that presides over the case. [54]

Article 1 of the Rome II declares that the regulation applies in situations regarding conflict of laws for non-contractual obligations in civil and commercial matters (article 1.1). Its use is however excluded, *inter alia*, in cases where the non-contractual obligation arises out of family relationships or a violation of privacy or integrity rights (article 1.2.a and 1.2.g). Article 2 contains further provisions relating to the scope of application of the Rome II. This provision states that the regulation covers damage arising out of tort, unjust enrichment[55], *negotiorum gestio*[56] and *culpa in contrahendo*[57]. It can also apply to pre-contractual obligations that are *likely* to arise, meaning acts made to prevent damages, for example orders for financial penalties. [58] Similar to the Rome I, the application of the Rome II is universal and applies irrespective of whether or not the chosen law is that of a member state (article 3).

Regarding the applicable law to an event that has already occurred, the general rule is that the applicable law is the one chosen by the parties (article 14). A choice of law can either be made *before* or *after* the damaging event occurred. However, a prior choice of law is only possible if all parties are commercial actors (article 14.1.b). The choice must be clearly stated regardless of the parties' decision. Article 14.1 states that the choice "*shall be expressed or demonstrated with reasonable certainty by circumstances of the case and shall not prejudice the rights of third parties*". The application of a chosen law equally cannot override provisions in the law of the forum if they are mandatory (article 16). This is irrespective of what is stated by the law otherwise applicable to the obligation.

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[52] Bogdan, p. 145.
[53] Stone pp. 369-370.
[54] The CESL, recital 6, 8 and 14; Van Calster, p. 152.
[55] See definition in article 10 Rom I.
[56] An agent acts on behalf of a principal, without this person's consent. See further definition in article 11.
[57] Duty to negotiate with care when concluding an agreement. See further definition in article 12.
[58] Compare with Stone, p. 371.

If the parties did *not* agree on a law to govern the event giving rise to the damage, the relevant provisions are found in article 4. The general rule is that the law of the country where the damage *occurred* will govern the contract (the *lex loci damni principle*). This is not necessarily the same place as where the event that caused the damage arose. In other words, it can be a case of two different countries. The article further states that if both the perpetrator and the victim had their habitual residence in the same country when the damage occurred, then this country's law is applicable (article 4.2). However, if there is an obvious closer connection to another country than which the Rome II provisions point to, that domestic law will apply (article 4.3). Similar to Rome I[59], individual circumstances are thereby always most pertinent in deciding the applicable law if no choice has been made by the parties.

The correlation between the Rome II and other conflict rules with an overlapping scope of application are addressed in articles 27-28. The content is the same as for the corresponding provisions in the Rome I[60]. The rule regarding other EU instruments containing conflict provisions state that these instruments have priority if they are more specific (article 27). For conflict rules in international instruments, the regulation states that these take precedence over the Rome II as long as the minimum of one member state was party to the convention when it was adopted *and* the convention entered into force before the Rome II, i.e. before January 11, 2009 (articles 1, 30-32).

[59] Compare with article 4.3 in the Rome I.
[60] Compare with article 23 and 25 in the Rome I.

3 Existing Transnational Sales and Contract Legislation

3.1 Introduction

Since the 1980's, several multilateral regulatory frameworks have entered into force that contain transnational sales and contract law provisions affecting cross-border trade within the EU. [61] Various market participants have created these frameworks, including private research groups, international trade and law unification groups, other transnational organizations as well as the EU. [62] The effects of these laws and conventions on international trade law and the extent to which they have been used in cross-border transactions can be discussed. Findings may vary depending on the project examined. Demonstrating their scepticism, many critics are either of the opinion that new frameworks need to be created within the area of international trade or by holding that this type of transnational legislation is unnecessary. The latter view is based on contracting parties preferring to use their party autonomy in creating their own rules or that they will choose a (domestic) law already existing. [63]

Regardless of the discourse surrounding transnational sales and contract legislation, their existence is irrefutable and, due to our increasingly globalized society, an increase in number is a strong possibility. [64] This chapter will present the most influential provisions dealing with the subject, firstly central international conventions and then those coming from the EU.

3.2 International provisions

3.2.1 The PECL

A widely known transnational piece of legislation affecting cross-border trade within the EU is *the Principles of European Contract Law*, also known as the PECL. [65] The outline for the framework was created by *the Commission on European Contract Law* (CECL), a group[66] of independent academics originating from all EU member states. [67] The PECL started as a

[61] Dalhuisen, p. 299; Fogt, p. 86.
[62] See following chapters 3.2-3.3 regarding the originators of the frameworks in force.
[63] See Fogt, p. 85, Dalhuisen, pp. 299-303 and Meyer pp. 389-395.
[64] See, for example, Twigg-Flesner, p. 26.
[65] Eidenmuller, p. 3.
[66] Danish law professor Ole Lando led the work of the group. See all group members: http://www.cisg.law.pace.edu/cisg/text/peclintro.html (2013-11-20).
[67] Lando (2001), p. 2.

private law project, however growing hegemony from the Parliament led to the project's growth that, ultimately, began to finance it. [68]

With the PECL, the CECL aspired to create general principles of contract law common to all EU members. The aim was to form a base of legal obligations from provisions that most member states already had in common in their juridical systems. [69] From the beginning, this body of obligations was created in order to serve as the basis of a European civil code but as the work progressed, the purpose widened. [70] Today, the stated goal of the PECL is to provide a possible framework for European draft legislation. [71] Article 1:101 p 2 in the finished product of the DCFR states that the principles "*are intended to be applied as general rules of contract law in the European Union*". The PECL also declares to encourage development of a common European law operating within the framework's field of application. Equally, it does not intend to present a full range of provisions that should be directly transformed into (binding) political legislation. [72]

The PECL was published by the CECL in three parts and extended the work on the regulatory framework to over two decades. The first project group, *the 1982 Project Group*, published the first set of rules in 1995. The provisions dealt mainly with performances, remedies and non-performances (breaches) regarding sales contracts. The second working group, *the Second Commission on European Contract Law*, started their project in 1992 and presented the result in 1999. These additional principles were said to supplement the first provisions published in 1995. The new rules concerned questions of validity, formation, interpretation and content of sales contracts as well as agent authorities. The third and last set of principles became available to the public in 2002 and was introduced as a continuation of the work completed in 1999. These addressed matters within contract law such as assignment of claims, debt, prescription and transfer of contracts. [73]

Inspiration for the PECL was said to be the CISG, which was published more than ten years earlier (see further in chapter 3.2.4). The PECL is however, unlike the CISG in that the former is considered *soft law* and therefore only binding to the parties if they decide to apply it to their contract. The PECL can be used when the parties agree to incorporate it into their contract or decide that the contract should be governed by its principles (article 101:1 p 2). The PECL can also be used if the parties agree that their contract should be governed by "general principles of law", *lex mercatoria*[74] (or equivalent legislation) or when the parties have not made any choice of legislation (article 1:101 p 3 a-b).

[68] Lando, Introduction p. xv.
[69] Lando (2001), p. 2; Lando, Introduction p. xv.
[70] Lando, Preface p. x.
[71] Lando, Introduction p. xv.
[72] Lando, Introduction p. xvii.
[73] Lando, Preface p. xi and p. ix; Lando (2001), p. 2.
[74] Customary international trade law.

3.2.2 The PICC (UNIDROIT Principles)

The UNIDROIT project *Principles of International Commercial Contracts*, mainly referred to as the UNIDROIT Principles or the PICC, is a regulation often mentioned in connection with the PECL. Together, they intend to form a *soft law framework* for countries that want to create legislation within the area of international contract law. The PICC is however, like the PECL, an independent regulation in itself, providing a set of rules for parties to choose if they do not want either of their domestic laws (or any other state law) to govern their contract, but rather a "neutral" set of rules that is equally foreign to all parties involved. [75]

The PICC was presented in 1994 by the intergovernmental independent organization *International Institute for the Unification of Private Law* (UNIDROIT). Established in 1926, the UNIDROIT statutes state that their aim is to study needs and methods for modernising, harmonising and co-ordinating private law, in particular commercial law, in order to formulate uniform law instruments, principles and rules to achieve these objectives. Today the organization consists of 63 member states, including all major trade nations worldwide. [76]

The UNIDROIT initiated the PICC project because they aimed to establish and render a set of commercial contract rules serviceable for all countries, irrespective of differences in legal traditions and political, social and economic conditions. [77] The main objective for the framework is, similar to the PECL, to serve as a tool for interpreting and supplementing domestic law regulations. The principles are intended to be a vague model for future national and international legislation created within its scope. [78] Comparatively, it can be concluded that while the PICC aims to regulate global transactions and to create harmonization within the field, the PECL focuses, to a greater extent, on European transactions and attempts to find a common core in current EU legislation in order to create its own acquis. [79]

The PICC principles have so far been published in three versions. The latest, from 2010, has added provisions regarding ailed contracts, illegality, conditions and plurality of obligors to the previous edition presented in 2004. Following these additions, the PICC now targets problems of formation, validity, interpretation, performances, non-performances and general provisions regarding international commercial contracts. [80] Similar to the PECL, the PICC is applicable when the contracting parties agree to its applicability. The framework can also be used when the parties agree that

[75] Lando (2001), p. 3; http://www.unidroit.org/english/principles/contracts/main.htm (2013-11-16).
[76] http://www.unidroit.org/dynasite.cfm?dsmid=103284 (2013-11-11).
[77] The PICC, Introduction p. viii and p. xxiii.
[78] The PICC, recital 6-7.
[79] Conclusion from previous information in chapter 3.2.
[80] http://www.unidroit.org/english/principles/contracts/main.htm (2013-11-11).

their contract should be governed by "general principles of law" or the *lex mercatoria*. [81]

3.2.3 The DCFR

A further central soft law framework containing international contract provisions is *the Draft Common Frame of Reference* (DCFR). *Grosso modo*, the regulation was created by legal academics from *the Study Group on a European Civil Code* (SGECC). More specifically, was this completed by a research group within the SGECC named *the Research Group on the existing EC Private La*w (the Acquis group). [82] This assembly was formed following recent discussions in the EU regarding a future common contract law. The group's assignment was to systematically examine community law in order to highlight common structures in current community private law, with the aim of turning this into EU law. [83] The project ended in 2008 with the group publishing their final product, the DCFR framework. [84] Sources of inspiration were said to be similar to then-existing regulations like the PECL and the PICC. [85]

In the DCFR's introductory chapter, the framework is described as comprising principles, definitions and models of European private law common to all countries in the EU. [86] It is further stated that the DCFR is not a framework for contracting parties to refer to directly, but rather it should be employed as a possible model for creating new binding common frames of references (CFR). The Acquis group emphasizes that a CFR based on the DCFR should not directly copy its content; the DCFR should only aid in the creation process. Regardless of whether it is used as a basis for a CFR or not, the DCFR will still act as independent legislation and is able to function as research and educative material. [87] Several *underlying* principles of the framework are also mentioned, for example that it provides material for a discussion on fundamental law principles in Europe and that it explores the content of core aims of European private law. [88]

The DCFR is a comprehensive instrument with principles, definitions and models presented in *ten* books. [89] The provisions concern an entire legal spectrum from prescription and remedies for non-performances to provisions regarding rights on withdrawal, as well as non-discrimination rules. [90] The field of application for the DCFR is addressed in article 1:101, which states that that the provisions are intended to be used in relation to

[81] The PICC, Preamble introduction.
[82] http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf (2013-11-12).
[83] http://www.acquis-group.org/ (2013-11-11).
[84] The DCFR, p. 7.
[85] The DCFR, p. 10.
[86] von Bar, pp. 3-4.
[87] von Bar, pp. 6-7.
[88] von Bar, pp. 10-13.
[89] The DCFR, p. 2.
[90] http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf (2013-11-12).

contracts and other juridical acts, contractual and non-contractual rights, obligations and related property matters.

