Chapter 2
Some Private International Law Issues

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Abstract The Draft CESL is not only intended to cover intra-European transactions, but will also be applicable to contracts linked to third countries. This twofold effect raises interesting legal questions that are going to be analysed in this chapter from the perspective of Private International Law.

During the final stages of the legislative process, certain decisive decisions must be adopted. In particular, from the perspective of Private International Law, there are some key aspects which should also be clarified. Attention should be paid, for example, to certain significant issues such as its relationship with Rome I and II Regulations, or with the CISG; as well as the applicability of the European instrument when a cross-border transaction would be governed by the law of a third country that is not a Member of the EU.

Keywords European Private International Law · Cross-border transactions · Conflict-of-laws aspects · Consumer protection rules

2.1 Legal Context of the Proposal

The proposal for a Regulation on a Common European Sales Law (CESL)[1] is an important step forward in the direction of creating a harmonized normative legal framework for contracts in the European Union (EU). This initiative is also closely linked to the development of a "European Contract Law". In that respect, some recent and definitive landmarks connected with this European initiative are worth mentioning:

a. As a starting point and from an academic point of view, the Draft Common Frame of Reference (DCFR) of 2009 must be highlighted (Von bar et al. 2009). This work was the result of several decades of study and discussion carried out

[1] COM (2011) 635 final.

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by hundreds of academics and practitioners from all the EU Member States—in particular, those involved in the "Study Group on a European Civil Code" and the "*Acquis* Group", who cooperated in the framework of the "Joint Network on European Private Law" (Palao Moreno 2011). The DCFR 2009 has been an important precedent of the Draft CESL, which was prepared by the "Expert Group" for a Common Frame of Reference on European Contract Law, appointed by the European Commission,[2] which presented a "feasibility study" for a future instrument in the field of European Contract Law in 2011 (Gómez Pomar and Gili Saldaña 2010).[3]

b. Additionally, and from an institutional perspective, the European institutions have recently produced various definitive documents that have stimulated this process; *inter alia*: the Communication "An area of freedom, security and justice serving the citizen",[4] the Green Paper "On policy options for progress towards a European Contract Law for consumers and businesses"[5] or, even more recently and directly related to the Draft CESL, the Communication "A Common European Sales Law to facilitate cross-border transactions in the single market".[6] Other decisive documents that should also be taken into account in relation to this process are the Communication "Europe 2020"[7] and the "European Digital Agenda".[8]
c. These notable initiatives have, as their main objective, the strengthening of the Internal Market as well as promoting cross-border sales within the EU and, more particularly, e-commerce. Therefore, all of them are closely linked to the development of a "European Private International Law" in the field of the Law of Obligations, a legal sector where some important Regulations have also been adopted from a purely conflict-of-laws perspective—the Rome I and Rome II Regulations,[9] as well as from a jurisdictional perspective—the Brussels I Regulation, which has been recently "recasted"[10].

This intense legislative process has not finished yet. Thus, any reflection on it can only be provisional in nature. However, it is not difficult to observe the strong po-

[2] *OJ* No L 105/109, 27.1.2010.

[3] Available at: http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf, accessed 9.12.2013.

[4] COM (2009) 262 final.

[5] COM (2010) 348 final.

[6] COM (2011) 636 final.

[7] COM (2010) 2020 final.

[8] COM (2010) 245 final.

[9] Respectively, Regulation (EC) No 593/2008, on the law applicable to contractual obligations (Rome I)—*OJ* No L 177, 17.6.2008; and Regulation (EC) No 864/2007, on the law applicable to non-contractual obligations (Rome II)—*OJ* No L 199, 31.7.2007.

[10] Regulation (EC) No 44/2001, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters—*OJ* No L 12, 16.1.2001, "recasted" by Regulation (EU) No 1215/2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)—*OJ* No L 351, 20.12.2012.

litical interest underlying the development of a future CESL. In this respect, the fact that the European Parliament has recently published a definitive Report on the Proposal (at the end of September 2013) is highly significant. This new document enables us to consider that the end of this journey is getting closer.[11]

According to art. 1.1 (*Objective and subject matter*), the Draft CESL basically aims "(…) *to improve the conditions for the establishment and the functioning of the internal market by making available a uniform set of contract law rules as set out in Annex I ('the Common European Sales Law')*".[12] These are a set of rules that "(…) *can be used for cross-border transactions for the sale of goods, for the supply of digital content and for related services where the parties to a contract agree to do so*".[13] Amongst the benefits to be derived from the future instrument, paragraph 2 refers to: "*(...) reducing unnecessary costs while providing a high degree of legal certainty*", and paragraph 3 mentions the importance of guaranteeing "*(..) a high level of consumer protection, to enhance consumer confidence in the internal market and encourage consumers to shop across borders*", (Recitals 1–8). However, various authors have made critical comments to the reality of being able to fulfil these objectives (Posner 2012; Eidenmüller 2012; Smits 2012; see however, Mak 2012).

