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Aurelia Colombi Ciacchi *Editor*

Contents and Effects of Contracts – Lessons to Learn From The Common European Sales Law

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Editor

Contents and Effects of Contracts - Lessons to Learn From The Common European Sales Law

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Preface

This book arises from a research and publication project funded and organised by the Groningen Centre for Law and Governance (GCL): the project 'Content and Effect of Contracts: the CESL in the European Multi-Level System of Governance'. I have had the honour and pleasure to coordinate and carry out this project in 2013–2014 in cooperation with other 22 European scholars, affiliated to 15 universities based in 5 countries (England, Germany, Italy, the Netherlands and Turkey): the Universities of Amsterdam (UvA), Bremen, Exeter, Groningen, Istanbul (Türkisch-Deutsche Universität), Kassel, Leiden, Lüneburg, Oldenburg, Osnabrück, Rome (La Sapienza), Tilburg, Utrecht, Warwick and Würzburg. The contributions included in this volume represent the final product of a research process whose first results were presented at the international workshop 'Content and Effect of Contracts: the CESL in the European Multi-Level System of Governance', which took place in Groningen on 31 May–1 June 2013.

This book is structured into two parts. The first part contains five essays exploring the origin, the ambitions and possible future role of the Common European Sales Law (CESL) in general and its Chapter 7, in particular, for European contract law and contract practice. The second part contains specific comments to each of the provisions laid down in Chapter 7 CESL (Art. 66–78).

This research and publication project on Chapter 7 CESL has been organised in the spirit of the Hanse Law School (HLS), which is a bachelor and master's programme in European and comparative law offered jointly by the Universities of Bremen and Oldenburg in cooperation with the University of Groningen. Only a small number of selected, particularly talented and motivated, students can study at the Hanse Law School. The percentage of HLS students who after the graduation embark in an academic career is remarkably high. Therefore, HLS alumni often meet their former HLS teachers at academic events across Europe. One third of the scholars involved in this project have studied or taught at the HLS. So the HLS alumni Tobias Pinkel and Franziska Weber met in the context of this project their former HLS teachers Axel Halfmeier, Mel Kenny, Vanessa Mak, Peter Rott, Bernd Seifert and myself.

The comparative law perspective of the HLS focuses mainly, but not exclusively, on German and Dutch law. In the HLS courses, students often analyse English law as well and sometimes also legal materials from other European countries, such as Italy or France. Therefore, the majority of contributors to this volume are European contract lawyers with a German or Dutch background, flanked by some excellent experts from England and Italy. I am very happy to have brought together, with this research and publication project, both worldwide renowned senior scholars like Hugh Beale, Ewoud Hondius, Salvatore Patti, Oliver Remien and Norbert Reich and junior scholars like Ruben de Graff, who at the beginning of this project was a master's student (now he has become a lecturer and Ph.D. candidate at the University of Leiden).

All scholars involved in this project have considerable experience in comparative contract law. Many of us have been living and working abroad for several years. Some of us have left our country of origin long ago and changed our country of academic affiliation several times, so that we can no longer be associated with one particular national background. Our home is Europe as a whole.

I would like to express my gratitude to all participants to this research and publication project for the very pleasant collaboration and their inspiring oral and written contributions. I also would like to thank all team members of the Groningen Centre for Law and Governance for their valuable support to this project and, in particular, Ms. Gillian Erasmus for her careful editing of the contributions included in this volume. Last but not least, I would like to thank the publisher Springer and, in particular, Diana Nijenhuizen and Neil Olivier and the editor of the Springer book series *Studies in European Economic Law and Regulation*, Prof. Kai Purnhagen, for their precious help in bringing this publication project to a good end.

Groningen, The Netherlands
30 September 2015

Aurelia Colombi Ciacchi

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Contributors

Alain Ancery (1984) studied law at the University of Groningen in the Netherlands. As of 2008 he read for his Ph.D. at the same university. He successfully defended his thesis on the *ex officio application of EU law* in 2012. After having worked for a brief period as a policy advisor for the Liberal Party in the House of Parliament, he is currently working as a law clerk to an advocate general at the Supreme Court of the Netherlands since 2013 and as a part-time assistant professor at the Groningen Law Faculty since 2014. His main research interest lies in the field of European private Law.

Hugh Beale, QC FBA is professor of law at the University of Warwick in the UK and senior research fellow of Harris Manchester College and visiting professor at the University of Oxford. He was a law commissioner from 2000 to 2007. He was a member of the Commission on European Contract Law (1987–2000) of the Study Group on a European Civil Code and of the group of experts called upon to draft the feasibility study for a Common European Sales Law. Among his publications, he is an editor (with B Fauvarque-Cosson, J Rutgers, D Tallon and S Vogenauer) of *Casebooks on the Common Law of Europe: Contract Law* (2nd ed, 2010). He is the general editor of *Chitty on Contracts* (32nd ed., 2015).

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Aurelia Colombi Ciacchi is professor of law and governance and academic director of the Groningen Centre for Law and Governance at the University of Groningen, Faculty of Law, since 2010. Previously, she was a researcher and lecturer at the universities of Kiel and Bremen in Germany and a Marie Curie Fellow at the Institute of European and Comparative Law at the University of Oxford in the UK. She authored and edited several publications in comparative law and European private law. Since 2014, she is the editor in chief of the *European Journal of Comparative Law and Governance* (EJCL) and the chair of the 'Contract' group within the 'Common Core of European Private Law' project.

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Axel Halfmeier is professor of civil law, comparative law, international private law and procedural law at Leuphana University Lüneburg, Germany. He holds law degrees from the University of Hamburg (Dr. iur., 1999) and the University of

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Viola Heutger is affiliated with the Turkish-German University in Istanbul, Turkey, where she is teaching legal methodology and European legal history. From 2000 to 2004 she acted as team manager of the working group on sales law of the Study Group on a European Civil Code. The results of that research have been published by Oxford University Press/Sellier in 2008 as *Principles of European Law: Sales*, edited by Ewoud Hondius, Viola Heutger and Christoph Jeloschek. Until 2009 she participated in the group preparing the Draft Common Frame of Reference.

Ewoud Hondius is professor of European private law at Utrecht University, the Netherlands. From 1960 to 1966 he read law in Leyden and New York (Columbia University). From 1966 to 1980 he was affiliated with Leyden University, from 1978 as professor of civil law. From 1980 to present he has been affiliated with Utrecht University. He has been a visitor or visiting professor in Baton Rouge (Louisiana State), Cambridge (Trinity College), Gent, Hamburg (Bucerius University), Kyoto (Ritsumeikan), London (Queen Mary), Münster, Paris (Paris I), Stellenbosch and Sydney. He is a member of the Royal Netherlands Academy of Sciences and holds honorary doctorates from the Catholic University of Leuven and the University of Edinburgh. He extensively published on issues of comparative law. He has been joint editor in chief of the *European Review of Private Law* from 1992 to 2015.

Bart Krans is professor of private law at the University of Groningen, the Netherlands. He obtained his Ph.D. at Leiden University. Prior to joining the University of Groningen, he was an attorney with Pels Rijcken & Droogleever Fortuijn. He is a member of the editorial board of several Dutch law journals (*Nederlands Tijdschrift voor Burgerlijk Recht* (*NTBR*) and *Tijdschrift voor Civiele Rechtspleging* (*TCR*)) and book series (*Burgerlijk Proces & Praktijk* and *Studiereeks Burgerlijk Recht*) in the field of substantive private law and civil procedure law. His research areas concern civil procedure law and substantive private law. In 2011–2012 he was a part-time visiting professor at the University of Gent (Belgium) on the TPR chair. In 2015 was also a part-time visiting professor at the University of Gent.

Marco Loos is professor of private law, in particular of European consumer law, at the University of Amsterdam, the Netherlands. He regularly publishes in the fields of contract law, consumer law and European private law. He is a member of the editorial board of the Dutch consumer law review *Tijdschrift voor Consumentenrecht en handelspraktijken* (TvC) and a member of the advisory board of the *European Consumer and Market Review* (EuCML, formally EUVR) and of the Board of Governors of the Research School Ius Commune. Finally, he is a part-time judge to the Court of Appeal of's-Hertogenbosch.

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Bernd Seifert studied law at Bielefeld University, Germany. Having graduated as a fully qualified German lawyer in 1999, he is now deputy head of the legal department and data protection officer at the Chamber of Industry and Commerce (IHK) in Oldenburg. He also is a lecturer in commercial law at Carl von Ossietzky University Oldenburg and chairman of the advisory board of Hanse Law School. He has published a number of books and articles on various legal subjects including German and European corporate law, commercial law and contract law.

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Part I
Lessons to Learn from the CESL

Chapter 1
Contents and Effects of Contracts: Lessons to Learn from the CESL

Aurelia Colombi Ciacchi

Abstract This introductive chapter describes the background, objectives and possible future impact of the research project from which the present book has arisen. The first part of this chapter provides a brief history of the proposition and subsequent withdrawal of the draft Regulation on a Common European Sales Law (CESL). This brief history embeds the CESL in the discourse on the legislative creation of common European rules of private law from 1989 until today. The second part of this chapter describes the Groningen project "Content and effects of contracts: The CESL in the European multi-level system of governance" and its relation with the academic spirit of the Hanse Law School. The third and last part of this chapter addresses the lessons to learn from the withdrawn CESL and the usefulness of this book with regard to possible future national and supranational instruments in the field of European sales law.

1.1 The CESL: A Brief History

The discourse on the legislative creation of common European rules of private law[1] resembles to a certain extent the cycle of birth, rise and fall of stars.[2] In this discourse, between 1989 and today, four stars were born, rose and fell, one after the other: the European Civil Code, the Common Frame of Reference, the Optional Instrument on general contract law, and most recently, the Common European Sales Law (CESL).

[1] With "common rules of private law", this chapter intends private law rules which are of a general, i.e. non sector-specific nature.

[2] The word "star" in this metaphor refers to the showbusiness and not to the astronomic context. In fact, astronomically speaking, stars do not fall: they collapse, explode, become black dwarfs, neutron stars, or black holes. See http://www.enchantedlearning.com/subjects/astronomy/stars/lifecycle/stardeath.shtml

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The star "European Civil Code" was officially born with the European Parliament resolution of 26 May 1989, envisaging EU action to bring into line the private law of the Member States.[3] The birth of a star in the showbusiness obviously occurs several years after the birth of the artist in question: in this case, the artist – i.e. the academic discourse on a possible European Civil Code, or European Code of Obligations – existed since the early 1970s.[4]

Despite the strong support of the European Parliament[5] and a large number of prominent scholars,[6] the idea of a European Civil Code did not find sufficient consensus at the academic and EU institutional level. Not even all members of the group of scholars set up by the first ideator of a European Code of Obligations, Ole Lando, agreed on the desirability of a Code.[7] The idea of codifying private law

[3] OJ 1989 C 158, 26.6.1989, 400.

[4] In 1974, a conference on the proposed European convention on the law applicable to contractual and non-contractual obligations was held in Copenhagen. During a dinner after the conference, Professor Ole Lando sat next to the European Commission official Dr. Winfried Hauschild. Both agreed that uniform rules of private international law would not suffice, since a common European market would require a uniform substantive law. Dr. Hauschild said: 'We need a European Code of Obligations'. Cf. the Preface and Introduction to Parts I and II of the PECL: O Lando and H Beale (eds), *Principles of European Contract Law, Parts I and II* (The Hague, Kluwer, 2000), xi. On the origins of the discourse on the European Civil Code see also A Colombi Ciacchi, 'An Optional Instrument for Consumer Contracts in the EU: Conflict of Laws and Conflict of Policies', in A Somma (ed), *The Politics of the Common Frame of Reference* (Alphen aan den Rijn, Kluwer Law International, 2009), 3–18 at 3 et seq.

[5] After the above-mentioned Resolution of 26 May 1989, in 1994 the European Parliament issued a second Resolution advocating the creation of a European Civil Code: the Resolution of 6 May 1994 concerning the codification of private law and the Commission on european contract law, OJ 1994 C 205, 25.7.1994, 518.

[6] Among which the members of the Study Group on a European Civil Code (SGECC), chaired by Christian von Bar. For a description of this group and its work see C von Bar, 'Die Study Group on a European Civil Code' in P Gottwald, E Jayme, D Schwab (eds) *Festschrift für Dieter Henrich zum 70. Geburtstag am 1. Dezember 2000* (Bielefeld, Gieseking, 2000) 1–11; K Gutman, *The Constitutional Foundations of European Contract Law: A Comparative Analysis* (Oxford, Oxford University Press, 2014) 152 et seq. The SGECC coordinated the monumental collection of volumes "Principles of European Law": http://www.sellier.de/pages/en/buecher_s_elp/europarecht/454.principles_of_european_law.htm?reihe=16. On the SGECC and its publications see also http://www.sgecc.net. Further key publications inspired by the idea of the European Civil Code include the volumes *Towards a European Civil Code* edited by Arthur Hartkamp, Martijn Hesselink and (since the fourth edition) Ewoud Hondius, Chantal Mak and Edgar du Perron: AS Hartkamp, MW Hesselink, E Hondius, C Mak and E du Perron (eds) *Towards a European Civil Code* (4th edn, Alphen aan den Rijn, Kluwer-Ars Aequi Libri, 2011). In favour of a fully-fledged and binding European Civil Code, see U. Mattei, 'Hard Code Now!' (2002) *Global Jurist Frontiers* 2, no. 1 Article 1; *id*., 'Hard Minimal Code Now – A Critique of "Softness"' in S Grundmann and J Stuyck (eds) *An Academic Green Paper on European Contract Law* (The Hague et al.,: Kluwer Law International, 2002) 228. For a comprehensive study defending a 'hard' European Civil Code, see K-H Lehne and S Scholemann-Lehne, *Auf dem Weg zum Europäischen Zivilgesetzbuch* (Baden Baden, Nomos, 2006). For a more cautious approach see C. Schmid, 'On the Legitimacy of a European Civil Code' (2001) 8 *Maastricht Journal of Comparative Law* 277 et seq.

[7] See O Lando, 'My life as a lawyer' (2002) *Zeitschrift für Europäisches Privatrecht* 520; H Beale, 'The Future of the Common Frame of Reference' (2007) 3 *European Review of Contract Law* 259 et seq.

(or the law of obligations) as a whole did not find sufficient supporters either. Instead, all members of the Lando group[8] agreed on the purpose of drafting common European rules of contract law. Thus the final product of this research group was called "Principles of European Contract Law" (PECL).[9]

The idea of enacting common European rules on contract law found strong support in the European Commission. With a series of Communications issued between 2001 and 2004,[10] the Commission gave birth to two new stars: the Common Frame of Reference (CFR) and the Optional Instrument (OI) on European contract law.

It is debatable whether or not the birth of these two new stars signified the death of the star "European Civil Code". The CFR and OI could be seen as the first pieces of a future, broader codification of European private law. Certainly the European Commission greatly supported the Study Group on a European Civil Code (SGECC)[11]: it granted a major research funding to a network of academics led and coordinated by the SGECC,[12] for the preparation of a Draft Common Frame of Reference (DCFR), which was eventually published in 2009.[13]

The DCFR as an academic draft was supposed to build the basis for the enactment of a future "political" CFR.[14] However, the sufficient political support for such an enactment was not found. One of the obstacles to a political marketing of the DCFR was its too broad scope. In fact, the DCFR goes far beyond contract law: it includes also rules on non-contractual obligations arising from unjust enrichment, damage caused to another, and benevolent intervention in another's affairs. In substance, the DCFR is a European Code of Obligations under a different name.

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[8] The group founded by Lando was the famous "Commission on European Contract Law". For a recent description of this group and its work see K Gutman (n 6) 149 et seq.

[9] O Lando and H Beale (eds) *Principles of European Contract Law, Parts I and II* (The Hague, Kluwer, 2000); O Lando, E Clive, A Prüm and R Zimmermann (eds) *Principles of European Contract Law, Part III* (The Hague, Kluwer, 2003). In Lando's view, 'the main purpose of the PECL is to serve as a first draft of a part of a European Civil Code': O Lando (n 7) 521.

[10] COM (2001) 398 final, COM (2003) 68 final, COM (2004) 651 final. For a recent and comprehensive discussion of these Communications see K Gutman (n 6) 180 et seq.

[11] See n 6. The SGECC was the successor or 'heir apparent' of the Lando Commission: see E Hondius, 'Towards a European Civil Code' in AS Hartkamp, MW Hesselink, E Hondius, C Mak and E du Perron (eds) *Towards a European Civil Code* (n 6) 3, 13; K Gutman (n 6) 152.

[12] On this network ("Network of Excellence") see recently K Gutman (n 6) 153 et seq.

[13] Study Group on a European Civil Code, Research Group on Existing EC Private Law (Acquis Group) (eds) *Principles, Definition and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Outline Edition* (München, Sellier European Law Publishers, 2009); Study Group on a European Civil Code, Research Group on Existing EC Private Law (Acquis Group) (eds) *Principles, Definition and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition* (München, Sellier European Law Publishers, 2009).

[14] On the envisaged role of the DCFR with regard to the preparation of EU legislation on European contract law see among others H. Beale, 'The Future of the Draft Common Frame of Reference' (2007) 3 ERCL 257; K Gutman (n 6) 229 et seq. with further references.

The DCFR and the CFR were also supposed to build the basis for the enactment of an Optional Instrument on European contract law.[15] Both the CFR and the OI were expected to resemble the PECL, since the 2004 "Way Forward" Communication of the European Commission[16] contained an Annex on the possible structure of the CFR, which looked very much like the structure of the PECL.

However, after the publication of the DCFR in 2009, no sufficient political consensus was found for drafting either a CFR or an OI on European contract law as a whole. The EU institutions opted for drafting sector-specific optional instruments instead. The first instrument they envisaged was one on sales law.[17] Thus the EU left aside the two stars CFR and OI and gave birth to a new star: the Common European Sales Law (CESL).

1.2 The Groningen Project "Content and Effects of Contracts: The CESL in the European Multi-level System of Governance"

The European Commission's proposal for a Regulation on a Common European Sales Law (CESL) was published in October 2011.[18] An impressive amount of academic literature has followed the publication of the proposed CESL between October 2011 and today.[19] The vast majority of comments address the instrument as

[15] On the envisaged Optional Instrument see, among others, MW Hesselink, JW Rutgers and TQ de Booys, *The legal basis for an optional instrument on European contract law*, Study for the European Parliament, Final Report, 8 February 2008; A Colombi Ciacchi (n 4); J Rutgers, 'European Competence and a European Civil Code, a Common Frame of Reference or an Optional Instrument' in AS Hartkamp, MW Hesselink, E Hondius, C Mak and E du Perron (eds) *Towards a European Civil Code* (n 6) 311 et seq.

[16] COM (2004) 651 final.

[17] For a recent overview of the developments from the publication of the DCFR until the publication of the draft CESL see K Gutman (n 6) 252 et seq.

[18] COM (2011) 635 final.

[19] For an overview see E Hondius, 'The Many Advantages of a Common European Sales Law' (in this volume). Among the most recent works see MBM Loos, 'Transparency of Standard Terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law' (2015) 23 ERPL 179; M Storme, 'The Young and the Restless: CESL and the Rest of Member State Law' (2015) 23 ERPL 217; C Twigg-Flesner, 'CESL, Cross-Border Transactions and Domestic Law: Why a Dual Approach Could Work (Although CESL Might Not)' (2015) 23 ERPL 231; H Beale, 'Hopes for the CESL: A Brief Response to DiMatteo, Loos, Schulte-Nölke, Storme, and Twigg-Flesner' (2015) 23 ERPL 251; A-G Castermans, R de Graaf and M Haentjens, 'The Digital Single Market and Legal Certainty: A Critical Analysis of the Common European Sales Law' (2015) Leiden Law School Research Paper No 6, March 12, 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2577321; JM Smits, 'The Future of Contract Law in Europe' (2015) Maastricht European Private Law Institute Working Paper No 2015/2, 17 Feb 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2566149; M Lehmann (ed) *Common European Sales Law Meets Reality* (Munich, Sellier, 2015); J. Plaza Penades, LM Martines Velencoso (eds) *European Perspectives on the Common European Sales Law* (Berlin, New York, Springer, 2015).

a whole. Only very few detailed commentaries of the individual CESL provisions exist.[20] This is understandable, since the preparation of a comprehensive commentary to all individual CESL provisions requires an enormous effort in term of both coordination and time.

In 2013–2014, the Groningen Centre for Law and Governance (GCL) funded and organised the research and publication project "Content and effects of contracts: The CESL in the European Multi-Level System of Governance". The purpose of this project was to analyse and comment on the CESL provisions on the contents and effects of contracts (Chap. 7 CESL) from both the governance perspective of the GCL and the European and comparative law perspective of the Hanse Law School (HLS).

For what concerns the governance perspective of the GCL, "governance" is broadly understood as the coordination of action, interests, policies and objectives of diverse actors (public, private or public-private).[21] In the European private law context,[22] a particularly interesting aspect of governance consists in the conflict and balancing of different interests and societal policies underlying an apparently technical or politically neutral piece of legislation.[23] Against this background, the GCL project "Content and effects of contracts: The CESL in the European Multi-Level System of Governance" (hereafter: "the Groningen project") intended to analyse selected CESL provisions and contribute to answering the question of whether and to what extent they would improve the position of consumers or businesses in comparison to the correspondent provisions of national contract law. For this exercise, Chap. 7 CESL was selected because the rules on the contents and effects of contracts play a major role in determining how much consumer-friendly or business-friendly a contract is.

Most research projects are limited by the amount of time and resources at disposal of the coordinators. For a comparison of all provisions of Chap. 7 CESL with all correspondent national rules of all EU Member States, the Groningen project was too small. Like the CESL commentary coordinated by Dannemann and

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[20] R Schulze (ed) *Common European Sales Law (CESL). A Commentary* (München, Beck; Oxford, Hart Publishing; Baden Baden, Nomos, 2012); G Dannemann and S Vogenauer (eds), *The Common European Sales Law in Context. Interactions with English and German Law* (Oxford, Oxford University Press 2013).

[21] See Issalys' definition of governance as "mechanisms by which social actors seeking to achieve coordinate action can work together to accommodate their own legitimacy, diversity of objectives, values and interests": P Issalys, 'Choosing Among Forms of Public Action' in P Eliadis, M Hill and M Howlett (eds), *Designing Government: From Instruments to Governance* (Montreal, McGill-Queen's University Press, 2005) 154, 180.

[22] On governance in the European private law context see, generally, F Cafaggi and H Muir-Watt (eds) *Making European Private Law. Governance Design* (Cheltenham, Elgar, 2008). On contract governance from the perspective of European contract lawyers, see F Möslein and K Riesenhuber, 'Contract Governance: A Draft Research Agenda' (2009) 5 *European Review of Contract Law* 248 et seq.

[23] On governance as "policy-making with or without politics", see A Kazancigil, 'Governance and science: market-like modes of managing society and producing knowledge' (1998) 50 *International Social Science Journal* 69 et seq.

Vogenauer,[24] also the commentary to Chap. 7 CESL prepared by the Groningen project could only focus on two countries. We chose Germany and the Netherlands, also because of the German-Dutch cooperation in the framework of the Hanse Law School (HLS).

The HLS is a bachelor and master programme in European and comparative law offered jointly by the Universities of Bremen and Oldenburg in cooperation with the University of Groningen. The admission to the HLS is limited to a maximum of 30 selected, particularly talented and motivated students per year. The comparative law perspective of the HLS focuses mainly, but not exclusively, on German and Dutch law. In the HLS courses, students often analyse English law as well, and sometimes also legal materials from other European countries, such as Italy or France.[25] The present commentary on Chap. 7 CESL has been organised in the HLS spirit. Therefore, the majority of authors are European contract lawyers with a German or Dutch background, flanked by a couple of renowned scholars from England and Italy.

In the framework of the above-mentioned project, the international workshop "Content and Effect of Contracts: the CESL in the European Multi-Level System of Governance" took place in Groningen on 31 May-1 June 2013. Most of the contributions presented at this workshop were further elaborated between 2013 and 2015, and are now included in the present volume.

1.3 After the CESL Withdrawal: Lessons to Learn for Future EU Instruments in the Field of Sales Law

In February 2014, the European Parliament – with a large majority – voted in favour of the CESL, although it suggested some amendments.[26] However, in powerful member states such as France, Germany, and the UK, the CESL seems to be politically undesidered. The new European Commission in office since 1 November 2014 took account of the fact that the CESL did not find sufficient support in

[24] See n 20 above.

[25] On the Hanse Law School and its teaching and research methodology, see C Godt (ed) *Cross Border Research and Transnational Teaching under the Treaty of Lisbon: Hanse Law School in Perspective* (Nijmegen, Wolf Legal Publishers, 2013), with further references.

[26] European Parliament legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011)0635 – C7- 0329/2011 – 2011/0284(COD)). On the amendments suggested by the European Parliament see MW Hesselink, 'Unfair Prices in the Common European Sales Law' in L Gullifer and S Vogenauer (eds) *English and European Perspectives on Contract and Commercial Law. Essays in Honour of Hugh Beale* (Oxford, Hart Publishing, 2014) 225 et seq.; T Pinkel, 'Der Anwendungsbereich und zentrale Vorschriften des Kommissionsentwurfs für ein Gemeinsames Europäisches Kaufrecht sowie die Änderungsvorschläge des ELI und Änderungsanträge des Parlaments im Vergleich' (2014) *Hanse Law Review* 45.

the Council.[27] In its Work Programme 2015, presented on 16 December 2014,[28] the Commission included the CESL in the list of withdrawn proposals. The explanation for the withdrawal consists in the intention to prepare a "(m)odified proposal in order to fully unleash the potential of e-commerce in the Digital Single Market". [29,30]

This means that, politically, also the CESL star has fallen and that the European Commission will soon give birth to a new star once again. However, the CESL as proposed by the Commission in 2011 will arguably continue to be very useful for European and national policy-makers, academics and practitioners, because it remains an important piece of soft law that can be used to interpret and develop future instruments in the field of European contract law.[31]

Moreover, it is most probable that the CESL provisions as drafted by the European Commission in 2011 and amended by the European Parliament in 2014 will strongly influence both the newly envisaged EU instrument on online sales, and future EU and national legislation. In fact, on 6 May 2015, the Commission published its Communication 'A Digital Single Market Strategy for Europe'.[32] In this document, the Commission expresses its intention to "make an *amended*[33] legislative proposal (…) further harmonising the main rights and obligations of the parties to a sales contract". Thereby the Communication explicitly refers, in footnote 2, to the CESL proposal published in 2011.[34] This means that the Commission does not aim at drafting a completely new proposal. It aims at *amending* the draft CESL, restricting its scope of application, and making further changes

[27] Cf. Commissioner Jourová's remarks before the European Parliament's Legal Affairs (JURI) Committee on 19 January 2015: https://ec.europa.eu/commission/2014–2019/jourova/announcements/commissioner-vera-jourovas-remarks-european-parliaments-legal-affairs-juri-committee-19-january-2015_en: "You had suggested focusing the Common European Sales Law on online sales. However, as the proposal for the Common European Sales Law has not found sufficient support in Council we want to withdraw it and put forward a modified proposal this year. This will be one of the new initiatives to be announced in the Digital Single Market package."

[28] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 16 December 2014, Commission Work Programme 2015: A New Start, COM(2014) 910 final.

[29] See COM(2014) 910 final, Annex II, no. 60.

[30] According to Eric Clive, "(t)his new emphasis was stressed in the speech by the First Vice-President Frans Timmermans who said that one of the Commission's priorities for 2015 would be an ambitious digital single market package which would, among other things, modernise copyright laws and simplify rules for consumers making online digital purchases." E Clive, 'Proposal for a Common European Sales Law withdrawn', posted on 7 January 2015 in "European Private Law News", http://www.epln.law.ed.ac.uk.

[31] See H. Beale's contribution in this volume.

[32] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 6 May 2015, A Digital Single Market Strategy for Europe, COM(2015) 192 final.

[33] Emphasis added.

[34] COM(2015) 192 final, 5.

deemed opportune in order to achieve the goals laid down in the abovementioned Communication of 6 May 2015.

In June 2015, the Commission opened a public consultation "on contract rules for online purchases of digital content and tangible goods".[35] Citizens, organisations and public authorities were invited to complete, between 16 June and 3 September 2015, the online *Questionnaire on Contract Rules for Online Purchases of Digital Content and Tangible Goods*.[36] The results of this public consultations are supposed to guide the Commission in drafting a new proposed instrument that regulates such online purchases.

One may therefore speculate whether perhaps a new star called CEROP (Common European Rules on Online Purchases) will soon replace the CESL. One thing seems to be sure: Whatever instrument replaces the proposed CESL is likely to cover fewer topics than did the CESL.[37]

We sincerely hope that, in amending the draft CESL provisions on the contents and effects of contracts so as to make them fit for the purposes of the Digital Single Market Strategy for Europe, the Commission will take the comments and suggestions included in the present volume into account. The "lessons to learn" contained in this volume, however, intend to help not only the Commission but also other national and supranational actors, both public and private (including courts, lawyers, stakeholders, contract parties, academics and students) in dealing with present and future European and national instruments in the field of contract law.

[35] See http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm

[36] Available at http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm

[37] Cf. the Introduction to H. Beale's chapter in this volume.