The DCFR was, from the beginning, a privately funded project but, as the EU became progressively interested in the project's results and intended to use its conclusions for creating a European civil law, the project itself became later financed by the Commission. Through this cooperation the DCFR was incorporated as an outline for what later came to be the CESL proposal (see further chapter 4). [91]

3.2.4 The CISG

The United Nations Convention on Contracts for the International Sale of Goods, the CISG, is often said to be the most prosperous international substantive contract legislation in force today, as well as the most successful influence in trans-border commerce of *all time*[92]. [93] As of September 2013, a total of 80 states were parties to the legislation, including influential market actors like the United States, Canada, Australia, Russia and all EU member states except the United Kingdom, Portugal, Malta and Ireland. [94] Altogether, the regulatory framework covers over two-thirds of the international world trade market. [95]

The United Nations Commission on International Trade Law (UNCITRAL) created the CISG, signed in Vienna[96] in 1980. [97] Through the mechanism of the CISG, the UNCITRAL wanted to construct a framework governing the rights for the buyer and the seller when completing international transactions. The UNCITRAL intended to facilitate international trade and to ensure its growth with the regulation in force. In effect, it would result in the legal situation being the same for all contracting parties no matter of their state of origin. [98]

The provisions in the CISG intend to cover the entire process of an international transaction, including rules on delivery of goods, obligations for the buyer, remedies for contract breaches by the seller, third party claims and more. [99] The CISG principally consists of provisions regarding sales contract formation, as well as obligations and rights of the parties arising from their contract. The CISG does not therefore regulate *all* situations that can potentially arise in the process of a transnational trade situation. Rules

[91] Perfetti in Alpa (ed.), pp. 49. See also chapter 4.1.
[92] This statement is far from unchallenged. See, for example, Dalhuisen, p. 305.
[93] See, for example, discussion by Meyer, p. 389.
[94] http://www.cisg.law.pace.edu/cisg/countries/cntries.html (2013-11-12).
[95] Lookofsky (2008), p. 18.
[96] The CISG is occasionally referred to as *The Vienna Convention*.
[97] Dalhuisen, p. 299.
[98] Aksoy, pp. 460-462.
[99] The CISG, table of content.

on how to deal with third parties or provisions regarding contract validity are for example not embraced. [100]

In comparison with other transnational contractual regulatory frameworks concerning cross-border trade, such as the PECL and the PICC, the CISG differs in that it is *not* considered soft law. Its application is not dependent on the choice of the parties. The CISG applies by default as long as the contracting parties do not choose to opt-out, thus choosing other legislation instead. [101] The CISG is binding law in all countries that have ratified the legislation. For the convention to apply in cross-border sales transactions, the requirements for its application must be fulfilled in every individual case (see article 1). Predominantly, the sphere of application extends to contracts concerning the sale of goods between parties whose place of business are in different states, on the condition that all parties involved are contracting states (article 1.1). If they are not, private international rules must lead to the application of the CISG (article 1.1.a-b). Aside from this, the convention only applies to sales contracts regarding trade between *professional* traders. This is implied with the statement that contracts regarding the sale of goods bought for personal, family or household reasons are excluded from the legislation's sphere of application (article 2a).

3.3 EU provisions

3.3.1 Adopted legislation

Over the course of the last 30 years, there has been discourse in the EU surrounding the need for common sales and contract legislation dealing with cross-border trade within the Union. Despite this, no common contract law has yet been drafted. The DCFR has indeed come close however, aside from the EU's processing of their work, it is not an EU project. [102] By contrast, the EU has adopted several directives regarding various aspects of contract law, most of them guaranteeing a minimum level of consumer protection within the common market. [103] A few directives not concerning consumer law are also in existence, for example *the Late Payment Directive*[104]. [105] It can therefore be concluded that contract law provisions regarding B2B contracts have only to a very small extent been subject to EU harmonization attempts. This area of law has not been of priority since B2B provisions usually are non-mandatory for all parties involved, unlike for consumer rules. [106]

[100] Lookofsky, p. 24.
[101] The CESL, p. 5. Compare with information in chapters 3.2.1-3.2.3.
[102] Twigg-Flesner, p. 196.
[103] Twigg-Flesner, p. 10.
[104] Directive 2001/7/EU on combating late payment in commercial transactions.
[105] Lilleholt, p. 4.
[106] Twigg-Flesner, pp. 10-11.

Regarding the common sales and contract legislation that *do* exist, directives currently in force include *the Directive on Distance Selling of Financial Services* [107], *the Directive on Consumer Credit* [108] and *the Directive Regarding Unfair Commercial Practices* [109]. Most of them demand a minimum standard of harmonization, meaning that member states can retain or adopt domestic provisions that are more favourable to consumers. Contrastingly, the Consumer Credit directive necessitates maximum harmonization. Domestic legislation cannot therefore be more or less favourable than the directive's provisions. [110] Furthermore, the current directives only deal with specific aspects of contract law. In such cases, either only one type of contract is dealt with (*vertical application*) or they are *all* dealt with. However, in the latter case, only a particular issue is covered (*horizontal application*). This means that each directive has a narrow area of application and the harmonizing effect within the common market is thereby also limited.[111] One of the few directives with a broader scope is *the Consumer Rights Directive*[112]. Promulgated in 2011, its aim was to merge four existing directives regarding consumer rights within the EU. [113] The regulation has since its enforcement met severe criticism however, mainly surrounding the inappropriateness of allowing the EU to have exclusive competence in deciding the level of consumer protection within the Union. [114]

The EU has so far only used directives in order to harmonize contract law within the Union, however this way of working has been criticized as ineffective. Development has nonetheless turned and today the EU legislative powers focus on creating a freestanding European contract law, in response to remarks from critics. Ultimately this development can be seen in the CESL proposal. [115]

3.3.2 Supportive provisions

Aside from creating directives within the area of contract law, the EU has made other legislative moves in order to facilitate the formation of a common contract law within the Union. The TFEU contains, as earlier presented (see chapter 2.1), provisions stating the EU's aims to guarantee the free movement of goods, capital, services and people within the

[107] Directive 2002/65/EC concerning the distance marketing of consumer financial services.
[108] Directive 2008/48/EC on credit agreements for consumers.
[109] Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market.
[110] Lilleholt, p. 4.
[111] Twigg-Flesner, pp. 124-125.
[112] Directive 2011/83/EU on Consumer Rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance.
[113] Lilleholt, p. 4.
[114] Lilleholt, p. 4; Smits, pp. 9-10.
[115] DiMatteo, pp. 231-232.

common market. These rules have, in turn, resulted in the formation of domestic laws in accordance with these aims. National contract law in member states cannot result in a violation of these stated principles[116]. The free movement provisions are thereby indirectly supporting cross-border activity and acting as a barrier to the creation of future trade obstacles. [117]

The EU's competence to create common contract legislation is usually addressed as originating from article 114 in the TFEU. Whether or not this article actually has the capacity to be the legal basis for adopting a common European contract law, or single directives on the subject, has been debated. [118] Some commentators go as far as to state that the EU in general has no jurisdiction in private law formation, and that the Union only uses article 114 as a backdoor to add legitimacy to legislation within this area of law. [119] Article 114 asserts that:

> "The European Parliament and the Council shall […] adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market." [120]

The provision aspires to be used not only for measures that intend to establish the internal market, but also for measures related to its functioning, for example reducing or removing competitive disadvantages. Article 114 has operated as a legal basis for the majority of the contract law provisions existing today within EU law. [121] Imperative for discussion has been the limits of the article's authorizing powers, for example if it can serve as the legal basis for an optional regulatory framework. Such regulation does not supplement nor replace national law, effectively alluding that there technically will be no act of harmonization in existing domestic laws. [122]

[116] This process of striking out national laws that are incompatible with the objectives of the EU is often referred to as "negative harmonization", contrary harmonization through the implementation of directives in domestic legislation (called "positive harmonization"). See further Twigg-Flesner, p. 23.
[117] Twigg-Flesner, p. 23.
[118] See, for example, Heidemann, pp. 1121-1126 or Staudenmayer in Alpa (ed.), pp. 21-23.
[119] Dalhuisen, p. 314.
[120] The TFEU, article 14.
[121] Twigg-Flesner, p. 30.
[122] Hesselink, p. 2.

4 CESL – Proposal for a Common European Sales Law

4.1 Background

On October 11, 2011 the Commission presented their proposal for a common European sales law, named *the Common European Sales Law*[123] (the CESL). [124] The preparatory work had however begun almost ten years earlier. The Commission launched what is arguably the first embryo of a common sales law for the European market in July 2001, when suggesting a contract law framework[125] with the aim of removing obstacles to cross-border trade. The communication generated discourse regarding how the EU should develop their work in the area of common contract law. However, nothing concrete was decided. [126]

Following the presentation of the DCFR in 2008 (see chapter 3.2.3) the Union, in 2010, considered legislative provisions incorporating a partially pre-existing common contract law within the EU. The Commission decided to create an expert group[127] mandated to form the grounding of a common EU contract law based on parts of the DCFR considered relevant for the project. Their opinion was that if the principles were updated and the expert group could fill in lacunae, the DCFR could lead to the establishment of a new European contract law instrument. This required however, that the content of this instrument was to be compatible with already existing regulatory frameworks within the area such as the CISG, the PICC and the PECL. [128]

The same year that the expert group began to process the DCFR principles, the Commission launched their *Green Paper*[129]. The report presented various opinions on how progress could be achieved within the area of a common European contract law, all with the purpose of strengthening the internal market. [130] Three of the suggestions discussed the creation of an optional law in the matter. [131] The report also stated that any future common

[123] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final.
[124] Graf von Westphalen in Alpa (ed.), p. 11.
[125] COM (2001) 398, 11.7.2001.
[126] The CESL, p. 4; Whittaker pp. 579-580.
[127] Participants in *the Expert Group on European Contract Law:* http://ec.europa.eu/justice/contract/files/expert-group_en.pdf (2013-12-05).
[128] Dalhuisen, p. 299; Perfetti in Alpa (ed.), p. 49.
[129] The Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, COM(2010) 348 final.
[130] The CESL, pp. 4-5; Berlinguer in Alpa (ed.), p. 45.
[131] Educate, p. 14.

contract law should target both B2B and B2C contracts. [132] Consumer contracts were therefore implicitly included, despite criticism that earlier attempts by the EU to harmonize consumer contract law had been subjected to (see chapter 3.3.1). In June 2011, the Parliament responded to the Green Paper by proposing a resolution[133] where they expressed their support for the creation of an instrument able, not only, to improve the functioning of the inner market but also one available to both consumers and traders. [134]

In conjunction with the launch of the Green Paper, the Commission presented their *Feasibility study for a future instrument in European Contract Law*[135]. This study is arguably the document most similar to the completed CESL proposal made by the Commission[136]. Once the Feasibility study was revised and the Parliament had expressed their support, the document was lastly presented by the Commission as a finished draft, in form of the CESL. [137]

Regarding the CESL today, negotiations are currently being held between member states as to whether the proposal should be adopted or not. The debate has initially centred around the question of whether there is a need for this kind of legislation at all, rather than discussions surrounding the content of the proposal. [138] *The Legal Affairs Committee* at the Parliament has, during 2013, arranged a number of events in order to allow experts to express their opinion on the CESL. Several hearings and debates have taken place. [139] Opinions on the proposal have also varied among the national parliaments. Member states such as Italy and Sweden are in favour of an entry into force, while others like Germany and the United Kingdom are more sceptical. [140] Both the Parliament and the Council must approve the proposal in order for it to enter into force. The Commission's original goal was that the EU would reach an agreement regarding the CESL in 2012. But as of the present day, none of the EU bodies have given it the green light, render the future for the CESL exceptionally uncertain and difficult to predict. [141]

[132] The CESL, pp. 4-5; Berlinguer in Alpa (ed.), p. 45.
[133] European Parliament resolution of 8 June 2011 on policy options for progress towards a European Contract Law for consumers and businesses 2011/2013.
[134] The CESL, p. 5.
[135] A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback.
[136] It is stated that the substantive provisions in the CESL (Annex 1) are nearly identical to the content of the Feasibility study. See Hesselink, p. 1.
[137] Aksoy, p. 459; Heidemann, p. 1121.
[138] Meyer, p. 390; Prunbauer-Glaser in Alpa (ed.), p. 4.
[139] Berlinguer in Alpa (ed.), p. 45.
[140] Lilleholt, p. 1.
[141] Lilleholt, p. 1; Meyer p. 390.