The proposal for a Regulation finds its legal basis in art. 114.1 Treaty for the Functioning of the European Union (TFEU)—instead of the other available alternatives—something that has been met with criticism by the authors: Fleischer (2012); Micklitz and Reich (2012), and Sánchez Lorenzo (2011). This provision enables the European institutions to "(…) *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*".

2.2 Main Elements of the Proposal

The Draft CESL consists of 16 Articles, 37 Recitals and 2 Annexes. In particular, from the perspective of Private International Law, this instrument can be characterised as a "special substantive rule" (Mankowski 2012a; Sánchez Lorenzo 2013), aimed at regulating the contracts covered by the instrument when they enjoy a cross-border nature. Due to the objective of this particular chapter, only the conflict-

[11] *Report on the proposal for a regulation of the European Parliament and the Council on a Common European Sales Law*, of 24.9.2013 (A7-0301/2013). Available at: http://www.europarl.europa.eu/document/activities/cont/201309/20130925ATT71873/20130925ATT71873EN.pdf, accessed 9.12.2013.

[12] The Report of the European Parliament of 24.9.2013, refers to the expression "*within the legal order of each Member State*", to underline its consideration of a "second national regime" (*cit*., p. 42), as it will be analysed later (see infra 2, D).

[13] In the Report of the European Parliament of 24.9.2013, this aspect has been made more specific as it refers to the necessity that those contracts be "*conducted at a distance, in particular online*" (*cit*., p. 23).

of-laws aspects of the future European instrument will be analysed. Thus, the rules of applicability, confined to the first provisions of the so-called "*chapeau*" of the proposal for a Regulation, will constitute the principal focus of this chapter.[14]

2.2.1 Substantive Scope of Application

To summarise, as this question will be analysed later in other chapters of this Book, the Draft CESL refers to its substantive scope of application mainly in arts. 5 (*Contracts for which the Common European Sales Law can be used*), and 6 (*Exclusion of mixed-purpose contracts and contracts linked to a consumer credit*); (Illescas Ortiz and Perales Viscasillas 2012; Wenderhorts 2012). Nevertheless, art. 2 (*Definitions*) and the related Recitals of the Proposal should also be taken into account (Recitals 16–20) (Wenderhorts 2012), in order to determine which type of transactions are covered by this future European instrument. Needless to say, all those provisions are of outstanding interest from the perspective of Private International Law.

On the one hand, art. 5 provides that transactions for the sale of goods, for the supply of digital content and for related services, are covered by the Proposal.[15] On the other hand, art. 6 establishes that mixed-purpose contracts and contracts linked to consumer credit should be excluded from its scope of application.[16] In relation to this, art. 2 aims to define those contracts in order to meet greater legal certainty and predictability, in the face of the conceptual disparities that can be found among the legal systems of Member States.

In that respect, and specifically from a cross-border standpoint, it must be emphasised that those concepts should be subject to an autonomous and independent interpretation, as mentioned in Recital 29. Thus the European Court of Justice (ECJ) must be the institution responsible for laying down uniform parameters for the concepts used in the Draft CESL, *via* the use of preliminary questions. However, the future instrument will ultimately be applied by the national courts of the Member States; an issue that is of importance for the fulfilment of the goals of the Draft CESL. In this respect, any divergent national application of the future instrument may have the effect of undermining legal certainty, if the different legal traditions within the EU are considered (Dimatteo 2012).

Therefore, it is important that not only the decisions arrived at by national courts be made accessible to the rest of the national jurisdictional authorities—to promote a coherent application of the CESL—but also that the information mechanism fore-

[14] In the Report of the European Parliament of 24.9.2013, this is called Part I under the name "*Application of the instrument*", in order to avoid confusion and to establish a robust connection with the Annexes.

[15] These contracts should be "*distance contracts, including online contracts*" as underlined by the Report of the European Parliament of 24.9.2013 (*cit*., p. 23).

[16] However, in the Report of the European Parliament of 24.9.2013 it is stated that this exclusion, present at art. 6.1, makes reference to "*Linked* contracts and *mixed-purpose contracts*".

seen in art. 14 (*Communication of judgments applying this Regulation*) be made applicable (Doralt 2011; Wenderhorts 2012).[17]

From another perspective, it can be seen that the Draft CESL concentrates exclusively on Contract Law matters (as stressed in Recital 28) and also mentions which issues should (Recital 26) or should not (Recital 27) be regulated by the future European instrument.[18] Again, this delimitation of the issues covered (or excluded) by the Draft CESL, is of a great importance from the perspective of Private International Law. In this respect, it has to be taken into consideration that those issues not covered by the Draft CESL should be governed by the applicable Private International Law system, in accordance with the issue in question (Hesselink 2012). Therefore, the interaction between the future Regulation and other Private International Law rules would gain practical importance.[19]

2.2.2 Cross-Border Contracts

Article 4 of the Draft CESL has been entitled "Cross-border contracts".[20] This provision is of outstanding interest, since it would determine whether or not the parties would be able to agree to the application of the future instrument to their contract. Besides, and as mentioned in Recital 13, it is in the context of cross-border situations "that the disparities between national laws lead to complexity and additional costs and dissuade parties from entering into contractual relationships".[21] Therefore, and in principle, the parties to those transactions would only be able to ask for the application of the Draft CESL to their cross-border contracts and not to purely domestic situations. it should be noted that the inclusion of this option is the sole responsibility of the European Commission and that it was not analysed by the Expert Group (Schulte-Nölke 2011).