Chapter 2
Origin and Ambitions of the Common European Sales Law, Especially Its Chapter on Contents and Effects

Oliver Remien

Abstract This chapter explores the origin and the ambitions of the CESL and its rules on contents and effects of contracts. Firstly, the chapter evidences how the CESL relies on previous models such as the Vienna Convention on the International Sale of Goods (CISG), the Principles of European Contract Law (PECL), the Unidroit Principles of International Commercial Contracts (UPICC), the Draft Common Frame of Reference (DCFR), and some EU directives in the field of contract law. The chapter thereby demonstrates that the CESL rules on contents and effects of contracts are not innovative, since almost all of them originate from the PECL (with the exception of two rules, of which one takes pattern from the DCFR and the other follows the model of the EU Consumer Rights Directive). Secondly, this chapter discusses whether the ambition of the CESL really consists in improving the functioning of the internal market, as the choice of art 114 TFEU as a legal basis might suggest. The chapter criticizes the latter choice and submits that invoking art 114 TFEU for such an instrument is hardly compatible with the case law of the ECJ. Arguably, the most important ambition of the CESL is not its internal market functionality but a different one: The CESL substantially contains model rules of general contract law, suitable for all contracts, not just for sales of goods or digital content. Therefore, the CESL rules are important for the future of private law in Europe.

2.1 Introduction

This chapter is based on the paper I presented at the Groningen symposium on the Chapter on Contents and Effects of the proposed CESL. The participation in this symposium was not only an honour and a pleasure. It also gave the possibility to

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look at the CESL in a broader perspective, especially to consider its origin and its ambitions. Thus, the temptation to adopt a "plan en deux parties" cannot be resisted – though I am not coming from France. Therefore, this chapter will explore first the origin, then the ambitions of the CESL and its rules on contents and effects. It will come to the conclusion that Chap. 7 of the CESL (i) is not innovative, (ii) rests on 20–30 years old academic efforts, (iii) is important for the future of private law in Europe.

2.2 Origin (=1ère partie)

2.2.1 In General

Whoever looks at the CESL will, with good reason, inquire into its origins. Is it an innovative European instrument, as the European Commission may try to present it? Or, in contrast, does the old Latin sentence apply: *Nihil nove sub sole* – Nothing new under the sun. Is this sentence also true for the CESL? A closer analysis and longer memory will show.

To start with, one should remember[1] that in the 1920's Unidroit asked *Ernst Rabel* to prepare a Uniform Sales Law. This led to drafts for Unidroit, *Rabel*'s famous two volume treatise on "Das Recht des Warenkaufs",[2] in the 1960's the two Hague Sales Laws ULIS and ULFIS, and in 1980 the Vienna Sales Convention, CISG. Strangely enough, the EU appears never to have cared even a little bit about CISG. Except the UK and a few others, all the Member States of the EU are contracting states of the CISG. Thus, to a certain extent there already is a Common Sales Law in Europe,[3] although not for consumer sales and with many lacunae.

To be sure, the CISG is very important for the proposal of the CESL. It has already sometimes been pointed out that the CESL proposal is based on a plurality of sources.[4] In perhaps a rough manner, one can say that there are three main sources:

– Sales Conventions, especially the CISG;

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[1] See already O Remien 'Gemeinsames Europäisches Kaufrecht für die EU? Eine Einführung' in O Remien, S Herrler and P Limmer (eds) *Gemeinsames Europäisches Kaufrecht für die EU? Analyse des Vorschlags der Europäischen Kommission für ein optionales Europäisches Vertragsrecht vom 11.10.2011* (München, Beck, 2012) 1 et seq.

[2] E Rabel, *Das Recht des Warenkaufs*, volumes 1 and 2 (Tübingen, Mohr Siebeck, I 1936 and reprint 1957, II 1958).

[3] Cf also O Lando 'CESL or CISG? Should the proposed EU Regulation on a Common European Sales Law (CESL) replace the United Nations Convention on International Sales (CISG)?' in O Remien, S Herrler and P Limmer (eds), *Gemeinsames Europäisches Kaufrecht für die EU? Analyse des Vorschlags der Europäischen Kommission für ein optionales Europäisches Vertragsrecht vom 11.10.2011* (München, Beck, 2012) 15.

[4] See eg Lando *ibid* 15; O Remien *ibid* 1 and 2.

– Academic Principles or Restatements such as the Principles of European Contract Law (PECL), the Unidroit Principles of International Commercial Contracts (UPICC), the Draft Common Frame of Reference (DCFR);
– EU-directives.

A fourth kind of source may be

– New ideas of the drafters of CESL.

There may be – despite the Latin saying – some new ideas and it would be interesting to analyse how many there are in the entire instrument, but this is not my task today. We are concerned with Chap. 7 only. My impression is that the new ideas are not so manifold – if we omit slighter changes and, of course, digital content.

The three main sources in themselves are not uniform: PECL and UPICC have much in common, but also show some divergences, the PECL with their comments and notes have very often been copied in a cut out and paste manner into the DCFR, sometimes even including minor mistakes. So to say, the DCFR does what every doctoral student is strictly forbidden to do! To be sure, this of course has been authorised by the Lando Commission. At the same time, there are also modifications. In addition, the Sales Conventions have developed over time, as did some directives. The CISG has clearly served "as some kind of a model" for the PECL.[5] Certainly the sales directive has had its effects on the proposed CESL.

For a clearer picture, it may be worthwhile to look at the origin of the provisions of the chapter on contents and effects, first with regard to the structure of the chapter, then to the individual provisions.

2.2.2 Contents and Effects

2.2.2.1 Structure

Already in the PECL, we find Chap. 6 on "Contents and Effects",[6] but not in the UPICC, which has a different disposition. The DCFR in its book 2 again has a Chap. 9 on "Contents and effects of contracts". Thus, the structure seems influenced by precedents.

In the CESL, Chap. 7 on "Contents and Effects" has 13 provisions, arts 66 to 78. It is not identical to Chap. 6 of PECL or Chap. 9 of book II DCFR, but most of what

[5] Commission on European Contract Law, *Minutes of the third meeting, held at Hamburg at the Max-Planck-Institut für ausländisches und internationales Privatrecht*, 8–10 November 1982, by O Remien, p 3, cited Minutes III p 3. In this chapter, reference to further Minutes of the (first) Commission on European Contract Law will be made in the same manner, indicating the number of the meeting by a Latin number and then giving the relevant page. The author has been the Secretary of the (first) Commission on European Contract Law (1982–1990) chaired by Ole Lando.

[6] The first drafts, however, only had a chapter on "Effects and Performance".

is dealt with here can in one form or the other be found in those chapters already. It should be borne in mind that the chapter does not describe the obligations of the parties and contain the rules on performance, but rather indicates the sources of those rules. The chapter has been described as a "Sammelsurium", ie a hotchpotch or mingle-mangle of provisions which do not fit elsewhere.[7] This may be too negative. However, it is difficult to cut the chapter with its 13 provisions into separate blocks. Looschelders and Makowsky have tried to group the 13 provisions under seven headings[8] – still a lot which does not create so much oversight, but perhaps a nice try: Basics in arts 66 to 68, special cases in arts 69 to 72, determination of price in art 73, determination of term by a party or a third person in arts 74 and 75, language in art 76, indeterminate duration in art 77, and contract in favour of a third party in art 78. Let us look at all that in more detail.

2.2.2.2 Details

Basics

The chapter starts with art 66 on "Contract terms". This is, in my opinion, just a list. It seems to have more pedagogical than regulatory value. It is an expression of the legislative style adopted in the CESL proposal which is not always a good choice. But an author has said that the approach of art 66 is to be appreciated.[9] Tastes are not uniform. After all, the less complete art 5.1.1 UPICC and II.-9:101 (1) DCFR to some extent already went into the same direction.

The following provision of art 67 concerns "Usages and practices in contracts between traders". This is a classic of commercial law and also of the PECL – in PECL it is art 1:105 – it has been discussed in the first Lando-Commission already in 1982, 1983 and later. In UPICC it is art 1.9, in the DCFR art II.-1:104 and, more briefly, also art II.-9:101 (1). CESL now limits it to B2B and thus returns to the old commercial law characterisation.

Art 68 is on "Contract terms which may be implied". Subparagraph 1 in substance copies art II.-9:101 (2) DCFR which largely stems from art 6:102 PECL 1999 which had replaced the older 5.108. Subparagraph 2 and 3 elaborate on that and are to be found in art II.-9:101 (2) – (4) DCFR, but probably do not add much except some clarification. Art 5.1.2 UPICC is quite similar to the rule in PECL.

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[7] CH Wendehorst 'Regelungen über den Vertragsinhalt (Teil III CESL-Entwurf)' in CH Wendehorst and B Zöchling-Jud (eds), *Am Vorabend eines Gemeinsamen Europäischen Kaufrechts, um Verordnungsentwurf der Europäischen Kommission vom 11.10.2011* (Wien, Manz, 2012) 91.

[8] See D Looschelders and M Makowsky 'Kapitel 7: Inhalt und Wirkungen von Verträgen' in M Schmidt-Kessel (ed), *Ein einheitliches europäisches Kaufrecht? Eine Analyse des Vorschlags der Kommission* (München, Sellier, 2012) 227 et seq.

[9] EM Kieninger in R Schulze (ed), *Common European Sales Law (CESL), Commentary* (Baden-Baden, München, Portland, Nomos, Beck, Hart, 2012) art 66 no 2.

Special Cases

The basics are complemented by special cases.

An interesting rule is art 69 "Contract terms derived from certain pre-contractual statements". At first sight it might seem to stem from the Consumer Sales Directive[10] or art II.-9:102 DCFR with even six sub-paragraphs, but it can be found in art 6.101(2) and (3) PECL 1999 already.[11] The Comment to the PECL mentions the UCC, Scandinavian, and Netherlands' law as models. Art II.-9:102 DCFR takes this up.

Art 70 has the heading "Duty to raise awareness of not individually negotiated contract terms". Thus, Chap. 7 also has a rule on terms which have not been individually negotiated although the other relevant rules are contained in articles 7 and 82ff. From both a systematic and a practical point of view, this is a bit strange. The Unfair Terms Directive does not know it, but the German "Einbeziehungskontrolle" of § 305 II BGB,[12] Netherlands' law, art 2:104 PECL and II.-9:103 DCFR do. Although, art 70 goes relatively far in including commercial contracts and in being mandatory for consumer cases.[13]

Art 71 concerns "Additional payments in contracts between a trader and a consumer". It seems to go back to art 22 Consumer Rights Directive 2011/83.[14] With good reason, it has already been criticised that art 71 CESL is more complicated and less readable than the provision of the directive.[15] But following the *acquis communautaire* for the CESL is, of course, more or less mandatory.

Art 72 regulates "Merger clauses". Merger clauses are already dealt with in art 2.1.17 UPICC, also art 2:105 PECL, II.-4:104 DCFR.[16] The primary effect in the CESL may be that of sub-paragraphs 3 and 4, the consumer is not bound by them. This has been criticised,[17] but generally will be in the interest of the consumer: the consumer needs a favourable rule even more than clear rules. If it is at all necessary, art 72 at least may be helpful to the consumer.

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[10] Kieninger in R Schulze (ed), CESL art 69 no 1 (n 9).

[11] See also Looschelders and Makowsky 'Kapitel 7: Inhalt und Wirkungen' (n 8) 234 fn 32.

[12] W Ernst 'Das AGB-Recht des Gemeinsamen Europäischen Kaufrechts' in O Remien, S Herrler and P Limmer (eds), *Gemeinsames Europäisches Kaufrecht für die EU? Analyse des Vorschlags der Europäischen Kommission für ein optionales Europäisches Vertragsrecht vom 11.10.2011* (München, Beck, 2012) 97.

[13] Critically Kieninger (n 9) art 70 no 6.

[14] See also Looschelders and Makowsky (n 8) 241.

[15] Kieninger (n 9) art 71 no 12.

[16] Cf also Kieninger (n 9) art 72 no 2 and 3.

[17] Kieninger (n 9) art 72 no 9.

Determination of Price and Other Terms

The CESL has three provisions on price determination and determination of other terms in its arts 73–75. The first Lando Commission discussed these issues already as of 1985[18]; it quickly developed one single provision with four sub-paragraphs, which then was split up in four sections.[19] The first three of them are the predecessors of arts 73–75.

Art 73 "Determination of price" can already be found in art 6:104 PECL, but is closer to art 5.1.7 (1) UPICC and just as this one is longer. In the DCFR it is art II.-9:104 DCFR.[20]

Art 74 "Unilateral determination by a party" stems from art 6:105 PECL, II.-9:105 DCFR and art 5.1.7 (2) UPICC[21] but as the latter one is longer and adapted to the approach of UPICC and art 73. Following these models, the rule is more lenient than some national laws such as § 315 III BGB – the solution chosen for the Lando Principles is adopted in CESL. Whereas art 73 only applies to the price, art 74 and also the following art 75 also apply to other terms.

Art 75 "Determination by a third party" has as its predecessor[22] art 6:106 PECL and II.-9:106 DCFR; UPICC art 5.1.7 has an equivalent to subpara I in 5.1.7 (3), but does not have the rule of subpara 2 and PECL.[23]

Clearly, arts 73–75 show the influence of their academic predecessors.

Language

Art 76 "Language" is a special case. It is practically copied from art II.-9:109 DCFR![24] It concerns the language of communications, not of the contract.[25] But is it consumer friendly? Many people may easily fill in a shopping basket on an internet site in a foreign language but later would have difficulty in arguing about their legal rights in that foreign language. Is the "'stick to the language'-rule" of the DCFR[26] really appropriate?

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[18] Minutes VII 38ff (on § 1.105 with four sub-paragraphs); VIII 19ff; X 23ff; XII 16f (split up in four sections); XIII 19ff.

[19] *Ibid*.

[20] See also Kieninger (n 9) art 73 no 4.

[21] See also Kieninger (n 9) CESL art 74 no 2.

[22] On this question also Kieninger (n 9) art 75 nos 1 to 3.

[23] J Kleinheisterkamp in ST Vogenauer and J Kleinheisterkamp (eds*), Commentary on the Unidroit Principles of International Commercial Contracts (PICC)* (Oxford, Oxford University Press, 2009) art 5.1.7 no 10.

[24] Cf also Kieninger (n 9) art 76 no 2.

[25] Kieninger (n 9) art 76 no 3.

[26] DCFR art II.-9:109 Comment B.

Indeterminate Time

Art 77 "Contracts of indeterminate duration" takes up an issue already treated in art 6:109 PECL and 5.1.8 UPICC on "Contract for an Indefinite Period" and in art III.-1:109 (2) DCFR,[27] but has been modified. Just as its predecessors, art 77 CESL is limited to contracts for an indefinite period of time and does not expressly cover all long term contracts. This means that the question of ending a contract for a fixed period for important reason[28] is not regulated. Already the first Lando Commission had – after consideration – found this too difficult a question.[29] This seems to not have been questioned since.

Contracts in Favour of a Third Party

Art 78 "Contract terms in favour of third parties" follows art 6:110 PECL which goes back to discussions and drafts of as early as 1985[30] but gives more detail in subparas. 2 and 3 and insofar appears to follow the example, though not the wording, of art 5.2.1 (2), 5.2.3 and 5.2.4 UPICC and II.-9:301 to 303 DCFR.[31] Later, the English legislator had intervened and adopted the European approach.[32] CESL art 78 can profit from this new harmony.

2.2.3 Conclusion

As a conclusion, one must say that most provisions were more or less already contained in the PECL (10 out of 12 or 13), at least 6 already in the drafts of the first Lando Commission which worked from 1982 to 1990. Sure the provisions of the CESL are sometimes longer and more detailed, sometimes insofar following UPICC and DCFR; details have been added or changed. To me, however, it appears that the main stuff is not new, but rests on the foundations laid 30 or 20 years ago.

Further, some of the topics in the PECL chapter have not been taken up in CESL – but in the DCFR –, namely art 6:101 Statements, 6:103 Simulation, 6:107 Non-Existent Factor, 6:108 Quality, whereas art 6:111 Change of circumstances –

[27] See also Kieninger (n 9) art 77 no 2.

[28] Cf eg in Germany § 314 BGB.

[29] Minutes XIII 41ff; see there also the reference to art 16 Commercial Agents Directive.

[30] Minutes VIII 31ff (Minutes VIII by Henning Klinkenberg) and IX 27ff; X 14f; XI 16; XIV 11f; see also IX 28 no 47 on the title "Agreement in favour of a third party" for § 1.113A.

[31] Similar Kieninger (n 9) art 78 nos 2ff.

[32] See Contracts (Rights of Third Parties) Act 1999; on this topic from a British comparative perspective, BS Markesinis, H Unberath and A Johnston, *The German Law of Contract, A Comparative Treatise*, 2nd edn (Oxford and Portland, Hart Publishing, 2006) 181 et seq with Chapter 4, "Relaxations to Contractual Privity".

an offspring of the first Lando-Commission[33] – is now art 89 CESL. Sometimes, topics and provisions have apparently been moved around in the different texts.

Out of the 13 provisions of Chap. 7 CESL, only one is really original from the DCFR. It looks as if the DCFR for the CESL has been more a juridico-technical-administrative enterprise than a fruitful creative step forward.

One provision of Chap. 7 originates from a directive – Art 71 CESL on additional payments.

In sum, this seems to show the great weight of PECL and UPICC, further developed in the DCFR, which intended to state general contract law Principles. Innovation in Chap. 7 is nearly completely missing!

2.3 Ambitions (=2ème partie)

In my shorter *deuxième partie* I would like to add some words on the ambitions.

2.3.1 Internal Market?

According to the considerations of the proposal and the chosen competence of art 114 TFEU, the CESL is about improving the internal market.[34] As an academic lawyer one might be proud to hear that differences in private law rules allegedly are of such economic importance[35] – but I cannot believe it, at least not if one looks at the contents of Chap. 7 and other parts of the CESL! When PECL and UPICC were drafted, the Commissions and Working Groups already thought about some necessary "selling effort" for their instruments! The idea was: Somehow the fine academic instruments should be "sold", ie made more interesting to the public and government bodies. I have the impression that the European Commission is a real specialist in "selling effort" activities. The DG Justice indeed also has a journalist and ethnologist, not a lawyer as its head.[36] Invoking art 114 TFEU, by the way is hardly compatible with the case law of the ECJ in the SCE case.[37] A European Contract law could be a nice thing, but it should be created in proper and not doubtful ways.

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[33] Cf Minutes VI 29ff; VII 15ff; VIII 14ff; IX 19ff; X 20; XI 15f; XII 15; XIII 18f; XIV 15.

[34] See recitals 1 to 7 of the Draft Regulation.

[35] "Differences in national contract laws therefore constitute barriers which prevent consumers and traders from reaping the benefits of the internal market", is the first sentence of recital 6.

[36] At the time of the symposium: Viviane Reding from Luxembourg.

[37] See eg O Remien 'Allgemeine parallele Zivilrechtskompetenz der Europäischen Union? Zur verfassungspolitischen Bedeutung der Kompetenzfrage beim Vorschlag eines Gemeinsamen Europäischen Kaufrechts (GEKR/CESL)' in N Witzleb, R Ellger, P Mankowsky, H Merkt and O Remien (eds) *Festschrift für Dieter Martiny zum 70. Geburtstag* (Tübingen, Mohr Siebeck, 2014) 987, 993 et seq.

2.3.2 Aiming at a EU-Private Law Competence

So, if not the internal market, what then is the ambition? When we look at Chap. 7, but also other parts of the CESL, we find general contract law. The CESL concerns sales and digital content, but many rules are suitable for all contracts, not just sales. Certainly this applies to Chap. 7. This is important! When art 114 TFEU works for sales in CESL, it works for nearly everything in patrimonial private law.[38] An insurance law project is already under way. Why then, theoretically, not also other things: service contracts, security over movables, hypothecs etc. – all as an "optional instrument"?

It must also be borne in mind that in an internal market with freedom of establishment, an optional instrument means an option or choice of law for any enterprise of a certain size. If not just too small, the enterprise can set up a subsidiary in another Member State and concentrate its marketing activities there. The consequence is that the Member States lose their regulatory power in private law except for merely local cases. There may be arguments in favour of that, but it would be a constitutional change and a loss of democratic government. Is this the Europe which we desire? In the context of Law and Governance, this question must be asked.

2.3.3 Conclusion

By way of conclusion, it can be stated that Chap. 7 of CESL on Contents and Effects (i) is not innovative, (ii) rests on twenty to thirty years old academic efforts, (iii) is important for the future of private law in Europe.

However, other pressing problems of Europe and EU are much more important than sales and contract law and until today remain unsolved. Contract law unification should take its time.

[38] Remien (n 37) 1000 et seq.

Chapter 3
The Many Advantages of a Common European Sales Law

Ewoud Hondius

Abstract Whatever its importance may be, the draft regulation for a common European sales law (CESL) has had one major effect. It has been discussed all over Europe and even outside.

The question whether or not an Optional Instrument should be introduced, is hotly debated. Basically, authors have either given a positive appraisal of the project, albeit usually with reservations regarding specific proposals, or rejected the Optional Instrument. Among the latter there is a widely held view that if the proposal does not help, it does not harm either. This view is challenged in this paper.

A different question addressed in this paper is why the Common European Sales Law seems to provoke the German speaking part of Europe so much more than other linguistic communities. The reason may be the following. The draft Regulation is of course available in all official languages including German. Until its publication, the earlier Feasibility study existed only in English. And although this is comprehensible to most German lawyers, it does make discussion of technical issues awkward. The present abundance of German language commentaries is most certainly attributable to this linguistic background.

Although basically the CESL proposal is modeled after the Feasibility study, there are also some differences. The major difference is that whereas the Feasibility study dealt with Contract Law in general, the CESL focuses on a sales plus contract. By 'sales plus' we should think of sales contracts and some related contracts. In the future, the CESL – or its follow-up – may serve as a building block for a Civil Code. It may even contribute to the further development of CISG. This also holds true for other parts of private law, although provisions on tort law for instance are more dif-

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Paper delivered at the conference *Content And Effects Of Contracts: The CESL In The European Multi-Level System Of Governance*. Groningen 31 May – 1 June 2013. The paper builds on an *Editorial* in the *European Review of Private Law* 2013/1.

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ficult to imagine as the object of an option. The CESL may serve as a regional supplement to CISG. When establishing the final text of the CESL, no limiting time constraints should be imposed.

3.1 Introduction

Whatever its merits and demerits may be, the draft regulation on a common European sales law (CESL)[1] has had one major effect. It has been discussed all over Europe and even outside. Whether or not an Optional Instrument should be introduced by the European Union is a hotly debated issue.[2] The battle between partisans and antagonists reminds one of the strife between Proculians and Sabinians in ancient Rome.

Basically, authors have either given a positive appraisal of the project, albeit usually with reservations regarding specific proposals, or rejected the Optional Instrument. Among the latter there is a widely held view that if the proposal does not help, it does not harm either. This view is challenged in this chapter. Seen from the viewpoint of an adversary – which, mind you, this author is *not* -, it would in his mind be unwise to adopt the Instrument. The lenient attitude of opponents of the proposal is based on the understanding that if no one opts in, the Optional Instrument will have no impact. So, opponents argue, let the Regulation be adopted and the fact that no-one opts in will defeat the project by itself. This view, it is suggested, is incorrect. Thanks to an interpretation in conformity with directives,[3] provisions such as those on reasonableness and good faith (Article 2), if the proposal is adopted, may be applied outside the few directives where they have been introduced (unfair contract terms and commercial agents). Likewise, the rules on formation may be applied to forum choice clauses. It is most probable that many of the regulation's opponents have never considered this possibility.

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[1] CM (2011) 635 final. The proposal has been the subject of differences of opinion between the European Commission and the European Parliament. Politically, the fact that France, Germany and the United Kingdom have expressed their disapproval with CESL has at present led to a stalemate – see J Rutgers, 'Unfair terms in consumer contracts' in L Gullifer, S Vogenauer (eds) *English and European perspectives on contract and commercial law* (Oxford, Hart, 2014) 279–289; and for the most recent news the frequent blogs on *European Private Law News* of Eric Clive.

[2] The European Parliament's Economic Affairs Committee on 11 October 2012 backed the proposal –<europa.eu/rapid/press-release_MEMO-12-777_en.htm>. And on 26 February 2014, the full Parliament backed the proposal with 416 votes for, 159 against and 65 abstentions – press release European Parliament PV 26/02/2014 – 9.12. However, according to several newsletters 'Despite strong backing from the European Parliament, proposals for a Common European Sales Law (CESL) are likely to be bogged down in the European Council, due to opposition from a majority of member states, including the UK, France and Germany'(*EurActiv* 24 March 2014). And indeed, by December 2014, after the submission of the present chapter, European Commissioner Frans Timmermans retracted the CESL proposal.

[3] JM Prinssen, *Doorwerking van Europees recht, De verhouding tussen directe werking, conforme interpretatie en overheidsaansprakelijkheid* (PhD Amsterdam, Deventer, Kluwer, 2004) 279; MH Wissink, *Richtlijnconforme interpretatie van burgerlijk recht* (Deventer, Kluwer, 2011) 448.

A different question addressed in this chapter is why the Common European Sales Law seems to provoke the German speaking part of Europe so much more than other linguistic communities. The reason may be the following. The draft Regulation is of course available in all official languages including German. Until this publication, the earlier Feasibility study and its drafts existed only in English. And although this is comprehensible to most German lawyers, it does make discussion of technical issues awkward. The present abundance of German language commentaries is most certainly attributable to this linguistic argument.

As mentioned, the CESL was preceded by a Feasibility study, drafted by a group of mainly academics. Although basically the CESL proposal is modeled after the Feasibility study, there are also some differences. The major difference is that whereas the Feasibility study dealt with Contract Law in general, the CESL focuses on a sales plus contract. By 'sales plus' we should think of sales contracts and some related contracts. In the future, the CESL may serve as a building block for a Civil Code. It may even contribute to the further development of CISG. This also holds true for other parts of private law, although provisions on tort law for instance are more difficult to imagine as the object of an option. The CESL may serve as a regional supplement to CISG. When establishing the final text of the CESL, no limiting time constraints should be imposed.

This chapter is based on a paper presented at a conference in Groningen in 2013. Where possible, it was updated to 2015. When this chapter was written, the future of the CESL was not certain. In December 2014, the European Commission withdrew the CESL proposal from the working agenda. However, in July 2015 the Commission announced that again it is working on a legislative proposal covering harmonised rules for online purchases of digital content and key contractual rights for domestic and cross-border online sales of tangible goods.[4]

In this chapter, I want to emphasise two points in the discussion. One is the question whether the introduction of an Optional Instrument will have any impact at all, if simply no trader proposes consumers to submit their contract to the optional regulation. The second point is not so much a thesis, but rather a statement as to the explosion of German legal literature on the subject. In order to illustrate this, I will try to provide the reader with an overview of some of the more interesting papers on the European Commission's proposal. Finally, some less pressing issues will briefly be touched upon.

3.2 Conferences All Over the Place

The draft regulation for an optional common European sales law has generated a large number of conferences, special issues of law reviews and books. Conferences and seminars have been organised in among others Amsterdam ('leap year

[4] Commissioner Věra Jourová's remarks before the European Parliament's Legal Affairs (JURI) Committee, 13 July 2015.

conference'),[5] Bonn,[6] Frankfurt,[7] Groningen,[8] Hamburg,[9] Leiden,[10] Luxembourg,[11] Maastricht,[12] Marburg,[13] Münster,[14] Paris,[15] Prague,[16] Rome,[17] Trier,[18] Vienna,[19] Würzburg,[20] and even Chicago.[21] Law reviews such as the *Common Market Law*

[5] University of Amsterdam, Conference of 29 February 2012. The papers by C Cauffman and M Loos have been published in *NTBR* of May 2012. Other Dutch-language papers may be found in the *Maandblad voor Vermogensrecht.*

[6] *Tagung der Zivilrechtslehrer*, papers by S Grundmann, Kosten und Nutzen eines optionalen Europäischen Kaufrechts (2012) *AcP*, 502–544; B Zöchling-Jud, 'Acquis-Revision', *Common European Sales Law* und Verbraucherrechterichtlinie, 550–574; D Looschelders, 'Das Allgemeine Vertragsrecht des *Common European Sales law*' (2012) *AcP*, 581–693; S Lorenz, 'Das Kaufrecht und die damit verbundenen Dienstverträge im *Common European Sales Law*'(2012) *AcP*, 702–847; A Stadler, 'Anwendungsvoraussetzungen und Anwendungsbereich des *Common European Sales Law*'(2012) *AcP*, 473–501; B Zöchling-Jud, 'Acquis-Revision, *Common European Sales Law* und Verbraucherrechterichtlinie' (2012) *AcP*, 550–574.

[7] Goethe Universität Frankfurt am Main, Seminar *Neue Entwicklungen im europäischen Vertragsrecht,* 25 June- 1 July 2012. In Frankfurt the German Ministry of Justice also organised a conference – see Jörg-Uwe Hahn (ed), *Gemeinsames Europäisches Kaufrecht/Moderner Ansatz oder praxisferne Vision ?* (München, Beck, 2012) 223.

[8] 31 May – 1 June 2013. See the chapters in this volume.

[9] Symposium *Optionales europäisches Privatrecht* for the *Verein der Freunde und Förderer des Max Planck Instituts,* 18 June 2011. The papers have been published in an updated version in *RabelsZeitschrift* April 2012.