4.2 Purposes of the framework

In the CESL explanatory memorandum (see further chapter 4.4), the Commission states that the overall purpose of the proposal is to improve the establishment and functioning of the common market by providing a uniform set of contract law rules. [142] It is stated that disparity in contract laws between member states hinder cross-border exports and imports, because market actors feel uncertain of which rules apply and what their content is. These legal dissimilarities result in complexity and create obstacles such as unexpected, and often increased, transportation costs. Such adverse effects will in turn inhibit both traders and consumers; *traders* who wish to expand within the common market and *consumers* who wish to enjoy benefits from engaging in cross-border trade. Through the enforcement of the CESL, a range of autonomous rules regarding cross-border trade will be available within the EU, which will benefit both consumers and traders. [143]

Regarding traders, the proposal states that its provisions only cover B2B transactions where at least one of the parties is a small trader. The purpose of this criterion is to protect minor businesses and embolden them to engage in cross-border trade. Small-sized businesses normally have a more limited knowledge about other legal systems than their own. At the same time they are more often, compared with their larger competitors, forced to accept that a foreign law governs their contract if the other contracting party is located abroad. With this lack of knowledge, entering into a foreign market will deepen legal complexity and increase risks for small enterprises. It will most likely also incur additional costs, as the trader will need to examine the content of the foreign law. Further costs will also arise when the parties must negotiate the applicable law. The costs generated through the process, negotiating and ascertaining the content of a foreign law, can often exceed the total profit of the cross-border deal. This is especially the case for minor businesses. [144]

The Commission stresses that those consequences will, in the long run, hinder the exercise of fundamental rights within the EU, for example the freedom to provide goods and services. [145] With the enforcement of the CESL, smaller traders will be given a more advantageous option to domestic laws. If the CESL governs a contract, there will no longer be a need for parties to research the substance of foreign domestic laws, with the exception of various less important cases where the CESL does not cover. It is for this reason that a smaller trader will reduce both his/her costs and risks in cross-border transactions. [146]

[142] The CESL, p. 4.
[143] The CESL, pp. 2-4 and p. 11.
[144] The CESL, p. 4 and recital 2.
[145] The CESL, recital 1.
[146] The CESL, p. 4 and recital 8.

Furthermore, the Commission explains that consumers will be favoured in several ways by the CESL. Missed opportunities for transnational trade within the Union not only has negative effects for traders but also for consumers, since less cross-border commerce will result in fewer imports and less competitiveness among traders. This will further lead to a more limited choice of products and higher prices for consumers in all member states. [147]

The Commission states that consumers tend to avoid buying products or services abroad as they feel uncertain of their rights and what the contents of the foreign rules are that might apply to the purchase. This is the case even if today, consumers within the common market have the right to invoke mandatory consumer protection rules existing in their domestic laws, if indeed any do exist (article 6 Rome I). [148] The CESL states that with its implementation, there will be no longer need to identify mandatory consumer protection rules in the consumer's domestic law. This is because the CESL contains a fully harmonized structure for consumer protection, providing a high protection standard throughout the whole EU. For some member states this will result in a raised standard, for others it will make no difference. [149] The harmonization will also lead to a less complex legal situation for traders involved in transactions with consumers, since traders will not need to examine the consumer's laws in order to establish the existence of any mandatory provisions. [150] Negotiations on the applicable law regarding B2C contracts [151] may also be less complex when the contracting parties have the opportunity to agree to use the CESL; a regulatory framework equally accessible to all actors involved. [152]

4.3 Scope of application

4.3.1 An opt-in procedure

There are numerous prerequisites required for using the CESL. First and foremost, the CESL is an optional instrument; emerging from the proposal's article 3. This means that the parties must choose, *opt-in* to, the CESL to make it applicable and to govern their contract. This choice must always be within the freedom of contract or within the freedom of choice of law granted to the parties. [153] The rules of the CESL will thereby only apply if the parties actively opt-in to the regulation in each individual case. [154]

[147] The CESL, p. 3 and recital 4.
[148] The CESL, recital 3-4.
[149] The CESL, recital 11-12.
[150] The CESL, recital 3.
[151] Can be the case if the consumer wants another law than his/her home state's to be applicable. See article 6.2 in the Rome I, chapter 2.2.1.
[152] Compare with the CESL, p. 2.
[153] Fogt, p. 89.
[154] The CESL, recital 8.

The regular definition of an opt-in legislation is that it *by operation of law* (*ipso jure*) replaces existing provisions within its scope of application. This means that if the contracting parties choose the CESL to govern their contract, neither of their respective national laws applies in areas covered by the CESL. Outside of these areas, the optional regulatory framework will operate parallel with domestic laws and other provisions. [155] For an opt-in instrument to take effect, the contracting parties must manifestly demonstrate their will for this to occur. This must be achieved in three parts: 1) the parties must have knowledge of the existence and the content of the optional instrument 2) both parties must, based on that knowledge, express their choice to apply the optional law and 3) a bilateral consensus regarding the above must prevail, meaning that the parties need to have agreed to opt-in to the instrument and decided to apply it to their contract.[156]

The CESL establishes a two-step procedure for opting-in specifically to its provisions. In article 8.2, it is stated that the choice to allow the CESL to govern a contract must be agreed upon in an "*explicit statement which is separate from the statement indicating the agreement to conclude a contract*". This requires that the parties in a first step agree to the contract and then secondly agree to subject the contract to the CESL. [157] Effectively, this adds an additional layer to the requirements of "regular" opt-in instruments[158]. The reason for this is stated in the CESL to be a procedure chiefly in place to draw consumers' attention to the fact that their agreement is mainly governed by the CESL, and not by their own national law. [159]

4.3.2 Additional prerequisites

Even if the requirements for opt-in are met (in accordance with those previously stated in chapter 4.3.1), the CESL will only apply to *three* types of contracts: contracts for the sale of goods, contracts for the supply of digital content and contracts for provision of services related to either of them (article 5). More specific definitions of these enumerated contract types are found in article 2. A *sales contract* is here defined as:

> "[a]ny contract under which the trader ('the seller') transfers or undertakes to transfer the ownership of the goods to another person ('the buyer'), and the buyer pays or undertakes to pay the price thereof" [160]

In this case the seller must be a trader, while the buyer can either be a trader or a consumer. The definition includes contracts regarding the sale of goods that not yet have been manufactured or produced. Excluded are contracts for sale on execution or contracts that otherwise involve the exercise of public

[155] Fogt, pp. 88-89.
[156] Fogt, pp. 90-91.
[157] See the CESL, article 8 and recital 22.
[158] In other words, the CESL cannot be agreed upon in standard contract terms.
[159] The CESL, recital 22.
[160] The CESL, article 2 point K.

authority. [161] The CESL provides no classification for contracts for the supply of digital content. The definition for *digital content* however, can be found in article 2:

> "[d]ata which are produced and supplied in digital form, whether or not according to the buyer's specifications, including video, audio, picture or written digital content, digital games, software and digital content which makes it possible to personalise existing hardware or software" [162]

The classification excludes financial services (including online banking services), legal or financial advice provided electronically, electronic healthcare, electronic communication services and networks (incorporating associated facilities and services), gambling, creation of new digital content as well as the amendment of existing digital content. [163] The third category regarding *related services* is also defined in article 2:

> "[a]ny service related to goods or digital content, such as installation, maintenance, repair or any other processing, provided by the seller of the goods or the supplier of the digital content under the sales contract, the contract for the supply of digital content or a separate related service contract which was concluded at the same time as the sales contract or the contract for the supply of digital content" [164]

Transport services, training services, telecommunications support and financial services are however excluded. [165]

Contracts found outside of the CESL scope of application are mixed-purpose contracts and contracts linked to consumer credit. A mixed-purpose contract is a contract that includes elements other than the sale of goods, supply of digital content or any related service (according to their definitions in article 5) (article 6.1). An example is if the contract contains an agreement for lease of goods or for a gift[166]. Contracts linked to consumer credit exist when a trader grants or promises to grant a consumer credit as a deferred payment, loan or similar financial arrangement (article 6.2).

A further requirement for the application of the CESL is that the contract must be of *cross-border* nature, meaning that a minimum of two of the contracting parties must have their habitual residence in different countries (article 4.2). Additionally, at least one of the parties must have their habitual residence in a member state. There is, however, no provision requiring *all* contracting parties to be located in a member state. This renders the proposal applicable in far more situations than trade within the common market and between EU member states. [167]

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[161] The CESL, article 2 point K.
[162] The CESL, article 2 point J.
[163] The CESL, article 2 point J.
[164] The CESL, article 2 point M.
[165] The CESL, article 2 point M.
[166] Examples from Schulze, p. 51.
[167] Schulze, pp. 35-37.

The possibility of employing the CESL to govern a contract is also limited to the *status* of the contracting parties (article 7). Parties to a contract can either be a trader and a consumer or alternatively all parties may be traders, as long as at least one of them is a SME, *small or medium-sized enterprise*. Article 7.2 defines a SME as a company that employs fewer than 250 people *and* that has an annual turnover below 50 million euros or an annual balance sheet not exceeding 43 million euros in total (or an equal amount in corresponding currency). [168] There is, however, one exception to the status requirement. Member states can themselves decide to make the CESL applicable to contracts between traders in cases where none of them qualify as a SME. The same exception can apply to the requirement for a cross-border contract. In other words, member states can also make the CESL apply to entirely national contracts. [169]

4.4 Structure and content overview

The structure of the CESL is divided into three main parts. [170] Before the first part, a so-called *explanatory memorandum* exists. Here, the Commission sets out and explains the purpose and scope of the proposal, presents provisions for agreeing to use the framework and the consequences of using it, for example in relation to domestic laws etc. [171] Following, the first part of the proposal is presented. It is a *preamble,* containing of 37 points (*recitals*) and 16 articles that informs the reader about the CESL and its content. For example, it is here explained the proposal's benefits for traders and consumers. [172] These recitals and articles are commonly referred to as the *chapeau rules*[173] of the framework. [174]

The second part of the proposal, normally stated to be *the Annex I*, is where the CESL's substantive provisions are found introducing the contract and sales law set-up. Third part of the CESL is *the Annex II*. This part provides a standard information notice about the CESL and is a summary of the key consumer rights enumerated in the proposal. [175]

Regarding the content of the substantive regulations in Annex I (normally referred to as the "CESL rules"), the Commission states in the preamble that the CESL intends to cover all matters of contract law that are of practical relevance during the life cycle of a contract type falling within the scope of the regulation. [176] This is specified to include provisions on:

[168] See the CESL, article 7.
[169] Lilleholt, p. 5.
[170] The CESL, p. 11; Fogt, p. 87.
[171] The CESL, pp. 2-21. Magnus, p. 3.
[172] The CESL, pp. 14-21.
[173] A French saying.
[174] Fogt, p. 87.
[175] Fogt, p. 87.
[176] The CESL, p. 4 and recital 26.

> "[p]re-contractual information duties, the conclusion of a contract including formal requirements, the right of withdrawal and its consequences, avoidance of the contract resulting from a mistake, fraud, threats or unfair exploitation and the consequences of such avoidance, interpretation, the contents and effects of a contract, the assessment and consequences of unfairness of contract terms, restitution after avoidance and termination and the prescription and preclusion of rights." [177]

The CESL asserts that it also aims to harmonize the sanctions available in cases of a contract breach and duties that can arise under its application. [178] As such, the proposal's intention is evidently not to cover all stages of the contracting process. For example, there are no provisions regulating questions on power of attorney, nor any rules on offsetting. [179]

On a closer consideration of Annex 1, it consists of eight provision categories and two appendices. The eight categories are divided into the following: 1) introductory provisions (for example principles binding on the parties such as the good faith requirement) 2) rules on making a binding contract 3) rules on assessing what a contract is 4) obligations and remedies for the parties to a sales contract 5) obligations and remedies for the parties to a related services contract 6) damages and interests 7) restitution and 8) prescription. Appendix 1 contains model instructions regarding withdrawal; instructions that the trader must provide the consumer before an agreement is made between the parties if the agreement regards distance selling or if it is an off-premises contract. Appendix 2 considers the same issue as the first appendix, but provides a model withdrawal form for the consumer affected by the purchase. [180]

[177] The CESL, recital 26.
[178] The CESL, recital 26.
[179] Compare with content of the regulatory frameworks presented in chapter 3.2.
[180] The CESL, p. 13.