[17] Nevertheless, this obligation has been suppressed in the Report of the European Parliament of 24.9.2013.

[18] The Report of the European Parliament of 24.9.2013 clarifies some of these elements. In this respect, its Recital 27 refers to the possibility that the CESL determine which issues would be included or excluded in order to clarify this issue. In relation to this objective, a new art. 11 (*Matters covered by the Common European sales Law*) would be added to specify those issues that are covered (paragraph 1) and those that are not covered (paragraph 2).

[19] This question was clarified—in the negative—in the Report of the European Parliament of 24.9.2013, with the following wording in art. 11.1: "*Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules, instead of the contract-law regime that would, in the absence of such an agreement, govern the contract within the legal order determined as the applicable law*".

[20] This also should have been qualified as "*distance contracts which are cross-border*", according to the Report of the European Parliament of 24.9.2013.

[21] In addition, the Report of the European Parliament of 24.9.2013 added: "(…), and that distance trade, in particular trade online, has a high potential".

However, despite the literal wording of art. 4, this provision does not only establish the main elements that would enable a contract to be considered as cross-border, but it also allows for the determination of the territorial scope of application of the future instrument (Wenderhorts 2012). This delimitation would depend on the characterisation of the transaction as being a contract between traders (B2B) or between a trader and a consumer (B2), due to their different nature and policy involved, in accordance with the contacts that each transaction maintains with the Member States of the UE—in a similar way that art. 1 of the Vienna Convention on Contracts for the International Sale of Goods of 1980 (CISG)[22] operates to determine its territorial scope of application (Wenderhorts 2012). This delimitation is also compatible with the one contained in art. 1 Rome I Regulation, according to Behar-Touchais (2012).

With regard to B2B transactions, art. 4 refers to those situations where "(…) *the parties have their habitual residence in different countries of which at least one is a Member State*". Hence, when the habitual residence of the traders is to be found in different countries and at least one of those countries is a Member State of the EU—and in the opinion of Wenderhorts (2012), this should mean both the EU and the European Economic Area (EEA)—the parties to the contract would be allowed to opt for the application of the future CESL.

In that respect, a crucial element to consider would be the determination of the place where the habitual residence of the traders is located. This operation would not always be easy to undertake because it is a personal and subjective element which can vary from one country to the other, and its location may depend on the circumstances of each case. So when traders are involved in a B2B transaction, their particular situation must be taken into account.

a. Firstly, where the trader is a legal person, it should be understood, in general terms, that its habitual residence is in the same place where its central administration is located. The equivalence between habitual residence and central administration here is not a novelty in EU Law, as a precedent can be found in art. 23.1 Rome II Regulation. However, a different approach was established in art. 60 Brussels I Regulation—for the determination of the internationally competent national jurisdiction—as this provision provides for an option of either the statutory seat, the central administration, or the principal place of business.
b. Secondly, if the trader, who is a legal person, is acting through a secondary establishment—a branch, an agency or other secondary establishment—it must bear in mind that its habitual residence will be considered to be where the secondary establishment was situated, if the transaction was concluded "*in the course of the (its) operations*" (*cf* Wenderhorts 2012). This solution resembles the one currently provided in art. 23.1 Rome II Regulation; and, from a jurisdictional perspective, it is also similar to art. 5.5 Brussels I Regulation.

[22] Available at: http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf, accessed 9.12.2013.

c. Third and finally, for those cases where one of the traders is a physical person, his/her habitual residence should be located in the place where that person was carrying his/her principal commercial activity. Article 23.2 Rome II Regulation is similar in this respect; but there are differences between them since the latter refers to the place of the principal establishment of the trader.

When the determination of the cross-border nature of a B2C transaction is at stake, the operation that must be carried out to identify the possible contacts between the transaction and the EU territory is even more complex. First of all, whether one of the following elements of the relationship was situated outside of the country of the trader's habitual residence should be verified: either the address indicated by the consumer, the delivery address of the goods or the billing address. In addition, at least one of those countries must be a Member State of the EU.

Consequently, if the above mentioned requirements are satisfied, the transaction will be considered cross-border in nature, and the future CESL could be applicable. However, this provision does not clarify if the habitual residence of the consumer must be located in a Member State of the EU or not. Again, it has been argued that EU and EEA countries should be made equivalent in this respect (Wenderhorts 2012; Scmidt-Kessel 2012). This solution warrants the following comments:

a. On the one hand, the option chosen by the European legislator can be criticised as having a highly subjective nature, as it exclusively depends on the information the consumer provides to the trader (Fernández Masiá 2012; Micklitz and Reich 2012). Therefore, it would be advisable for the parties to act cautiously in order to avoid undesirable results. This is not only because of possible false statements concerning such information—an aspect to which the EU legislator shows no interest at all, in the opinion of Wenderhorts (2012)—but also with regard to an undesired and unconscious "internationalisation" of the transaction.
b. On the other hand, and less important in practice, this provision does not take into account the habitual residence of the consumer in any way. This personal element, however, enjoys a central consideration in other EU instruments in the field of civil justice, such as the example offered by art. 6 Rome I Regulation; or similarly, albeit considering domicile, in art. 59 Brussels I Regulation.