[10] Annual conference of the Leiden student association *Suum cuique,* 26 April 2012.

[11] Presentation by Christian Twigg-Flesner, 'The proposed Common European sales law – a common law perspective' (20 March 2012).

[12] On its Brussels Campus. The papers have been published in the *Maastricht Journal* 1–2012.

[13] Universität Marburg, Rechtsvergleichendes Seminar im Sommersemester 2012, Ein einheitliches europäisches Kaufrecht, Sonia Meier.

[14] Conference "European Law Days – The European law of obligations at a turning point", 17–19 October 2012.

[15] Conference *Université Paris II,* 28 November 2011.

[16] November 2013.

[17] See G Alpa *et al.* (eds), *The proposed common European sales law – the lawyers' view,* (München, Sellier) 2013, 251.

[18] *Europäische Rechtsakademie*, An optional European sales law, 9–10 February 2012.

[19] *European Law Institute,* first workshop on the proposal for a Common European sales law, 17–18 November 2011 (with papers by Christian Alunaru, Carole Aubert de Vincelles, Fabrizio Cafaggi, Lars Edlund, Bénédicte Fauvarque-Cosson, Johan Gernandt, Paul Gilligan, Peter Limmer, Hans Schulte-Nölke, Pilar Perales Viscasillas, Matthias Storme, Sir John Thomas, Anna Veneziano, Christiane Wendehorst, Reinhard Zimmermann and Fryderyk Zoll).

[20] University of Würzburg, 20 January 2012 – see Remien/Herrler/Rimmer (2012); ZEuP-Tagung 3–4 April 2012.

[21] University of Chicago, 2 May 2012. The papers are published in the *Common Market Law Review* 2013/1.

Review,[22] *Contratto e impresa Europa,*[23] the *European Review of Contract Law,*[24] *ERPL,*[25] the *Journal of International Trade Law and Policy,*[26] the *Maandblad voor Vermogensrecht,*[27] the *Maastricht Journal,*[28] and *RabelsZeitschrift*[29] have devoted special issues to the proposal. There are a surprisingly large number of German language books already on the market[30]and even a full-fledged Commentary, in English, but likewise originating in Germany.[31]

Basically, the authors of the various publications referred to above have either given a positive appraisal of the project, albeit usually with reservations regarding specific proposals, or rejected the Optional Instrument. However, among the latter there is a widely held view that if the proposal does not help, it does not harm either. This is a view which this chapter wishes to challenge. I am myself in favour of the Optional Instrument – although in my view a 2-year period of reflection to substan-

[22] University of Chicago, *Conference on European contract law: a law-and-economics perspective,* 27–28 April 2012 – see *CMLR* 2013/1.

[23] *Contratto e impresa Europa* 2012, 1–482.

[24] *ERCL* 2012, 30–87, with papers by Jürgen Basedow, Dorota Leczykiewicz and Ruth Sefton-Green, and 241–366, with papers by Stefan Grundmann, Guido Comparato, Ruth Sefton-Green, Ralf Michaels, Jan Smits, Hugh Collins, Chantal Mak and Martijn Hesselink.

[25] *ERPL* 2011, 6: 709–1000.

[26] *Journal of International Trade Law and Policy* 11 (2012) No 3, 222–305.

[27] *Maandblad voor Vermogensrecht* 2012, issue 7/8 with papers by JHM Spanjaard & THM van Wechem, EH Hondius, PCJ De Tavernier and T Heremans.

[28] *Maastricht Journal 1*–2012, with papers by Eric Clive, Nicole Kornet, Gary Low, Ursula Pachl and Giesela Rühl.

[29] *RabelsZ* April 2012.

[30] O Remien, S Herrler, P Limmer (eds), *Gemeinsames Europäisches Kaufrecht für die EU ?* (München, Beck, 2012) 214; M Schmidt-Kessel (ed), *Der Entwurf für ein gemeinsames Europäisches Kaufrecht/Kommentar, Überblick über die wesentliche Streitstände und Ergebnisse* (München, Sellier, 2014) 884; H Schulte-Nölke, F Zoll, N Jansen, R Schulze, *Der Entwurf für ein optionales europäisches Kaufrecht* (München, Sellier, 2012) 424; D Staudenmayer, *Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über ein Gemeinsames Europäisches Kaufrecht* (München, Beck, 2012) 93; C Twigg-Flesner, *A cross-border-only regulation for consumer transactions in the EU* (Springer, 2012) 76; C Wendehorst, B Zöchling-Jud (eds), *Am Vorabend eines Gemeinsamen Europäischen Kaufrechts* (Wenen, Manz, 2012).

[31] R Schulze (ed), *Common European Sales Law (CESL)* (Baden-Baden, Nomos, 2012) 780, with chapters by C Wendehorst (Vienna) on the 'chapeau' and art 58–65 (interpretation), H Schulte-Nölke (Osnabrück) on art 1–6 and 9–12 (general principles), D Mazeaud (Paris) and N Sauphanor-Brouillaud (Versailles) on art 7 and 79–86 (unfair contract terms), F Zoll (Cracow) on art 8, 87–122 (digital content) and 140–158 (transfer of risk, rights and duties), G Howells (Manchester) on art 13–29 (precontractual relations), T Watson (Münster) on art 13–29 (precontractual relations) and 140–158 (transfer of risk, rights and duties), E Terryn (Leuven) on art 30–39 (formation), R Schulze (Münster) on art 40–47 (right to withdraw), T Pfeiffer (Heidelberg) on art 48–57 (defects of consent), EM Kieninger (Würzburg) on art 66–78 (contents and effects), Ge Dannemann (Berlin) on art 123–139 (duties of the buyer), D Možina (Ljubljana) on art 159–171 (compensation and interest), M Lehmann (Halle) on art 172–177 (restitution); P Møgelvang-Hansen (Copenhagen) on art 178–186 (prescription). All chapters have the same order: A. function, B. context, C. interpretation, D. criticism.

tially improve the text would be necessary.[32] But seen from the viewpoint of an adversary, it would be unwise to adopt the Instrument. The lenient attitude of opponents of the proposal is based on the understanding that if no one opts in, the Optional Instrument will have no impact. So, opponents argue, let the Regulation be adopted and the fact that no-one opts in will defeat the project by itself. This view, I submit with respect, is incorrect. Thanks to interpretation in conformity with directives, provisions such as those on reasonableness and good faith (Article 2), if the proposal is adopted, may be applied outside the few directives where they have been introduced (unfair contract terms and commercial agents),[33] whereas the rules on formation may be applied to forum choice clauses.[34] It is most probable that the regulation's opponents have never considered this possibility.

3.3 Germans Set the Tone

Now arriving at the second question, I will consider the issue why it is that the Common European Sales Law seems to provoke the German speaking part of Europe so much more than other linguistic communities? The reason may be the following. Christian Müller-Graff has pointed out that the draft Regulation is available in all official languages including German. Until then, the Feasibility study and its drafts existed only in English. And although this is comprehensible to most German lawyers, it does make discussion of technical issues awkward. The present abundance of German language commentaries[35] is most certainly attributable to this linguistic argument. Another reason in my view is that German private law is the most sophisticated such law in Europe and German lawyers therefore are in the best position to provide comments.

[32] In this sense also EM Kieninger, 'Allgemeines Leistungsstörungsrecht im Vorschlag für ein Gemeinsames Europäisches Kaufrecht' in H Schulte-Nölke, F Zoll, N Jansen, R Schulze, *Der Entwurf für ein optionales europäisches Kaufrecht* (München, Sellier, 2012) 205–228.

[33] M Stürner, 'Das Verhältnis des Gemeinsamen Europäischen Kaufrechts zum Richtlinienrecht' in H Schulte-Nölke, F Zoll, N Jansen, R Schulze, *Der Entwurf für ein optionales europäisches Kaufrecht* (München, Sellier, 2012) 47–84.

[34] M Gebauer, in H Schulte-Nölke, F Zoll, N Jansen, R Schulze, *Der Entwurf für ein optionales europäisches Kaufrecht* (München, Sellier, 2012) 121–145.

[35] See M Schmidt-Kessel (ed), *Der Entwurf für ein gemeinsames Europäisches Kaufrecht/ Kommentar, Überblick über die wesentliche Streitstände und Ergebnisse* (München, Sellier, 2014) 884.

3.4 Sales as a Building Block for Contract in General

The CESL was preceded by a feasibility study, drafted by a group of mainly academics. Although basically the CESL proposal is modeled after the feasibility study, there are also some differences. The major difference of course, is that whereas the Feasibility study dealt with Contract Law in general, CESL focuses on a sales plus contract. By 'sales plus' we should think of sales contracts and some related contracts. The argument I wish to present here, is that once a regulation on one contract is in force, others may easily follow. This is particularly true for those specific contracts which have been dealt with in the Draft Common Frame of Reference.

3.5 Other Parts of Private Law

The DCFR also included a number of other legal phenomena such as assignment and transfer of rights and obligations, which have been left out in the CESL.[36] Likewise, the presence of a regulation on sales may make it easier to adopt EU-wide legislation, once the framework has been established. The one objection is of course that not all DCFR-rules lend themselves to optional legislation. Those rules the application of which may not be made to depend on the exercise of an option, will need a different regime.

3.6 Europe and the World: CESL & CISG for Example

Much has already been written about CISG and the CESL.[37] It is clear that CISG is in need of an update. It is also quite evident that updating CISG by treaty will be an immense job. Therefore the question may be raised why CISG could not be updated by regional regulations such as the CESL. The shortcomings of CISG need not be set out here. The Advisory council has done a great work in suggesting getting around such shortcomings and several supreme courts have done the same. But it is the text of CISG which in daily practice will be the first source of rights and obligations of the parties and this should be supplemented by a single source which is easy to use. The CESL, for instance.

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[36] H Beale, WG Ringe, 'Transfer of rights and obligations under DCFR and CESL: interactions with German and English law' in G Dannemann, S Vogenauer (eds), *The Common European Sales law in context/Interactions with English and German law* (Oxford, University Press, 2013) 521–561.

[37] See some of the papers in P Mankowski, W Wurmnest (eds), *Festschrift für Ulrich Magnus zum 70. Geburtstag* (München, Sellier, 2014) 734.

3.7 Take Your Time

The second part of this book is devoted to an in depth discussion of the various articles of the proposed legislation. It must be admitted – even the supporters of the CESL do so concede – that criticism is possible. One of the answers of the draftspersons is that the Feasibility study was made under enormous time pressure. This happens when legislation becomes part of the political process. Politicians are interested in short-term success, like when an Australian minister commissioned the Australian Law Reform Commission with drafting a Contract Code within 6 months. They expect their civil servants to draw up a Civil code from scratch.[38] The experience with successful codification projects is that time is of the essence. Even the most famous codification project ever undertaken – that of the *Code Napoléon* – took some 4 years. A more recent recodification such as that of the Dutch Civil Code took 45 years from the royal edict starting the project until the entry into force of the main part in 1992. This long gestation period had the great advantage that critical comments of early drafts could be heeded and the additional advantage that the public at large could prepare 1992 with cram courses, legal commentaries adapted to the new code, and even the introduction of the new code in the curriculum of the law faculties long before the official introduction. In the case of CESL little seems to prevent contracting parties to already adhere to CESL, not by way of a legal system, but as general conditions.

3.8 Conclusions

The CESL is a great instrument. It has had at least one lasting effect: making lawyers all over Europe aware of the internationalisation of private law. The CESL text certainly is in need of improvement. There is nothing against taking our time to do so. Meanwhile, the use of CESL by way of general conditions makes it possible to experiment with the text.

The CESL is a great instrument. It has had at least one lasting effect: making lawyers all over Europe aware of the internationalisation of private law. The CESL text certainly is in need of improvement. There is nothing against taking our time to do so. Meanwhile, the use of CESL by way of general conditions makes it possible to experiment with the text.

[38] See Luke Nottage, The Government's Proposed "Review of Australian Contract Law": A Preliminary Positive Response, https://www.ag.gov.au.

Chapter 4
Identification of Gaps and Gap-Filling under the Common European Sales Law – A Model for Uniform Law Instruments?

Christoph Busch

Abstract The success of any uniform law instrument in the area of contract law will to a large degree depend on whether it offers a convincing solution for the issue of gap-filling. This chapter analyses to what extent the approach taken by the CESL can serve as a model. The topic is addressed in three steps. First, the delineation between two different categories of lacunae in the Proposal that require supplementation – internal and external gaps – is examined. The chapter then analyses the different techniques provided by the CESL for supplementing such gaps and compares them with the approach taken by the CISG. Finally, a specific problem of gap-filling is discussed that occurs with regard to the control of unfair contract terms.

4.1 Introduction

The Proposal for a Common European Sales Law (CESL)[1] unveiled by the European Commission in October 2011 was meant to mark a milestone in the development of European contract law. It was the most comprehensive legislative proposal in the area of contract law so far presented by the European Commission. At the time of writing, however, it seems that the CESL has been put on the shelf under "failed attempts to harmonise European contract law".[2] In spite of the favourable reception of the proposal by the European Parliament,[3] the new *Juncker* Commission, in its

[1] European Commission, Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 11 October 2011, COM(2011) 635 final.

[2] See J Basedow, 'Gemeinsames Europäisches Kaufrecht – Das Ende eines Kommissionsvorschlags' (2015) *Zeitschrift für Europäisches Privatrecht* 432; J-S Borghetti, 'Réforme du droit des contrats: un projet s'en vient, l'autre s'en va' (2015) *Recueil Dalloz* 1376.

[3] European Parliament legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law

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'Commission Work Programme 2015', presented on 16 December 2014, announced that it would withdraw the present legislative proposal and come up with a modified proposal "in order to fully unleash the potential of ecommerce in the Digital Single Market".[4] More recently, in its 'Digital Single Market Strategy', unveiled in May 2015, the Commission has announced that it will make an amended legislative proposal covering in particular harmonised EU rules for online purchases of digital content.

If one day the European legislator decides to make a proposal for a "new CESL", some lessons from the withdrawn proposal should be taken into account. Moreover, the lessons learnt from the CESL could provide valuable insights for drafting other uniform contract law instruments at a regional or global level. One question that will remain of practical relevance is the issue of gap-filling. Despite the impressive scope of the CESL proposal, it did – just as other instruments of uniform law[5] – contain a number of gaps. After all, the CESL was not a complete and exhaustive codification of contract law at the European level, but only a partial codification of sales law and several related issues of general contract law. This will most likely be true of any future uniform law instrument in the area of contract law. However, the success of any uniform law instrument in the area of contract law will to a large degree depend on whether it offers a convincing solution for the supplementation of the unavoidable gaps.

From this perspective, this chapter examines the question which guidelines the withdrawn CESL proposal provides for the supplementation of gaps and to what extent the approach taken can serve as a model for a future contract law instrument. This is not merely a technical question but a key issue for the success and the practical acceptance of an optional contract law instrument. Pursuant to Art 1(1) of the *chapeau* Regulation (RegCESL) the purpose of the CESL "is to improve the conditions for the establishment and the functioning of the internal market by making available a uniform set of contract law rules". From an economic perspective, the

(COM(2011)0635 – C7- 0329/2011 – 2011/0284(COD)). For an overview of the amendments suggested by the European Parliament see T Pinkel, 'Der Anwendungsbereich und zentrale Vorschriften des Kommissionsentwurfs für ein Gemeinsames Europäisches Kaufrecht sowie die Änderungsvorschläge des ELI und Änderungsanträge des Parlaments im Vergleich' (2014) *Hanse Law Review* 45.

[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 16 December 2014, Commission Work Programme 2015: A New Start, COM(2014) 910 final (Annex II, no. 60).

[5] Similar problems are well known from other instruments of uniform law, most prominently the CISG, see generally C Schmid, *Das Zusammenspiel von Einheitlichem UN-Kaufrecht und nationalem Recht: Lückenfüllung und Normenkonkurrenz* (Berlin, Duncker & Humblot, 1996); T Himmen, *Die Lückenfüllung anhand allgemeiner Grundsätze im UN-Kaufrecht (Art 7 Abs. 2 CISG)* (Jena, Jenaer Wissenschaftliche Verlagsgesellschaft, 2007); see also MJ Bonell, 'L'Interpretazione del Diritto Uniforme alla Luce dell' Art 7 della Convenzione di Vienna Sulla Vendita Internazionale' (1986) *Rivista di diritto Civile* 221; F Ferrari, 'Uniform interpretation of the 1980 Uniform Sales Law' (1994/95) *Georgia Journal of International and Comparative Law* 183; M Gebauer, 'Uniform Law, General Principles and Autonomous Interpretation' (2000) *Uniform Law Review* 683.

main purpose of an optional uniform contract law instrument is to reduce transaction costs imposed on businesses by doing business under more than one applicable set of rules ('legal diversity costs'[6]). For achieving this goal it is essential that a future contract law instrument offers businesses and consumers a reasonable degree of legal certainty. This, in turn, means that it must contain a straightforward and practicable solution for the supplementation of lacunae. If, by contrast, the 'gap-filling costs' are too high, the added value for market participants who opt-into the optional contract law will be too low for making the optional contract law an attractive alternative to the status quo.

This chapter addresses the issue of gap-filling under the CESL in three steps. First, it examines the delineation between two different categories of lacunae in the CESL that require supplementation. It then analyses the different techniques provided by the CESL for supplementing internal and external gaps. Finally, it addresses a specific problem of gap-filling that occurs with regard to the control of unfair contract terms.

4.2 Identifying Gaps in the CESL

4.2.1 Internal vs. External Gaps

Before examining the mechanism of gap-filling provided by the CESL, it is necessary to analyse the different categories of gaps that require supplementation. In accordance with the terminology commonly used with regard to the parallel issue under CISG a distinction can be drawn between 'internal gaps' and 'external gaps' in the CESL.[7] This distinction is notoriously difficult (and somewhat arbitrary) but necessary, because different techniques apply under CESL for filling the two different categories of gaps.[8]

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[6] See eg JJ Ganuza and F Gomez, 'Optional Law for Firms and Consumers: An Economic Analysis of Opting into the Common European Sales Law' (2013) *Common Market Law Review* 29, 50.

[7] See especially B Gsell, 'Der Verordnungsentwurf für ein Gemeinsames Europäisches Kaufrecht und die Problematik seiner Lücken' in O Remien, S Herrler and P Limmer (eds), *Gemeinsames Europäisches Kaufrecht für die EU?* (CH Beck, Munich, 2012) 145; D Solomon, 'Externe Lücken, allgemeines Kollisionsrecht und die Rolle der Parteiautonomie' in M Gebauer (ed), *Gemeinsames Europäisches Kaufrecht – Anwendungsbereich und kollisionsrechtliche Einbettung* (Munich, Sellier, 2013) 129; M Gebauer, 'Europäisches Vertragsrecht als Option – der Anwendungsbereich, die Wahl und die Lücken des Optionalen Instruments' (2011) *Zeitschrift für Gemeinschaftsprivatrecht* 227, 235; see also S Balthasar, 'The draft Common European Sales Law – Overview and Analysis' (2013) *International Company and Commercial Law Review* 24(2), 43; A Stadler, 'Anwendungsvoraussetzungen und Anwendungsbereich des Common European Sales Law' (2012) *Archiv für die civilistische Praxis* 473, 498 et seq.; N Konecny, *Der Verordnungsentwurf über ein Gemeinsames Europäisches Kaufrecht: Meilenstein der europäischen Integration oder Irrlicht der europäischen Politik?* (Frankfurt am Main, Peter Lang, 2014) 266 et seq.

[8] The different gap-filling techniques will be discussed further below, see Sect. 4.3.

The term 'internal gaps' (*lacunae intra legem*) refers to "issues within the scope of the Common European Sales Law but not expressly settled by it".[9] Pursuant to Art 4(2) such issues shall be settled "in accordance with the objectives and principles underlying it and all its provisions" without recourse to the otherwise applicable national law. This approach is confirmed by Art 11 RegCESL which, in its first sentence, states that, where the parties have validly opted into the CESL, "only the Common European Sales Law shall govern the matters addressed in its rules".

By way of contrast, the term 'external gaps' (*lacunae praeter legem*) refers to matters that are not addressed in the CESL. As these matters fall outside the scope of the CESL, it would seem natural if the CESL offered no guidance as to how such gaps should be filled.[10] However, Recital 27 reaffirms the general principle that such external gaps are to be filled by the national law applicable under the relevant conflict of law rules.

The qualification of a gap as internal or external also determines which court has the last word on the question of gap-filling. For the supplementation of internal gaps the monopoly of the CJEU on the interpretation of EU law following from Art 267 TFEU applies.[11] In contrast, external gaps which fall outside the field of application of CESL and, as the case may be, also outside the remit of other EU law do not fall under the interpretative monopoly of the CJEU.

4.2.2 The Fragmentary Scope of the CESL

While the distinction between internal and external gaps seems quite clear from a conceptual point of view, it is less obvious where exactly to draw the line between these two categories. Unlike the CISG which contains explicit exclusions of scope,[12] the original proposal of the CESL did not contain any such express exclusions. Only some guidance was provided by the Recitals 26 to 28 of the Commission's proposal.

Recital 26 contains a sort of 'positive list' of matters that should be covered by the CESL. The positive list mentions "the rights and obligations of the parties and the remedies for non-performance", as well as "pre-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". In addition, Recital 26 affirms that the CESL "should

[9] See Art 4(2) CESL; see also Recital 29 which refers to "questions concerning matters falling within the scope of the Common European Sales Law".

[10] Solomon (n 7) 130.

[11] Gsell (n 7) 110.

[12] See eg Arts 2-5, 30, 54 CISG.

settle the sanctions available in case of the breach of all the obligations and duties arising under its application."

The Proposal also offers a justification for the choice of issues addressed by the CESL. According to Recital 26, the CESL "should cover the matters of contract law that are of practical relevance during the life cycle of the types of contracts falling within the material and personal scope, particularly those entered into online". This 'life cycle' argument has attracted much criticism.[13] Indeed, it is doubtful why one should assume that such issues as assignment, representation and plurality of debtors, which are not covered by the CESL, are of lesser practical relevance.

In addition, Recital 27 provided some guidance with regard to those matters not covered by the instrument. The Recital, which contains a non-exhaustive 'negative list' mentioned the issues of legal personality, invalidity of a contract arising from lack of capacity, illegality or immorality, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law, including the transfer of ownership, intellectual property law, and the law of torts. The recital also stated that the issue of concurrent liability under contract law and tort law – the problem of *non-cumul* – falls outside the scope of the CESL.[14]

In addition, Recital 28 states that the CESL "should not govern any matters outside the remit of contract law". For example, information duties which are imposed for the protection of health and safety or environmental reasons should remain outside the scope of the CESL.

4.2.3 Drawing the Line Between Internal and External Gaps

A closer view reveals that the guidance provided by Recitals 26 to 28 of the Commission Proposal is somewhat misleading. This applies in particular to the 'negative list' in Recital 27. While the Recital explicitly excludes such issues as capacity and set-off from the scope of the CESL, the Proposal actually does address these matters. For example, according to Art 183 CESL prescription is postponed in case of incapacity. Similarly, there are two provisions in the instrument which refer to set-off. Under Art 85(c) CESL, contract terms that are not individually negotiated may not 'inappropriately exclude or limit' the consumer's right to set-off. In addition, Art 184 CESL indicates set-off among those actions of the debtor which lead to a new short prescription period. The examples show that the borderline between

[13] See especially Eidenmüller et al., 'The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law' (2012) *Edinburgh Law Review* 301, 308 ("astonishing assumption"); see also Solomon (n 7) 159.

[14] The same applies according to Recital 28 for information duties under the Service Directive 2006/123/EC. Further limitations of scope follow from Art 5 Reg-CESL which limits the material scope of the CESL to contracts for the sale of goods or digital content and related service contracts. In addition, Art 6 Reg-CESL excludes mixed-purpose contracts linked to a consumer credit from the field of application.

those matters covered and those falling outside the coverage of CESL – and thus the distinction between internal and external gaps – is rather fluid.[15]

Also in other cases it is difficult to ascertain whether a certain topic is covered by the CESL or not. For example, it has been criticised that the CESL – unlike the Consumer Sales Directive[16] – does not provide for a redress mechanism which ensures that the final seller is awarded remedies against the person or persons liable in the contractual chain.[17] The silence of the CESL on this issue could be interpreted in two different ways. On the one hand, one could assume that the redress issue is considered to be an external gap which needs to be filled by the applicable national law and its implementation of Art 4 Consumer Sales Directive. On the other hand, given that the CESL has extensively regulated the liability of the parties both for B2C and B2B contracts, one could argue that the redress issue is not an external, but rather an internal gap, which, however, has not been expressly settled by the CESL.[18]

4.2.4 Improvements in the Legislative Process?

Following the recommendations of the Committee on Legal Affairs,[19] the European Parliament in its Legislative Resolution of 26 February 2014 has introduced a new Art 11a to the Proposal which now spells out in paragraph (1) which issues are covered by CESL and in paragraph (2) which issues are not. Through this amendment the scope of the CESL has slightly been readjusted, and some gaps have (at least partially) been closed.[20] For example, the proposed Art 11a(2)(b) now makes clear that the CESL does actually cover some aspects of "illegality or immorality".[21] However, despite these clarifications it is nevertheless difficult to clearly identify which matters are covered by the CESL and which are not. The somewhat disillusioning observation by *Christiane Wendehorst* still remains true: "At the end of the day, this can only be decided after a thorough analysis of the CESL rules in their entirety".[22]

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[15] U Magnus, 'Interpretation and gap-filling in the CISG and in the CESL' *Journal of International Trade Law and Policy* (2012) 266, 276.

[16] See Art 4 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ 1999 L 171/12.

[17] See especially M Illmer and JC Dastis, 'Redress in Europe and the Trap under the CESL' (2013) *European Review of Contract Law* 109.

[18] In this vein Illmer and Dastis (n 16) 136 et seq.

[19] European Parliament, Committee on Legal Affairs, Report on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law, 26 September 2013, (COM(2011)0635 – C7-0329/2011 – 2011/0284(COD)).

[20] For further details see G Dannemann, 'Interactions between CESL and National Legal Systems' (2014) *Journal of European Consumer and Market Law* 250, 253.

[21] See also Sec. 4.3.2. below.

[22] C Wendehorst, 'Art 11 RegCESL' in R Schulze (ed) *Common European Sales Law* (CH Beck, Munich, 2012) para 5.

4.3 Gap-Filling Mechanisms

As already mentioned above, the CESL provides for two different techniques of gap-filling for internal and external gaps.

4.3.1 Internal Gaps: Autonomous Supplementation

4.3.1.1 CESL as a 'Closed System'

While the *definition* of 'internal gaps' in Art 4(2) CESL is similar to the corresponding definition in Art 7(2) CISG, the *technique* used for gap-filling is different.[23] Both the CISG and the CESL start from the principle of autonomous interpretation. Under Art 7(2) CISG gaps shall be closed "in conformity with the general principles on which it [ie the CISG] is based". In the same vein Art 4(2) CESL states that gap-filling under the CESL has to be done "in accordance with the objectives and the principles underlying it and all its provisions".

However, under CISG the principle of autonomous interpretation is only the first part of a two-step approach.[24] If no "general principles" can be found, Art 7(2) CISG requires a solution "in conformity with the law applicable by virtue of the rules of private international law". By way of contrast, the CESL does not provide for such an alternative solution. Art 4(2) even explicitly excludes any subsidiary recourse to the otherwise applicable national law or any other law. In other words, for the purpose of supplementing internal gaps, the CESL is conceived as a 'closed system',[25] while the CISG can be considered as a 'semi-open system'.

These differences with regard to the technique of gap-filling make the distinction between internal and external gaps in the CESL more important than in the CISG. Under the CISG, the qualification of a gap as internal or external can be left open if the CISG system does not provide for any general principles which may serve as a basis for solving the question. In such a case the distinction between internal and external gaps is of no practical relevance. In both cases the question will be solved according to the law applicable by virtue of the rules of private international law. In contrast, this would not be possible under the CESL. Here the qualification of a gap as internal or external decides already whether recourse to national law is possible or not.

From the perspective of European Law, a strictly autonomous interpretation and supplementation of the CESL or any future optional contract law instrument is nec-

[23] Solomon (n 7) 130.

[24] On this two-step approach see P Perales Viscasillas, 'Comment on Art 7 CISG' in S Kröll, L Mistelis and P Perales Viscasillas (eds), *UN-Convention on the International Sales of Goods* (Munich, CH Beck, 2011) paras 47 et seq; see also D Martiny, 'Comment on Art 7 CISG', in *Münchener Kommentar zum BGB*, vol. 5 (Munich, CH Beck, 6th edn 2015) paras 86 et seq.

[25] Solomon (n 7) 130.

essary to avoid divergent solutions regarding the possibility of an internal gap-filling solution and a creeping re-nationalisation of the optional instrument. Such problems are avoided by the 'closed system' approach of the CESL, but this solution comes at a cost. For it may not always be easy to identify an underlying principle required for gap-filling.

4.3.1.2 Criteria for Supplementing Internal Gaps

According to Art 4(2) issues within the scope of the CESL which are not expressly settled by it are to be settled in accordance with "the objectives and the principles underlying it and all its provisions". This provision is modelled on Art I.-1:102(4) DCFR according to which issues not expressly settled are "so far as possible to be settled in accordance with the principles underlying" the rules.