5 Central Conflict of Law Issues if the CESL Enters Into Force

5.1 Introduction

Since the CESL came up on the EU agenda, several criticisms have been presented in the legal discourse regarding the proposal. [181] For example, it has been questioned if there is a need for another cross-border trade legislation when similar frameworks, like the CISG, already exist. [182] Another assessment has been that the EU is acting outwith its legislative competence by developing such a framework within sales law, since this violates the established principle of *subsidiarity*[183] recognized within EU law. The fact that the proposal has been conceptualized as *optional* has raised concerns that article 114 TFEU cannot be considered a valid legal basis for the implementation of such legislation (see further on this debate in chapter 3.3.2). [184]

Criticism of the CESL has also concerned the potential law conflicts that may arise if the proposal becomes adopted in its current form. [185] The need to consider the CESL in the light of private international law is stated within its objectives. This is necessary due to the framework only applying to cross-border transactions. This means that more than one body of law will be involved, which forces conflict rules to decide which one that applies. [186] In the CESL explanatory memorandum, the Commission present their view on how the proposal intends to interact with existing conflict rules in the EU:

> "The Rome I Regulation and Rome II Regulation will continue to apply and will be unaffected by the proposal. It will still be necessary to determine the applicable law for cross-border contracts. This will be done by the normal operation of the Rome I Regulation. It can be determined by the parties themselves (Article 3 of the Rome I Regulation) and, if they do not do so, this will be done on the basis of the default rules in Article 4 of the Rome I Regulation. As regards consumer contracts, under the conditions of Article 6(1) of the Rome I Regulation, if the parties have not chosen the applicable law, that law is the law of the habitual residence of the consumer […] This agreement to use the Common European Sales Law is a choice between two different sets of sales law within the same national law and does

[181] See, for example, Dalhuisen, p. 299.
[182] Ortiz & Perales, p. 243.
[183] The principle is found in the TFEU, article 5. The article states that decisions must be made as close to the citizens as possible, meaning that the EU should not use its legislative powers to achieve something that can be done via domestic laws. See definition: http://europa.eu/legislation_summaries/glossary/subsidiarity_en.htm (2013-12-06).
[184] Heidemann, pp. 1121-1123.
[185] Mak, p. 328.
[186] Sánchez-Lorenzo, p. 191.

> therefore not amount to, and must not be confused with, the previous choice of the applicable law within the meaning of private international law rules." [187]

At first, the solution seems uncomplicated. The Rome I and the Rome II[188] (together further referred to as the "Rome Regulations") will continue to apply to situations that fall within the scope of the CESL. The relationship between the Rome Regulations and the CESL will be identical to their relationship with domestic laws. The Rome Regulations will thereby solve law collisions involving the CESL whenever its application overlaps with other bodies of law. [189] The description of the relationship between the CESL and the Rome Regulations can however be considered as oversimplifying the solution to potential law conflicts. Adding new legislation to an already well-regulated and complex area of law like international trade is not without complications. [190] Not only must the CESL's relationship with current conflict rules be established, but also the way in which it will interact with substantive law provisions that it may collide with, and where conflict rules cannot solve the issue. Examples of such provisions are mandatory rules, including consumer protection rules, and international trade legislation. In relation to these provisions, conflicts are likely to occur if there are no clear guidelines in the proposal to solve the collisions. [191]

Regarding the relationship between the CESL and current conflict rules, there is no further explanation from the Commission of how these relate to each other, apart from what has been presented. [192] In addition to this, the proposal has outlined how it intends to relate to substantive provisions that it may collide with in vague terms. [193] The Commission appears to fail to attach sufficient weight to the potential law conflict issues arising when applying the CESL. What the proposal states, is simply that conflict rules in force will be unaffected by the CESL and that this circumstance will solve all subsequent law conflicts with other substantive provisions. No problems will arise. [194] Critics have, however, raised issues with such a position. [195]

The debate regarding the CESL and the law conflict issues it potentially can cause has, so far, mainly concentrated upon three issues. The *first* regards the choice and enforcement of the CESL via current conflict rules, mainly the Rome Regulations (chapter 5.2). The *second* is the relation between the

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[187] The CESL, p. 6.
[188] In most cases where the CESL is chosen, as will be further shown, the applicable law will be determined by the Rome I. Nevertheless, there are some pre-contractual provisions in the CESL and therefore the Rome II can also become the current conflict rules. Problems connected to the Rome II *have* been discussed, even if not to a great extent. Therefore, the Rome II can be relevant to keep in mind regarding the following issues.
[189] Heidemann, p. 1127.
[190] Dalhuisen, pp. 299-301 and p. 303.
[191] Sánchez-Lorenzo, pp. 191-192.
[192] See previous citation from the CESL, p. 6.
[193] See following discussions in chapters 5.3-5.4.
[194] See previous citation from the CESL, p. 6.
[195] See following discussions in chapters 5.3-5.4

CESL and mandatory law provisions (chapter 5.3), while the *third* concerns how the CESL and the CISG will relate to each other (chapter 5.4). [196]

5.2 Problem I: Application via the Rome Regulations

5.2.1 Detour due to legal status

Within the field of private international law, the CESL can be categorized as a framework of special substantive rules. The provisions are *substantive*, as opposed to procedural, in the way that they concern material rules applicable within the scope of the CESL, and *special* in the sense that they are an alternative to domestic laws that otherwise would apply. [197] The aspect of the CESL explanatory memorandum relating to its relationship with existing EU conflict rules, previously presented in chapter 5.1, continues with the following:

> "The Common European Sales Law will be a second contract law regime within the national law of each Member State. Where the parties have agreed to use the Common European Sales Law, its rules will be the only national rules applicable for matters falling within its scope. Where a matter falls within the scope of the Common European Sales Law, there is thus no scope for the application of any other national rules. This agreement to use the Common European Sales Law is a choice between two different sets of sales law within the same national law and does therefore not amount to, and must not be confused with, the previous choice of the applicable law within the meaning of private international law rules." [198]

This excerpt describes the form of the CESL. This form is further clarified via a statement located within the preamble to the CESL:

> "[t]he agreement to use the Common European Sales Law should be a choice exercised within the scope of the respective national law which is applicable pursuant to [the Rome I Regulation], … [the Rome II Regulation], or any other relevant conflict of law rule." [199]

From the above, it can be concluded that the provisions in the CESL are not *independent* substantive rules. They have to be chosen by the Rome Regulations (or other relevant conflict rules) in order to apply, just like national laws have to be in cases where several of them are applicable, for example in cross-border transaction. If the Rome I is the conflict regulation that applies, the choice of law is done either by article 3 or article 4, depending on whether a choice of law has been expressed by the parties or not (see chapter 2.2.1). [200] The Rome Regulations state that if the parties

[196] See Conte in Alpa (ed.), pp. 68-74. Here, these three specific issues are stated to be the most central.
[197] Sánchez-Lorenzo, p. 192. Compare with Lookofsky, p. 7.
[198] The CESL, p. 6.
[199] The CESL, recital 10.
[200] Sánchez-Lorenzo, p. 192; Bisping, pp. 2-3.

have chosen a law, then that law is applicable (article 3 in the Rome I, article 14 in Rome II). Accordingly, no issue seems to exist if parties have chosen to let the CESL govern their contract. Their decision will always be valid and take effect via conflict provisions. [201]

However, the CESL is also a *dependent* regulatory framework in a way that domestic laws are not. Unlike for domestic laws, the CESL cannot be an option of choice for conflict rules. The previously presented citation from the CESL asserts that it will be a "*second contract law regime within the national law of each Member State*"[202]. This means that the proposal will have the status of an optional legislation *within* the national law that is chosen by conflict rules. [203] The relationship between the national law and the CESL is stated to be that when the CESL applies, the domestic law cannot be validly applied within the same scope. [204]

It can thereby be concluded that the CESL applies via the Rome Regulations *and* via domestic legislation. This process is called the *two-step application procedure*[205]. [206] The latter step, to apply the CESL via domestic legislation, inhibits the creation of a *29th European contract law regime*, a law that would exist parallel with the current 28 domestic contract laws. Instead, the CESL will, if it enters into force, create an alternative to each member state's contract law. The proposal will operate as an aspect of the domestic law that the Rome Regulations, or other conflict rules, consider to be applicable. Therefore, the CESL should *not* be seen as a piece of international law. Considering this, the CESL is often referred to and categorized as a *2nd contract law regime* when its form of legislation is discussed. [207]

The characterisation of the CESL as an alternative aspect of domestic laws allows conclusions to be drawn as to how potential law conflicts would be solved under existing conflict rules. The Commission has not expressly considered the potential law conflict ramifications following such a characterisation. [208]

5.2.2 Third state influence and other issues

An issue that arises due to the fact that the CESL applies via conflict rules is the involvement of a third state, a non-EU member state, in a situation

[201] Whittaker, pp. 588-589.
[202] See previous citation from the CESL, p. 6.
[203] The CESL, p. 4; Fogt, pp. 113.
[204] See previous citation from the CESL, p. 6: "*Where a matter falls within the scope of the Common European Sales Law, there is thus no scope for the application of any other national rules*".
[205] To clarify the steps: 1) The Rome Regulations make a domestic law applicable 2) This chosen domestic law makes the CESL applicable. See Fogt, p. 113.
[206] Fogt, pp. 112-113.
[207] Conte in Alpa (ed.), p. 68.
[208] See following discussions in chapter 5.2.2.

where the parties have agreed to let the CESL govern their contract. [209] A prerequisite for the CESL to apply is that only one of the contracting parties has his/her habitual residence in a member state (see prerequisites for application of the CESL in chapter 4.3.2). There is neither any requirement that the subject of the contract is performed within or delivered to a state within the EU. The country that is considered to be the one with the *closest connection* to the contract can therefore in many situations be a third state. [210]

First of all, the parties can *choose* to involve a third state[211], for example in accordance with article 3 in the Rome I, when applying the CESL. The chosen third state law will then govern all matters outwith the scope of CESL. Furthermore, a third state-involvement can occur without such agreement. An example of the latter situation is when the contracting parties have not chosen a domestic law to govern their contract, but agreed to use the CESL. Here, article 4 in the Rome I (see chapter 2.2.1) can lead to the application of a third state law, which will be the result if the contract's "main connection" is considered to be in a third state. [212] Another situation is if the contracting parties *have* agreed on a member state's law to be applicable along with the CESL, but this agreement for some reason has not met the conditions within article 3 of the Rome I. The choice of law will then not be valid, which will lead to the use of article 4. This determination under article 4 could result in the law of a third state being chosen as applicable. [213]

There are, as outlined above, a variety of situations where a third state can be involved in situations where the CESL applies. The question that remains, however, is *why* this involvement is a problem. Critics in the academic discourse have raised concerns regarding what the outcome will be if the Rome Regulations, due to a third state involvement, are *not* chosen as the applicable conflict rules within the scope of the CESL. Although, even if the Rome Regulations *are* applicable, it would not solve all potential conflicts. [214]

The first mentioned situation, and the resulting issues, has been emphasized through the following example. In the example, a consumer and a trader have agreed on a deal and decided to let the CESL govern their contract. They have also agreed on a member state law to apply to rule the issues not covered by the CESL, for example Italian law. With this, no third state should have a chance to become involved (at least not because of article 4 in the Rome I). The trader has his business located in a member state, for example France, and the consumer purchases goods that are to be delivered

[209] Fogt, pp. 128-129.
[210] The CESL, article 4. Compare with the Rome I, articles 3-4.
[211] See example in Sánchez-Lorenzo, p. 199.
[212] Sánchez-Lorenzo, pp. 198-199; Whittaker, pp. 588-589.
[213] See example from Sánchez-Lorenzo p. 199 in comparison with prerequisites for a choice of law according to the Rome I.
[214] See following discussions.

to an address in a member state, for example Germany. The consumer resides occasionally on this German address and he intends to store the purchased goods here. The parties' agreement to use the CESL in this situation seems valid. It regards a consumer purchase, the situation is cross-border, the purchase is made within the EU and all parties appear to be coming from EU countries (even if the last is not a requirement for the CESL to apply). No third state or third state law seems to be involved. Although, the consumer's permanent address is located in Switzerland, a third state, and this is where he is domiciled. The consumer has not declared this circumstance to the trader, since the information has no practical relevance for the purchase. However, according to the Commission, the applicability of the CESL must be determined through current law conflict rules (either the Rome Regulations or other) and not by the proposal itself. Jurisdiction must be given to a forum with jurisdiction to apply its conflict rules. Normally, this is done in accordance with the *lex fori principle*[215]. Although, since this case regards a consumer jurisdiction is normally based upon the domicile of the consumer (in this case article 15.1.c and 16.1-2 in *the Lugano Convention*[216]). This will, in the example, result in the application of *Swiss* private international law. The conflict resolution frameworks within Switzerland are made up of provisions different than the Rome Regulations. Here, the applicable law is the consumer's domestic law. There are no exceptions stated from this rule, even if the parties have agreed to apply another law to their contract (in this case a member state law). With this, the parties' choice to let the CESL govern their contract is void. [217]

The stated example is, however, a rarity. In the majority of circumstances, as highlighted by the proposal[218], the applicable conflict rules for a situation governed by the CESL will be the Rome Regulations. But, issues still arise as to the influence of a third state even if the Rome Regulations are applied. In the CESL, the Commission declares that: "*The Common European Sales Law will be a second contract law regime within the national law of each member state*"[219]. Accordingly, the situation where the involvement of a third state will cause the Rome Regulations to apply a third state's law to a contract that already is governed by CESL, is worthy of consideration. In such a situation, the CESL cannot apply. The proposal is only in force within member states' laws. The lack of reasoning on this issue is surprising, especially considering the opinions of many that such an issue appears "obvious". [220]

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[215] Jurisdiction is given to the country of the court that the event was brought to.