Various other issues arising from art. 4 also deserve serious analysis. Firstly, and from a terminological perspective, certain authors have criticised some of the expressions found in this provision—e.g. the word "use" instead of other more usual legal expressions such as "apply"—since in so doing the EU legislator clearly highlighted and stressed the idea that the future CESL could be considered as a legal "product" or as a "commodity", to be chosen by the parties in cross-border transactions (Hesselink 2012).

Additionally, it should also be taken into consideration—as the provision itself so states—that these elements should be determined at the moment in which the parties agree to submit the contract to the CESL. Therefore, once the parties have agreed on the application of the European instrument and from then on, any subsequent change of the said elements would be of no importance (Wenderhorts 2012).

Moreover it could be concluded, from the wording of art. 4 and the different situations that may be envisaged, that the future CESL should be applicable to both intra- and extra-EU relationships (Mankowski 2012a; Sánchez Lorenzo 2003). This possibility of this happening could produce some unbalanced effects for those companies established in the territory of the EU, compared to those located in third countries, as highlighted by Wenderhorts (2012).

Hence, on the one hand, this provision could offer a competitive advantage to large companies over small or medium-sized enterprises (SME)—as defined in art. 7—within the internal market, as the former could operate in a third country through a secondary establishment, and connect all their transactions to consumers situated in the EU not to two legal regimes, but to just one: the CESL. On the other hand, all traders established in a third country could also enjoy the same benefit over those established in a Member State of the EU, unless that Member State had decided that the future European instrument should also be made available for the parties to "domestic" transactions, according to that established in art. 13 Draft CESL (Recital 14). This is a possibility that has attracted certain positive endorsements (Doralt 2011; Wenderhorts 2012).

2.2.3 Optional Character

The possibility for parties to apply the Draft CESL to their contract can be found in art. 3 (*Optional nature of the Common European Sales Law*). In this regard, arts. 8 (*Agreement on the use of the Common European Sales Law*) and 9 (*Standard Information Notice in contracts between a trader and a consumer*) determine the requirements of the agreement for the application of the future instrument to be valid.[23]

First of all, and again from a purely terminological perspective, the reference made to expressions such as "use" in these provisions has been criticised, as it would support the aim of the EU legislator to consider a future CESL as a new "commodity" available in the "market" of "legal products" for the regulation of international sales of goods—although not fully confined to those contracts (Hesselink 2012). Additionally, and from a more general point of view, the reference made in art. 8.1 to the fact that the agreement (contemplated in art. 3) should be made "*to that effect*" must be highlighted. With this qualified option, the European legislator would have had intended that *the future CESL* would adopt an *opt-in model*, in line with other international instruments available in that "market"—just as the UNIDROIT Principles of International Commercial Contracts 2010[24] (Wenderhorts 2012).

[23] This aspect would be made much clear in the Report of the European Parliament of 24.9.2013, thanks to the expression added to Art. 3 "*subject to the requirements laid down in Articles 8 and 9*".

[24] As an example, in its Preamble it is established that "*They [The Principles] shall be applied when the parties have agreed that their contract be governed by them*". Accessible at: http://www.unidroit.org/english/principles/contracts/main.htm, accessed 9.12.2013.

Nevertheless, the Draft CESL neither makes any reference to any other specific elements in respect to the scope of those requirements, nor mentions significant aspects of the agreement—such as, for example, the determination of the moment when the parties make such agreement (Hesselink 2012). This silence obliges us to take into account, separately, whether the transaction would be considered as a B2B or B2C, in order to determine those elements of the agreement required to choose the future instrument.

Looking at this from a general perspective, and also what is directly applicable to B2B contracts, art. 8 establishes that the parties should reach an agreement as to the effect of the CESL be applicable to their contract. However, there are several questions related to such an agreement that must also be answered. For a start, it should be clarified whether, not only express, but also tacit, agreements—deriving from the elements of the contract—would be accepted. This problem has been met with different solutions in the legal literature: in favour is Hesselink (2012); and against Sánchez Lorenzo (2011). Bearing in mind that a clear answer cannot be found in the future Regulation, this issue must be approached cautiously when the parties set out the terms of the contract, in order to avoid an unnecessary level of unpredictability.[25] However, and from another perspective, the acceptance of an "incorporation by reference" should not create serious difficulties in the future European instrument.[26]

Moreover, partial agreements would also be accepted, enabling the parties to fragment the legal regime of the contract—with the exception of the mandatory provisions of the Draft CESL (Wenderhorts 2012).[27] In this sense, it should be taken into consideration that the Proposal does not make any mention of the necessity of having an agreement in favour of the instrument as a whole for B2B transactions, apart from the need to observe those mandatory rules that have been incorporated in the Proposal. Additionally, it must be understood that no problem would arise if the parties modified their decision in relation to the applicability of the CESL, either during the conclusion of the contract or subsequently, as long as this change were to respect the mandatory rules and the rights of third parties.