As regards the objectives of the CESL, the Explanatory Memorandum of the Commission Proposal provides some guidance. It states that "[t]he overall objective of the proposal is to improve the establishment and the *functioning of the internal market* by facilitating the expansion of cross-border trade for business and cross-border purchases for consumers."[26] One possible consequence could be to adopt a functionalist approach for the interpretation of the CESL and the supplementation of internal gaps.[27] However, it is doubtful whether a creative interpretation of the CESL or any future contract law instrument following the maxim 'in dubio pro libertate mercatus' can serve as a basis for building a European contract law system.

Leaving the rather broad indications regarding the overall purposes of the proposal set out in the Explanatory Memorandum and the recitals of the Proposal itself aside, there are rather scarce resources regarding the *travaux préparatoires* of the CESL. The 'operational conclusions' of the Commission Expert Group, which was entrusted with elaborating a 'Feasibility Study' for the CESL, have been published online by the Commission.[28] But they are not very revealing as to the political objectives of the Proposal nor is there any reliable information on why the Commission in some cases followed the advice of the Expert Group and in other occasions refused to do so.[29]

The second pillar for the supplementation of internal gaps are the 'underlying principles' of the CESL.[30] Such principles may be drawn from various European

[26] COM(2011) 635 final, p 4 (emphasis added).

[27] On the role of functionalism in European private law see HW Micklitz, 'The Visible Hand of European Regulatory Private Law—The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation' (2009) *Yearbook of European Law* 3.

[28] See the documents available at http://ec.europa.eu/justice/contract/expert-group/index_en.htm.

[29] S Whittaker, 'Identifying Legal Costs of the Operation of the Common European Sales Law: Legal Framework, Scope of the Uniform Law and National Judicial Evaluations' (2013) *Common Market Law Review* 85, 93.

[30] On such 'general principles' see generally S Vogenauer "General Principles' of Contract Law in Transnational Instruments' in L Gullifer and S Vogenauer (eds) *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Oxford, Hart, 2014) 291.

sources.[31] The first source of 'underlying principles' is the CESL itself. Under the heading of 'general principles' the first chapter of the CESL contains three articles referring to 'freedom of contract' (Art 1), 'good faith and fair dealing' (Art 2), and 'co-operation' (Art 3). Although one might argue that general principles explicitly stated in the CESL is not necessary the same as general principles underlying the CESL, the principles set out in Art 1-3 CESL can be understood as the expression of such underlying values and principles. To this list the principle of 'freedom of form' (Art 6) has to be added, which somewhat inexplicably was placed in Sect. 4.2 under the heading 'Application'.[32] Additional principles that can be inferred from the Recitals and the provisions of CESL are the protection of legitimate expectations and the protection of consumers.[33] A second source of 'general principles' is the jurisprudence of the CJEU. The Court has recognised a series of 'general principles of EU law' including the principles of equality, proportionality, legal certainty, fundamental rights and effectiveness which are commonly used by the CJEU as a guideline in the interpretation of legislation.[34]

4.3.1.3 Recourse to the DCFR and Other Transnational Principles

Considering the legislative background of the CESL, which can be considered as the latest product of the European Contract Law Initiative, the question arises whether it is possible to look to other sources of inspiration for internal gap-filling, in particular the Draft Common Frame of Reference (DCFR), the Principles of European Contract Law (PECL) and the Acquis Principles (ACQP).[35] Other possible sources of 'underlying principles' are the CISG and the UNIDROIT Principles.[36]

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[31] A different approach is suggested by Magnus (n 14) 276, who advocates for an "international, CISG-like interpretation".

[32] Vogenauer (n 29) 310.

[33] See eg Recital 11, Art 1(3) RegCESL (consumer protection) and Art 28(2), 32(3)(c), 51(a), 100(a) CESL (protection of legitimate expectations). See also C Herresthal, 'Die Chancen und die Risiken eines optionalen Gemeinsamen Europäischen Kaufrechts' (2012) *Wirtschaft und Verwaltung* 140, 150.

[34] On these 'general principles' see T Tridimas, *The General Principles of EU Law* (Oxford, Oxford University Press, 2nd edn. 2006); see also A Metzger, *Extra legem, intra ius: Allgemeine Rechtsgrundsätze im Europäischen Privatrecht* (Tübingen, Mohr Siebeck, 2009).

[35] For a brief account of the legislative background of the CESL H Schulte-Nölke 'Vor- und Entstehungsgeschichte des Vorschlags für ein Gemeinsames Europäisches Kaufrecht' in H Schulte-Nölke, F Zoll, N Jansen and R Schulze (eds) *Der Entwurf für ein optionales europäisches Kaufrecht* (Munich, Sellier, 2012) 1 et seq; see also G Dannemann and S Vogenauer, 'Introduction: The European Contract Law Initiative and the 'CFR in Context' Project' in G Dannemann and S Vogenauer (eds) *The Common European Sales Law in Context* (Oxford, Oxford University Press, 2013) 1 et seq.

[36] Magnus (n 14) 276.

Again, the scarcity of publicly available *travaux préparatoires* makes it difficult to assess to what extent it is possible to have recourse to such sources.[37] The introduction to the 'Feasibility Study' prepared by the Expert Group on European Contract Law sheds at least some light on the drafting process and provides some indications as to the working method and the reference texts used by the Expert Group:

> The Commission asked the Expert Group to select those parts of the Draft Common Frame of Reference – the result of extensive comparative law research launched by the Commission and produced by a network of European contract law experts between 2005 and 2009 – which were of direct relevance to contract law and to simplify, restructure, update and supplement the selected content. In this process the Expert Group was also asked to take into consideration the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG), the Unidroit Principles of International Commercial Contracts, as well as other research work conducted in this area, such as the Principles of European Contract Law prepared by the Commission on European Contract Law and the Principes Contractuels Communs of the Association Henri Capitant and Société de Legislation Comparée.[38]

Considering that the work of the Commission's Expert Group was based on the academic work of the Study Group for a Civil Code, it seems obvious to refer to the DCFR where a provision in the CESL can be seen to be closely related if not even identical to a provision in the DCFR. [39] In the same vein, one might consider that the 'meta-principles' set out in the preface to the DCFR can be referred to when identifying the 'underlying principles' of the CESL. The preface to the Outline Edition of the DCFR contains no less than 40 pages of deep thoughts on general principles of 'contractual freedom', 'contractual security', 'justice' and 'efficiency'.

However, there are several important limitations on the possible usefulness of the DCFR as a source of inspiration for gap-filling under the CESL. First, many of the policy choices made by the drafting teams that have elaborated the DCFR remain in the dark and there has been much controversy about the plurality of values underlying the DCFR.[40] In addition, given that the scope of the instrument was massively reduced during the metamorphosis of the DCFR into the CESL it is therefore rather doubtful whether the list of 'underlying principles' from the DCFR can be used *tel quel* for the purposes of the CESL.[41]

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[37] A helpful tool might also be the Synopsis of the CESL and the Feasibility Study contained in H Schulte-Nölke, F Zoll, N Jansen and R Schulze (eds) *Der Entwurf für ein optionales europäisches Kaufrecht* (Munich, Sellier, 2012), 297 et seq.

[38] European Commission, 'European Contract Law: Work in Progress, Version of 19 August 2011', Introduction, p 5, available at http://EC.europa.eu/justice/contract/files/feasibility-study_en.pdf.

[39] Whittaker (n 28) 94; see also HP Mansel, 'Der Verordnungsvorschlag für ein Gemeinsames Europäisches Kaufrecht, Teil I' (2012) *Wertpapiermitteilungen* 1253, 1267.

[40] See especially H Eidenmüller et al., 'The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems' (2008) *Oxford Journal of Legal Studies* 659, 674 et seq.

[41] S Vogenauer, 'Drafting and Interpretation of a European Contract Law Instrument' in G Dannemann and S Vogenauer (eds) *The Common European Sales Law in Context* (Oxford, Oxford University Press, 2013) 82, 112.

Furthermore, it has to be recognised that the DCFR, the PECL and ACQP are merely academic codifications with no formal legal status. They may have been used as a source of inspiration by the drafters of the CESL. But using them as a direct source for gap-filling would probably overestimate their normative value. The situation would certainly be different if the DCFR were elevated to the status of a formal toolbox which provides a framework for interpretation and application of EU law.[42] But for the time being, this is not the case. With regard to CISG, it must be taken into consideration that not all EU member states are contracting parties to the convention, notable exceptions being the United Kingdom and Portugal.

If recourse is neither possible to national law nor to international conventions and transnational principles, one might consider taking recourse to the existing acquis communautaire. Yet again, there are some caveats.[43] In particular, it has to be taken into consideration that the CESL is conceived as an optional instrument and not a mandatory piece of legislation such as the consumer law directives. The different normative status is one reason for a number of divergences between the CESL and the existing consumer acquis. This structural difference would be ignored, if differences between the CESL and the other parts of the acquis communautaire would be ironed out by recourse to the acquis.

4.3.2 External Gaps: Recourse to the Applicable Background Law

For matters not covered by the CESL, Recital 27 of the Commission Proposal states that such external gaps have to be filled by recourse to the national law determined by the relevant conflict of law rules. This means that for the issues falling outside the coverage of CESL the problem of a 'law mix' and – as a result – a lack of legal certainty remains. The existence of such gaps undermines the aim of establishing a uniform law for the internal market and – in practice – could encourage the phenomenon of forum shopping. The associated application of national, non-harmonised laws of the Member States results in a need for advice on local laws and thus creates the transaction costs that the Commission wants to avoid.[44] The crucial question is whether these – to some extent unavoidable – disadvantages will outweigh the expected benefits of the CESL. The answer to this question very much depends on

[42] On this aspect see C Busch, 'Kollisionsrechtliche Weichenstellungen für ein Optionales Instrument im Europäischen Vertragsrecht' (2011) *Zeitschrift für Europäisches Wirtschaftsrecht* 655, 660.

[43] See also Gsell (n 6) 151 et seq.

[44] S Balthasar, 'The draft Common European Sales Law – Overview and Analysis' (2013) *International Company and Commercial Law Review* 24(2), 43 at 46; see also M Stürner, 'Kollisionsrecht und optionales Instrument: Aspekte einer noch ungeklärten Beziehung' (2001) *Zeitschrift für Gemeinschaftsprivatrecht* 236, 241.

the size and the practical relevance of the external gaps. Some of the perceived problems may not be as relevant as they seem.[45]

For example, it has been criticised that the CESL does not contain rules on illegal and immoral contracts.[46] As a result, national rules could continue to govern the question whether a contract is void for illegality or immorality. The resulting lack of legal certainty may be an acceptable consequence as far as 'sex, drugs and weapons'[47] are concerned. To put it in a more provocative way: It is probably not the task of the European legislator to provide a secure legal platform for those who want to do business in the dark corners of the internal market. If a trader keeps a safety distance to possible issues of good morals and decency or illegal drugs or weapons, problems with national laws on illegality and immorality will not arise. If, in contrast, a trader wants to use the CESL for distasteful or dangerous material in the internal market, he does so at his own peril.

A more serious problem could the application of national immorality provisions (such as § 138 of the German Civil Code) as an instrument to protect one party against a severe imbalance under the contract. In this context, it has been argued that a contract concluded under CESL could possibly be declared immoral and thus void on the basis of § 138 of the German Civil Code if the price grossly exceeds the value of the sold goods.[48] English courts, by contrast, only ascertain whether there has been consideration of a certain value, but they do not verify whether the value is 'appropriate' or 'adequate'.[49] It is doubtful, however, whether the cited example actually concerns an external gap of the CESL. If one assumes that such a scenario falls within the scope of Art 51 CESL, which provides for an avoidance right in case of unfair exploitation, recourse to provisions of national law is excluded.[50]

Comparative research suggests that only some the external gaps are potentially hazardous, in particular 'the exclusion of pre-contractual duties other than information duties, the exclusion of illegality rules, the limitation of restitution provisions to avoidance and termination of contract, and the exclusion of rules on transfer of obligations'.[51] A future revision of the CESL should therefore focus on these mat-

[45] For a detailed analysis see G Dannemann, 'Choice of CESL and Conflict of Laws' in G Dannemann and S Vogenauer (eds) *The Common European Sales Law in Context* (Oxford, Oxford University Press, 2013) 21–81.

[46] S Balthasar, 'The draft Common European Sales Law – Overview and Analysis' (2013) *International Company and Commercial Law Review* 24(2), 43 at 46 et seq.; see also F Faust, 'Der Vorschlag für ein Gemeinsames Europäisches Kaufrecht' (2012) *Bonner Rechtsjournal* 123, 129.

[47] In the words of C Wendehorst, 'Art 11 RegCESL' in R Schulze (ed) *Common European Sales Law* (CH Beck, Munich, 2012) para 5.

[48] See eg BGH (2003) Neue Juristische Wochenschrift-Rechtsprechungs Report Zivilrecht 558 (regarding the sale of a horse).

[49] A major disproportion may, however, be an indication for fraud or defective consent, see *Chitty on Contracts* (2008) para 3-014.

[50] In this vein T Pfeiffer, 'Art 51 CESL' in R Schulze (ed) *Common European Sales Law* (CH Beck, Munich, 2012) paras 28 et seq.

[51] G Danneman, 'The CESL as Optional Sales Law: Interactions with English and German Law' in G Dannemann and S Vogenauer (eds) *The Common European Sales Law in Context* (Oxford, Oxford University Press, 2013) 708, 728.

ters. Other gaps (eg capacity) are of lesser practical relevance. In a more general perspective, a triple test should apply for defining the material scope of an optional contract law instrument.[52] First, the instrument should address the matters already covered in the relevant acquis communautaire (eg pre-contractual information duties, withdrawal rights, control of unfair contract terms, rules on consumer sales, consumer credit). Second, it should address the issues covered by the CISG in order to be an attractive alternative for contracting parties. Third, it should cover all matters which under Art 12-18 Rome I Regulation are governed by the law which apply to a contract.

4.4 Fairness Control of 'External Clauses'

Finally, I will address a problem of gap-filling which is specific to the CESL and has no parallel in the CISG. In accordance with the acquis communautaire, the CESL contains provisions on unfair contract terms (Arts 79-86 CESL). By way of contrast, the CISG refers the matter of fairness of contract terms as an aspect of material validity to the applicable national law (Art 6 CISG). Certainly, the uniform regulation of the issue of unfair contract terms is a laudable progress.[53] However, it also raises further questions regarding the identification of gaps in the CESL and the possible need for gap-filling.

4.4.1 Leitbildfunktion of the CESL

When assessing whether a contract clause is 'unfair' within the meaning of Art 83(1) or Art 86(1) CESL, the default rules of the CESL will be considered as having a model character (*Leitbildfunktion*).[54] Although this model character is not explicitly addressed in the text of the CESL, it can be inferred from the wording of the relevant provisions. For B2C contracts Art 83(1) refers to a "significant imbalance in the parties' rights and obligations". If one assumes that the default rules of the CESL are intended to establish a 'fair balance' between the parties, it seems appro-

[52] C Busch, 'Scope and Content of an Optional European Contract Law' (2012) *Contratto e Impresa Europa* 193, 202; see also G Dannemann, 'Interactions between CESL and National Legal Systems' (2014) *Journal of European Consumer and Market Law* 250, 253.

[53] See eg U Magnus, 'CISG and CESL' in MJ Bonell et al. (eds) *Liber Amicorum Ole Lando, Michael Joachim Bonell* (Copenhagen, Djøf Forlag, 2012) 225–255, 236.

[54] On the role of this concept under German Law see P Hellwege and L Miller, 'Control of Standard Contract Terms' in G Dannemann and S Vogenauer (eds) *The Common European Sales Law in Context* (Oxford, Oxford University Press, 2013) 423, 442 et seq.; see also W Wurmnest, 'Comment to § 307 BGB' in *Münchener Kommentar zum BGB*, vol. 2 (Munich, CH Beck, 6th edn 2012) para 65.

priate to take the default rules of the CESL as a model to which the contract clause is to be compared. From this perspective, assessing the (un-)fairness of a contract clause is mainly about measuring how far the clause deviates from the otherwise applicable default rule of the CESL. Metaphorically speaking, the fairness test is a sort of 'legal distance measurement' between the CESL and the contract clause. Art 83(2) CESL adds further contextual criteria to this test.

Under Art 86 CESL a similar approach applies to B2B contract. The main difference is that a different (more lenient) yardstick is used for the distance measurement. Pursuant to Art 86(1) the fairness test depends on whether the contract clause "grossly deviates from good commercial practice, contrary to good faith and fair dealing". If one assumes that the default rules of the CESL represent a codification of the requirements of 'good commercial practice', these default rules also serve as a model or *Leitbild* for the fairness control.

4.4.2 Different Standards for 'Internal Clauses' and 'External Clauses'?

The concept of *Leitbildfunktion* is particularly helpful for assessing contract terms which address issues that are covered by the provisions of the CESL ('internal clauses').[55] For such cases the CESL provides – either explicitly or implicitly – a model for a 'fair balance of the parties' rights or obligations'. In contrast, for contract terms regarding issues that fall outside the scope of the CESL ('external clauses'), such a comparison is not possible. Examples of such clauses are standard terms relating to issues of data protection and retention of title clauses.[56]

Different solutions have been suggested for dealing with the problem of external clauses.[57] On approach could be to exclude such clauses entirely from a fairness control on the basis of the CESL, even on the basis of the general clauses (Arts 83 and 86 CESL).[58] If, however, one applies Arts 83 and 86 CESL to external clauses, the question arises how to assess the fairness of such clauses. On option could be to take recourse to the applicable national law for assessing how far the clause deviates from the otherwise applicable national default rule. This solution would be in line

[55] For the terminological distinction between internal and external clauses see B Gsell 'Interne und externe Lücken des GEK – Die Rolle des EuGH und der mitgliedstaatlichen Gerichte bei der Lückenfüllung' in M Gebauer (ed), *Gemeinsames Europäisches Kaufrecht – Anwendungsbereich und kollisionsrechtliche Einbettung* (Munich: Sellier, 2013) 105, 111.

[56] W Ernst, 'Das AGB-Recht des Gemeinsamen Europäischen Kaufrechts' in O Remien, S Herrler and P Limmer (eds), *Gemeinsames Europäisches Kaufrecht für die EU?* (CH Beck, Munich, 2012) 93, 104.

[57] For a summary of the different views see Konecny (n 6) 281 et seq.

[58] See eg Ernst (n 6) 105; see also P Hellwege and L Miller, 'Control of Standard Contract Terms' in G Dannemann and S Vogenauer (eds) *The Common European Sales Law in Context* (Oxford, Oxford University Press, 2013) 423, 455 et seq. (with regard to retention of title clauses).

with the approach taken by the CJEU in the case *Freiburger Kommunalbauten*[59] and would mean a continuation of the current division of labour between the CJEU and national courts.[60] A third approach could be the application of a European standard that is developed by a comparative analysis or on the basis of general principles of EU law, which would then be applied exclusively by the CJEU.[61]

The CESL seems to provide some evidence that such a European approach is preferred by the drafters of the Proposal. In fact, several provisions mentioned in the 'black list' of Art 84 CESL and the 'grey list' of Art 85 CESL address issues that are otherwise not regulated in the Proposal. Examples of such explicitly addressed 'external clauses' are contract terms limiting the trader's obligation to be bound by its authorised agents (Art 84 lit c), clauses excluding or limiting the right to set-off (Art 85 lit c) penalty clauses (Art 85 lit e) and clauses concerning the transfer of obligations (Art 85 lit m). On the one hand, one could argue that these provisions are only selective and individual 'transgressions' of the general scope of the CESL as set out in Recital 27. This would be an argument in support of a 'national' fairness control of clauses relating to such issues as representation, penalties, set-off or transfer of obligations, which are not explicitly mentioned in Arts 84 and 85 CESL. On the other hand, it could be argued that the 'overshooting' provisions in Arts 84 and 85 CESL actually show that the issue of fairness control in general is one of the matters covered by the CESL. As a consequence any recourse to national law would be excluded pursuant to Art 11 RegCESL. Thus, Arts 83 and 86 CESL would also apply to external clauses and such clauses – just as internal clauses – would have to be assessed on the basis of an autonomously developed European standard.[62] In comparison with the approach taken by the CJEU in the case *Freiburger Kommunalbauten* this would certainly be a more European approach, which would go beyond the harmonisation achieved by the Unfair Terms Directive.[63] This solution would thus reflect the paradigm shift from harmonisation to (optional) unification in the field of European contract law.

4.5 Conclusion

For the practical acceptance of a future optional contract law instrument that could take the place of the failed CESL proposal it is essential to provide a straightforward solution for the problem of gap-filling. If the 'gap-filling costs' are too high, the added value for market participants will be too low for making the optional

[59] Case C-237/02 *Freiburger Kommunalbauten* [2004] ECR I-3404, paras 21–23.

[60] In this vein Gsell (n 54) 111.

[61] F Möslein, 'Kontrolle vorformulierter Vertragsklauseln' in M Schmidt-Kessel (ed) *Ein einheitliches europäisches Kaufrecht? Eine Analyse des Vorschlags der Kommission* (Munich, Sellier, 2012) 255, 280.

[62] For a critical view see Gsell (n 54) 112; see also Faust (n 43) 130 et seq.

[63] Möslein (n 60) 282.

instrument an attractive alternative to the status quo. In accordance with the terminology commonly used with regard to the CISG and other uniform law instruments, a distinction can be drawn between internal and external gaps in the CESL. Given the uncertainty regarding the scope of the CESL, the line between these two categories is rather fluid. The distinction between internal and external gaps not only decides whether recourse to national law is possible, but also determines whether the supplementation of the gap falls under the interpretative monopoly of the CJEU. As a consequence, the uncertainty regarding the scope of the optional instrument could be major source of legal uncertainty.

While the definition of internal gaps under CESL is similar to the corresponding definition under the CISG, the technique used for gap-filling is different. Unlike the CISG, which for the purpose of supplementing internal gaps can be considered as a 'semi-open system', the CESL is conceived as a 'closed system' which excludes any recourse to national laws. The more rigid approach of the CESL may help to avoid a creeping re-nationalisation of the optional instrument. It is, however, questionable whether this approach increases legal certainty as it may be difficult to identify general principles required for the supplementation of internal gaps. For supplementing external gaps recourse to a background law applicable under the relevant conflict of law rules is necessary. As only some of these gaps are potentially hazardous, future work on a new contract law instrument should focus on the most relevant issues for an adjustment of scope.

In the context of the control of unfair contract terms specific gap filling problems arise that have no parallel under the CISG. The crucial question whether the fairness control under the CESL also applies to 'external clauses'. It is argued that Arts 83 and 86 CESL should also apply to 'external clauses' and that such clauses should be assessed on the basis of an autonomously developed European fairness standard.

Chapter 5
The Digital Single Market and Legal Certainty: A Critical Analysis

Alex Geert Castermans, Ruben de Graaff, and Matthias Haentjens

Abstract This chapter critically examines the CESL from the viewpoint of its capability to provide legal certainty for commercial actors. This chapter's analysis focuses on three important stages in the life cycle of a contract, seen from a business perspective: the *scope rules* that determine whether the CESL applies to a contract (para. 5.2), the *interpretation* of entire agreement clauses (para. 5.3) and the legal consequences of a *breach of contract* (para. 5.4). The chapter concludes that, with a few notable exceptions, the CESL rules do not enable contracting parties to predict, with a sufficient degree of certainty, the legal consequences of entering into the contract. From a business perspective, the CESL rules are therefore not crafted well enough to serve as a *blueprint* for future legislation.

5.1 The Bundling Career of King Rex

In his tale about the bundling career of Rex, a fictitious king who wants to reform the law in his country, Lon Fuller distinguishes eight important *principles of internal morality*. One of them is the duty to adopt clear rules:

> The dismay of Rex's subjects was all the more intense, therefore, when his code became available and it was discovered that it was truly a masterpiece of obscurity. Legal experts who studied it declared that there was not a single sentence in it that could be understood either by an ordinary citizen or by a trained lawyer. Indignation became general and soon a picket appeared before the royal palace carrying a sign that read, "How can anybody follow a rule that nobody can understand?"[1]

The former European Commission was almost as ambitious as the late king Rex. In 2011, it proposed to create a Common European Sales Law (CESL), in order to

[1] LL Fuller, *The Morality of Law* (Revised edition) (New Haven, Yale University Press 1969) 36.

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promote and facilitate cross-border trade within the European internal market.[2] The instrument was to be used in business to consumer ('B2C') and business to business ('B2B') contracts. According to the Commission, parties should be able to choose for 'a single uniform set of contract laws' to govern 'the full life cycle of a contract'.[3] Evidently, the Commission aimed to provide these parties with clear and consistent rules that provide for legal certainty:

> This Regulation enables traders to rely on a *common set of rules* and use the same contract terms for all their cross-border transactions thereby reducing unnecessary costs while *providing a high degree of legal certainty*.[4]

The European Consumer Organisation BEUC was not convinced:

> This optional tool would increase legal complexity, *introduce great legal uncertainty*, undermine existing rules on private international law and [sic] as well as consumer protection standards in a number of countries.[5]

What does legal certainty demand, in terms of legislation? In many respects, this is a topical subject. In the Netherlands, it has been given particular attention since the publication of *De wet als kunstwerk* ('Legislation as a work of art') by the Dutch scholar and senator Willem Witteveen, who died in the MH17 crash before the book was published.[6] Witteveen adds two commandments to the eight principles of Fuller. He emphasises *autonomy* and the need for self-regulation, and he stresses that rules should *guide* behaviour, and not enforce it.

It is also a topical question on the European level. When, by the end of 2014, a new European Commission took office, *Better Regulation* became one of its priorities. Vice-President Frans Timmermans, who is in charge of this agenda, has repeatedly stated that the EU legislator should focus on the "big issues":

> First of all we need to change the attitude that only if I make law am I contributing. There are other ways of contributing without necessarily having to legislate. And this is a cultural thing. We believe we don't exist if we don't make laws.[7]

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[2] European Commission, Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, Brussels 11.10.2011, COM (2011) 635. Explanatory Memorandum to the Regulation, 4; Art 1 Regulation. This draft Regulation of the European Parliament and of the Council consisted of two parts: Annex I, containing the substantive sales law rules; and the Regulation itself, containing scope rules and other formal provisions. In this chapter, provisions of the Regulation itself will be referred to as CESL Reg., while provisions of the substantive part will be referred to simply as CESL. We will refer to the Commission proposal (COM (2011) 635 final, 2011/0284(COD)), unless indicated otherwise.

[3] European Commission, Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, Brussels 11.10.2011, COM (2011) 635, 16, para 6.

[4] Art 1 (2) CESL Reg (emphasis added).

[5] *Joint call by consumers' organisations and e-commerce businesses to reject the Commission's proposal for a Common European Sales Law regulation*, letter to EP members, 10 June 2013 (emphasis added). See http://www.fdih.dk/media/1207735/brev_om_cesl_m_beuc_og_ecommerce_europe_juli_2013.pdf

[6] W Witteveen, *De wet als kunstwerk. Een andere filosofie van het recht* (Den Haag, Boom Juridische uitgevers, 2014).

[7] Interview with Vice-President Timmermans, https://euobserver.com/political/127456

On 16 December 2014 the EU Commission presented its Work Programme for 2015 to the European Parliament. The CESL is listed as item 60 in the Annex of withdrawn proposals.[8] This does not, however, mean that these rules are completely beyond consideration. The Annex states that the proposal is being modified 'in order to fully unleash the potential of e-commerce in the Digital Single Market'. Creating a connected digital single market is indeed one of the top priorities of the Juncker Commission.[9] One of the aims will be to simplify rules for online digital purchases by consumers.[10] It is therefore expected that the content of the CESL rules and the amendments proposed by the European Parliament will serve as a *blueprint* to draft a new instrument, as part of an ambitious digital single market package.[11]

A critical examination of the CESL rules against the commandments of legal certainty is therefore still relevant. But what does legal certainty demand? If we follow Fuller, Van Gerven and Lierman,[12] and Witteveen, legal certainty demands such rules to be (1) accessible and clear, (2) calculable and reliable, and (3) feasible and enforceable. The *first* requirement focuses on the content of the rule, which has to be intelligible and clear, in order to enable the legal subject concerned to *predict* its legal position with a reasonably sufficient degree of certainty and foresee the legal consequences of his decisions. It also concerns the requirement of coherence of the legal order as a whole, and the consistency of its different branches. The *second* requirement focuses on the durability of legislation: rules may not be altered overnight and changes should be accompanied by a proper law of transitions. The *third* requirement entails that the legislator takes into account whether the rule is achievable in practical terms: no legal subject should be required to do the impossible, nor should government agencies be held to enforce the unenforceable.