[216] 88/592/EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, done at Lugano on 16 September 1988.

[217] Eidenmuller, p. 8.

[218] See the CESL, p. 6: "*The Rome I Regulation and Rome II Regulation will continue to apply [...] It will still be necessary to determine the applicable law [...] This will be done by the normal operation of the Rome I Regulation.*".

[219] A different solution is not possible. The EU has no competence to make the CESL a 2nd contract law regime within a non-member state's law.

[220] Fogt, pp. 108-109; Bisping, p. 8.

To conclude, the only situation where a choice of the CESL can be relied upon is if the law of a member state is chosen as the applicable law by the relevant conflict rules in the case. This is not stated as a prerequisite for the application of the CESL. The addition of an explicit requirement to this effect has been one of the suggestions presented in the debate in order to solve the issue with third state influence. For this suggestion, a parallel can be drawn to the CISG, a similar regulation to the CESL. The provisions of the CISG only apply if "*the rules of private international law lead to the application of a law of a contracting state*" (article 1.1.b CISG). Critics in the debate regarding the CESL have concluded that this kind of additional provision could be convenient as supplement to the CESL, but it would instead refer to the law of a *member state*, not a contracting state. [221]

Another option to facilitate the application of the proposal is to adopt an alternative interpretation of the decision of parties to use the CESL. If this decision is interpreted to be the choice of the domestic law of the member state with the closest connection to the contract, the Rome Regulations cannot make a third state law applicable along with the CESL. On the other hand, issues arise as to whether the assumption would meet the requirements for a *chosen* law within article 3 of the Rome I. Here, the intentions of the parties to choose a law must be expressed in an explicit manner. [222]

Another way to reduce the complications of a third state involvement when the CESL applies is to change the *legal status* of the CESL in the Rome I (see further regarding the categorisation of the CESL in chapter 5.2.1). However, the Commission may have missed out on such an opportunity. [223] A recital in the Rome I declares the following:

> "Should the community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules" [224]

This provision allows a non-national legal regulation to become subject to the Rome I. If the provision had been used when the CESL was created, the proposal would have had the status of an independent EU legislation in the eyes of the Rome I. With this, the proposal had become the 29th European contract regime, instead of having its current status as 2nd contract law. In other words, the CESL would have been treated like any domestic law within the Union. This change of status would remove the step of applying the CESL via domestic laws, and thereby eliminate the risk that third state law becomes applicable via the Rome I. The change states that this solution would be a fundamental improvement of the proposal regarding its legal certainty and predictability. [225]

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[221] Sánchez-Lorenzo, p. 193.
[222] Sánchez-Lorenzo, p. 199.
[223] Sánchez-Lorenzo, pp. 194-195.
[224] The Rome I, recital 14.
[225] Sánchez-Lorenzo, pp. 194-195.

Creating the CESL's *own* set of conflict rules, has also been discussed as a way to solve the issues relating to third state involvement. If the CESL had its own conflict rules, the choice to apply the proposal would classify as a conflict choice of law. If so, the CESL would take precedence over the Rome I, or other conflict rules, in accordance with article 23 in the Rome I (see chapter 2.2.1). Conflict rules in the CESL would be seen as more *specific* than the Rome I provisions, making the latter regulation no longer applicable. [226]

The Commission's decision to apply the CESL *via* alien conflict rules has been criticised ever since the publication of the proposal. [227] A general aim when creating international substantive laws is to, as far as possible, facilitate the application of such legislation. If this goal is met when a law applies via foreign conflict rules, is questionable. [228] Several critics have agreed that conflict rules should be added to the CESL. In an article by Horst Eidenmuller in *The Edinburgh Law Review*, the author states that: "*defining the CESL's applicability in the regulation itself, and without interference from the Rome I Regulation and Member State's laws, is the preferred solution*". [229] The possibility to add conflict provisions to the CESL is even listed explicitly in the proposal with the statement: "*the agreement to use the Common European Sales Law should be a choice exercised within [...] the [Rome I Regulation], ...[the Rome II Regulation],* ***or any other*** *conflict of law rule*"[230]. [231] However, the idea to create conflict rules for the CESL has not been undisputed. Some argues that due to the CESL's status as a 2nd contract law regime, the principle of subsidiarity is respected. The CESL supplements national laws without replacing it[232]. [233]

All in all, several suggestions have been presented in the academic discourse regarding how issues on third state involvement, caused by the fact that the CESL applies via conflict rules, can be solved. They all comprise ideas on how to avoid a third state law from being applicable within the CESL scope of application. To summarize, the suggestions include: 1) additions of a prerequisite that a member state law must be chosen by conflict rules for the CESL to apply (see similar solution in the CISG) 2) the adoption of an interpretation that the choice to use the CESL is the choice of the law in the member state with the closest connection to the contract 3) a change to the status of the CESL in the Rome I 4) addition of independent conflict rules to the CESL.

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[226] Fogt, p. 103.
[227] See, for example, Fogt, pp. 108-109.
[228] Eidenmuller, p. 7.
[229] Eidenmuller, p. 9.
[230] The CESL, recital 10.
[231] Compare with previous discussion by Eidenmuller, p. 9.
[232] Here, the author argues that it would have been better for the EU to use the full harmonization directive option. With this, the same result as for an optional law would have been achieved. However, it would be a major overriding change for traders that do not want to be affected by the CESL provisions. See a similar conclusion by Heidemann, p. 1126.
[233] Staudenmayer in Alpa (ed.), p. 25.

Besides the discourse on issues appearing due to the application of the CESL via the Rome Regulations, or other conflict rules, a parallel discussion has arisen if the provisions of the Rome Regulations can *prevent* the application of the CESL. [234] As previously stated, the CESL is not actual national law, even if the proposal clearly states that it should be *considered* as national law (in the form of 2nd national contract law, see chapter 5.2.1). In the CESL, the Commission have expressed that the Rome Regulations should continue to have the same content and function within the CESL's scope of application. [235] Attention has been drawn as to the question of if the CESL is a regulatory framework that can be taken into force via these regulations. [236] One argument is that as the CESL cannot be seen as actual national law, it cannot be applied via the mechanism of the Rome Regulations. The reason for this is that the proposal does not originate from a national parliament, like national laws do, but from the EU legislative powers. Neither are there any striking aspects of the CESL that makes it similar to national law, since it aims to create uniformity in a transnational setting. The mere self-categorization of the CESL as national law does not make it such in the eyes of the Rome Regulations. [237]

However, an alternative argument is that the CESL is applicable due to the effect of recital 13 of Rome I. The recital declares that: "*this Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention*". The CESL, even if not considered national law, could still be applied via the Rome I. The CESL clearly satisfies the conditions to be considered an international convention in accordance with the requirements in Rome I. [238] Opponents however, point out that if the Commission want to rely on recital 13, the status of the CESL has to change. These opponents contest the fact that the CESL meets the requirements for an international convention and use the fact that the Commission has clearly stated that the proposal should be considered as national law in support of this. [239]

A third approach has been taken on the issue of whether the CESL is a regulatory framework that can apply via the Rome Regulations. Some state that this question does not have to be solved at all. The reasoning for such an argument is based on the CESL being applied only *via* domestic laws, in accordance with the two-step application procedure (see chapter 5.2.1). The process would involve the Rome Regulations, whenever current, choosing the applicable domestic law and such domestic provisions to then apply the CESL. [240]

[234] See following discussions by Heidemann and Bisping.
[235] The CESL, recital 10.
[236] See following discussions by Heidemann and Bisping.
[237] Heidemann, pp. 1127-1128.
[238] Bisping, p. 4.
[239] Compare with Heidemann, pp. 1127-1128.
[240] Fogt, pp. 113-115.

5.3 Problem II: Relation to mandatory law provisions

5.3.1 Introduction

In addition to the aforementioned issues relating to the CESL and potential law conflicts, other compatibility concerns arise in relation to the CESL and the Rome Regulations. [241]

As formerly mentioned, the CESL will enter into force in a legal area that is already regulated to a great extent, for example by national laws and EU law provisions. A potential issue here is the relation between the CESL and mandatory law provisions that exist within domestic or EU legislation. [242] Many questions have been raised regarding the issue. Examples of queries are if the parties' freedom to choose the CESL will be limited due to existing mandatory rules, or if the outcome of such a collision will depend on the type of mandatory provisions that are involved[243]. The CESL only partly answers the concerns that have arisen. [244]

5.3.2 Consumer protection

The majority of mandatory law provisions relevant to cross-border contracts concern *consumer protection*. This is one of few areas that the contracting parties, the trader and the consumer, cannot govern. To a certain extent the weaker party must be protected. [245]

An expressed objective for the CESL regarding consumer protection is to create a less fragmented situation in respect of the matter within the EU. To achieve this, the CESL aspires to fill pre-existing gaps in current consumer rights directives whilst covering new areas where such protection is required.[246] Critics have stated that these objectives vague describe the Commissions' intentions for how the CESL is to affect current consumer provisions and the level of consumer protection that today exists throughout the EU. One of the main questions in the academic discourse is whether the Commission aspires to *raise* the consumer protection level in the EU through the CESL or if other advantages instead are afforded to consumers within the proposal. [247]

[241] Compare with Sánchez-Lorenzo, pp. 197-208.
[242] Bisping, pp. 2-4.
[243] For example if a provision originates from EU law or regards consumer protection.
[244] Bisping, p. 2.
[245] Bisping, pp. 2-3.
[246] Eidenmuller, p. 11.
[247] Bisping, pp. 7-10.

In considering what is stated within the CESL regarding its relation to existing mandatory consumer protection rules, the following can be found in the explanatory memorandum:

> "Under the normal operation of the Rome I Regulation there are however restrictions to the choice of law for business-to-consumer transactions. If the parties choose in business-to-consumer transactions the law of another Member State than the consumer's law, such a choice may under the conditions of Article 6(1) of the Rome I Regulation not deprive the consumer of the protection of the mandatory provisions of the law of his habitual residence (Article 6 (2) of the Rome I Regulation)." [248]

Previously, it has been determined that the Commission wished the application of the Rome Regulations to remain unaffected by the proposal. This presented excerpt from the proposal emphasizes that this also includes article 6 in the Rome I regarding consumer protection rules (see also chapter 2.2.1 regarding provisions in the Rome I). In applying the relevant provisions, the law of the consumer's home state will remain the default applicable law if the parties have not agreed on anything else (article 6.1 Rom I). The parties are not precluded from agreeing on another body of law to apply, but this *cannot* deprive the consumer of mandatory consumer protection provisions existing in the law of his/her habitual state (article 6.2 Rome I). In this aspect, the freedom of choice for the contracting parties is limited due to the protection of consumers, and this continues to apply when the parties have chosen the CESL to govern their contract. [249]

So far, conflict issues regarding the relationship between the CESL and mandatory consumer protection rules, applicable due to the Rome I, appear to be straightforward to solve. It seems like opting-in to the CESL will not change any aspects of the situation. The Rome I will still apply to the proposal's area of application, including article 6, meaning that consumer protection rules are still supreme. [250] Although, the excerpt previously presented from the explanatory memorandum (see citation above) continues:

> "The latter provision [referring to article 6.2] however can have no practical importance if the parties have chosen within the applicable national law the Common European Sales Law." [251]

A similar statement is also found in the proposal's preamble:

> "Since the Common European Sales Law contains a complete set of fully harmonised mandatory consumer protection rules, there will be no disparities between the laws of the Member States in this area, where the parties have chosen to use the Common European Sales Law. Consequently, Art. 6(2) [Rome I Regulation] which is predicated on the existence of differing levels of consumer protection in the Member States, has no practical importance for the issues covered by the Common European Sales Law." [252]

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[248] The CESL, p. 6.
[249] Compare with the Rome I, articles 3-4. See also Bisping, pp. 2-3.
[250] Fogt, p. 132.
[251] The CESL, p. 6.
[252] The CESL, recital 12.