However, it should also be stressed that his generous acceptance of party autonomy in relation to the application of the CESL for B2B transactions could also entail legal uncertainty (Behar-Touchais 2012). Therefore, a cautious use of this possibility is advisable, so that parties minimize that risk and endeavour to incorporate an adequate level of foreseeability in their dealings in relation to the legal regime applicable to their contract.

[25] The new wording given to Recital 9 *in fine* in the Report of the European Parliament of 24.9.2013, clarifies this question, opting for an express choice, when it states that: "The Common European Sales Law should apply on a voluntary basis, upon an express agreement of the parties, to a cross-border contract" (*cit.*, p. 7).

[26] According to Recital 13 Rome I Regulation.

[27] Again, the Report of the European Parliament of 24.9.2013 would clarify this aspect, as it would provide a new wording of art. 8.3, which would sate that: "In relations between traders, the Common European sales Law may be chosen partially, provided that exclusion of the respective provisions in not prohibited therein".

On the other hand, with regard to B2C transactions, the applicable legal framework for the validity of the agreement can be found in art. 8, paragraphs 2 and 3, and art. 9 Draft CESL. These provisions aim at guaranteeing an informed consent by the consumer; however, in these situations, the choice of the CESL would be mainly made by the trader (Doralt 2011; Whittaker 2012) and protecting themselves in relation to cross-border transactions, even when general contract terms are used (Hesselink 2012). This choice would not be directly controlled by the obligations imposed in the Draft CESL, and nor by Directive 93/13 (Basedow 2012). Authors such as Behar-Touchais (2012), estimate that the future instrument would guarantee a high level of protection as compared with current national legislations in many situations. In this respect, the following should be noted.

a. First of all, art. 9 lays down the obligations that could be imposed on the trader, in relation to information that should be made available to the consumer, before entering into the agreement to apply the CESL. Hence, this provision contemplates the necessity to provide the consumer with a "Standard Information Notice" (available in Annex II), which could also be made available in electronic format and free of charge. In this respect, the Internet should be considered an adequate environment for these transactions and the fulfilment of this requirement—through pressing the so-called "Blue Button" (Schulte-Nölke 2011; Fernández Masiá 2012). In case this duty to provide information is not satisfied, the consumer would not be bound by the agreement to apply the future CESL.
b. In addition, and according to art. 8.2, the agreement for the application of the CESL should be only valid if it was expressed through "*an explicit statement which is separate from the statement indicating the agreement to conclude a contract*". Moreover, from the perspective of the trader, this party should "*provide the consumer with a confirmation of that agreement on a durable medium*".
c. Finally, art. 8.3 establishes that parties can only choose the CESL "*in its entirety*". Hence, partial agreements of the future instrument would not be acceptable for B2C transactions. This obligation derives from the objective pursued by the future Regulation to create "a complete set of fully harmonised mandatory consumer protection rules" (Recital 11).[28] The exclusion of a partial choice would benefit both parties, as it would not only guarantee a uniform level of protection for consumers at EU level, but also would favour traders who could benefit from a single legal regime for the whole internal market—a uniform normative framework which would operate as a "Trustmark" within the EU (Mankowski 2012a).

As a consequence, a tacit choice of the future CESL by the parties would not be allowed, as arts. 8.2 y 9 stress the need for an explicit agreement by the consumer (Esteban de la Rosa and Olariu 2013); nor would it be possible for there to be a partial choice of the legal regime of the contract, according to art. 8.3. Moreover, any change in the choice of the CESL, or indeed its exclusion after the conclusion of the contract, would be considered invalid (Esteban de la Rosa and Olariu 2013; Fornasier 2012). Thus, where these conditions are not fulfilled, the agreement will, in principle, be invalid.

[28] The Report of the European Parliament of 24.9.2013 has incorporated a new Recital (11a) with a definition of "consumer" for the CESL (*cit.*, p. 9).

However, it should be born in mind that the non fulfilment of the conditions imposed on the trader, could have a harmful affect on the interests of the consumer. A good example of this is a case in which the consumer visits a website and, as a result, clicks on the "Blue Button" confirming his/her interest in concluding the transaction with the application of the CESL, but the trader fails to provide the confirmation of that agreement to the consumer. In those situations, the agreement would be considered invalid despite the legitimate expectations of the consumer that the CESL is applicable to the transaction, after confirming his/her interest to conclude the contract. For this reason, some authors would prefer to maintain the binding nature of the agreement for the benefit of the consumer, instead of the radical invalidity of applying the CESL in those situations (Esteban de la Rosa and Olariu 2013; Wenderhorts 2012).

The optional nature of the Draft CESL also raises the question of its relationship with other international and competitive instruments, which also have an optional nature, as it happens with the Vienna Convention 1980, on Contracts for the International Sale of Goods (CISG) (Huber 2003), a Convention that has significant practical importance in current International Business Law (Magnus 2012).