In this chapter, we assume that the CESL rules, if adopted as a part of the digital single market package, will fulfil the second and third requirement. We assume that they will not be changed overnight or without proper arrangements, and that these rules will be applied by the Member States courts and enforceable by the same. In the present context, we wish to measure whether the CESL rules meet the first requirement of accessibility and clarity. Thus, we ask ourselves: are these rules well-crafted or ill-conceived? Do they really enable contracting parties to predict, with a reasonably sufficient degree of certainty, the legal consequences of entering into a CESL contract? We are aware that we should to some extent be cautious, for we recognise that drafting a piece of legislation, especially on the international

[8] http://ec.europa.eu/atwork/pdf/cwp_2015_withdrawals_en.pdf

[9] http://ec.europa.eu/atwork/pdf/cwp_2015_new_initiatives_en.pdf

[10] See https://ec.europa.eu/futurium/digital4eu

[11] See the blog by Eric Clive, http://www.epln.law.ed.ac.uk/2015/01/07/proposal-for-a-common-european-sales-law-withdrawn/

[12] W van Gerven & S Lierman, *Algemeen Deel. Veertig jaar later* (Mechelen, Kluwer, 2010) nr 66: 'Aan de hand daarvan worden hierna beknopt de drie uit het *rechtszekerheidsbeginsel* voortvloeiende *hoofdeisen* besproken: (i) toegankelijkheid en duidelijkheid; (ii) berekenbaarheid en betrouwbaarheid; (iii) uitvoerbaarheid en handhaafbaarheid.'

level, is without any doubt a difficult task and sometimes, any legislation (however unclear) may be better than none. No legislation is perfect or immune to criticism.[13]

However, bearing in mind the ambition of the new European Commission to aim for *Better Regulation*, we do think that it is necessary to hold the CESL rules against the stated objective of 'providing a high degree of certainty', in order to see whether they are fit for further implementation in the future digital single market package. In this chapter, we will not provide a commentary on each and every CESL provision,[14] or thoroughly compare the CESL with other legal systems.[15] Instead, we will focus on three important stages in the life cycle of a contract, seen from a *business perspective*.[16] After all, the CESL was meant, to a large extent, to serve traders' interests (see Art. 1 (2) CESL Reg. cited above). Moreover, the trader will normally determine the rules of a sales contract and therefore has to be tempted to choose the instrument in the first place. We will examine the *scope rules* that determined whether CESL applies to a contract (para. 5.2), the *interpretation* of entire agreement clauses (para. 5.3) and the legal consequences of a *breach of contract* (para. 5.4).

5.2 Conclusion, Entering into a CESL Contract

5.2.1 General

As stated above, accessibility and clarity are critical ramifications of legal certainty. This requirement entails that parties to a contract wish to be certain about the rules that apply to the contract they conclude. Consequently: (a) they wish to know the extent of the freedom they have to negotiate the rules applicable to their contract; and, as a corollary of the same, (b) they wish to know which rules of mandatory law will apply. Because the CESL has been proposed as an *optional* instrument, these issues are particularly acute. Not only does the CESL itself contain rules that are mandatory or semi-mandatory (i.e. parties can agree to derogate from the CESL provided the derogation is not to the detriment of the consumer) and thus may set aside party agreement,[17] but the same agreement may also be set aside by (mandatory rules of) the otherwise applicable, national law, even when the parties have chosen to apply the CESL.

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[13] Cf. S Vogenauer, 'Drafting and Interpretation of a European Contract Law Instrument', in G Dannemann & S Vogenauer (eds), *The Common European Sales Law in Context* (Oxford, OUP, 2013) 83–84.

[14] Eg R Schulze (ed), *Common European Sales Law (CESL). A Commentary* (Oxford, Hart, 2012).

[15] Eg G Dannemann & S Vogenauer (eds), *The Common European Sales Law in Context: Interactions with English and German Law* (Oxford, Oxford University Press, 2013).

[16] For a combined business and consumer perspective: A.G. Castermans, 'Towards a European Contract Law through Social Dialogue', *European Review of Contract Law* (7) 2011 (360).

[17] Examples of semi-mandatory rules may be found in Arts 69, 71, 75 and 77 CESL, examples of (fully) mandatory rules in Arts 70 and 74 CESL.

In case parties have mistakenly thought that their contract would fall within the CESL's scope, (parts of) the CESL might then apply as a matter of 'incorporation by reference', i.e. the CESL might then apply as if it were clauses agreed by the parties. Yet such clauses cannot preclude mandatory rules of the otherwise applicable national law. Moreover, under Article 6(2) of the Rome I Regulation,[18] mandatory rules of the consumer's jurisdiction will apply, should this law, in short, protect him better than the (erroneously) chosen CESL rules or the otherwise applicable national law would.[19] Thus, from a predictability perspective, it is of the utmost importance that parties are sufficiently enabled to determine whether the CESL applies. It is evident that the same predictability is, to a large extent, dependent on clear scope rules.[20]

In this paragraph, we assess whether the CESL scope rules are sufficiently clear. Thus, we assess whether contracting parties, when similar scope rules apply, can predict with a reasonably sufficient degree of certainty whether a court of a European Member State will apply those rules they thought would apply. We will therefore assume that a court in a European Member State will be requested to judge on the application of the CESL rules; that this court has jurisdiction; and that the otherwise applicable, national law will be the law of a Member State, as the proposed CESL could only be chosen as a 'second' law of contract of a Member State.[21] It will be concluded that contracting parties, most notably the trader, need to make rather complex legal qualifications which, it is submitted, would not have brought certainty in many cases, and will not bring certainty in future cases, if the EU legislature were to adopt a similar approach in its future contract rules for online purchases of digital content and tangible goods.

5.2.2 Formal Scope Rules

The scope of the CESL is limited in two ways: both formally and materially. The CESL is limited formally, because it applies only to parties of certain jurisdictions (territorial limitation), only to certain parties (personal limitation), and only when (explicitly) chosen. The CESL is limited materially, because it only applies to certain types of contract.

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[18] In full: Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177.

[19] See J Thomas et al. (eds), *Statement of the European Law Institute on the Proposal for a Regulation on the Common European Sales Law* (ELI, Vienna, 2012) 321 ("ELI Statement"), to be consulted via www.europeanlawinstitute.eu/projects/publications/, 21.

[20] Cf. S Whittaker, 'Identifying the Legal Costs of Operation of the Common European Sales Law', *Common Market Law Review* 50 (2013) 95.

[21] See Recital (10) CESL. On the ramifications of this policy choice, ie to have CESL function as a 'second' set of contract law rules, rather than, eg, the 28th set of European contract law rules, see, eg, M Fornasier, '"28" versus "2. Regime" – 'Kollisionsrechtliche Aspekte eines optionalen europäischen Vertragsrechts', *RabelsZ* Bd. 76 (2012) 401 et seq. and M Lehmann, 'Dogmatische Konstruktion der Einwahl in das EU-Kaufrecht (2., 28. oder integriertes Regime) und die praktischen Folgen', in M Gebauer (ed) *Gemeinsames Europäisches Kaufrecht – Anwendungsbereich und kollisionsrechtliche Einbettung* (2013) 67 et seq.

5.2.2.1 Territorial Scope: Cross-Border Requirement

As a matter of principle, only cross-border contracts are governed by the CESL.[22] This sounds clear enough, but how would it work out in practice? The CESL distinguishes between business to consumer ('B2C') and business to business ('B2B') cross-border contracts. If the contract is to be B2C, the 'address indicated by the consumer, the delivery address for goods, or the billing address' of the consumer must be located in a different country than the 'habitual residence' of the business, or in the CESL terminology: the trader.[23] Thus, parties to a contract must first establish whether they qualify as a 'trader' or a 'consumer'.

The 'trader' – 'consumer' qualification must be made on the basis of the definitions of these terms as provided in the CESL Reg. Under Article 2, caput and under (e) the CESL Reg., 'trader' means any natural or legal person who is acting for purposes relating to that person's trade, business, craft, or profession, while under (f), 'consumer' means any natural person who is acting for purposes which are outside that person's trade, business, craft, or profession.[24]

Then, it must be determined where the addresses of both parties are located. The consumer's address (i.e. the address indicated by him, his delivery address, or his billing address) seems straightforward enough. However, it may lead to ambiguity in the following situations: a consumer's habitual residence might lie outside the EU/EEA, while the address indicated by him, the delivery address for goods, or his billing address is inside the EU/EEA. Then, pursuant to Article 6(2) of Rome I Regulation, the mandatory law of the jurisdiction in which his habitual residence lies applies, should this law, in short, protect him better than the CESL would. Thus, even if CESL would (also) apply under Article 4 CESL Reg., then the law of a jurisdiction outside the EU/EEA might also apply if it protects the consumer more. More generally, Article 6(2) Rome I Regulation applies to all transactions of traders with consumers whose habitual residences and addresses lie outside the EU.[25] In all these cases, a prudent trader would have to investigate whether the law of the consumer's jurisdiction protects the consumer more, which was exactly what the CESL tried to avoid.[26]

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[22] Recital 13–15, Arts 1(1) and 4 CESL Reg.

[23] Art 4(3) CESL Reg.

[24] Even these definitions are not as straightforward as they might seem, as evidenced by the following Parliament amendment: "(f) 'consumer' means any natural person who is acting for purposes which are outside that person's trade, business, craft, or profession; *where the contract is concluded for purposes partly within and partly outside that person's trade and the trade purpose is so limited as not to be predominant in the overall context of the contract, that person shall also be considered to be a consumer; (See the wording of recital 17 of Directive 2011/83/EU)*" [emphasis in the original]. This is not to mention the difficulties that arise when one of the parties acts both as a consumer and a trader, or when it is unclear in what capacity the same party is acting. Cf. ECJ 20 January 2005, C-464/01, ECLI:EU:C:2005:32 (*Johann Gruber/Bay Wa AG*).

[25] See also J Basedow, in M Gebauer (ed) *Gemeinsames Europäisches Kaufrecht – Anwendungsbereich und kollisionsrechtliche Einbettung* (2013) 16.

[26] See Explanatory Memorandum to CESL, 2–4.

The CESL's reference to the trader's address (habitual residence) is even more problematic: it is his 'place of central administration' (*siege réel*).[27] However, this rule does not apply if the 'the contract is concluded in the course of the operations of a branch, agency or any other establishment' of the trader. In such instance, that 'branch, agency or any other establishment' should be the relevant location for purposes of CESL (Art. 4(5) CESL Reg.).

As a connecting factor, the trader's *siege reel* is problematic, as it is not always easy to ascertain where an enterprise's 'place of central administration' is. The Netherlands private international law for instance, does not, as a matter of principle, recognise the place of central administration but rather the place of statutory seat as the connecting factor for, in short, issues of company law (Art. 10:118 Dutch Civil Code (*Burgerlijk Wetboek*)). Also, the Insolvency Regulation refers, as a matter of principle, to the jurisdiction of a company's 'centre of main interest' (a *siege réel* rule of sorts), but, presumably to provide certainty, 'the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary'.[28]

Even more problematic is the exception for branches: if a 'branch, agency or any other establishment' would be 'the relevant location' for purposes of the CESL, the jurisdiction of that branch, agency or other establishment would be relevant for purposes of establishing whether the cross-border requirement has been met. First, in many instances, it is submitted, it would be virtually impossible to establish whether an 'establishment' would be a 'relevant location'. What to think of all contracts that are to be concluded via internet (which might be the only kind of contracts that the future contract law instrument will apply to): what location would then be 'relevant'? Surely not the location where the trader's IT-equipment is located.[29] Second, this exception for branches may lead to a possibility of legal arbitrage by multi-national traders, which possibility is not open to SMEs.[30] Multi-national traders with branches all over Europe may wish to designate branches not located in their consumers' jurisdictions as the 'relevant locations', so that the cross-border requirement will be met and the CESL may apply – when more favourable to the trader. The converse (i.e. that traders designate branches located in their consumers' jurisdictions as the 'relevant locations') might be equally possible, so that the otherwise applicable, national private law must apply, rather than the CESL.

Also, Member States may opt-in and have the CESL apply to all traders with habitual residence in its jurisdiction and to consumers with their addresses in the

[27] Art 4(4) CESL Reg.

[28] Art 3(1) Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160.

[29] Cf. article 4(2)(a) of the Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (concluded 5 July 2006): "For the purposes of paragraph (1)(a), an office is not engaged in a business or other regular activity of maintaining securities accounts [the Convention's connecting factor, the authors] – (a) merely because it is a place where the technology supporting the bookkeeping or data processing for securities accounts is located; (…)."

[30] See also ELI Statement (n 19) 20.

same, and thus forego the cross-border requirement.[31] This opt-in possibility further complicates matters. Pursuant to the cross-border requirements discussed above, the CESL might not apply. Yet the CESL could nonetheless apply, provided all other CESL Reg. requirements for applicability have been met, *and* the otherwise applicable law would be the law of a Member State that has opted-in. Consequently, not only must parties investigate per transaction whether the scope rules of the CESL Reg. are met, but also (if the CESL would not apply under its own cross-border requirement) whether the otherwise applicable, national law would be the law of the same Member State as the habitual residence and addresses of the parties, and whether that Member State has opted into CESL under Article 13(a) CESL Reg.

Finally, one of the parties must be located in the EU. This means that in B2B contracts, one of the (two) traders must have his habitual residence in EU, while in B2C contracts, one of the addresses of the consumer must be in the EU.[32]

5.2.2.2 Personal Scope: Consumer and SME Requirement

As stated above, the CESL is limited formally in three ways: it applies only to parties of certain jurisdictions (territorial limitation), only to certain parties (personal limitation), and only when (explicitly) chosen. The personal limitation entails, in short, that the CESL only applies if the buyer is a consumer, or, in case both seller and buyer(s) are traders, one of the parties is a small or medium-sized enterprise ('SME').[33]

When applying the CESL, parties should therefore not only determine whether the cross-border requirement is met, but also whether this personal requirement is met. To that purpose, parties must – as in the case of the territorial requirement – ascertain whether they qualify as a 'trader' or a 'consumer' as defined in the CESL Reg.

In case both parties qualify as 'traders', they would have to ascertain whether one of them qualifies as an SME. For this qualification, Article 7(2) CESL Reg. provides requirements, which – pursuant to Recital (21) – must be interpreted in the light of Commission Recommendation 2003/361.[34] Consequently, a trader would qualify as an SME if: (i) it employs fewer than 250 employees calculated by Annual Work Units; *and* (ii) its turnover does not exceed EUR 50 million; or (iii) its balance sheet does not exceed EUR 43 million, calculated according to latest approved accounting period (and, should none be available: according to a *bone fide* estimate).[35] Articles 4–6 of the Annex to Commission Recommendation 2003/361

[31] Art 13(a) CESL Reg.

[32] Art 4(3)(b) CESL Reg. and Recital 13.

[33] Art 7(1) CESL Reg.

[34] In full: Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422), 2003/361/EC, OJ L 124/36.

[35] Art 2(1) of Commission Recommendation 2003/361.

provide further directors for the way to calculate the staff headcount, the financial amounts and reference period. Importantly, these tests must be applied per 'autonomous enterprise', i.e. an enterprise that is not a 'partner enterprise', nor a 'linked enterprise' as defined in Article 3(2) and (3) of the Annex to Commission Recommendation 2003/361 (which definitions fill almost an entire page of the Official Journal).

Thus, this SME test is extremely complex and difficult to establish, especially as regards concerns or group-enterprises. It can be safely assumed that some traders may not wish to investigate or rely on the declaration of their trader counterparty as regards their employee count or turnover/balance sheet numbers. It has even been argued that enterprises themselves nor their advisors often know whether they qualify – at the time of conclusion of a contract – as an SME.[36] The following scenario would therefore be plausible. Two traders wish to conclude a contract under the CESL. Due to a (considering the varying size of this company perfectly understandable) miscalculation of the headcount of one the parties' companies, they are mistaken in their belief that this party qualifies as an SME. As a result, they are mistaken in their belief that the CESL would apply under its own scope rules. As explained above, under para. 5.2.1., the CESL would then only apply as a matter of 'incorporation by reference', i.e. the CESL might then apply as if it were clauses agreed by the parties. Yet these CESL clauses could be set aside by mandatory rules of the otherwise applicable national law, which neither party has realised nor wished to investigate. In fact: the whole point for the parties in question to choose the CESL to apply was to avoid such time consuming and costly investigation. Consequently, it would be rational for the same enterprises not to rely on a choice for the CESL.[37]

Finally, and similar to the cross-border requirement, Member States may opt-in to have the CESL apply to all traders and thus forego the SME-requirement.[38] Consequently, parties must investigate per transaction whether the scope rules of the CESL Reg. are met, but also (if the CESL would not apply under its own SME requirement) whether the otherwise applicable, national law would be the law of a Member State that has opted into CESL under Article 13(b) CESL Reg. Other than as regards the cross-border requirement, the otherwise applicable national law need not be the law of the Member State where one of the parties has its habitual residence or address.

5.2.2.3 Scope: Requirement of (Explicit) Choice

The CESL is meant to be an opt-in instrument. This means that the CESL only applies if chosen and agreed by the parties. This agreement to have the CESL apply, i.e. its existence and validity, is governed by the CESL itself.[39] Again, when analysed more closely from the perspective of a party who wishes the CESL to apply, the

[36] Basedow (n 25) 18.

[37] See also ELI Statement (n 19) 13 and 18–19.

[38] Art 13(b) CESL Reg.

[39] Recital (10) and Arts 8–9 CESL Reg.

CESL Reg. provisions on this choice of law agreement are far more complex than one might think at first sight.

Also as regards this choice of law, the CESL distinguishes between agreements made by a trader and consumer on the one hand, and by traders on the other. In case of a B2C contract, the choice to have the CESL apply must meet the following cumulative criteria: (i) the consumer's consent to have the CESL apply must be given in a statement that is separate 'from the statement indicating the agreement to conclude a contract'; (ii) the consumer's consent must be given explicitly; (iii) the trader must have confirmed the same consent; (iv) on a durable medium; and (v) the choice of law must relate to the CESL in its entirety.[40] It needs no argument that these criteria are rather elaborate, which enhances the risk of non-compliance with one or more of them and thus of non-applicability of the CESL. By contrast, in case of a B2B contract there are no further requirements.[41]

5.2.3 Material Scope Rules

As stated above, the CESL is limited formally but also materially, as it applies to certain types of contract only. Thus, parties who wish the CESL to apply must determine whether they and their contract fall within the formal scope of the CESL (as discussed above), and also take the following three steps so as to determine whether their contract falls within the material ambit of the CESL: (i) parties must determine whether their contract concerns a sale of goods, supply of digital content, or related service contract. If not, the CESL cannot apply, at least not with prejudice to mandatory rules of otherwise applicable national law (Art. 5 CESL Reg.); (ii) parties must determine whether no exception applies as defined in Article 6 CESL Reg. Under this provision, the CESL may not apply if the contract is mixed-purpose or contains a form of consumer credit (but only in case of B2C contracts); and (iii) parties must determine whether no exception applies following from the definitions of Article 2 CESL Reg.

Under the definitions of Article 2 CESL Reg., a sale, for instance, can only be governed by the CESL if it leads to a transfer of ownership of goods against a price (Articles 2 caput and under (k), and 1(1) and 3 CESL Reg.). 'Goods' are defined as 'tangible movable items' under Article 2 caput and under (h) CESL Reg., so that electricity, gas, water (unless in limited volume and set quantity) are excluded. However, it is unclear how parties must determine whether the sale leads to a 'transfer of ownership', which may be problematic in cases of retention of title, a fiduciary

[40] Arts 8(2) and (3) CESL Reg.

[41] Yet this freedom for traders to 'cherry pick' and choose which parts of CESL to apply seems inconsistent with Art 1 CESL, which implies that mandatory provisions of CESL may not be excluded. Pursuant to an amendment of the European Parliament, traders would not be allowed to escape such mandatory rules. European Parliament Committee on Legal Affairs, Draft Report 2011/0284 (COD) of 18 February 2013 ("EP Draft Report") 41.

transfer and termination of a provisional transfer of ownership.[42] This qualification must probably be made under the applicable private international law, as the CESL itself explicitly excludes 'property law including the transfer of ownership'.[43] Consequently, this exclusion may lead to diverging interpretations of (the scope of) the CESL between Member States.

Finally, the exclusion of mixed contracts may lead to uncertainty.[44] Even if a minor part of a given contract does not fall under any of the definitions of sale, supply of digital content, or related service contracts as just discussed, then the entire contract falls outside the scope of the CESL and must be deemed governed by the otherwise applicable national law.[45] Consequently, if a seller grants the buyer deferred payment, the CESL does not apply to the entire contract as such deferred payment qualifies as 'credit', which makes it outside the scope of the CESL under Article 6(1) CESL Reg. It is unclear, however, whether a tax payment policy would also qualify as 'credit' so that CESL would not apply.[46] It seems safe to assume that this will force traders to make separate contracts, which will add to complexity and therefore to uncertainty, especially if sale and credit would be closely linked (as they are in many cases – think of car sales where financing forms an important part of the sale offer).

5.2.4 Preliminary Conclusion

From the above, it follows that the CESL would not have brought legal certainty as advertised as regards its scope rules.[47] Both the formal scope rules (territorial, personal, choice) and material scope rules have been tested on clarity and predictability. Not only are the scope rules – considered as a set – relatively complex which, by definition, is a form of unclearness and thus may lead to uncertainty, but the rules individually are also difficult to use and in the cases discussed do not lead to unequivocal answers. Some scope rules are extremely difficult to establish: this is the case when parties have to ascertain whether they qualify as an SME. What is more, some scope rules are virtually impossible to establish: this is the case, for instance, when parties have to ascertain what the 'relevant location' of an internet retailer is that has branches all over the EU. Finally, some scope rules require an

[42] In its Draft Report, the European Parliament proposes to review the exclusion of retention of title clauses after five years of CESL operation; EP Draft Report (n 40) 21.

[43] Recital (27) CESL.

[44] See ELI Statement (n 19) 21–22. Under the European Parliament proposal, this rule will be abandoned; EP Draft Report (n 40) et seq.

[45] See ELI Statement (n 19) 21.

[46] Cf. ELI Statement (n 19) 22.

[47] Accord: S Schaafsma, 'IPR en EPR, Over wisselwerking, eenheidenverscheidenheid' (inaugural lecture Leiden, 2014) 11; and Whittaker (n 19) 108.

investigation into the otherwise applicable law: this is the case when opt-in rules apply and as regards property law matters.

Thus, for the CESL scope rules, its objective of certainty, or, in any event, its objective of not having to establish otherwise applicable law, is not met. In order to enhance their practicability, it is submitted that the scope rules should be individually redrafted, or alternatively, exclusions and refinements should be deleted, as these greatly contribute to the complexity of the current set.[48] It is foreseeable that the rules will not become clearer if the future instrument will be limited to 'distance contracts', i.e. online purchases of digital content and tangible goods'. This will add yet another limiting scope rule to the already existing ones.[49]

5.3 The Interpretation of an Entire Agreement Clause

5.3.1 General

Suppose the CESL rules are clearly applicable and a contract has been concluded. One of the main concerns of businesses will then be its interpretation by the courts. How much trust and certainty may they put in their texts? Traditionally, this has been a bone of contention between common law and civil law. Common law emphasises the literal interpretation of the contract, whereas civil law stresses the importance of a more objective interpretation. Although some convergence between civil and common law may be noted since Lord Hoffman famously stated that 'interpretation is the ascertainment of the meaning which the document would convey to a reasonable person',[50] differences may still exist.

Commercial parties often stress the importance of the wordings of a contract by including a so-called 'entire agreement-'or 'merger clause'. Such a clause states that it is the intention of the parties that the written document contains the entirety of the contract between the parties. The purpose is to preclude a party to rely on a promise or statement, made during the negotiations, when it is not expressly contained in the written document. Does the content of the CESL rules facilitate parties who wish to attain this form of legal certainty?

[48] Accord: Basedow (n 24) 21; and H Eidenmüller et al. 'Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht', *JZ* 67 (2012) 288–289.

[49] See the EP Draft Report (n 40) 35 and the Public consultation on contract rules for online purchases of digital content and tangible goods, issued by the European Commission on 12 June 2015, see http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm

[50] *Investors Compensation Scheme v. West Bromwich Building Society* [1997] UKHL 28; [1998] 1 All ER 98; [1998] 1 WLR 896 (19th June, 1997).

5.3.2 Interpretation Rules

Contracts are to be interpreted according to the meaning which a reasonable person would give to them.[51] The common intention of the parties should in any case be of paramount importance, even if this differs from the normal meaning of the expressions used in the contract.[52] Specific intentions of one party are relevant if at the time of the conclusion of the contract the other party was aware, or could be expected to have been aware, of such intentions.[53] Article 59 CESL adds that regard may be had to various facts and circumstances. Although the 'nature and purpose of the contract' is mentioned,[54] a preference for *literal* interpretation in business-to-business relationships is not evident from Article 59 CESL.

To be certain, parties could agree that there are no other obligations than those stated in the contract. For one, the CESL does not forbid to exclude the application of its interpretation rules in commercial contracts.[55] Article 72 CESL is devoted to such an entire agreement- or merger clause:

1. Where a contract in writing includes a term stating that the document contains all contract terms (a merger clause), any prior statements, undertakings or agreements which are not contained in the document do not form part of the contract.
2. Unless the contract otherwise provides, a merger clause does not prevent the parties' prior statements from being used to interpret the contract.[56]

These paragraphs do not deserve a beauty prize. They may lead to a situation in which statements, commitments, and arrangements that have not been included in the written contact *are not part of the contract* (para. 1), while nevertheless prior statements *may be taken into account* when interpreting the contract (para. 2). Thus, apparently, these statements, taken separately, cannot serve as a ground for any contractual obligation. Yet they may be used to substantiate a line of reasoning. This could be confusing if the line of reasoning results in an interpretation that favours prior statements over the wordings of the contract. Was this the real intention of the parties? This proves that businesses do themselves a great service by also – explicitly[57] – excluding the use of such statements, even when they have

[51] Art 58 (3) CESL.

[52] Art 58 (1) CESL.

[53] Art 58 (2) CESL.

[54] Art 59 (g) CESL.

[55] In consumer contracts, however, (ie contracts in which one of the parties qualifies as a 'consumer', see also above, under para 2.2.1–2.2.2.) such an exclusion is disallowed (Art 64(2) CESL).

[56] The meaning of a merger clause in a consumer sale will be limited, since Article 72(3) provides that the consumer is not bound to such a clause and Article 72(4) forbids the parties to derogate from that rule. Hence, an agreed merger clause will only bind the professional party and is therefore not expected to be used in practice. About this in a critical sense EM Kieninger in Schulze et al. (eds), *Common European Sales Law (CESL) – Commentary* (Baden-Baden, Nomos, 2012) 353.

[57] Cf. Schulze et al. (eds), *Common European Sales Law (CESL) – Commentary* (Baden-Baden, Nomos, 2012) 308 and 353.

included an entire agreement clause in their contract. Nonetheless, in spite of its somewhat ambiguous wordings, the CESL facilitates parties that wish to create legal certainty by using entire agreement- or merger clauses.

Yet, one caveat is necessary. One should bear in mind that an entire agreement- or merger clause needs to be interpreted itself. Take for example the Lundiform-case, in which the Dutch Supreme Court took a firm stand on what such a clause is all about.[58] The clause read:

> 9.1. This Agreement constitutes the entire agreement between the parties and supersedes any earlier written or oral arrangements and agreements made between the parties. (…)
> 9.5. No variation of this agreement shall be valid unless it is in writing and signed by or on behalf of each of the parties.

The Dutch Supreme Court noted in general terms, after having emphasised that such a clause is a relevant circumstance for interpretation:

> (…) that an 'entire agreement clause' on itself is not an interpretation provision. The clause has a specific origin and function in the Anglo-American legal sphere, and has not automatically a special meaning according to Dutch law. [T]he clause does not automatically preclude that for the interpretation of the terms in the contract significance is attached to statements made or actions performed in the stage prior to the conclusion of the contract.

With regard to the specific clause in the Lundiform-case, the Supreme Court held that the Court of Appeal should have taken into account the following statements by Lundiform, referring to the way the contract between Lundiform and the other party, Mexx, had been concluded:

> (i) that the parties have not negotiated about the written contract, in particular not about the text of [the entire agreement clause],
> (ii) that at the conclusion of the contract Lundiform was not assisted by a lawyer, and
> (iii) that the model contract had been drawn up by the legal department of Mexx.

Thus, the Supreme Court assumes that the decision not to negotiate a contract with the assistance of a professional lawyer must lead to the conclusion that there was in fact no equal bargaining power between the parties. As a consequence, the reason to attach great importance to the linguistic meaning of the contract would cease to be valid.

While this line of reasoning seems to be similar to paragraph 2 of Article 72, the CESL seems to be more subtle, as it takes into account whether the parties had equal bargaining power during their negotiations:

> To the extent that there is an inconsistency, contract terms which have been individually negotiated prevail over those which have not been individually negotiated within the meaning of Article 7.[59]

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[58] Dutch Supreme Court, 5/03/13, (2013) *NJ*, 214 (Lundiform/Mexx).

[59] See for similar provisions: Article 5:104 PECL and Article II.-8:104 DCFR. Article 70 Common European Sales Law still adds to this that the supplier of a contract term that has not been individually negotiated (hence read: could not be negotiated) must have drawn the other party's attention to this term.

According to Article 7 (1) CESL, a contract term is not individually negotiated if it has been supplied by one party and the other party has 'not been able to influence its content'. So, it is not decisive whether parties have in fact negotiated about a certain provision, but whether they have been able to question its wordings in the first place. This may prove to be a useful criterion in business-to-business relationships. After all, a professional party who is not satisfied by the contract terms should prove that it has not been able to influence their content. We believe this is just, for a contract should serve the parties as their law, including the tradesman who accepts a contractual term because he considers a contract profitable in its entirety.