Such statements raise further issues. [253] The declaration that the CESL intends to harmonize consumer protection standards within the EU, and consequently provide a higher level of consumer protection in all member states, has resulted in little resistance. However, a debate has risen regarding what the Commission implies with their statement that article 6.2 in the Rome I will be of no practical relevance. The possibility that the CESL will deprive consumers of a *higher* protection level in their own domestic law seems unlikely, due to the aim of the EU to increase consumer protection within the common market. [254] For practical reasons, a trader may argue for the opposite: he/she wants to be able to *solely* rely on the consumer rights and duties laid down by the CESL where the CESL is governing the law. [255]

If the latter option is the case, the CESL will set a maximum limit for consumer protection, a level of protection that the consumers must agree upon when opting-in to the CESL. [256] Naturally, this limit is only an issue if the law of the consumer's home state provides a higher level of consumer protection than the CESL does. [257] Critics emphasize that even though this might not currently be the case, the situation can change in the future. Domestic laws can improve their level of consumer protection. Others assert that the CESL does not even contain all current domestic consumer protection and that the argument that article 6.2 is not needed because the CESL contains a complete set of consumer rules, is thereby unfounded. Rights currently afforded to consumers may, in fact, be removed. [258]

The alternative argument is that the CESL is not made for the purpose of strengthening the existing consumer protection in the EU, but to facilitate cross-border trade. [259] According to the proposal, it aims to create a balance between the interests of the consumer and the trader and also uphold a high level of consumer protection throughout the EU. Therefore, these objectives could be met even *if* the CESL was to remove article 6.2. [260] Conspiracy theories have flourished stating that the Commission with the CESL wants to take away rights from consumers that otherwise would be afforded, in order to facilitate cross-border trade and through this create a better economy for the EU. The fact that consumers are put in a less favourable situation when opting-in to the CESL is exemplified with a provision (article 8.2) stating that the parties must decide to use the proposal in a separate agreement. Through this agreement the trader will make the consumer aware of his or her new obligations and deprived rights. [261]

As outlined above, many questions exist regarding how the CESL will affect article 6.2 in Rome I. Conflicts may arise in relation to so-called

[253] Bisping, p. 3.
[254] Sanchez-Lorenzo, p. 205; Piers & Vanleenhove, p. 14.
[255] Bisping, p. 10.
[256] Sánchez-Lorenzo, p. 207.
[257] Piers & Vanleenhove, p. 15.
[258] Sánchez-Lorenzo, p. 205.
[259] Bisping, p. 7; Piers & Vanleenhove, p. 14.
[260] Bisping, pp. 7-10.
[261] DiMatteo, pp. 232-233.

"excess" consumer rights, those rights that are not included in the CESL but can be found either in applicable domestic laws or EU provisions. Conflicts arise between the CESL and the provisions containing the "excess" consumer rights, the latter applicable because of the Rome I. [262]

If the Commission tries to deprive consumers their rights contained within domestic or EU legislation through the CESL, then this would not be valid. The following scenario exemplifies the issue. In the example, a French trader and a German consumer have agreed to apply the CESL and French law to their contract (article 3 and 6.2 Rome I). With this choice, according to the provisions of the CESL, the consumer cannot rely upon German law anymore. Only consumer rights found in the CESL apply. If the parties instead had agreed that *only* French law would govern their contract, the consumer would still be able to rely upon rights derived from his/her domestic law in accordance with article 6.2. Although now, when the parties have opted-in to the CESL, the effect is that the consumer cannot call upon such consumer provisions in his/her domestic laws. In practice, the repercussions will not be as dramatic, since the CESL will cover many of the consumer rights found within German laws. Still, the CESL assumes that the relevant consumer rights in domestic legislation are found in those areas of law that the CESL covers, but there are no guarantees that this is the case. As well, there is no logic as to why the CESL (the 2nd German contract law) would be superior, and seen as the framework with a more relevant range of consumer protection rules, compared to German domestic laws. Was this what the consumer intended when he/she opted-in to the CESL? The result of the example is that a choice made by the parties to use the CESL must include a hypothetical will from the consumer to completely exclude, in this case, German law, including the rights falling within the scope of article 6.2. Looking at the ordinary rules of interpretation, it is difficult to see how the consumer's choice of the CESL can be interpreted to such an extent that would include this intention[263]. [264]

There are also other ways to prove that the CESL's declaration regarding article 6.2 is default. This can be done on the basis that the statement that article 6.2 will have no *practical importance* for contracts covered by the CESL, since the proposal contains a full range of mandatory rules, is simply false. [265] The CESL clearly declares that it does not cover *all* aspects of a transaction. Considering this, mandatory consumer provisions can occur in areas that the CESL does not cover, even if the CESL applies to the transaction otherwise. These provisions will be subject to article 6.2 (as long as the Rome I applies) regardless of what the CESL may state, because they are *outwith* the proposal's scope. With this, the result is that article 6.2 *will* be of practical importance in a case where the parties have chosen to apply the CESL. It is irrelevant if the parties have chosen a domestic law along with the CESL or not, the result will be the same. All in all, the Commission

[262] Conclusion from the debate previously presented.
[263] Since this has never been a will expressed by the parties.
[264] Whittaker, pp. 589-590.
[265] Eidenmuller, p. 7.

has made a mistake assuming that there are no consumer protection provisions existing outside the CESL scope of application. With this wrongful assumption, the Commission's argument regarding article 6.2 is unsustainable. [266]

The Commission have explained their statement regarding article 6.2 in the CESL, but the above arguments are not considered. With the construction of the proposal (see also chapter 5.2.1) article 6.2 will not be *removed*, it will only lack practical relevance. Also, consumers will not be deprived of any of their rights afforded by domestic law. The excerpt from the CESL explanatory memorandum previously presented, stating that article 6.2 will be of no practical relevance, continues with an explanation on *why* this is the case: [267]

> "The reason [for article 6.2 not being of practical relevance] 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." [268]

Here, the Commission declares that article 6.2 is irrelevant because the CESL is national law of the consumer's home state (a 2nd national contract law). Due to this circumstance, the chosen law and the consumer's domestic law are the same legislation: the CESL. Clearly, no gap will exist between the CESL and the CESL that requires protection by article 6.2. The Rome I will thereby be fully respected, but the 6.2-operation will be of no practical relevance. The fact that the CESL is national law is neither a problem seen to the current protection given to consumers, the Commission declares, because the proposal contains the same consumer protection level as domestic laws in the EU. The legality of such a solution, which in effect circumvents established consumer protection rules, has been questioned. [269]

One of the critics of the Commission's explanation in the CESL, states that the construction is not possible due to what is declared within article 6.2. Considering the article's statement that: "*provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable*", it is difficult to see how the CESL can be considered as the law that would have been applicable if the parties had not made an agreement. The only reason that the CESL applies in this case is because the parties have *agreed* to use it. Even if the CESL would have status as domestic law, this does not change the circumstances. Hence, the "otherwise applicable law" in article 6.2 must refer to the domestic law of the consumer's domicile (see article 6.1 Rome I) and thereby it should be that domestic law that is compared with the CESL. Accordingly, the consumer can always rely on article 6.2 to invoke rights that are not found

[266] Eidenmuller, pp. 7-8; Piers & Vanleenhove, p. 14; Eidenmuller (2013), pp. 13-14.
[267] Conte in Alpa (ed.), pp. 69-70. See also previous debate and following citation.
[268] The CESL, p. 6.
[269] Sánchez-Lorenzo, p. 205; Fogt, p. 13.

within the CESL, since the Rome I is mandatory and binding upon member state courts. [270]

Regarding how other EU regulatory frameworks relate to mandatory consumer provisions, a closer look can be taken at the adopted *Consumer Rights Directive*. [271] In the matter, the directive declares that:

> "[i]f the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by the national measures transposing this Directive. Any contractual terms which directly or indirectly waive or restrict the rights resulting from this Directive shall not be binding on the consumer." [272]

Here, the view seems to be that a complete avoidance of national laws cannot be done within the consumer directive's sphere of application. This is since national laws contain the provisions that transpose the directive. The position is opposite to what the CESL seems to state in this matter. Critics state that the relation between the Consumer Rights Directive and the CESL must be clarified, since an adoption of the CESL will not replace or change the directive. The same is for other consumer directives in force that might have different content than the CESL. Many seem to insist that the CESL is a set of consumer protection rules presented in an EU legislation that, due to its status and legal character, is superior mandatory consumer law provisions coming from domestic laws and those found in EU directives. [273]

To conclude, the debate has been intense and the speculations many regarding what impact the CESL will have on the current consumer protection level for consumers that opt-in to the framework. Most would agree that there is a need for clarification in the CESL regarding its relation to mandatory consumer protection rules. [274] Two relatively uncomplicated alterations have been proposed in order to prevent conflict issues to arise with the CESL. The first is that the CESL should let article 6 in the Rome I to apply fully within the proposal (and with this take the consumer's domestic law into consideration). The second option is that the CESL becomes superior to all other consumer protection rules within the EU. As a consequence, only the consumer rights that are found in the CESL can be called upon by consumers that have opted-in to the framework. The change states that the last option would, however, likely require a change in the Rome I, so the first alternative appears the most appropriate. Regardless what the solution is, this issue must be clarified in the CESL in order to avoid future law conflicts. [275]

[270] Whittaker, p. 590; Piers & Vanleenhove, p. 14.
[271] Sánchez-Lorenzo, pp. 210-211.
[272] The Consumer Rights Directive, article 25.
[273] Sánchez-Lorenzo, p. 211.
[274] Conclusion from previous discussions in the chapter.
[275] Fogt, pp. 134-135.

5.3.3 Other mandatory provisions

As discussed previously, compulsory consumer rules are not the only mandatory provisions that exist that the CESL will have to accommodate. The CESL has specific rules relating to consumer law provisions, but none exist for *other* mandatory provisions. [276] Issues relating to these are similar to those raised in respect of the consumer protection rules, such as if the CESL can prevent mandatory provisions from applying or what the outcome will be if the CESL contradicts a mandatory provision. [277] Already when the CESL presented their Green Paper regarding a common European sales law (see chapter 4.1), attention was drawn to the fact that such law must clearly regulate its relationship with mandatory rules outside the field of consumer law[278]. Yet, the issue is not mentioned in the CESL. [279]

The definition of a mandatory provision is found within Rome I, article 9.1:

> "Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation." [280]

A provision falling within the scope of article 9.1 is, for example, a national law prohibiting the export of rare cultural objects. In article 9.2, courts are given the freedom to apply mandatory rules of the forum where the obligation arises from instead of the law otherwise applicable as determined by the Rome I. [281]

Few mandatory rules fall under the definition of article 9.1 that would currently overlap with the CESL scope of application. Article 9 should be interpreted restrictively and is applicable only in "exceptional circumstances". [282] Besides, many provisions that could fall under article 9.1, for example a ground for invalidating a contract due to public policy considerations, are already found within the CESL. A group of rules identified as *not* included in the CESL, but ones that could fall within the scope of article 9, are those regarding unfair contract terms[283]. [284] Whether they can be invoked in a case where the CESL applies, due to article 9 in Rome I, is unclear. [285]

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[276] Bisping, p. 3 and p. 15.
[277] Sánchez-Lorenzo, p. 212.
[278] The specific proposal was presented by a German research organization called *the Max Planck Institute*.
[279] Bisping, p. 16.
[280] The Rome I, article 9.
[281] Bisping, p. 5. See also the Rome I, article 9.2.
[282] Whittaker, p. 593.
[283] An example given in the debate is the British legislation *Unfair Contract Terms 1977*. Example from Bisping p. 3 and p. 6.
[284] Whittaker, pp. 594-595; Bisping, pp. 6.
[285] Compare with Bisping, p. 3.