In this respect, some authors have questioned the real need to develop a future CESL—particularly in relation to B2B transactions—since there is already an international instrument available; and also in order to avoid unnecessary complexities in this particular field (Illescas Ortiz and Perales Viscasillas 2012; Kornet 2012; Lando 2011; Mankowski 2012b; Schwenzer 2013). Again, it can be seen that the priorities of the EU political agenda justifies this very much criticised decision.

a. On the one hand, it has to be taken into consideration that there may be some amount of overlapping between the two instruments, in relation to several aspects. In this respect, there would be a partial concurrence of both their substantive and territorial scopes of application. However, in relation to the first aspect, the future CESL would go beyond what has been established for the CISG, as far as the former would not only cover more, and different, types of transactions as compared to the second—which is limited to sales of goods—but also because the CISG does not regulate certain specific issues covered by the future European instrument; such as, for example, the pre-contractual period (Fogt 2012; Magnus 2012). With regard to the second aspect—the territorial scope of application—while the Draft CESL would be applicable in all Member States of the EU, the CISG has not been ratified by all of them; notable exceptions being Ireland, Malta, Portugal and the United Kingdom.
b. On the other hand, it is also important to highlight the different ways in which these international instruments are considered to be applicable. With regard to arts. 3, 8 and 9, the future CESL would be a non-compulsory instrument based on an opt-in model. In comparison, even though the CISG is not a binding instrument for the parties, it can be teased out from the wording of arts. 1 and 6 that this instrument is based on an opt-out model: provided that the transaction falls within the scope of application of the Convention, the parties can decide not to apply the international instrument.

With these previous considerations in mind, the relationship between the two instruments—both potential competitors in the international market of legal products—and the possible dialogue between them can be seen more clearly. Moreover, they can also offer some clues for the determination of the following questions: what happens when none of the instruments would be considered as applicable; or under which circumstances they can be jointly applicable? In relation to this, the legal character of each text and the consequences deriving from this should be carefully considered (Fogt 2012). The answer to these issues is to be found in Recital 25 Draft CESL, under which "*the choice of the Common European Sales Law should imply an agreement of the contractual parties to exclude that Convention*".

Even if this approach may be deemed simple at first sight, its consequences are not only more complex to ascertain (Mansel 2012), but also create some practical problems (Fogt 2012). Moreover, it is important to stress that the afore-mentioned Recital has a different meaning and scope in its different linguistic versions (Sánchez Lorenzo 2013). It can be drawn out from most of the linguistic versions—notably the English one—that the option in favour of the future CESL would imply the direct exclusion of the CISG. By contrast, in other languages—and this is actually the case with the Spanish version—this exclusion is not contemplated in such a straight forward way, so that a statement in the agreement in favour of the Draft CESL is also required. Thus, those different approaches to this issue lead to an undesirable level of unpredictability because there is not a clear priority rule between those two instruments.

If the first mentioned approach is supported, it could be considered as an *ultra vires* action of the EU in relation to the CISG (Sánchez Lorenzo 2013). In that respect, it has been stressed that the conditions determining the applicability of the CISG must be found solely in the Convention itself and not in other instruments (Kornet 2012). As a consequence, and in order to avoid the uncertainties which the Recital could create, it would be advisable for the parties to clearly state that they expressly opt for the future CESL, and also clearly exclude the application of the CISG (Hesselink 2012). Moreover, and also with this objective in mind, partial choices should be avoided if possible.

2.2.4 Material Choice

As emphasised in the Recital of the Draft CESL, the agreement in favour of the future instrument has to be understood as a "material choice", because "The agreement to use the Common European Sales Law should therefore not amount to, and not be confused with, a choice of the applicable law within the meaning of the conflict-of-laws rules and should be without prejudice to them".[29] Nevertheless, in

[29] Again, the Report of the European Parliament of 24.9.2013 clarifies this aspect by providing the following wording to Recital 10 "The agreement to use the Common European Sales Law results from a choice between two different regimes within the same national legal order. That choice, therefore, does not amount to, and should not be confused with, a choice between two national

order to grasp the extent of the meaning of this statement, the various choices available to the European legislator in order to provide for the applicability of the future instrument have to be considered (Rühl 2012).

a. Firstly, the EU institutions could have developed an optional and uniform CESL, which could have been conceived as a "28th regime" (currently, "29th"), and would have been made applicable through the choice of the parties following a conflict-of-laws approach (Palao Moreno 2011). This could have been made possible in accordance with art. 3.1 Rome I Regulation, and in particular, its Recital 14. However, if a consumer were to be involved in the transaction, art. 6.2 Rome I Regulation would also need to have been considered; and, as a result, this provision would mean the exclusion of the possibility of a uniform application of the CESL within the EU (Wenderhorts 2012).
b. Secondly, the production of an optional European Convention of uniform law could have followed another of the possibilities available to the EU institutions: a "1st regime" (Rühl 2012). However, again with this approach, a similar result to the above option would have been achieved. This European instrument could have also included those provisions that would determine its scope of application—substantive, personal and territorial—with the possibility of establishing an *Opt-out* model, following the example of art. 1.1(a) CISG (Fogt 2012). Nonetheless, apart from the problems concerning the legal basis of this approach, it would not have been able to avoid the application of art. 6.2 Rome I Regulation, and, as a result, it would have not been possible for the parties to choose the future CESL "*in its entirety*" in relation to B2C transactions.
c. Finally, there is the option selected by the European legislator, which is based on an opt-in model where parties agree upon the application of a "second national legal regime" within each Member State's legal order (Fornasier 2012). Here, the choice of the future CESL would be possible not only when the transaction was under its scope of application (Wenderhorts 2012), but also when the law applicable to the contract was the legislation of a Member State (Esteban de la Rosa and Olariu 2013). In this respect, the future CESL has to be considered as a legal "hybrid", because it has a European origin but it is characterised as national law (Hesselink 2012). However, the sole responsibility for the development of such a "second regime" model lies with the European Commission, as this option was not present in the Study presented by the Expert Group (Schulte-Nölke 2011).