5.3.3 Preliminary Conclusion

The CESL stresses the importance of entire agreement clauses, while it provides for a criterion to assess whether parties could rely on such a clause. Not the absence of negotiations is decisive, but whether parties were able to influence the content of their contract terms. Despite the ambiguous formulation in Article 72 CESL, which implies that prior statements are not part of the contract but may nonetheless be taken into account when interpreting the contract, the CESL interpretation rules facilitate parties that wish to create legal certainty by using entire agreement- or merger clauses. We advise the Commission to consider these rules for its future instrument, in order to enhance the predictability of the contractual arrangements between commercial parties.

5.4 The Legal Consequences of a Breach of Contract

5.4.1 General

Unfortunately, contracting parties will not always live up to the expectations. During the lifecycle of a contract, their mutual relationship may take a turn for the worse. The buyer was full of anticipation, only to find out that the delivered goods do not match his expectations and even cause losses and distress. The seller trusted that the other party would pay the price soon after delivery, but is now unable to reach his counterparty. When all else fails,[60] the scheme of remedies, which affects the enforcement of their rights, becomes of crucial importance to the contracting

[60] Of course, parties should first try to seek a solution together, through consultation, mediation or alternative dispute resolution. This has the attention of the EU legislator as well, *cf.* Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR); Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

parties. Any prudent contracting party would therefore want to know beforehand the range of available remedies, their hierarchy and the possibilities to dictate otherwise in their contract. As a result, the degree of certainty provided by the remedial system will generally encourage or discourage parties to enter into a contract.[61]

In this context, two issues divide the different European legal systems and therefore deserve closer examination. First, the legal consequences of a breach of contract, and especially the relationship between damages, specific performance and termination (para. 5.4.2). Is the normal and automatic remedy *damages* or *specific performance*, and does *termination* have a subsidiary character? Second, the relationship between contract and tort law (para. 5.4.3). Once a party claims damages, may he choose the most advantageous remedy or is he confined to base his claim on the CESL?

5.4.2 The Relationship Between Performance, Damages and Termination

5.4.2.1 Background: Different Approaches in Common and Civil Law

Common law and civil law traditions display great divergences when it comes to the remedies for breach of contract, at least in theory. While *damages* are the normal and automatic remedy in the common law,[62] civil law generally aims at *performance* of the obligations under the contract.[63] In the United Nations Convention on Contracts for the International Sale of Goods (CISG), the positions were not reconciled.[64] While the right to require performance was acknowledged,[65] the question of whether or not to award this remedy was left to the discretion of the national courts.[66] This result has been criticised, for example by Erauw and Flechtner:

> When they approached the topic of remedies, the drafters seem to have abandoned hope of bridging gaps among domestic legal systems, and to have opted instead for incorporating

[61] Cf. V Mak, *Performance-oriented remedies in European sale of goods law* (Oxford, Hart Publishing, 2009) 1.

[62] Cf. Lord Diplock in *Photo Production Ltd v Securicor Ltd* [1980] AC 827 (HL) 848-9 and Lord Hoffmann in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*, [1998] AC 1 (HL).

[63] See generally Mak (n 60) and H Sivesand, *The Buyer's Remedies for Non-Conforming Goods* (München, Sellier, 2005) 29 *et seq.*

[64] See AH Kastely, 'The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention', *Washington Law Review* 63 (1988) 607–610.

[65] Art 46 (1) and 62 CISG.

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

> more or less intact the different and even contradictory approaches of different legal traditions. (…) The result is not so much a remedies system as a wilful bundling together of diverse elements, offering an aggrieved buyer or seller a diverse smorgasbord of remedy options from which to choose.[67]

On the European level, an agreement was reached by introducing a clear hierarchy of remedies under the Consumer Sales Directive.[68] Under this Directive, the consumer has to give the seller the chance to cure a lack of conformity.[69] As a result, the consequences of a breach of contract are not entirely determined by the buyer's choice for one remedy or the other, or purely by the economic interests of the seller. It has been argued that under Dutch law the remedial scheme now has gained an ever more subtle character, which gives the courts more power to intervene when a particular solution is seen as disproportionate.[70] This trend may be seen in international sales law and even – according to Mak – in the common law, where the courts 'are beginning to show a tendency towards a wider scope for specific performance'.[71] It is reflected in recital 32 of the proposed CESL as well:

> The Common European Sales Law should aim at the preservation of a valid contract whenever possible and appropriate in view of the legitimate interests of the parties.

This development also affects the possibility to use the remedy of termination. This far-reaching 'remedy' releases both parties from their obligations.[72] That this 'remedy' should be of an exceptional character is reflected both in the common and the civil law traditions. In the common law, termination is only possible if the term which has been broken is a 'condition' of the contract or if the breach is 'fundamental'. Within the civilian tradition, for example in Germany[73] and the Netherlands,[74] termination is generally only possible if the other party has been given an additional period of time to remedy the breach. Both solutions emphasise the subsidiary character of termination, which is mirrored on the European and international level,

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[67] J Erauw and HM Flechtner, 'Remedies under the CISG and limits to their uniform character', in P Šarčević and P Volken (eds), *The International Sale of Goods Revisited* (Alphen aan den Rijn, Kluwer Law International, 2001) 43–44. *Cf.* Sivesand (n 62) 105–106.

[68] Directive 99/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L 171.

[69] Art 3 Consumer Sales Directive.

[70] See eg, for Dutch private law, JH Nieuwenhuis, 'Vernietigen, ontbinden of aanpassen (I)', *WPNR* 1995/6164, 23–26; FB Bakels, *Ontbinding van wederkerige overeenkomsten* (diss. Leiden), (Deventer, Kluwer, 1993); T Hartlief, *Ontbinding: over ongedaanmaking, bevrijding en rechterlijke bevoegdheden bij ontbinding wegens wanprestatie* (diss. Groningen), (Deventer, Kluwer, 1994); MM Stolp, *Ontbinding, schadevergoeding en nakoming : de remedies voor wanprestatie in het licht van de beginselen van subsidiariteit en proportionaliteit* (diss. Nijmegen), (Deventer, Kluwer, 2007).

[71] See Mak (2013) 206.

[72] According to Smith, it is therefore not strictly a remedy; see SA Smith, *Atiyah's Introduction to the Law of Contract*, 6th ed (Oxford, Clarendon Press, 2005) 371.

[73] § 323 (1) BGB. See M Chen-Wishart and U Magnus, 'Termination, Price Reduction, and Damages', in Dannemann and Vogenauer (n 15) 660.

[74] Art 6:265 (2) Dutch Civil Code.

where either a clear hierarchy of remedies has been introduced (Consumer Sales Directive)[75] or the requirement of 'fundamental' breach has been adopted as a condition for termination (UNIDROIT Principles).[76] Does the CESL follow this trend?

5.4.2.2 The Remedial Scheme in B2B Transactions

In line with Article 25 of the CISG, the CESL defines the non-performance of an obligation as 'any failure to perform that obligation, whether or not it is excused'.[77] It is a broad and objective test, which gives the aggrieved party access to the scheme of remedies.[78] The buyer may require performance, withhold his own performance, terminate the contract, reduce the price and claim damages. For commercial buyers, this does not mean that the remedy termination may be used immediately. Its application is subject to another, familiar threshold: the non-performance has to be 'fundamental'.[79] This is the case if the non-performance 'substantially deprives the other party of what that party was entitled to expect under the contract, unless at the time of conclusion of the contract the non-performing party did not foresee and could not be expected to have foreseen that result', or if 'it is of such a nature as to make it clear that the non-performing party's future performance cannot be relied on'.[80]

Furthermore, the commercial buyer's rights to exercise any remedy – except withholding performance – are subject to cure by the seller and subject to examination and notification requirements.[81] The buyer has to examine the goods, or have them examined, 'within as short a period as is reasonable not exceeding 14 days from the date of delivery of the goods, supply of digital content or provision of related services'.[82] In the event of a lack of conformity, the buyer has to inform the seller within a *reasonable time*.[83] Finally, the buyer will lose his right to terminate the contract 'if notice of termination is not given within a reasonable time from when the right arose or the buyer became, or could be expected to have become, aware of the non-performance, whichever is later'.[84] The European Parliament has proposed to fix this period at *two months*,[85] which will increase the certainty of this rule and follows the example of the Consumer Sales Directive.

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[75] Eg Consumer Sales Directive.

[76] Eg in the UNIDROIT Principles, Art 7.3.1.

[77] Art 87(1) CESL.

[78] Art 106(1) CESL.

[79] Art 114–115, 134 and 136 CESL.

[80] Art 87(2)(a) and (b) CESL.

[81] Art 106(2)(a)–(b) CESL.

[82] Art 121(1) CESL.

[83] Art 122(1) CESL.

[84] Art 119 CESL.

[85] Amendment 201.

According to Article 178 CESL, '[a]right to enforce performance of an obligation, and any right ancillary to such a right, is subject to prescription by the expiry of a period of time in accordance'. Because the right to terminate the contract can hardly be qualified as a right to *enforce* performance, it was unclear whether this remedy was subject to prescription.[86] Fortunately, the European Parliament has proposed to amend Article 178, to make clear that all remedies for non-performance – except withholding performance – are indeed subject to the rules on prescription.[87] The short period of prescription is two years,[88] the long period of prescription will be ten years (proposal European Commission) or six years (proposal EP).[89] In the event of a right to damages for personal injuries, this period is thirty years.[90]

In any event, the buyer will lose his rights based on a lack of conformity if he does not notify the seller 'within two years from the time at which the goods were actually handed over to the buyer in accordance with the contract'.[91] Here, the European Parliament proposed to add that the buyer 'may still reduce the price or claim damages, except for loss of profit, if he has a *reasonable excuse* for his failure to give the required notice'.[92] Although this amendment is understandable, it makes an exception to a clear rule of prescription and does therefore not benefit the clarity of that rule. It does, however, point out the subsidiary character of the right to terminate the contract, which is not available when the buyer failed to notify the seller, even if he has a 'reasonable excuse'.

In its remedial scheme for B2B transactions, the CESL follows its own stated objective of preserving a valid contract whenever possible. It introduces a certain hierarchy and makes termination conditional upon the presence of a 'fundamental' non-performance. With one exception, the amendments proposed by the European Parliament further enhance the clarity of the rules on examination and notification duties, and on the loss and prescription of rights.

5.4.2.3 The Remedial Scheme in B2C Transactions

Quite the opposite can be observed for B2C transactions. Here, the CESL employs a highly consumer-friendly regime. First of all, the threshold for termination is not applicable. A new requirement is being introduced:

[86] Cf. ELI Statement (n 19) 321.

[87] Amendment 248.

[88] Art 179(1) CESL.

[89] Amendment 249.

[90] Art 179(2) CESL.

[91] Art 122(2) CESL.

[92] Amendment 204.

> In a consumer sales contract and a contract for the supply of digital content between a trader and a consumer, where there is a non-performance because the goods do not conform to the contract, the consumer may terminate the contract *unless the lack of conformity is insignificant*.[93]

This provision significantly lowers the preconditions for termination. It presumes that any non-conformity is significant and shifts the burden to prove otherwise to the seller.[94] The seller, in his turn, is not helped with any further definitions, guidelines or non-exhaustive lists with examples, which makes it very difficult to predict which lack of conformity is or is not 'insignificant'. Unfortunately, the European Parliament has decided not to propose amendments to this provision.

Furthermore, the proposal states that the buyer's rights are generally *not* subject to cure by the seller.[95] Again, this provision significantly lowers the preconditions for termination and abandons the idea of preserving a valid contract as much as possible. Only one exception has now been proposed by the European Parliament, for goods or digital content 'which are manufactured, produced or modified in accordance with the consumer's specifications or which are clearly personalised'.[96] This exception may be welcomed, but it has to be noticed that the burden of proof is still shifted to the seller, while a general acknowledgment of a right to cure is absent. Add to this that the requirements of examination and notification do not apply to B2C transactions,[97] and it is clear that these rules are highly consumer-friendly.

It seems that with respect to B2C transactions, the European Commission has not been able to avoid inconsistencies with previous instruments of international sales law. It departs from the agreed hierarchy under the Consumer Sales Directive and returns to the traditional patterns by allowing an almost absolute freedom to choose between the different remedies for non-conformity. These rules benefit the position of the consumer more than they benefit the position of businesses. But that is not the main problem here. The problem is that commercial parties cannot rely on these rules to predict with a reasonably sufficient degree of certainty the legal consequences of a breach of contract. Without prior notification of the non-conformity itself, their contract may easily be terminated, leaving it to the commercial seller to prove that the lack of conformity was in fact *insignificant* or related to a tailor-made product.

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[93] Art 114(2) CESL.

[94] M von Kossak, 'The Remedial System under the Proposed Common European Sales Law (CESL)', *European Journal of Commercial Contract Law* 1 (2013) 10.

[95] Art 106(3)(a) CESL.

[96] Amendment 192.

[97] Art 106(3)(b) CESL. With the exception of the notification of termination, *see* Art 119 CESL and Amendment 201.

5.4.3 The Relationship Between Damages in Contract and Damages in Tort[98]

5.4.3.1 Concurrent Remedies in Contract and Tort

A breach of contract may also constitute a violation of a right to property or lead to an injury to body or health.[99] If a party decides to claim damages for such losses, he may be able to do so on the basis of contractual or tortious liability. This may undermine the certainty the EU legislator wants to provide, because the tort law regimes of the Member States will often differ in terms of establishment, scope and prescription of liability – not only between themselves, but also with the CESL or any other future contractual liability regime. A substantive conflict rule is therefore needed to govern the relationship between contract and tort.

Within Europe, two contrasting approaches exist: some legal systems confine the claimant to contract law, others provide him with the opportunity to also invoke tort law. The first route has been chosen by the French *Cour de Cassation*. Whenever a fault has been committed in the context of the performance of a contract, the liability may only be based on contract law:

> Les Art 1382 et suivants sont sans application lorsqu'il s'agit d'une faute commise dans l'exécution d'une obligation résultant d'un contrat.[100]

This principle of *non-cumul des responsabilités* protects French contract law against the breadth of the principle-based and very casuistic character of French tort law.[101] German and English private law take the opposite stance: the claimant has the *freedom to choose* between an action in contract and an action in tort, when both are possible on the same facts. The claimant is not precluded to bring an action in tort when the liability in contract has been barred or exempted:

> Er ist insbesondere nicht gehindert, auf die Haftung aus unerlaubter Handlung zurückzugreifen, wenn vertragliche Ansprüche – etwa wegen eingetretener Verjährung oder einer nur sie erfassenden Haftungsfreizeichnung – nicht mehr bestehen.[102]

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[98] Parts of this section have been previously published in R de Graaff, *Something old, something new, something borrowed, something blue?* (Leiden/The Hague, Jongbloed, 2014).

[99] Cf. C von Bar and U Drobnig, *The Interaction of Contract Law and Tort and Property Law in Europe. A Comparative Study* (München, Sellier European Law Publishers, 2004) 190–191.

[100] Cass. 11 January 1922, *DP* 1922.I.16. Reaffirmed in Cass. 2e civ. 26 May 1992, *Bull. Civ.* 1992. II.154; Cass. 1e civ. 19 March 2002, *CCC* 2002/106, n° 00-13971. See Brieskorn 2010, p. 218.

[101] On the (mis)conceptions about the character of French tort law, *see* JS Borghetti, 'The Culture of Tort Law in France', *JETL* 3 (2012/2) 158–182.

[102] BGH, 24/11/76, *BGHZ* 67, 362 et seq, my italics. This is still the doctrine under German law, see T Zerres, *Bürgerliches Recht. Eine Einführung in das Zivilrecht und die Gründzuge des Zivilprozessrechts* (Heidelberg, Springer, 2009) 314.

The House of Lords eventually followed this line of reasoning.[103] Lord Goff of Chieveley expressed the *ratio decidendi* on behalf of the Lords:

> [T]he plaintiff, who has available to him concurrent remedies in contract and tort, *may choose that remedy which appears to him to be the most advantageous*.[104]

The starting point is the freedom of the claimant to choose between the different applicable regimes.

5.4.3.2 The Dividing Line Between Contract and Tort

Both solutions discussed above result in the precedence of one regime over the other. Either tort law is excluded as a matter of principle (*non-cumul*), or the least advantageous regime is excluded as a result of the claimant's choice (*free concurrence*). These solutions seem straightforward, but there is one complicating factor: the dividing line between contract and tort is 'by no means as clear as might be imagined'.[105]

Modern contract lawyers question whether the division between contractual obligations, resulting wholly from an exchange of promises, and tortious obligations, imposed by the law, is still accurate. Conversely, tort lawyers struggle with certain cases of tortious liability where the parties are in a contractual relationship.[106] In 1974, Gilmore proclaimed 'the death of contract', stating that contract law 'is being reabsorbed into the mainstream of "tort"'.[107] He was supported by Atiyah, who argued that the idea 'that tort liabilities are wholly different from contractual liabilities because the latter arise from consensual obligations is not soundly based, either in logic or in history'.[108] These findings are supported by the fact that one and

[103] Earlier – in 1985 – the House of Lords had expressly rejected the application of tort law within a contractual relationship: 'Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship.' See HL, 3/07/85, *AC* 1985/80 at 107 (*Tai Hing Cotton Mill Ltd/Liu Chong Hing Bank*), statement Lord Scarman.

[104] HL 25 July 1994, [1995] 2*AC* 145, at 184 (*Henderson/Merrett Syndicates Ltd*), my italics. Earlier, the Irish Supreme Court and the Supreme Court of Canada issued similar judgments: IESC, *IR* 1979/249 (*Finlay/Murtagh*); SCC, [1986] 31 *DLR* (4th) 481 (*Central Trust Company/Rafuse*). Cf. Ward 2010, p. 23.

[105] R Zimmermann, *The law of obligations: Roman foundations of the civilian tradition* (Oxford, Oxford University Press, 1996) 11; and D Howarth, 'The General Conditions of Unlawfulness', in AS Hartkamp et al. (eds), *Towards a European Civil Code* (Alphen aan den Rijn, Kluwer Law International, 2011) 848.

[106] Cf. S Deakin, A Johnston and B Markesinis, *Markesinis and Deakin's Tort Law. Seventh Edition* (Oxford, Clarendon Press, 2013) 15.

[107] G Gilmore, *The Death of Contract* (Columbus, Ohio State University Press, 1974) 87.

[108] P Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, OUP, 1979) 505.

the same legal issue is characterised as belonging to contract law in one country, while it is dealt with by tort law in another country.[109]

Under French law, it is arguably most difficult to cope with this interaction. The principle of *non-cumul* may force courts to deny a contractual relationship in order to be able to apply tort law.[110] Yet, some problems have been solved by complementing the obligations arising from a contract with the requirements of equity, customs and the law on the basis of Articles 1134 and 1135 of the French Civil Code.[111]

The principle of *free concurrence* forces the courts to limit the freedom of the claimant to bring any action he wishes, in order to do justice to the interests of the defendant.[112] Under German law, an exception is made when 'the application of tort law would (…) *frustrate* the purpose of a contract law norm'.[113] As Koch wrote:

> Diese Regel [a free choice for the claimant] *soll jedoch keinen Bestand haben*, *wenn*, als Folge konkurrierender Ansprüche, *der Zweck einer Vorschrift unterlaufen wird*, was insbesondere bei Haftungsmilderungen und Verjährungsfragen relevant ist.[114]

Under English law, the concurrence between contract and tort is 'subject (…) to ascertaining whether the tortious duty is *so inconsistent* with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded'.[115] In most cases, tort law will therefore not afford greater protection, because a claimant may benefit from its application only *in the absence* of a limitation or exclusion of liability in the contract.[116]

It has become clear that different legal systems have different reasons for allowing recourse to tort law or not. The possibility to invoke tort law is limited when it goes against the wording of the contract (England) or against statutory law (Germany), or as a matter of principle, because it would risk to open the floodgates of litigation and compensation (France).[117] What are the implications for the interaction between the CESL and national tort law?

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[109] Eg defective products give the consumer a claim in tort in England, while French courts allow an action in contract. See Zimmermann (n 104) 11–12. Cf. Von Bar and Drobnig (n 98) 848.

[110] Cf. Von Bar & Drobnig (n 98) 40–41.

[111] For France, see MW Hesselink, 'De opmars van de goede trouw in het Franse contractenrecht', *WPNR* (1994/6154) 694–698.

[112] Cf. JH Nieuwenhuis, 'They still rule us from their graves', *WPNR* (2009/6693) 3.

[113] Von Bar & Drobnig (n 98) 201, emphasis added.

[114] D Koch, *Produkthaftung: zur Konkurrenz von Kaufrecht und Deliktsrecht* (Berlin, Duncker und Humblot, 1995) 227, emphasis added.

[115] HL 25 July 1994, [1995] 2 *AC* 145, at 184 (*Henderson* v. *Merrett Syndicates Ltd.*), my italics. See also Cartwright 2013, p. 51.

[116] Cf. J O'Donovan, *Lender Liability* (London, Sweet & Maxwell Ltd, 2005) 197–198.

[117] Cf. W van Gerven & S Covemaecker, *Verbintenissenrecht* (Leuven, Acco, 2006) 310.

5.4.3.3 The Dividing Line Between CESL and National Tort Law

As we have seen, the purpose of the European Commission is to create a *self-standing* regime of sales law. However, Recital 28 of the Regulation stresses that the CESL should not govern matters 'outside the remits of contract law' and stipulates that '[t]his Regulation should be without prejudice to the Union or national law in relation to any such matters'.[118] Recital 27 lists some examples:

> These issues include legal personality, the invalidity of a contract arising from lack of capacity, illegality or immorality, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law *and the law of torts*. Furthermore, *the issue of whether concurrent contractual and non-contractual liability claims can be pursued together falls outside the scope of the Common European Sales Law*.[119]

This statement is understandable. Efforts to harmonise private law have so far concentrated on contract and consumer law, not on tort law.[120] The law of torts concerns a different economic and political reality, making it difficult to demonstrate the necessity of EU legislation.[121] Only one legislative instrument within the area of private law, also a Regulation,[122] clearly aims to *replace* the national law of torts with a ground for non-contractual liability at EU level.[123] Yet it explicitly states that the interpretation of key concepts is left to the applicable system of national private law.[124]

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[118] Some areas are also mentioned in Recital 28: 'For example, information duties which are imposed for the protection of health and safety or environmental reasons should remain outside the scope of the Common European Sales Law. This Regulation should further be without prejudice to the information requirements of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.'

[119] Emphasis added.

[120] Such efforts have only been pursued at an academic level, for example in Book IV of the Draft Common Frame of Reference. Although the Directive on Product Liability creates an "extra" level of liability, it 'shall not affect any rights which an injured person may have according to the rules of the law of contractual or non-contractual liability' (Art 13), and therefore it does not harmonise the general law of torts. *See* Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

[121] Cf. Howarth (n 104) 848–851.

[122] Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, amended by Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 and Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011.

[123] Art 35 (1) states: 'Where a credit rating agency has committed, intentionally or with gross negligence, any of the infringements listed in Annex III having an impact on a credit rating, an investor or issuer may claim damages from that credit rating agency for damage caused to it due to that infringement.'

[124] See Art 35 (4): 'Terms such as "damage", "intention", "gross negligence", "reasonably relied", "due care", "impact", "reasonable" and "proportionate" which are referred to in this Article but are

Although the Regulation stresses that the CESL should not govern matters outside the remits of contract law, this does not mean that there is no overlap between CESL and national tort law. By bringing consequential losses within the scope of the CESL, the European Commission clearly intended to include a core area in which contractual and tortious liability overlap.[125] An aggrieved party may be entitled to a sum of money 'as compensation for loss, injury or damage',[126] including 'economic loss and non-economic loss in the form of pain and suffering'[127] and 'future loss which the debtor could expect to occur'.[128]

When the victim wishes to claim damages for such losses, the question of whether he is allowed to bring an action in tort will be a matter for the applicable national system of private law. When recourse to tort law is allowed, the question remains whether and to what extent this freedom of choice should be limited. Because consequential losses are included within the scope of the CESL, and because 'only the [CESL] shall govern the matters addressed in its rules',[129] it seems that the CJEU has to provide this answer. In doing so, it will be guided by general principles of EU law. As Wendehorst wrote:

> At the end of the day, it should be the ideas of *effet-utile* on the one hand and of *subsidiarity and proportionality* on the other that count, ie we have to ask whether the uniformity of results which the CESL (…) seeks to achieve throughout the EU would require the CESL (…) rules to be exclusive in a particular area or whether parallel regimes of an entirely different nature, in particular tort and property, must be tolerated.[130]

This is not an easy task. On the one hand, the Court of Justice will be tempted to provide all the answers by interpretation of the CESL rules and the existing *acquis communaitaire*. This is important for countries such as France, where the *non-cumul* principle forces the courts to protect the CESL from the breadth of French tort law

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not defined, shall be interpreted and applied in accordance with the applicable national law as determined by the relevant rules of private international law.'

[125] Some authors are very critical of the proposed definitions: 'In placing loss of an economic and non-economic nature, injury, and damage on the same level, the proposed regulation confuses protected interests with heads of damage. (…) It is difficult to escape the conclusion that these provisions need thorough re-drafting.' This has not happened thus far by amendments of the European Parliament. See H Eidenmüller, N Jansen, EM Kieninger, G Wagner and R Zimmermann, 'The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law', *The Edinburgh Law Review* 3 (2012) 340. Interestingly, the international counterpart of the CESL – the UN Convention on Contracts for the International Sale of Goods (CISG) – *excludes* liability for death or personal injury from its scope. See Art 5 CISG.

[126] Art 2 (g) Reg CESL.

[127] Art 2 (c) Reg CESL.

[128] Art 159 (2) CESL.

[129] See Art 11 Reg CESL.

[130] See the comments by Wendehorst in Schulze et al. (eds), *Common European Sales Law (CESL) – Commentary* (Baden-Baden, Nomos, 2012) 70, emphasis added. *Cf.* Howarth (n 104) 849, according to whom the question surrounding harmonisation in this area of law will always be 'whether the degree of anomaly which results from cases crossing the contract-tort divide is sufficient to justify what otherwise would be a violation of the principle of subsidiarity.'

as much as they are used to protect French contract law from French tort law. In such a situation, all answers have to be given within the remits of contract law.

However, providing such answers may involve a very inventive interpretation of the CESL, which is written as a comprehensive set of contract rules and is silent or at least not explicit on some matters, such as causation. The Court of Justice will be hampered by the very limitations of the CESL itself. When asked to do so, this may be an argument for an English or German court to provide the answers within the remits of national tort law, especially when it concerns sensitive issues on which there is no European consensus.[131]

In any event, the attempt to draw a clear line between the CESL and tort law would have been ill-fated. This does not mean that the CESL rules provide less certainty than national systems of private law do. It does mean that the claim by the European Commission that commercial parties would only have to acquaint themselves with one common set of rules was untrue. Also with regard to a future instrument of contract law, these parties have to bear in mind that such an instrument will not provide all the answers, that claimants will try to escape into tort law and that national courts follow different approaches in this respect.

5.5 General Conclusion

In this chapter, we have measured the CESL rules against the stated objective of providing a high degree of legal certainty through a common set of rules. In doing so, we have taken a business perspective. We have assessed the rules governing three important stages in the life cycle of a contract: the rules that determine whether CESL applies to a contract, the interpretation of entire agreement clauses and the relationship between the different remedies for breach of contract. We have examined whether these rules are clear and predictable.

With regard to the first stage – formal and material scope rules – we conclude that the CESL would not have brought legal certainty as advertised.[132] Some scope rules are extremely difficult to establish: this is the case when parties have to ascertain whether they qualify as an SME. What is more, some scope rules are virtually impossible to establish: this is the case, for instance, when parties have to ascertain what the 'relevant location' of an internet retailer is that has branches all over the EU. Finally, some scope rules require an investigation into the otherwise applicable law: this is the case when opt-in rules apply and as regards property law matters. It is foreseeable that the rules will not become clearer if the future instrument will be limited to 'distance contracts', i.e. 'online purchases of digital content and tangible goods'. This will add yet another limiting scope rule to the already existing ones.

[131] Such as the derogation from a prescription period, or liability *in solidum* of producers/sellers.

[132] See above, para 5.2.

With regard to the second stage, the CESL rules stress the importance of entire agreement clauses, while they provide for a criterion to assess whether parties could rely on such a clause. Not the absence of negotiations is decisive, but whether parties were able to influence the content of their contract terms. Despite the ambiguous formulation in Article 72 CESL, which implies that prior statements are not part of the contract but may nonetheless be taken into account when interpreting the contract, the interpretation rules facilitate parties that wish to create legal certainty by using entire agreement- or merger clauses. In all, we believe these rules to be sufficiently clear and advise the Commission to consider these rules for its future instrument, in order to enhance the predictability of the contractual arrangements between commercial parties.[133]

With regard to the final stage – the remedies for breach of contract – a nuanced picture emerges. The CESL remedial scheme in B2B transactions lives up to expectations. It introduces a clear hierarchy and makes termination conditional upon the presence of a 'fundamental' non-performance.[134] Quite the opposite may be observed in B2C transactions. Here, the Commission chose to depart from the hierarchy under the Consumer Sales Directive and to return to the traditional patterns by awarding the consumer an almost absolute freedom to choose between the different remedies for non-conformity. Whereas these rules may be clear in themselves, we do not think commercial parties can rely on them to predict with a reasonably sufficient degree of certainty the legal consequences of a breach of contract.[135]

Furthermore, if a party decides to claim damages for consequential losses, he may do so on the basis of contractual or tortious liability. This may undermine the certainty an instrument of European contract law wants to provide, because tort law regimes of the Member States often differ in terms of establishment, scope and prescription, not only between themselves, but also with the CESL or any other future European contractual liability regime. Although the European Commission clearly intended to include some issues traditionally belonging to tort law into the scope of the CESL, the attempt to draw a clear line between these two areas will be ill-fated. Parties have to bear in mind that a future instrument of contract law will not provide all the answers, that claimants will try to escape into tort law and that national courts follow different approaches in this respect. Any prudent commercial party will therefore have to consider non-contractual liability claims.[136]

In our opinion, the overall conclusion must be that the proposed CESL rules do not live up to the expectations. With a few notable exceptions, they do not enable contracting parties to predict, with a sufficient degree of certainty, the legal consequences of entering into the (CESL) contract. From a business perspective, the current CESL rules are not crafted well enough to serve as a *blueprint* for future legislation.