However, some assert that there is unlikely to be any major law conflicts between mandatory law provisions (not regarding consumer protection) and the CESL. Both can apply fully. This is the case as if mandatory rules are not included in the CESL, they fall outwith the proposal's scope of application. Outwith the CESL, the Rome I is applicable without any reservations including article 9. Due to this, a mandatory provision cannot be neglected by the proposal. Even if a mandatory rule were considered to be within the CESL area of application, it would still apply. The reason for this is that the Commission has stated that the Rome Regulations remain valid and unchanged when considering the CESL. Any specific bypassing of article 9 has never been stated by the Commission as part of the proposal. Conflicts will thereby never occur between the CESL and mandatory law provisions falling under the scope of article 9 in Rome I. [286]

5.4 Problem III: The CISG relation

5.4.1 Comparing the CESL and the CISG

When generally considering the CESL (see chapter 4) and the CISG (see chapter 3.2.4), it can be concluded that a difference between an optional framework (like the CESL) and a non-optional one (such as the CISG), is that a non-optional instrument, normally, does not depend on conflict rules for its application. Without this procedure, many conflict issues are avoided. Regarding the CISG, the regulatory framework applies by default when all contracting parties involved have their place of business or they reside in a state that has ratified the legislation (article 1.1.a CISG). [287] The application of a non-optional law can also, occasionally, be done *via* conflict rules. In the CISG, article 1.1.b declares that its provisions can be used even if only one of the parties involved is a contracting state, as long as international conflict rules point out that contracting state's law as applicable. Conflict rules can thereby *extend* the application of the CISG. Otherwise, they are not involved in the process of making the legislation that will govern the parties' contract. [288]

When comparing the CESL and the CISG, it can be determined that their legislation types also differ in other ways. The CISG has been submitted as a fragmentary global framework, while the CESL is a comprehensive regional instrument. The latter is *regional* because it applies only to either cross-border transactions within the EU or to transactions between a member state and a third country. Also the structures of the regulatory frameworks differ. The CISG is made in line with a traditional treaty model, while the categorisation of the CESL is more uncertain. The proposal is a EU legislative instrument, but it is not made like a classic directive. Such

[286] Bisping, p. 16 and p. 18; Piers & Vanleenhove, p. 13.
[287] Fogt, pp. 92-93.
[288] Fogt, pp. 92-93; DiMatteo, pp. 231-232.

directives must normally be implemented by member states in order for its provisions to become in force. [289]

Despite these differences and the fact that the CESL and the CISG are two separate frameworks with separate provisions, they are not entirely dissimilar in their area of application. An overlap is by many seen as unavoidable, since both relate to sales and contract rules regarding cross-border trade. [290] Corresponding substantive provisions, rules regarding specific issues that both the CESL and the CISG enclose, are, for example, ones comprising obligations of the buyer and the seller in conjunction to a purchase (chapters 10 and 12 in the CESL, chapters 2-3 in the CISG), as well as provisions regarding the passing of risk between parties (chapter 14 in the CESL, chapter 4 in the CISG). [291] Regarding the types of contracts these provisions target, their common area of application is B2B contracts, or more specifically B2SME contracts. [292] This distinction between B2B and B2SME is done since the CISG only covers trade between professional traders (article 2.a CISG) and the CESL only encloses those B2B contracts where at least one of the parties is a SME (article 7.1 CESL). It should thereby be possible to conclude that there will be no conflicts between the CESL and the CISG regarding B2C contracts. However, this may not always be the case. It has been speculated that there can be a collision between the CISG as an *international instrument of harmonization* and the CESL in the form of European consumer law. If this would be the case, conflicts between the frameworks would occur in both B2B and B2C contract situations. [293]

5.4.2 Subsequent complications

As mentioned in the previous chapter (chapter 5.4.1), the CESL and the CISG relate differently to conflict rules. The CESL applies via conflict legislation, while the CISG normally does not. However, this statement does not reveal anything about how a conflict *between* the CESL and the CISG would be dealt with in a private international law context. [294]

Since the previous chapter also stated that the CESL and the CISG overlap in their area of application, concerns have been raised that the CESL will cause law conflicts with the CISG if the proposal is adopted. [295] Today, 24 of the 28 EU member states have ratified the CISG. [296] This means that the vast majority of member states would have to deal with law conflicts

[289] Fogt, pp. 86-87; Ortiz & Perales, pp. 241-242.
[290] Magnus, p. 4; Aksoy, p. 462.
[291] See table of contents in the CESL and the CISG.
[292] DiMatteo, p. 229.
[293] Fogt, p. 102.
[294] See following discussions in the chapter.
[295] Piers & Vanleenhove, p. 17.
[296] Aksoy, p. 462. For a list of member states, see:
http://www.cisg.law.pace.edu/cisg/countries/cntries.html (2013-11-22).

between the CESL and CISG when opting-in to the CESL. [297] Several questions have arisen in the matter. The first question is what the outcome will be if the CESL and the CISG regulate the same situation in different ways, in other words, which regulatory framework that is superior. How the practical opt-in and opt-out procedures of the instruments affect each other must also be clarified, in order to understand their relation. If the parties opt-in to the CESL, does this mean that they opt-out of the CISG and/or vice versa? [298]

The intended relationship between the CESL and the CISG is found in the preamble of the CESL. The Commission acknowledges that there is a risk of conflicts between the frameworks and this requires a solution. [299] The preamble states that:

> "Where the United Nations Convention on Contracts for the International Sale of Goods would otherwise apply to the contract in question, the choice of the Common European Sales Law should imply an agreement of the contractual parties to exclude that Convention." [300]

The Commission's view in the matter is that an opt-in to the CESL results in an opt-out of the CISG. The procedure seems simple. [301] The solution has however been subjected to criticism as to whether it is valid. [302] As concluded, the CESL clearly states that an opt-in to the proposal will lead to an opt-out of the CISG. To opt-out of the CISG can however, according to the framework itself, not be done implicitly. There is no legislative support for asserting that an opt-in to the CESL includes an opt-out of the CISG. The CISG is not an EU regulation. It determines its own scope and opting-out of the CISG must therefore be done in accordance with what the framework instructs on the matter (see article 6 CISG). [303]

According to the CISG, it can be opted-out of if the following requirements are met:[304] 1) the parties are aware of the CISG and its application in their specific case 2) the parties have, in a clear manner, decided to opt-out of the CISG and act consistently with that decision 3) a bilateral consensus develops as to the parties' agreement to opt-out of the CISG and settle on which law that should apply instead of it. Such requirements are difficult to meet in practice, especially if the parties involved are small or medium-sized businesses. Such enterprises usually have a more limited knowledge of the CISG and its provisions and may not meet the requirements of an opt-out. This means that the CISG applies by default when these types of businesses are involved as contracting parties. [305] Parties to a contract *can*

[297] Aksoy, p. 462.
[298] Fogt, p. 96.
[299] Compare with Fogt, p. 108 and the CESL, recital 25.
[300] The CESL, recital 25.
[301] See Staudenmayer in Alpa (ed.), pp. 23-24.
[302] See following discussions by Fogt and Piers & Vanleenhove.
[303] Piers & Vanleenhove, p. 18; Conte in Alpa (ed.), pp. 71-72.
[304] Preconditions for applying the CISG is mainly found in article 8.
[305] Fogt, pp. 91-92.

meet the requirements previously stated to opt-out of the CISG whenever the CESL is applicable, but *only* a provision in the CESL is not a valid exit out of the CISG. A statement is simply not enough. As a result of this finding, the argument is that the CESL provision cannot have any affect on the CISG. [306]

If the CESL cannot regulate and avoid a collision between the CESL and the CISG (in order words, if the opt-out provision in the CESL is considered to be invalid), the question is how it can be determined which one of the frameworks is superior in the event of a conflict. This has been a lively debate. [307]

A collision between the CESL and the CISG is argued to be exceptionally difficult to solve. The reason for this is that neither of the instruments is more specific than the other, which makes the *lex specialis* rule difficult to apply. An argument exists that the CESL is the more specific framework, and thereby superior to the CISG, because it applies due to an active and more specific act of the parties compared with a default application. Also, the CESL is a regional instrument, which is generally considered as a more specific alternative than the CISG. On the other hand, it can also be argued that the precedence origins from the dignity of the law. Therefore, the last-mentioned argument can likewise be used in favour of the CISG, with the argument that a global framework is superior to a regional. [308] Reasoning similar to the latter is that the CISG is superior because of the fact that it is a more established legislation. The CISG has been in force for many years and should therefore be seen as supported by an international body of case law. [309]

The issues of the relationship between the frameworks appear not to be solved by reference to the statuses of each regulatory body. Therefore, a closer examination has been made of the provisions of the CISG, the one legislation in force, in order to find an answer to the problem. In the matter, it can be concluded that article 90 and 94 of the CISG deal with issues connected to the relation between the CISG and similar conventions. Article 90 is a conflict rule applicable when a CISG member state adapts a new international agreement, bilateral or multilateral, and this process creates a divergence between the CISG and the new regulation. [310] The article states that:

> "This Convention does not prevail over any international agreement which has already or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such an agreement." [311]

[306] Piers & Vanleenhove, p. 18.
[307] See following discussions.
[308] Fogt, p. 96.
[309] Heidemann, p. 1130.
[310] Fogt, p. 99.
[311] The CISG, article 90.

The excerpt shows that the CISG only gives another framework precedence if the parties have their residence in a state that is party to the new agreement and such a state decides to generally displace the CISG in favour of a future international agreement. Additionally, the new rules only apply in situations where the CISG is current due to its "main application rule", because all involved parties are parties to the contract (see further regarding the application in chapter 5.4.1). With this, it is argued that the CESL can be superior to the CISG if it is considered to be an *international agreement* in the way that article 90 of the CISG states. Opinions differ as to whether the requirements for this are satisfied or not. Some state that all EU legislation can be seen as international agreements in accordance with the article, since they are transnational law regulations with states as parties to the agreements. Considering this, the CESL is superior to the CISG. Others have reasoned that EU contract law provisions cannot be seen as international agreements in accordance with the article 90. So far, EU contract law has only appeared as directives. These are not international agreements, but demands for change at domestic level. On the other hand, the CESL will not be a directive, but a freestanding regulatory framework that parties can opt-in to. This does not matter for opponents. They emphasize that member states do not ratify EU provisions and neither are member states subject to the regulations like contracting states usually are to international agreements. Accordingly, no form of EU legislation can be considered as an international agreement seen to article 90 of the CISG. The CESL can thereby not be superior to the CISG. [312]

Whether article 90 of the CISG can regulate the priority between the CESL and the CISG, article 94 of the CISG needs to be explored further. The reason for this is that the article could be used in order to make the CESL superior to the CISG and thereby the law conflict could be solved. [313] The article addresses the following:

> "1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.
>
> (2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.
>
> (3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration." [314]

This provision could be used for the CESL in order to exclude the

[312] Fogt, pp. 99-102.
[313] Fogt, p. 102 and p. 104.
[314] The CISG, article 94.

application of the CISG through *operation of law*. It could be done through a common EU declaration of neighbouring reservations. This would make the CISG non-applicable in cases where the CESL applies in accordance with the CISG's own provision (article 94). However, this has been stated as a radical move to be made by the EU. How it would be facilitated within the CESL, and whether such a reservation would actually be valid, is not elaborated upon within academic discourse. [315]

Other, perhaps less radical, ideas have been presented for creating a priority between the CESL and the CISG with the use of the current provisions of the CISG. One example has been to make the application of article 90 wider. This would include the article to cover those harmonization measures taken by the EU with their legitimacy originating from EU Treaties[316]. This kind of extended application of article 90, the rule that gives supremacy to other laws over the CISG, could make the CESL superior to the CISG. This move would, however, result in the CISG eventually losing its influence in the EU. [317]

To conclude, if the construction in the CESL regarding the opt-out of the CISG is void there seems to be no clear answer, but several different solutions, to the priority between the frameworks. An obvious solution cannot be found in either the CESL, general principles of law, or in the CISG. However, not everyone agrees that the CESL opt-out process is void, but even so, law conflict issues seem to appear. The reason for this is that the opt-out statement is vague regarding what it encloses and there is no further information existing regarding the matter, other than the previously presented excerpt from the CESL. [318] The issue of whether the statement refers only to those rules in the CISG that have a counterpart in the CESL or of all provisions are covered, is not clarified. [319] Questions have therefore risen regarding what the outcome will be if parties to a contract have opted-in to the CESL and then have to deal with an issue that is not regulated in the CESL, but covered by the CISG. This could, for example, be the case when a part of a contract comprises of the seller performing a transport related to a purchase[320]. The example is one of many where the CISG applies, but the CESL does not. [321]

In this matter, many have stated that the CESL and the CISG should not be used in the same situation and that an opt-in to the CESL therefore implies a *complete* opt-out of the CISG, including those provisions that cannot cause

[315] Fogt, p. 100 and p. 104.
[316] This argument presupposes the belief that the CESL can claim its legitimacy from article 114 or another article in the TFEU (or another EU treaty). However, if this is the case for the CESL is a separate discussion, as stated in chapter 3.3.2.
[317] Fogt, p. 104.
[318] Heidemann, p. 1130.
[319] See, for example, Perfetti in Alpa (ed.), p. 52 or Piers & Vanleenhove, pp. 19-20.
[320] Further prerequisites exist, for example that the contract falls within the scope of the CESL.
[321] Fogt, pp. 97-98; Magnus, p. 12.

a collision with the CESL. [322] A critic accentuates that the CESL and the CISG should under no circumstances apply at the same time, since this would create a too complicated law conflict situation in the matter. The domestic law that conflict rules chose as the applicable should govern those areas that the CESL does not cover. [323] Some say that the CESL and the CISG cannot apply simultaneously, but a subsequent law conflict arises due to domestic laws not filling in the "internal CESL-gaps". Instead, these gaps must be dealt with in accordance with the objectives and underlying principles of the CESL. This does not necessarily mean that the domestic applicable law (chosen by conflict rules) or international principles (for example the PECL or *lex mercatoria*) should be used. The most convenient solution proposed is that EU law applies where the CESL does not. [324]

Despite the previous, some do believe that the CESL and the CISG can apply at the same time according to the CESL proposal. Thereby, they do not agree that an opt-in to the CESL implies a complete opt-out of the CESL; only those specific provisions that collide will be targets. An opinion in favour of this view states that the CISG should fill in gaps after an application of the CESL in a case and that national law, as a *third* step, should cover those areas that the CISG does not regulate. Using the CISG to fill in gaps where the CESL cannot apply would give the advantage of uniformity in cases where the CESL is chosen, compared to what would be the case if different domestic laws had this role[325]. This solution would be more suitable with the purposes of the CESL, since the proposal intends to create harmonization within its area of application. Therefore, the CISG preserves a useful role as a "gap-filler" along with a CESL application. [326]

[322] DiMatteo, p. 234.
[323] Magnus, p. 12.
[324] Fogt, p. 95.
[325] Which domestic law that would apply depends on the applicable conflict rules.
[326] Piers & Vanleenhove, pp. 19-20.