As a consequence of the above, an agreement in favour of the future CESL would result in the development of a "second" national regime within every Member State, which would co-exist with the "first" national legal system, and which would have been considered as a less invasive approach (Recital 9).[30] Therefore, this European

legal orders within the meaning of the conflict-of-law rules and should be without prejudice to them. This Regulation will therefore not affect any of the existing conflict-of-law rules such as those contained in Regulation (EC) No 593/2008" (*cit.*, pp. 7–8).

[30] The Report of the European Parliament of 24.9.2013 stresses that it is to be considered as a "second regime" when determining that: "This *directly applicable* second regime *should be an*

instrument would allow a certain amount of competition within Member States, in relation to the transactions covered by the future Regulation (Müller-Graff 2012). This result could only happen if the following conditions are met: (a) the parties should have *opted-in* to the future European model (in accordance with arts. 3, 8 and 9); (b) the transaction should be characterised as 'cross-border' (as established in art. 4); (c) the contract should be one of those covered by the substantive scope of application of the future Regulation (as determined by arts. 5 y 6); and (d) the legal relationship should be within the personal scope of application of the future instrument (defined in its art. 7) (Wenderhorts 2012).

From the perspective of Private International Law, this characterisation of the future European instrument would allow the Draft CESL to be considered not only as national law (Mankowski 2012a), but also as a "dependent" "special substantive rule" (Mankowski 2012a; Sánchez Lorenzo 2013). This is because its application would rely on the law of a particular Member State being held applicable under the Regulations Rome I and II—the later because the future instrument would also cover the pre-contractual period (arts. 3, 4 and 6 Rome I Regulation and art. 12 Rome II Regulation), (Wenderhorts 2012). In this sense, the agreement in favour of the Draft CESL would not only affect the existing conflict-of-laws rules, but would also be totally compatible with them.[31]

Despite all the problems that this approach attempts to resolve, it has also been severely criticised by some authors. On the one hand, it has been reported that there has not been any successful example of this "second regime" model in the past (Lando 2011). Moreover, on the other hand, it has also been stressed that this model will result in an unnecessarily complicated and expensive system, particularly for consumers who operate internationally within the EU (Sánchez Lorenzo 2013; Wenderhorts 2012).

Apart from that, the wording of this provision does not offer a clear answer in relation to extra-European situations, where the law of a third country applies. In that respect, it should be taken into account that the agreement in favour of the future CESL may be found to be invalid in that type of situations, but could be accepted as an "incorporation by reference", if so accepted by the Private International Law system of that third country (Scmidt-Kessel 2012). Nevertheless, such situations may be equivalent to those cases where standard contract terms had been chosen (Magnus 2012).

In this respect, Recital 10 states that: "This Regulation will therefore not affect any of the existing conflict-of-law rules". As a consequence, and in principle, the choice of the future CESL would not affect Private International Law rules. Thus, the selection of this instrument would have to be done through a "double choice"

integral part of the legal order applicable in the territory of the Member States. In so far as its scope allows and where parties have validly agreed to use it, the Common European Sales Law should apply instead of the first national contract-law regime within that legal order. It should be identical throughout the Union and exist alongside the pre-existing rules of national contract law" (*cit.*, p. 7).

[31] Recital 10 *in fine*. In this sense, see: Recitals 12 and 14 Rome I Regulation.

mechanism. In relation to this, the determination of a national legal system *per* Rome I and II Regulations would be the first choice, and the second would refer to the agreement in favour of the CESL, in accordance with arts. 3, 8 y 9 as analysed above (Fernández Masiá 2012). Therefore the determination of the national applicable law would not only operate as a "gateway" for the application of the future CESL, but also would be the residual applicable law for those questions not covered by the CESL (Wenderhorts 2012). However, it should be stressed that this model might imply the application of foreign laws in the Member States (Whittaker 2012), and the national solutions in that respect still differ from one Member State to another (Esplugues et al. 2011).

Additionally, Recital 12 underlines the idea that the application of the future CESL would imply the deactivation of provisions such as art. 6.2 Rome I Regulation, because they would have "no practical importance for the issues covered by the Common European Sales Law".[32] Besides, the application of the Draft CESL would be intended to exclude the application of mandatory rules—art. 9.2 Rome I Regulation—since the future instrument would be made applicable "*in its entirety*" for B2C transactions (Scmidt-Kessel 2012).