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[133] See above, para 5.3.

[134] See above, para 5.4.2.2.

[135] See above, para 5.4.2.3.

[136] See above, para 5.4.3.3.

It is expected that the CESL rules will be modified and included in a 'digital single market package', which is intended to boost online consumer sales. While drafting this new instrument, we do hope that the EU legislature will take the abovementioned recommendations into account. The Commission already announced its objectives:

> The Commission will put forward clear contractual rules for online sales of both physical goods like shoes or furniture and digital content, like e-books or apps. It will fill in the existing legislative gap at EU level regarding digital content and will harmonise a key set of rules for physical goods. This will create a level-playing field for businesses, allow them to take full advantage of the Digital Single Market and sell with confidence across borders. At the same time, it will boost consumer trust in online purchases. Consumers will have even more solid and effective rights.[137]

The Commission is still as ambitious as the late king Rex. Let us hope that no picket will have to appear before the Brussels palace, carrying a sign that reads: "How can anybody follow a rule that nobody can understand?"

[137] European Commission, Fact sheet, *Who will benefit from a Digital Single Market?* 6 May 2015, http://europa.eu/rapid/press-release_MEMO-15-4920_nl.htm

Part II
Contents and Effects of Contracts: Lessons to Learn from Chapter 7 CESL

Chapter 6
Art. 66–68: The Sources of Contract Terms Under the CESL

Hugh Beale

Abstract This chapter considers at the sources of obligations and duties in contracts that would have been governed by the CESL, and, now that the CESL cannot amount to more than "soft law", in future may help to interpret and develop the rules of whatever instrument is to replace the CESL proposal. It gives an overview of the various sources of terms listed or referred to in Article 66, and refers to other articles of the CESL that are relevant. It then discusses the question of obligations or duties that were not specifically agreed by the parties, with particular reference to Article 68 (Contract terms which may be implied). It is argued that there are many terms which, though not explicitly mentioned by the parties, may be treated as "tacitly agreed" by the parties and which therefore do not have to meet the "necessity" test of Article 68. The chapter ends by considering the issue of "ancillary" obligations and duties, in particular duties to avoid causing harm to the other party (obligations de sécurité, Schutzpflichten) and how the CESL would have interacted with the otherwise applicable law on these topics.

6.1 Introduction

When a lawyer needs to determine the obligations of the parties under a contract that is governed by a law with which the lawyer is familiar, the lawyer will know what to look at. In English law, for example, the lawyer will almost certainly start with what was expressly agreed between the parties, whether in writing or orally. She will then ask what terms were "implied" into the contract, whether by legislation, by custom, or as a matter of common law rules that apply to contracts of the relevant type, or because the term must be implied into the particular contract because without it the contract would be unworkable. No doubt there are approximate equivalents in all legal systems. However, the ways in which the obligations arise are seen, or at least are described, differently in the various laws. So in an

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instrument like the CESL[1] that is designed for use by lawyers from many different traditions, it is useful to set out the sources of obligations as they are conceived in the instrument. Doing this should also be useful to businesspeople and to consumers and their advisors, who may not have a legal training.

As explained in the Introduction, whatever instrument replaces the proposed CESL is likely to cover far fewer topics than did the CESL; and in particular it may give only limited guidance as to how the terms of contracts that fall within its scope are to be ascertained. If instruments are adopted covering the supply of digital products and digital sales of goods (or a single instrument covering both), as recently been proposed by the Commission,[2] it is likely that there will be detailed coverage of the rules on conformity. The provisions will almost certainly cover the obligations that arise without any express agreement between the trader and the customer (as far as digital products are concerned, the Commission's *Questionnaire* that preceded the proposals refers to these as "objective criteria (criteria set by law)"[3]) and may also impose obligations to comply with other requirements of the contract (which are referred to as "subjective criteria (criteria set only by the contract)"[4]). Some other issues, such as failure to supply a digital product and late performance[5] will also be covered. But it is quite possible that the instrument(s) ultimately adopted will refer to ''other obligations under the contract", or use some other general phrase and, at least where those "other obligations" are related to conformity (for example, relate to quantity, which in the CESL was treated as a form of

[1] Proposal for a Regulation on a Common European Sales Law, 11 October 2011 COM(2011) 635 final. The European Law Institute has produced an invaluable critique of the CESL with suggestions of amendments (*Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law*, 2012). In this chapter, the ELI proposals are referred to as "ELI para (00)" or "ELI Art00" as appropriate. Many of its suggestions were taken up by the European Parliament, which adopted an amended version of the CESL (European Parliament legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law, P7_TA-PROV (2014)0159). The amendments to the CESL adopted by the European Parliament are referred to here as "EP Am.00".

[2] *Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content COM(2015) 634 final; Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods COM(2015) 635 final.*

[3] *Questionnaire on Contract Rules for Online Purchases of Digital Content and Tangible Goods*, available at http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm, qu.12.

[4] Ibid. The proposed Directives show that "subjective criteria" include the obligation to ensure that goods are fit for any particular purpose indicated by the customer and accepted by the seller, as this obligation will not arise in every contract; compliance with any other express term is also included in "subjective criteria".

[5] Delay in delivering goods is already covered by the Consumer Rights Directive, art.18. It would be odd not to have EU legislation on the equivalent problem where it is a digital product that is to be supplied.

non-conformity[6]), provide the customer with remedies in the event of non-performance by the trader. In that case, it would at least be arguable that "other obligations" has an autonomous European legal meaning – in other words, that the question of what the parties' "other obligations" are is not a matter for national law but must be determined by European principles. As suggested in the Introduction, the CESL might be particularly valuable as "soft law", a source of guidance and inspiration. For this reason, in this chapter I treat the CESL as a soft law instrument, and speak of it in the present tense, rather than treating it as a failed legislative proposal.

Some of the issues that are dealt with in the CESL are likely to be dealt with also in any replacement instrument. The provisions of the new instrument will then represent the "hard law", and the equivalent CESL provisions will no longer be relevant. It is the rest of the CESL that will serve to interpret and supplement the new instrument. As at the time of writing we do not know either what the new instrument will ultimately be called nor what it will cover, it is not a good idea to make references to it; so in this Chapter I will continue to refer to the CESL provisions. For example, if a new instrument comes into force that deals with issues of conformity and remedies for non-conformity, references in this Chapter to those topics must read as references to the equivalent provisions of the new instrument.

Similarly, any references to mandatory rules of the CESL must be read as referring to whatever rules are made mandatory by the new instrument. If these are different to the rules that were mandatory rules of the CESL, then it is of course the rules of the new instrument that will be relevant, not whether a provision was or was not mandatory under the CESL. A soft law instrument cannot impose make any term mandatory.

6.2 Sources of the Parties' Obligations

In the CESL, the sources of the parties' obligations are listed at the start of Chapter 7, Contents and effects:

> Article 66 Contract Terms
>
> The terms of the contract are derived from:
>
> (a) the agreement of the parties, subject to any mandatory rules of the Common European Sales Law;
> (b) any usage or practice by which parties are bound by virtue of Article 67;
> (c) any rule of the Common European Sales Law which applies in the absence of an agreement of the parties to the contrary; and
> (d) any contract term implied by virtue of Article 68.

[6] CESL art.99(1)(a).

In this chapter I will consider each of these sources in turn. I will concentrate in particular on Article 66 itself and on Articles 67 (Usages and practices) and 68 (Implied terms).[7]

Article 66 refers also to the rules of the CESL that also impose obligations on one or both parties. Some of these are mandatory (see Article 66(a)) and some are "default" rules, ie rules that apply unless the parties have agreed otherwise (see Article 66(c)). So in addition to explaining Articles 66 and 68, we need to refer to a significant number of other Articles.

Many of these other Articles specifically impose obligations on one party or the other: for example, the articles of Chapter 10 deal with the obligations of the seller, those of Chapter 12 with the obligations of the buyer and, for those contracts in which the trader agrees to provide a related service, those of Chapter 15 Sects. 2 and 3 deal with the obligations of the trader as "service provider" and of the buyer as "customer" respectively.[8] Another example is that Article 13(2) creates obligations in relation to information that is provided to comply with the pre-contractual information requirements in a distance or off-premises contract. Other articles of the CESL are in the nature of general gap-fillers. In addition to Article 68, the main examples are Article 2 (Good faith and fair dealing) and Article 3 (Co-operation). The references to these other articles of the CESL will be brief. Most of them fall outside Chapter 7, ie outside "Contents and effects", and detailed consideration of them must be sought in other publications. Article 69 (Contract terms derived from certain pre-contractual statements) is discussed in detail in another paper.[9]

We also need to consider the extent, if any, to which obligations under a contract for which the parties have agreed to use the CESL may be determined by the otherwise-applicable national law. This becomes particularly relevant when we consider the last point in this chapter: how the CESL deals with "ancillary" obligations and duties, in particular duties to avoid causing harm to the other party (*obligations de sécurité, Schutzpflichten*).

6.3 Expressly Agreed Terms

The first source of terms listed in Article 66 is "the agreement of the parties". This refers most obviously to what was agreed expressly. Even in a B2C contract, what was expressly agreed between the parties is probably the natural starting point for

[7] Article 67 (Usages and practices) is considered also in another chapter in this volume: see V Mak 'Contract Interpretation and the Role of 'Trade Usage' in the Proposed Common European Sales Law (CESL)' in this volume.

[8] It is not clear why the parties are re-christened in this way. Possibly the terminology was adopted before it was decided to limit the CESL to related services provided by the same trader as is selling or supplying to the same buyer. See ELI para (29) and ELI Art 2(1). The EP did not adopt this suggestion.

[9] See B Seifert 'Pre-contractual statements under Article 69 CESL – Remake or Revolution?' in this volume.

most lawyers. It is certainly the starting point of the CESL, with its emphasis on freedom of contract. Article 1 (Freedom of contract) provides:

1. Parties are free to conclude a contract and to determine its contents, subject to any applicable mandatory rules.

The reference to "applicable mandatory rules" is a reference to the mandatory rules of the CESL, as the mandatory rules of the law that might apply otherwise (such as the "domestic" or "pre-existing" law of the consumer's habitual residence) on any issue that is within the scope of application of the CESL are displaced by the CESL rules.[10] Mandatory rules of the otherwise-applicable pre-existing national law will still govern issues that are outside the scope of the CESL, such as issues of illegality and immorality, property law and the law of torts.[11]

It should be noted that some issues are within the scope of application of the CESL even though the CESL contains no provision directly on the issue and deals with it in some other way. For example, some Member States have implemented the Unfair Terms in Consumer Contracts Directive, 1993/13/EEC, in such a way that the fairness test applies to any term supplied by the trader, whether or not the term was individually negotiated – or have left in place pre-existing legislation to that effect.[12] In the CESL the controls over unfair terms apply only to terms that were not individually negotiated; there are no controls over individually negotiated terms in consumer contracts (other than under general articles such as Article 51, Unfair exploitation[13]). Control over unfair contract terms is within the scope of application of the CESL. The broader rule in the relevant Member States, even if it is regarded as mandatory for contracts that are governed by the pre-existing national rules, will not apply when the parties have chosen to use the CESL for their contract.

Subject the mandatory rules of the CESL, therefore, the parties are free to agree their own terms on issues that are within the scope of application of the CESL.

The parties' "agreement" is not the same thing as a document that may purport to set out the terms of the contract. First, the agreement may be purely oral. In some cases it may even be possible to derive a term of the contract between the parties from their conduct when making the contract – for example, if a customer negotiating to buy goods on a cross-border shopping expedition is unsure how to ask in the shop-keeper's language whether he may pay by debit card and simply holds up the card, and the shopkeeper nods to show her assent, it will be a term of the contract that the customer may pay by card.

More importantly, even if there is a written document that purports to contain terms of the contract, it may not be exhaustive. Nor indeed will the terms contained in the document necessarily form part of the contract.

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[10] See CESL Recital 12 and Reg Art 11.

[11] See Recital 27.

[12] See H Schulte-Nölke, C Twigg-Flesner and M Ebers, *EC Consumer Law Compendium* (Munich, Sellier, 2007), 226; and, more recently, the UK Consumer Rights Act 2015, s 62.

[13] On the applicability of Art 2, Good faith and fair dealing, to negotiated clauses see below, 6.13.2.

The document may not be exhaustive because the parties may have agreed other terms in addition to what is in the document. Some legal systems have a rule, or at least a legal presumption, that if the parties appear to have agreed to a written statement of the terms of their contract, that there were no other terms adding to, varying or contradicting what is the writing.[14] The CESL contains no such "parol evidence rule". What terms were agreed by the parties is simply a question of fact. Naturally, if after careful negotiation they have signed a detailed contractual document but later on, one party alleges that there was some further term that was omitted, there will be a common-sense presumption that the omitted term cannot have been meant to be part of the contract. It will be no more than a factual presumption, however. If the parties wish to exclude anything that is not written in the document from being a term of the contract, they must agree to that effect. Article 72 (Merger clauses) recognises that the parties to a written contract may agree that the document contains all the contract terms. However a consumer is not bound by a merger clause; and even between businesses, if the clause was merely one of a set of terms supplied by one party and not individually negotiated, it may amount to an unfair term and be unenforceable by the party who supplied it.[15]

The terms in the document may not even form part of the contract if the party who has drawn up the document has not taken sufficient steps to bring the document to the attention of the other party. Under CESL Art 70(1), contract terms supplied by one party and not individually negotiated may be invoked against the other party only if the other party was aware of them, or if the party supplying them took reasonable steps to draw the other party's attention to them, before or when the contract was concluded. Paragraph (2) of Article 70 adds that, in relations between a trader and a consumer, contract terms are not sufficiently brought to the consumer's attention by a mere reference to them in a contract document, even if the consumer signs the document. The implication is that in a B2C contract, terms will form part of the contract if they are contained in a document that the consumer signs, but not if the signed document merely refers to terms in a further document. In B2B contract, it will normally be sufficient to refer to the further document.[16]

6.4 Tacit Agreement of the Parties

The phrase "agreement of the parties" includes more than may have been written or said expressly. There are many everyday contracts where the expressly agreed terms are of a minimal nature and where a great deal depends on tacit agreement.

[14] Eg the "parol evidence rule" of English Law: see H Beale (gen ed), *Chitty on Contracts*, 31st edn (London, Sweet and Maxwell, 2012) (paras 12–096–12–105) (–Guest).

[15] See Chapter 8, especially Articles 79 and 86.

[16] The Feasibility Study (n 1) contained a further provision on "surprising" terms, roughly equivalent to §305c BGB, but it was not included in the CESL proposal. It seems that if the document to which the other party's attention was drawn nonetheless contains a term that the other party would not reasonably expect, the issue will now have to be dealt with under the general provision on unfair terms in Chapter 8 of the CESL.

What is obviously understood although it is not stated is part of the agreement. For example: A, who lives in Flanders, telephones B, a newsagent in Maastricht, and orders a single copy of a monthly Dutch-language magazine. Only the name of the magazine may be spoken but there will normally be a tacit agreement that the magazine to be supplied will be the current issue, not last month's issue.[17]

There is tacit agreement on a term whenever any reasonable party would say the term was so obvious that it was simply taken for granted.

In some legal systems, such "obvious" terms are regarded as "implied".[18] Under the CESL, Article 68 (Contract terms which may be implied) is aimed rather at terms to cover unusual situations which the parties had failed to consider at all. The test of whether a term should be implied under Article 68 is not whether it was "obvious" but whether it is "necessary"; a term which the reasonable bystander would think was obviously meant to be included may not be strictly necessary. That said, in the case of an "obvious term" it will make little practical difference whether the term is treated as part of the agreement under Article 66(a) or as an implied term under Article 68.

Deciding what terms were tacitly agreed is essentially a process of interpretation. Regard may be had to any relevant circumstances. Chapter 6, and in particular Article 59 (Relevant matters), may provide some guidance here. The factors mentioned in Article 59 include the circumstances in which the contract was concluded; the conduct of the parties; the interpretation which has already been given by the parties to expressions which are identical to or similar to those used in the contract; the practices the parties have established between themselves; usages which would be considered generally applicable by parties in the same situation; the nature and purpose of the contract; the meaning commonly given to expressions in the branch of activity concerned; and good faith and fair dealing.

6.5 Usages and Practices

The next source of terms mentioned in Article 66, letter (b), is usages and practices by which the parties are bound under Article 67. Article 67 provides:

> Usages and Practices in Contracts Between Traders
>
> 1. In a contract between traders, the parties are bound by any usage which they have agreed should be applicable and by any practice they have established between themselves.
> 2. The parties are bound by a usage which would be considered generally applicable by traders in the same situation as the parties.
> 3. Usages and practices do not bind the parties to the extent to which they conflict with contract terms which have been individually negotiated or any mandatory rules of the Common European Sales Law.

[17] Cf DCFR Art II.-9:101 Comment C.

[18] For example, under the "officious bystander" test used in English law: see *Shirlaw v Southern Foundries (1926) Ltd* [1939] 2 KB 206, 227 (aff'd [1940] AC 701).

6.5.1 Usages and Practices in General

A usage may be described as a course of dealing or line of conduct which is, and for a certain period of time has been, generally adopted by those engaged in a trade or other activity.[19] A practice which the parties have established between themselves will arise as a result of a sequence of previous conduct in relation to a particular transaction or transactions of a particular kind between the parties. It is established when their conduct may fairly be regarded giving rise to as a common understanding. The parties' conduct may not only lend a special meaning to words and expressions which they use between themselves but may also create rights and obligations.

6.5.2 Agreed Usages

If parties who are traders agree that a particular usage should apply to their contract, the usage will form part of the contractual terms, even though the parties do not identify the requirements of the usage or set it out in detail and even though the usage would not otherwise apply to these parties. For example: Trader A, based in Paris, agrees to buy 1000 frozen rabbits from trader B, based in Rome. The price agreed is a lump sum of £3000. The parties agree that the usages of the London meat market should apply. One of those usages is that a buyer who buys "1000" rabbits will be given 200 extra at no additional charge. B is obliged to deliver 1200 rabbits for the price agreed.

6.5.3 Practice Established Between the Parties

A practice established between the parties may vary their initial agreement, and it may create other mutual rights and obligations between them. For example: Having been called a couple of times to fill A's oil tank, B, on the basis of information received regarding A's consumption, has filled the tank for more than 5 years without having been called. B has seen to it that A, whose factory is dependent on the oil, never runs out of oil. A has always paid B close to but not later than 90 days after receipt of the oil. In this case, the initial agreement between the parties that B should only fill the tank when called upon has been changed by their practice; an obligation on B to see to it that the tank never runs out of oil has been created. Also, although never expressly agreed upon, a practice between the parties extending to a credit of not more than 90 days after receipt has been established between them.[20]

[19] See DCFR II.-1:104, Comment A.

[20] See DCFR II.-1:104, Comment D.

6.5.4 Usages Applicable Without Express Agreement

A usage may operate without having been agreed upon by the parties (provided that the parties have not agreed, expressly or by implication, to exclude it). For such a usage to be binding, paragraph (2) of Article 67 requires that it is one which would be considered applicable by persons in the same situation as the parties. The usage must be so well established and have such general application among those engaged in the trade or activity that persons in the same situation as the parties would consider it applicable. This will depend on whether the parties' contract falls within the trade or trades in which the usage applies, and whether it applies to cross-border contracts. The usage may apply to cross-border contracts either because it is recognised as applying in cross-border trade, or because it operates in the states of both the parties (and is considered applicable to cross-border contracts as well as domestic contracts).[21]

A local or national usage which operates at the place of business of one of the parties but not at that of the other party can only bind the latter if reasonable traders in the same situation would consider it binding. A trader who "comes into" the other party's market will often be bound by the local usages. For example: A in Brussels sends an order to B, a corn broker in Rotterdam, to be executed on the Rotterdam Corn Exchange. A is ignorant of exchange transactions and has no knowledge of the usages of the Rotterdam Exchange, though they are generally accepted by all traders using that market. A did not intend to submit to these usages. Nevertheless the order is to be executed in accordance with the usages of the Rotterdam Corn Exchange.[22]

6.5.5 Usages and the Other Terms of the Contract

A usage is a kind of default term, but one which is supplied by trade custom rather than by the CESL. It follows that a usage will only apply to the extent that it is consistent with what the parties have negotiated. So Article 67(3) provides that a usage will not bind them to the extent that the practice is inconsistent with an individually negotiated term. For example: on the facts of the previous example, if the usages of the Rotterdam Corn Exchange require the buyer to pay the price within 2 h of the sale taking place, the buyer must pay within 2 hours; but if the parties have negotiated a longer settlement period, the 2-h payment usage will not apply.

Similarly, in case of a conflict between a practice between the parties and a usage not agreed upon by the parties, the practice (which as stated above represents an agreement between the parties) will take precedence over the usage.

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[21] See DCFR II.-1:104, Comment E.

[22] Ibid.

A usage will not necessarily be overridden by a term that was not individually negotiated. Traders will often not sign up to such terms without realising that they contradict or exclude a usage that otherwise should apply. In this case, Article 67(3) does not provide for the usage to be displaced by the term.

There are two possible interpretations of Article 67(3). One is that, to the extent that they conflict, the usage will prevail over the non-negotiated term in any event. The other interpretation is that it is for the court to evaluate whether, or to what extent, the parties intended the non-individually-negotiated terms to replace the usage. Thus if in the last example the contract was made on the buyer's standard terms which provide for payment only after 7 days, it is for the court to decide which is to prevail, the 2-h usage or the non-negotiated period of 7 days.

I must say that neither solution seems sound to me. I think Article 67(3) is a mistake. It would be perfectly normal for a party's standard terms to exclude a particular usage, or usages generally, just as they may exclude default rules supplied by the CESL. Why is exclusion of a usage ineffective, while excluding a default rule of the CESL is effective? A term that excludes the CESL default rule can be challenged as unfair under Article 86; the same ought to apply to usages, but on the first interpretation, Article 67(3) simply overrides the exclusion. On the other interpretation the court has to work out which the parties meant, a task that I suspect will be very difficult and will give rise to significant uncertainty.[23]

6.5.6 Practices and the Other Terms of the Contract

Practices which have been established between the parties are in effect a kind of agreement by conduct. If for the particular contract the parties have negotiated a term that is inconsistent with their previous practice, it is to be assumed that the previous practice is not to form part of the new contract. Therefore Article 67(3) provides that an established practice between the parties will not bind them to the extent that the practice is inconsistent with an individually negotiated term.

The same cannot be said when the inconsistent term was merely part of terms supplied by one party and was not individually negotiated. It will be very common for the parties simply to sign a standard form to signify that they have a new contract without intending that the "small print" should displace their previous practice. Again the correct interpretation of this article is not clear: does an agreed practice always override a non-negotiated term to the contrary, or in this case also it is for

[23] I note that the ELI also would say that "Usages and practices do not bind the parties to the extent to which they conflict with the agreement of the parties…", ie if they conflict with any term, not just if they conflict with the individually negotiated terms (ELI Art 65(3)). The justification offered by the ELI (p 192) refers only to individually negotiated terms, so they give no reason for excluding usages that are contrary to non-individually negotiated terms. EP Amendment 138 adopts the ELI's amendment.

the court to evaluate whether, or to what extent, the parties intended the non-individually-negotiated terms to replace their practice?[24]

6.5.7 Usages, Practices and Consumer Contracts

Usages and established practices between the parties only give rise directly to a term in contracts between traders. In a consumer contract, the trader who wishes to follow a usage or previous practice must obtain the consumer's explicit agreement to it, preferably by setting out the term in a durable medium. (If the usage or practice affects matters covered by the information requirements of Articles 13, 18 or 19, this will be required in any event.)

However, what has been agreed by the parties may be interpreted in the light of usages, and of practices established between the parties. Thus if a usage is so well-known that any reasonable party would say that it was simply taken for granted, there is tacit agreement on a term that in effect incorporates the usage.

6.6 Implied Terms

It is convenient to deal next with implied terms, since these are dealt with within Chapter 7, Contents and effects. They are listed as a source of terms in Article 66(d). Under the CESL, the only terms that are stated to be implied are those covered by Article 68:

> Contract Terms Which May Be Implied
>
> 1. Where it is necessary to provide for a matter which is not explicitly regulated by the agreement of the parties, any usage or practice or any rule of the Common European Sales Law, an additional contract term may be implied, having regard in particular to:
>
>   (a) the nature and purpose of the contract;
>   (b) the circumstances in which the contract was concluded; and
>   (c) good faith and fair dealing.
>
> 2. Any contract term implied under paragraph 1 is, as far as possible, to be such as to give effect to what the parties would probably have agreed, had they provided for the matter.
> 3. Paragraph 1 does not apply if the parties have deliberately left a matter unregulated, accepting that one or other party would bear the risk.

[24] The rule as it applies to practices seems less problematic than the rule for usages, because at least the practice is a kind of agreement. But I am not convinced that it is a sound rule. Again I think the better solution would be to say that established practice applies only if it is consistent with any term. If a non-negotiated term excludes or limits established practices in a way that takes the other party by surprise, the term can be challenged under Art 86.

6.6.1 Filling Gaps

Even when all the possible sources of terms listed in paragraphs (a)-(c) of Article 66 are taken into account, there may be cases where there is an obvious gap in the contract. There may be some matter which the parties simply did not foresee or provide for and where it would be unrealistic to assert that there was any tacit agreement, and there may be no rule of the CESL, nor any applicable usage or practice, to provide a solution. In such circumstances Article 68 allows a court to imply an additional term, though only if it is necessary to do so, given the nature and purpose of the contract, the circumstances in which it was concluded and the requirements of good faith and fair dealing. The same factors must also be taken into account in determining what term should be implied.

Ultimately, the decision may have to be decided by a court or arbitrator. This does not, of course, mean that the parties have to resort to litigation to resolve every unforeseen contingency. It is always open to them to agree to settle a dispute (no doubt taking into account what a court or arbitrator would probably decide) or, if their contract is on-going, to modify or supplement its terms by agreement.

6.6.2 Nature of Implied Term

An implied term may be of any type that is necessary. It may be an obligation, or a qualification of one of the express terms, or a condition of the contract continuing. For example: Art dealer A in Brussels agrees to sell a tapestry to Art dealer B in London. Neither party was aware that, because of the age and rarity of the tapestry, an export license would be required. When he discovers the position, A applies for a license but it is refused. A nonetheless insists that B must pay the full price of the tapestry. It is an implied term of the contract that it is subject to an export license being granted, and when the licence is refused, the contract ceases to bind the parties.

It will be rare for Article 68 to apply. This is for two reasons.

First, the CESL applies only to contracts of sale and related services. Even if the parties have not made a detailed agreement, the articles of the CESL provide rules that cover most situations that are likely to occur and that fall within the scope of the CESL. No term should be implied under Article 68 if the matter is already regulated by a term derived from any of the sources mentioned in paragraphs (a)–(c) of Article 66.

Secondly, because of the danger of giving courts and arbitrators too much power to rewrite contracts according to their own ideas of what the parties should have provided, Article 68 limits implied terms to cases where it is necessary to provide for a matter which is not otherwise regulated. The word “necessary” indicates that a term should only be implied if it is really needed. A term should not be implied merely to “improve” the operation of the contract. The additional term must be

necessary, having regard in particular to the factors mentioned in letters (a)–(c) of paragraph (1). One criterion will be whether the contract would be workable without the term. If it would not be, then a term should be implied to make it workable. Workability is not an exclusive criterion, however. There may be cases where the contract as a whole would be workable after a fashion without the additional term but where some particular aspect of it is unregulated and where the lack of regulation would produce results that were inconsistent with the nature and purpose of the contract, or cause such a gross distortion in the balance of the contract as to render results that are incompatible with good faith and fair dealing. In such cases it is necessary to imply a term. But the term implied should only go so far as is necessary to cure the problem.[25]

Article 68 then sets out factors that are likely to be particularly relevant to deciding what term, if any, should be implied. The words "having regard … to" imply that the matters listed are not intended to be applied in any hierarchical order.

6.6.3 The Nature and Purpose of the Contract

The reference to the nature and purpose of the contract allows consideration to be given to how the contract can best be carried out if there are gaps in the terms agreed by the parties or supplied by the law or by usages and practices. For example: C, an art dealer in the UK, buys an antique statue from art dealer D in Rome, who agrees to deliver the statue to the UK. C informs D that he will be reselling the statue to a wealthy collector. Under Italian law statues of such an age cannot be exported without an export license. As agreed, D applies for such a license but it is refused because D negligently fails to provide all the information the authorities require about the provenance of the statue. As a result, the statue cannot be delivered and C loses the substantial profit he would have made on the resale. It is an implied term of the contract that D should make a proper application for the license, and D is liable to C for the loss caused by the failure to do so.