6 Analysis

After the examination of current conflict rules (chapter 2), transnational substantive sales and contract provisions that the CESL may collide with (chapter 3), the CESL proposal (chapter 4) and the three most pertinent conflict issues in the legal discourse regarding the CESL (chapter 5), the following can be concluded as the most central conflict of law issues expected to arise if the CESL enters into force:

Potential conflict issues: the CESL and conflict rules

Initially, the conclusions regarding the relationship between the CESL and current conflict rules can be set-out. Firstly, the CESL is a framework of special substantive rules. The relation of these provisions to current conflict rules is that they apply via conflict rules *and* domestic law, through a *two-step application procedure*. This means that conflict rules will decide which domestic law that applies, and, in turn, the domestic law will make the CESL applicable. The CESL will appear as a *2nd contract law regime* within the chosen domestic system. In other words, the proposal does not have its own set of conflict rules. When applying the CESL, such rules must be utilised due to the fact that the proposal regards cross-border trade.

Applying the CESL via the Rome Regulations, or other conflict rules, will likely result in law conflict issues. These issues will arise due to the fact that the proposal is not completely compatible with current conflict rules. Accordingly, a choice to use the CESL will be void if relevant conflict provisions makes a third state law applicable within the CESL scope of application. The reason for the nullity is that the CESL *only* is applicable within a member state law. It can also been discussed whether the CESL *at all* can apply via the Rome Regulations, as these regulations only can take domestic laws or international agreements into account. Whether the CESL falls within either of these categories has been debated. Some critics in the academic discourse believe that this question does not need to be discussed due to the two-step application procedure, which results in the CESL being validly applied via domestic laws.

Another conflict issue connected to the relationship between the CESL and conflict rules, is how the CESL and mandatory law provisions will relate to each other. Here, discussion have regarded the Commission's somewhat unclear construction of the CESL's relationship with article 6.2 of the Rome I. The Commission believes the CESL to include all consumer rights that a consumer, who opts-in to the CESL, needs. However, this view has met with opposition. The validity of the construction of article 6.2 Rome I in the CESL, which results in the article having no practical relevance, has been questioned. There is great confusion regarding the CESL's effect on current consumer protection level within EU. This confusion coupled with the vague explanation given by the Commission and the CESL, will create law

conflicts. If the CESL is deemed to contain less favourable consumer protection than as would otherwise have been afforded by the applicable domestic law according to the Rome Regulations, there will be a collision between the proposal and domestic laws.

Potential conflict issues: the CESL and substantive provisions

The next matter to consider is the potential law conflicts between the CESL and transnational substantive provisions regarding sales and contract law that the proposal may collide with.

The PECL, the PICC and the DCFR are all regulatory frameworks that aim to provide instructions for how future laws and provisions should be shaped in a suitable way within the area of international trade law. Among them, the provisions with the most influence on the content of the CESL have been the DCFR. However, these frameworks can also be used to govern a specific international transaction. This alternative is only the case if contracting parties actively opt-in. Law conflict between the CESL and the PECL/PICC/DCFR will thereby only occur if parties opt-in to the latter. Accordingly, it does not matter if such frameworks contain corresponding provisions and a similar intended area of application as the CESL; no conflicts will appear solely by the act of adopting the CESL.

However, a substantive framework that is most likely to cause law conflicts in relation to the CESL is the CISG. Given the striking resemblance between the CESL and the CISG, this may not be a vast surprise. The reason for the occurrence of such conflicts is because the CISG, unlike the aforementioned frameworks, is *not* an opt-in instrument. It applies by default whenever the requirements for its application are met. In many situations where the CESL could govern a contract, the CISG will already be applicable. The cause of this is that both frameworks have a partly overlapping scope, namely certain provisions regarding B2SME contracts. Accordingly, enforcement of the CESL will cause an immediate conflict with the CISG.

Considering the previous, the CESL has stated that whenever the proposal is *opted-in* to, the CISG is *opted-out* of. This solution has, however, been heavily criticized. First, it has been questioned if the opt-out provision is valid due to the fact that it does not meet the requirements for an opt-out of the CISG, as set out within the CISG itself. Allowing the CISG to regulate this question would be the easiest solution as the legislation is already in force and binding upon contracting states. Secondly, law conflicts will still occur even if such an opt-out provision was to be considered valid, because it is indistinct what it means. Either it refers to a complete opt-out of the CISG whenever the CESL applies, or it refers only to those provisions that conflict. In other words, there will be law conflicts between the CESL and the CISG *regardless* of the validity of the CESL opt-out provision.

Lastly, the relationship between the CESL and existing EU contract laws are worthy of consideration. Currently, EU contract law has only appeared in the form of directives, mainly concerning protection for consumers. The EU may seem to act in a contradictory manner if the CESL and contract law directives regulate an issue differently. Still, such a divergence will *not* cause any law conflicts between the CESL and these directives. The directives are implemented into national laws and are not currently considered as independent laws that can apply simultaneously with the CESL. Due to the fact that they will be considered domestic law they will be overruled by the CESL in accordance with the parties' choice to use the proposal. However, if the directives relate to mandatory consumer protection provisions, the conflict is separate and discussed previously.

Considered the above, the only transnational substantive law regime likely to conflict with the CESL will be the CISG. Although it will be the only collision regarding the CESL and similar substantive provisions, it is still an extensive problem for the Commission.

Proposed solutions

At this point, central conflict issues likely to occur if the CESL is brought into force have been investigated and presented. Several *solutions* to these issues have been presented in the academic discourse. First, it can be determined that there is no clear solution to the conflicts. Of the solutions presented, none appear to include any major amendments to the CESL.

In short, proposed solutions for the issues that arise when applying the CESL via conflict rules, mainly the Rome Regulations, have focused upon the possibility of the CESL incorporating its *own* set of conflict rules. If this cannot be incorporated, the risk of third state law influence would at least be minimized with, for example, a prerequisite in the proposal stating that the CESL is only applicable when a member state law is chosen by current conflict rules. Another solution suggested is that the parties' choice to apply the CESL is interpreted to be the choice of the law in the member state with the closest connection to the contract.

Regarding conflict issues connected to the application of mandatory provisions, suggestions for solving these have also been mentioned. Here, the solutions have been to either let all of article 6 Rome I apply unmodified in relation to the CESL, and, with this, allow the CESL to be compared with the domestic law in the consumer's domicile *or* decide that within the scope of the CESL only the rules contained within the proposal can apply. The latter suggestion would, however, require a change in the Rome Regulations. Overall, greater clarity has been demanded in order to reduce the possibility of law conflicts.

Concerning the potential conflicts between the CESL and the CISG, further explanation regarding the matter has been demanded by critics in order to reduce the possibility of conflicts between the instruments. Some seem to

think that the Commission's solution within the CESL is acceptable and applicable, but have stated that the CESL opt-out provision needs to be clarified. Others state that a priority between the frameworks cannot be validly created by the CESL, but that such priorities can be found in *other* areas of law, for example the CISG or in general principles of law.

The CESL – a regulatory framework for the future?

The Commission had a tall task facing them when they decided to create a transnational law regarding cross-border trade to further the interests of the EU. The fact that it had to function within, and be compatible with, the legal area of private international law would have been evident to the drafters. The CESL proposal has hardly been rushed, since it has taken over ten years to develop and it has *still* not entered into force. With this in mind, the EU, and in particular the Commission, had adequate time to discuss and evaluate potential law conflict issues that the CESL may create. Still, there has been little recognition of them, either within the proposal itself or via any other avenue by the Commission. Nevertheless, they seem to believe that the CESL will facilitate trade within the Union whilst hoping that major law conflicts will not occur when the proposal is in force. If the Commission had solutions to the predicted clashes, they would have presented them, but there may exist no real answers to the potential issues. The area of international trade law is too complex and crowded for law conflicts to be completely avoided.

What the Commission aims for with the CESL, is not mainly to facilitate for those traders and consumers that already engage in cross-boarder trade. They want this commerce to *grow* and to attract *new* market entrants. Therefore, in my opinion, it is not unlikely that the EU would try to gather the applicable consumer provisions within the CESL and thereby setting a "maximum limit" of protection for consumers that opt-in to the CESL. From the perspective of traders, it is advantageous to know that the only consumer protection that can be called upon is contained within the provisions of the CESL.

Regardless of the underlying intentions for the proposal, it has previously been concluded that several law conflict issues are predicted to appear with an adoption of the CESL. Looking to them and looking at the suggestions presented to solve them (see previous conclusions), it can be stated that several minor changes can be made in the CESL in order to minimize the possibility of law conflicts. Some of these changes, in my opinion, should also be carried out. These include allowing article 6 of the Rome I to remain unchanged within the CESL and therefore allowing consumers, which have decided to opt-in to the proposal, to invoke rights falling under article 6.2 in the Rome I. The article can simply not be discarded and ignored due to it allegedly being "of no practical relevance". Likely, a favourable change would also be if the CESL had its own set of conflict rues. However, a modification of the proposal's status may be a violation of the subsidiarity

principle in EU law and thereby an act beyond EU competence. With this change, the CESL would no longer be a supplement to national laws.

Yet, even if changes were made to the CESL, law conflicts will still occur with the proposal in force. The legal area that the CESL will operate within is simply too crowded and complicated for no conflicts to arise. Therefore, the question comes down to whether the advantages will outweigh the disadvantages of implementing the proposal. Within this matter, two questions can be asked regarding the necessity of the CESL. The first is whether the CESL will apply to new circumstances, compared to for example the CISG, to such an extent that it outweighs the complications likely to arise. In my opinion, the answer to this is no. Although the CESL covers some new grounds that cannot be found in similar existing regulatory frameworks, this is not to a great extent. The second question is to what extent market actors will opt-in to the CESL if it enters into force. I do not believe that consumers or small traders will use the CESL. The majority of these actors refrain from cross-border trade because they feel uncertain of the provisions that will apply to a potential issue arising from the transaction, but this problem is *not* cured by the CESL. Consumers and smaller traders will feel the same way about the CESL as they feel about other foreign laws that may apply to their situation. In this matter, it is better for the EU to use directives to create a more uniform contract law within the Union, at least regarding these types of smaller market actors, even if it is quite a slow and ineffective process. However, choosing the full harmonization directive option for the CESL is not a preferred idea. Such an act would be an excessive judicial intervention, at least for those traders and consumers that are uninterested to become affected by any part of the proposal.

All in all, my final opinion and conclusion regarding the matter examined in this thesis is that there are too many gaps in the CESL regarding its conformity with private international law. This will lead to a multitude of law conflict issues. Following implementation is of such severity that the Commission should seriously consider if the proposal should be brought into force at all. If the disadvantages of the CESL, due to the law conflict issues it creates, outweigh the advantages to cross-border trade then the CESL would have no practical benefits.

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