Nevertheless, this exclusion would meet with certain significant limitations, because choice-of-law rules would play an important role in some circumstances. This would, therefore, create an intense relationship between the future CESL and the rest of the Private International Law system (Fogt 2012). In that respect, as mentioned earlier, the application of the future European instrument would not only be made dependent on choice-of-law rules, but these would also be used to cover the "external gaps" of the CESL; e.g. those questions excluded from its substantive scope of application (Fornasier 2012; Mansel 2012). This could create new uncertainties and extra costs, as highlighted by Eidenmüller (2012). In contrast, the "internal gaps" of the CESL would be addressed by using the principles underlying that instrument. However, some authors have argued that this option might bring certain difficulties (Magnus 2012; Sánchez Lorenzo 2013).

Apart from that, it should also be taken into account that the normal application of the conflict-of-laws rules could result in the application of the national law of a third country—in relation to B2B transactions *per* arts. 3 or 4 Rome I Regulation—so that it should be clarified what might happen in those situations where the parties had chosen to apply the CESL.

[32] This question has been clarified by the Report of the European Parliament of 24.9.2013 offering a new wording for that Recital: "Once there is a valid agreement to *use the Common European Sales Law, only the Common European Sales Law should govern the matters falling within its scope.* Since the Common European Sales Law contains a *comprehensive* set of *uniform* harmonized mandatory consumer protection rules, there will be no disparities between the laws of the Member States in this area, where the parties have chosen to use the Common European Sales Law. Consequently, Article 6(2) of Regulation (EC) No 593/2008, which is predicated on the existence of differing levels of consumer protection in the Member States, has no practical *relevance to* the issues covered by the Common European Sales Law, *as it would amount to a comparison between the mandatory provisions of two identical second contract-law regimes*" (*cit.*, pp. 9–10).

The relationship between the future CESL and the rest of the Private International Law system must be highlighted with regard to art. 6 Rome I Regulation and its framework of B2C transactions (Esteban de la Rosa and Olariu 2013; Mankowski 2012a).

a. On the one hand, if the consumer had his/her habitual residence in a Member State, there are several situations in which the relationship between the future CESL and art. 6.2 must be addressed. First of all, if the trader directs his/her activity to the Member State where the consumer habitually resides and the parties had chosen the law of that (or a different) Member State—according to the conditions imposed by art. 6 Rome I Regulation—the agreement for the application of the CESL would be considered as valid (Micklitz and Reich 2012). Hence, in those circumstances, art. 6.2 Rome I Regulation would be neutralised, as established in Recital 12.

However, the proposal for a Regulation does not clarify what would happen if the law of a third country is considered to be the applicable law of a particular contract, in accordance with arts. 3 and 6 Rome I Regulation. In other words, the Draft CESL does not clearly determine, whether, under those circumstances, the application of the CESL would be impossible, nor if the CESL would be available *via* an "incorporation by reference". Moreover, the proposal does not makes it clear whether the future CESL could be made applicable for those cases not covered by art. 6 Rome I Regulation; e.g. transactions involving "active" consumers, which are excluded from its substantive scope (Sánchez Lorenzo 2013).

b. On the other hand, difficulties could also arise where the consumer has his/her habitual residence in a third country, and the law of that country was considered to be applicable according to the rules of Rome I Regulation. For those cases—in which the European instrument could be considered as non-operative in practice (Fernández Masiá 2012)—would the European legislator suggest not only that the parties should not have chosen the CESL, but also that they should consider the application of the Private International Law system of that third country as being competent determine the validity of such an agreement (Recital 14)?

However, Recital 14 does not offer a global analysis of this problematic situation. For example, it is questionable as to whether this would result in it being impossible for the parties to agree upon the application of the CESL in those cases where the consumer habitually resided in a third country and where this person purchased a product from a trader who operated out of a Member State, with the law of that third country being considered as the applicable law to the transaction (this being the most favourable for the consumer) (Micklitz and Reich 2012; Wenderhorts 2012).

2.3 Concluding Remarks

The Draft CESL significantly improves the current complex legal situation, benefiting the interests of traders and consumers who operate within the European internal market. However, the future instrument is not only intended to cover intra-European

transactions, but will also be applicable to contracts linked to third countries. This twofold effect raises interesting legal questions that have been analysed in this chapter from the perspective of Private International Law. However, it is impossible to predict what will be the definitive answer to these questions since the process for the development of the Regulation has not yet finished.

During the final stages of this process, certain decisive decisions must be adopted. These legislative considerations should address certain issues, such as the correctness of the terminology used; the lack of coherence, within the instrument, between some of the matters already decided; and its relationship with the European *acquis* in the field of Consumer Law. In particular, from the perspective of Private International Law, there are some key aspects which should also be clarified within the future developments of the CESL. Attention should be paid, for example, to certain significant issues such as its relationship with Rome I and II Regulations, or with the CISG; as well as the applicability of the European instrument when a cross-border transaction would be governed by the law of a third country that is not a Member of the EU.

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