6.6.4 The Circumstances in Which the Contract Was Concluded

The circumstances in which the contract was concluded, including the negotiations, may provide a good indication of what the parties would probably have agreed had they foreseen and provided for the contingency which has arisen.

[25] cf DCFR II.-9:101, Comment G.

6.6.5 Good Faith and Fair Dealing

The reference to the requirements of good faith and fair dealing requires an objective examination of what good faith and fair dealing would require. If the matter which has not been provided for would pose an unacceptable risk for one party unless a term is implied to give that party some protection, a suitable term may be implied.[26]

6.6.6 The Probable Intention of the Parties

Paragraph (2) of Article 68 provides that any term implied under paragraph (1) should, where possible, be such as the parties, had they provided for the matter, would probably have agreed. In some cases there may be evidence which would enable the probable agreement of the parties to be determined with some confidence. For example, the parties may have consistently rejected one type of solution and consistently opted for another type of solution in relation to a range of foreseen problems. In such circumstances it might be reasonable to conclude that they would probably have applied the same approach to an unforeseen problem. In other cases the assessment of what the parties would probably have agreed will have to be based on more general considerations. For example, it would usually be justifiable to assume that the parties would have wished the contract to be carried out in a way which is fair, reasonable and practicable. The words "as far as possible" are inserted to provide for the situation where it is not possible to reach any conclusion about what the parties would probably have agreed within a range of fair, reasonable and practicable solutions but where it is still necessary to imply an additional term to give effect to the contract.[27]

6.6.7 Matters Deliberately Left Unprovided For

Paragraph (3) of Article 68 deals with the situation where the parties have foreseen a contingency and have deliberately left it unprovided for, accepting the risks and consequences of so doing. The principle of autonomy of the parties means that it must be open to the parties to do this if they wish. The consequences will normally be that, in the absence of an express or implied term, any loss will lie where it falls. This situation should be contrasted with the situation where the parties foresee a

[26] I note that the ELI would delete this (ELI Art 67(1)). No reason is given; presumably the ELI thinks the paragraph is redundant.

[27] cf DCFR II.-9:101, Comment K. I note that EP Am.138 would add "had they provided for the matter" to the text. The change seems to make little difference.

situation but either they think it will not materialise or they "forget" to regulate it, without intending to accept the risks.[28]

6.7 A Hierarchy in the Sources of Terms

When Articles 67 and 68 are taken into account, it becomes clear that the sources of terms listed in Article 66 form a hierarchy. At the top, the mandatory rules of the CESL will always apply. Next in the hierarchy are the terms expressly agreed. Then comes what was tacitly agreed (since what was agreed tacitly must be subject to what was agreed expressly.) If the parties are traders, they may be bound by usages they have agreed and practices they have established between themselves (see Article 67). Generally-applicable usages may also apply. However, an established practice or a usage will apply only so far as is consistent with the individually-negotiated terms, see Article 68(3) below. "Default" rules of the CESL (see Article 66(c)) will apply only so far as they are not excluded by what was agreed by the parties (whether or not the relevant agreement was individually negotiated) or by an applicable usage or practice. Terms are to be implied under Article 68 only so far as none of the other sources cover the relevant issue, and so implied terms are the lowest item in the hierarchy.

6.8 Default Rules of the CESL

I have left the third source of terms listed in Article 66 until last, even though it ranks higher in the hierarchy than the implied terms considered above, simply because it requires consideration of a significant number of provisions that are to be found throughout the CESL. It seems sensible to divide them into groups according to their content. Some are very obvious, others less so.

6.9 The Principal Obligations of Seller and Buyer

The principal obligations of the seller are set out in Chapter 10. They are summarised in Article 90:

> Main Obligations of the Seller
> The seller of goods or the supplier of digital content (in this part referred to as 'the seller') must:

[28] cf DCFR II.-9:101, Comment L.

(a) deliver the goods or supply the digital content;
(b) transfer the ownership of the goods, including the tangible medium on which the digital content is supplied;
(c) ensure that the goods or the digital content are in conformity with the contract;
(d) ensure that the buyer has the right to use the digital content in accordance with the contract; and
(e) deliver such documents representing or relating to the goods or documents relating to the digital content as may be required by the contract.

The articles that follow provide details: for example, Articles 93–95 deal respectively with the place, manner and time for delivery and Articles 99–105 set out the precise requirements as to conformity of the goods or digital content. This is not the place to discuss these Articles in detail.

Similarly, the buyer's obligations, which are dealt with in Chapter 12, are summarised in Article 123:

Main Obligations of the Buyer

1. The buyer must:

   (a) pay the price;
   (b) take delivery of the goods or the digital content; and
   (c) take over documents representing or relating to the goods or documents relating to digital content as may be required by the contract.

2. Point (a) of paragraph 1 does not apply to contracts for the supply of digital content where the digital content is not supplied in exchange for the payment of a price.

6.10 Obligations Where Trader Provides a Related Service

The CESL may be used where the trader, in addition to agreeing to sell goods or supply digital content to the buyer, also undertakes to supply a "related service", provided that the related service is agreed either in the same contract or in a separate contract that is entered into between the same parties at the same time.[29] "Related service" is rather narrowly defined:

'related service' means any service related to goods or digital content, such as installation, maintenance, repair or any other processing…
… it excludes:

(i) transport services,
(ii) training services,
(iii) telecommunications support services; and
(iv) financial services;

It is not quite clear why "related service" is defined so narrowly: why, for example, should the CESL not apply if the trader agrees to provide training in use of the goods or digital content, or a telephone helpline? It is true that the services that are treated as related – installation, maintenance, repair or any other processing – all

[29] See the closing words of Reg Art 2(m).

involve doing something to the goods or digital content, rather than merely providing advice or assistance, but the distinction seems more conceptual than practical. Meanwhile, it is not wholly clear whether other activities that involve handling the goods in some way are covered. What if the seller agrees to store the goods? Moreover, how can it be said that transport services are excluded when several articles of the CESL clearly require the seller either to bring the goods to the buyer[30] or to arrange for them to be transported to the buyer or some other destination?[31]

These questions would not matter so much if the CESL could still be used for a contract that involved obligations not covered by the CESL – the obligations not covered by the CESL could simply be dealt with under the otherwise applicable law. But that is not the case. Reg.Art 6 (Exclusion of mixed purpose contracts…) provides that the CESL "may not be used" for contracts that include other elements outside the definition of "related service". This provision has been strongly criticised[32] and it is fervently to be hoped that it will not be replicated in any future instrument.

Be that as it may, if the trader has agreed to provide a related service, the relevant obligations of the service provider (ie the trader) and of the customer (ie the buyer) are set out in Chapter 15, in Articles 148–152 and 153–154 respectively.

6.11 Other Specific Obligations

There are a number of Articles outside Chapters 10, 12 and 15 that also impose specific, primary obligations on the trader. One example is Article 69 (Contracts derived from certain pre-contractual statements), which is the subject of a separate chapter in this collection.[33] It can be said that Article 69 is actually "incorporated by reference" into Chapter 10, since one of the requirements for conformity set out in Article 100 is that the goods or digital content must

> (f) possess the qualities and performance capabilities indicated in any pre-contractual statement which forms part of the contract terms by virtue of Article 69.

However, there is at least one other Article that is not referred to in Chapter 10 but which is a source of primary obligations related to the goods or digital content.

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[30] Eg Article 93 (Place of delivery), which states that in the case of a distance or off-premises contract, the "default" place of delivery is the consumer's residence.

[31] Eg Article 96 (Seller's obligations regarding carriage of the goods). Probably it is only "free-standing" contracts for the transport of goods by the seller that are excluded by Reg. Art 2(m). Thus the CESL cannot be used if the parties agree that the seller will deliver the goods at a certain place (for example, by making them available to the buyer at the seller's shop or at the seller's works, so that delivery is to take place there and the risk is to pass to the buyer at that point), and then the seller is subsequently to transport them, or to arrange for their transport under its responsibility. In practice such an arrangement is very unlikely.

[32] See ELI paras (17)-(21) and ELI Art 6. See also EP Ams 64–68, to similar effect.

[33] See Seifert (n 4).

This is Article 13 (Duty to provide information when concluding a distance or off-premises contract). This sets out the trader's duty to provide the consumer with a long list of information, with further details being provided in Articles 14–17; and then, like the Consumer Rights Directive from which these Articles are directly taken, Article 13 provides that:

> The information provided, except for the addresses required by point (c) of paragraph 1, forms an integral part of the contract and shall not be altered unless the parties expressly agree otherwise.[34]

The effect of this provision (and likewise of the equivalent provision of the CRD) is not entirely clear. The most likely interpretation seems to be as follows:

(i) In some cases the effect of Article 13(2) is that the information given simply adds to, or displaces (or overrides), what was provided in the trader's terms. The simplest example is provided by Article 13(1)(b), which requires the trader to state the total price and additional charges and costs (the detailed requirements are set out in Article 14). In this case, the CESL provides expressly in Article 29(2) that the consumer does not have to pay the additional charges: so the information simply displaces whatever may be stated in the trader's terms.

(ii) Statements about the main characteristics of the goods, digital content or related services made in order to comply with Article 13(1)(a) will form "an integral part of the contract". That seems to mean that there is a contractual obligation on the part of the trader to deliver goods that meet what was said about them. In practice, however, this will add very little if anything to the trader's obligations or the consumer's rights. Article 69 provides that, where the trader states the characteristics of the goods, the statement is incorporated as a term of the contract (unless the consumer knew it could not be relied on or could not have been influenced by it: see sub-paragraphs (a) and (b).) If the statement turns out to be incorrect, the goods, digital content or related service will not conform to the contract (see Article 100(f)). The consumer will then have the normal range of remedies for non-performance, including the right to demand repair or replacement (see Article 106). The same will apply if the trader's statement has the result that the goods do not conform to the contract under Article 99 (eg because they are not of the description required by the contract) or Article 100 (eg because they are not of the quality that the buyer reasonably expected, see Article 100(g)). The consumer will be entitled to terminate unless the non-conformity is insignificant (see Article 114(2)) and without giving the seller the opportunity to cure (see Article 106(3)). In either of these situations, although Article 13(2) applies (the information was not correct and so the consumer would be entitled to a remedy for non-performance), it gives the consumer less strong rights than he already has (eg the consumer has a wider right of termination for non-conformity than for other kinds of

[34] Article 13(2), following CRD Art 6(5).

non-performance, see Article 114) and so Art 13(2) is not of practical importance in case (ii).

(iii) Article 13 also requires the trader to give information that neither adds to (or displaces a provision of) the contract, nor goes to the question of conformity. Examples are information about after-sale services, about commercial guarantees provided by third parties and about ADR. Under Article 13(2) the consumer may again have a remedy for non-performance. However, it is likely that there are both conditions of liability (that the information was in correct at the time) and practical limitations on remedies for non-performance in such cases. The reason for thinking this is that the trader is frequently giving information about matters that are outside the trader's control.

Take for example a trader who states that the manufacturer of the goods provides an after-sales service. Will the trader be responsible if the manufacturer subsequently discontinues the service? To interpret Article 13 so as to make the trader responsible for ensuring the continuing correctness of the information would turn every statement that an after-sales service is available into a promise that one will exist for the future. The effect would be to turn the statement into a contract by the trader to ensure that repair is provided on demand. That cannot be the correct interpretation of Article 6(5) of the CRD or of Article 13(2) of the CESL. The correct interpretation appears to be that the trader is liable under Article 13(2) only if the trader's statement was untrue at the time it was made.

It follows that a trader who states that it provides its own after-sales service, and who at the time does indeed provide such a service, but who subsequently decides to discontinue it, will not be in beach of its duty under Article 13(1) and will not be responsible under Article 13(2). An undertaking that a fact was true when stated is not an undertaking that it will remain true for the future. The trader could of course itself give such an undertaking; and a statement by the trader that its own after-sales service is available might be interpreted as a promise to provide one, if that is how the average consumer would reasonably understand the trader's statement. But that follows from the general rules of interpretation; it is not a result of Article 13(2).

It is true that Article 13(2), like Art 6(5) CRD, provides that the information "shall not be altered unless the parties agree expressly otherwise." This appears merely to prevent two things: (1) to prevent the trader from relying on a term in the contract that purports to permit obligations arising from pre-contractual information being changed unilaterally; and (2) to prevent the trader who has subsequently told the consumer that the information was given from arguing that the consumer has given up, waived or lost its rights by taking delivery of the goods or some such conduct. Any subsequent change to the terms of the contract must be expressly agreed by the consumer. The words do not turn the statement of fact into a promise for the future.

As to the remedies: Even if the trader has given information that was incorrect, so that Article 13(2) applies and there is a non-performance of the contract, that does not necessarily mean that the consumer can require the trader to perform as if the information were true. That is the effect in cases that fall within (i) and (ii)

above, but not in the cases under discussion under sub-heading (iii). For example, if the trader gives the consumer the information that goods are covered by a manufacturer's guarantee when that is not in fact the case, the trader cannot be required to provide a manufacturer's guarantee: it would be impossible for the trader to do so. So the consumer's remedy will be to terminate the contract if the non-performance by the trader was fundamental (see Article 114(1)), or to claim a reduction in price, and to claim damages for any further loss.

Moreover, it follows from the fact that the trader will not be liable if the information becomes untrue only after the contract was made, that the damages are to put the consumer into the same position as if the information had been correct at the time, not the position the consumer would have been in if the information had remained correct. In other words, Article 13(2) does not have the effect of turning every piece of information given by the trader in compliance with Article 13 into a contractual undertaking to provide the service or other feature that the trader had said existed when the contract was made.

It follows that Article 13 is a further source of contractual terms. But the terms that arise as a result of Article 13 vary in nature. Sometimes they replace the terms that would otherwise apply (case (i) above); sometimes they give rise to contractual guarantees that the information given was correct (case (iii) above). Where they relate to the main characteristics of the goods (case (ii) above), the terms arising as a result of Article 13(2) seem in theory to add additional obligations to deliver goods that conform to the information, but in practice these terms add nothing to what is found elsewhere in the CESL.

6.12 Secondary Obligations

I referred in the last section to specific, "primary" obligations. The CESL also provides remedies for non-performance and in other cases, such as when the contract is avoided under one of the provisions of Chapter 5 (Defects in consent). Thus the party who has failed to perform may be liable in damages under Chapter 16 (unless the non-performance was excused under Article 88 (Excused non-performance)); and each party may have to make restitution of benefits received under Chapter 17. It is quite common to think of liability to pay damages or to make restitution as also being a form of obligation, though usually they would be qualified as "secondary obligations" that arise because of non-performance or termination of the primary obligations. Similarly, one party may come under an obligation when the other has not performed: for example a seller who is left in possession of the goods or the digital content because the buyer, when bound to do so, has failed to take delivery must take reasonable steps to protect and preserve them.[35] This also may be regarded as a secondary obligation, or perhaps as an "ancillary obligation".[36] However, it

[35] Art 97(1).

[36] On ancillary obligations see also the last section of this chapter.

would be unusual to think of either the obligation to pay damages, or the obligation to take care of goods that the buyer has failed to accept, as "a term of the contract" within the meaning of Article 66, and such provisions will not be considered further in this chapter.[37]

6.13 General Provisions

The last source of contractual terms arising under the CESL are the "general clauses" contained in Chapter 1. There are two: Article 2 (Good faith and fair dealing) and Article 3 (Co-operation).

6.13.1 Co-operation

Article 3 seems quite straightforward:

> The parties are obliged to co-operate with each other to the extent that this can be expected for the performance of their contractual obligations.

The obligation to co-operate becomes a term of the contract, unless the parties have agreed to exclude it – it is not one of the mandatory rules of the CESL. It therefore falls squarely within Article 66(c), a "rule of the Common European Sales Law which applies in the absence of an agreement of the parties to the contrary". Failure to perform the obligation to co-operate has the same effects as failure to perform any other contractual obligation and attracts the various remedies prescribed for non-performance of a contractual obligation. These remedies include specific performance. So, for example, if the trader (the "service provider") needs access to the buyer's ("customer's") land in order to perform a related service and if the customer refuses access for no good reason, the service provider could (if it so wished) obtain a court order compelling the customer to grant access. It should be noted, however, that there are general restrictions on the remedy of specific performance that could be particularly relevant in relation to the obligation to co-operate. For example, a person could not be forced to accept services or work of a personal character.

[37] It is unclear whether the CESL provisions apply to performance of secondary obligations. For example, if damages are payable, does the CESL apply? Article 90 (Extended application of rules on payment and on digital content not accepted) might suggest that Articles 124 (Means of Payment) and 125 (Place of payment) must be applied with appropriate adaptations to the damages. Or is the payment of damages governed by the otherwise applicable law, eg the law of the forum? There does not seem to be a ready answer to this question.

6.13.2 Good Faith and Fair Dealing

Article 2 is a more difficult provision to explain and, indeed, to interpret. It provides:

> Good Faith and Fair Dealing
>
> 1. Each party has a duty to act in accordance with good faith and fair dealing.
> 2. Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other party.
> 3. The parties may not exclude the application of this Article or derogate from or vary its effects.

The first question, though perhaps a somewhat theoretical one, is whether good faith and fair dealing is a term of the contract at all. First, it does not seem to fit any of the sources of terms listed in Article 66 – it is a mandatory rule of the CESL (see paragraph (3)) and the only reference in Article 66 to mandatory rules is to say that the express terms cannot contradict them.[38] Secondly, Article 2 imposes a duty, not an obligation. This means that a party cannot be required to perform in the way dictated by good faith and fair dealing; at most, the remedies provided in paragraph (2) will be available. So the legal consequence of breach of the duty of good faith and fair dealing may be, depending on the circumstances, loss of the possibility to rely on a certain right, remedy or defence, and/or liability in damages. We would not think of the information and other duties that arise under Chapter 2 as giving rise to the terms of the contract: if they are broken the remedy is damages, and possibly avoidance of the contract.[39] Nor would we normally think of the duty of transparency imposed a party who supplies terms for a contract to a consumer[40] as a term of the contract.

However, perhaps the duty of good faith and fair dealing should be regarded as giving rise to a term of the contract, for three reasons. First, whereas in many laws the duty of good faith and fair dealing can apply even during negotiations that do not result in a contract, the CESL can apply only if the parties have reached an agreement. Secondly, whereas the other duties have to be performed before or at the moment the contract is concluded, the duty of good faith applies throughout the life of the contract. In other words, Article 2 covers good faith in performance as well as in formation (provided a contract has in fact been formed). And thirdly, there are terms of the contract which, if not performed, do not give rise to the normal remedies for non-performance – see the discussion of Article 13(2) above.

However, it seems to make little practical difference whether the duty of good faith and fair dealing is to be regarded as a term of the contract or not. Whatever the answer, each party is bound by the duty; it cannot be excluded or reduced; and it gives rise to remedies stated above.

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[38] Art 66(a).

[39] See Arts 28 and 29.

[40] See Art 82.

What is more important, I suggest, is to concentrate on the role of good faith and fair dealing under the CESL.

A preliminary point is that Article 2 is not intended as a "gap-filler" or "expansion joint" that will enable a court to develop rules to cover situations that fall within the scope of the CESL but on which there appears to be a lacuna, whether because the matter was omitted by accident or because there has been some development that was not contemplated by the CESL. It is well known that the German courts, for example, used §242 BGB to develop rules such as "positive breach of contract" and controls over non-negotiated terms. That Article 2 of the CESL is not to have this function is shown simply by the fact that there is another provision, Article 4(2), which allows for developments of this kind:

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

This is not the place to explore the difficult question of whether the fact that the CESL does not contain a provision on an issue that is within the scope of the CESL is a lacuna that should be filled "in accordance with the objectives and the principles underlying" the CESL, or was a deliberate policy choice that matter should be left to the parties.[41]

Secondly, it is clear that the duty of good faith and fair dealing under Article 2 is to have a somewhat wider role than was envisaged by the equivalent provision of the DCFR – but not how much wider. DCFR III.-1:103 stipulated that

> (3) Breach of the duty does not give rise directly to the remedies for non-performance of an obligation but may preclude the person in breach from exercising or relying on a right, remedy or defence which that person would otherwise have.

In other words, there was no provision for damages to be awarded for breach of the duty. In the DCFR, therefore, it was made clear that good faith and fair dealing might exclude certain types of behaviour,[42] and prevent a party who had broken the duty from exercising rights he might otherwise have,[43] but it could not give rise to a duty, let alone an obligation, to do anything.

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[41] For example, the CESL does not provide any controls over terms that were individually negotiated between the parties, even if the term may appear to be unfair. First, it is submitted that controls over unfair terms in contracts using the CESL is a matter that is within the scope of application of the CESL, and thus any controls that might apply under the otherwise-applicable law will be displaced by the CESL. (On this see M Storme 'The young and the restless: CESL and the Rest of Member State Law' 23(2) *ERPL 217 (2015).*) Secondly, it is submitted that the absence of controls over individually negotiated terms was a deliberate policy choice, not a lacuna, so courts should not develop controls on the basis of Article 4(2).

[42] Cf R Summers, 'The conceptualisation of good faith in American contract law: a general account' in R Zimmermann and S Whittaker (eds), *Good Faith in European Contract Law* (Cambridge, CUP, 2000) 118, esp. at 125–129.

[43] In other words it was a form of *Obliegenheit*.

What difference is made by the closing words of Article 2(2) of the CESL, "or may make the party liable for any loss thereby caused to the other party"? Article 2 still cannot impose an obligation – that much is clear from the fact that Article 2 speaks only of a "duty" to act in accordance with good faith and fair dealing. However, there seem to be two possible ways to interpret the provision.

One way to interpret the provision is to say that damages should only be awarded as an alternative to precluding a party from exercising a right when damages would be more appropriate. For example: Trader A sells goods to consumer B. The goods do not conform to the contract. B demands that the seller repairs the non-conforming goods. When the seller comes to repair them, B might be precluded from turning the seller away at the door on the ground that the B has changed his mind and now demands replacement. Alternatively the court might allow B to claim replacement if B compensates the seller for the wasted trip to try to repair the goods.

The alternative interpretation is that under Article 2, damages may be awarded if a party fails to take positive steps that are required by good faith and fair dealing. For example: CESL Article 14(3), which replicates CRD Article 6(1)(f), requires the trader to inform the consumer of the cost when this is at more than the basic rate, eg the consumer has to call the trader by telephone on a "premium rate" number. It does not matter whether it is the trader or a third party who will benefit from the premium: the consumer must be told. Article 14(3) does not, however, require that this information be given at the outset of the call; it suffices that the consumer is told before the contract is concluded or the consumer is bound by an offer. By that stage the consumer might have run up a considerable bill. However, for the trader deliberately to delay giving this information until the last moment would be contrary to good faith and fair dealing. The trader would be unable to claim the extra charge or, if the charge was payable to a third party, would have to pay damages to the consumer under Article 2(2).

The third point is that Article 2 is to play a residual role only. The general duty of good faith and fair dealing is not meant to undermine limitations to remedies or relief specifically dealt with elsewhere in the CESL (eg in the case of change of circumstances, in Art 89). Although some will regard this as the obvious result of the *lex specialis* principle that is stated in Article 4(3) of the CESL, the idea is nevertheless spelled out explicitly in preliminary recital 31:

> As some rules constitute specific manifestations of the general principle of good faith and fair dealing, they should take precedent over the general principle. The general principle should therefore not be used as a tool to amend the specific rights and obligations of parties as set out in the specific rules.

This means, for example, that Article 2 cannot be used to introduce new grounds of invalidity or to extend the control of unfair contract terms under the CESL beyond the limits contained in Chapter 8, eg to individually negotiated terms (Article 82 applies only to terms that have not been individually negotiated) or to core terms (which are not subject to review for fairness, see Art 80(2)). The function of Article 2 is in this sense residual.

6.14 Ancillary Duties

The last issue I want to address in this chapter is that of "ancillary" obligations and duties, in particular duties to avoid causing harm to the other party (*obligations de sécurité*, *Schutzpflichten*). In some legal systems, a party's obligation to perform the contract and to do so without causing "collateral damage" is seen as a distinct duty. Thus § 241 BGB provides

> Duties Arising from an Obligation
>
> (1) By virtue of an obligation an obligee is entitled to claim performance from the obligor. The performance may also consist in forbearance.
> (2) An obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party.

In other systems the obligation not to cause damage is seen as one of the party's obligations. Thus in English law, a party who is to perform services is under an obligation to use reasonable care and skill[44]; and the statutory section applies to both the case where the work itself is not done properly and the case of careless damage to some other piece of property. How does the CESL deal with such issues?

The CESL also distinguishes between the seller or service provider's main obligation to deliver a product that conforms to the contract[45] and ancillary duties, but between the parties themselves, the position is straightforward and should seldom cause any difficulty. In relation to goods and digital content, any injury to the buyer, or damage or loss to the buyer's patrimony, will usually occur because the goods or digital content do not conform to the contract and the buyer will simply recover damages for non-conformity.[46] In sales contracts that fall within the scope of the CESL, there is little scope for causing damage of other kinds and it is thought that the CESL has explicit provisions for the likely cases: for example, a seller who is left in possession of the goods or the digital content because the buyer, when bound to do so, has failed to take delivery must take reasonable steps to protect and preserve them.[47] In respect of related services, Article 148 deals with the main obligation. It requires the service provider

> …to perform the service with the care and skill which a reasonable service provider would exercise, and in conformity with any statutory or other binding legal rules which are applicable to the related service.

Art 149 then deals with the ancillary duty:

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[44] Supply of Goods and Services Act 1982, s 13.

[45] For goods and digital content, see Art 91, quoted earlier; for related services, see Art 148.

[46] As is now the case under German Law, see §§437 (sales) and 634 (work).

[47] Art 97(1). There would be rather more scope for liability of this kind were the EP Am.74 to be adopted. This would extend the scope of application of the CESL to pre-contractual matters even if the parties never conclude a contract, "where the parties enter into negotiations, or otherwise take preparatory steps for the conclusion of a contract, with reference to the Common European Sales Law."

Obligation to Prevent Damage

The service provider must take reasonable precautions in order to prevent any damage to the goods or the digital content, or physical injury or any other loss or damage in the course of or as a consequence of the performance of the related service.

A much more difficult issue is raised by contracts that, in certain laws, are treated as having protective effects towards third persons, or as conferring rights on third person so that though they have no right to enforce the contract, they may have a right to sue if a non-performance of it causes a loss to them. For example, the *obligation de sécurité* of French law not only imposes strict liability on some service providers (such a railway companies) but, if a customer is killed, gives an action to his or her close relatives. A different example is the *garantie de vice cachée*, by which a party who provides goods that have a latent defect may be liable not only to the buyer but also to subsequent owners of the goods. How are such cases dealt with under the CESL?

The injured party may qualify as a third party beneficiary of the contract. Article 78 provides

Contract Terms in Favour of Third Parties

1. The contracting parties may, by the contract, confer a right on a third party. The third party need not be in existence or identified at the time the contract is concluded but needs to be identifiable.
2. The nature and content of the third party's right are determined by the contract. The right may take the form of an exclusion or limitation of the third party's liability to one of the contracting parties.

…

This is a broad provision; the contract does not have to state expressly that the third party is to have a right of enforcement, nor need the contract "purport to benefit" him or her.[48] If it is obvious that it is a third person "donee", rather than the buyer, who is to receive and enjoy the goods (for example, the goods are ordered just before Christmas and are to be delivered to the third person), it would seem perfectly legitimate to treat the contract as conferring a right on the donee. Further, the right conferred on the third party is determined by the agreement between the seller and the buyer, and it might be possible for a court to hold that the parties intended the third party to have only a right to claim damages for any loss rather than to a right to demand performance. But it is doubtful whether a third party whose existence is completely unknown to the seller (such as a relative or employee of the buyer who has been injured by non-conforming goods) should be treated as having a right under the contract. Although French law treats the *obligation de sécurité* as contractual (so as to impose strict liability), in many if not most other European legal systems, liability to the relations of the victim of a fatal accident is treated as a question of tort law. Tort law is outside the scope of the CESL and is governed by the otherwise-applicable national law. As recital 27 explains:

[48] Compare the English Contracts (Rights of Third Parties) Act 1999, s 1.

> All the matters of a contractual or non-contractual nature that are not addressed in the Common European Sales Law are governed by the pre-existing rules of the national law outside the Common European Sales Law that is applicable under Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict of law rule. These issues include … the law of torts. Furthermore, the issue of whether concurrent contractual and non-contractual liability claims can be pursued together falls outside the scope of the Common European Sales Law.

The position of the *garantie de vice cachée* under the CESL is less clear. In French law this appears to be treated as a form of contractual right conferred on the subsequent owner of the property, so that (when it still made a difference[49]) contractual limitation periods applied and the clauses in the original contract between first seller and buyer are "opposable" against the subsequent owner.[50] However, it is far from clear whether all courts would classify this as contractual, let alone as a contractual issue that is within the scope of the CESL.

The European Parliament has helpfully proposed that the CESL should include a detailed list of matters that are inside and that are outside the scope of the CESL.[51] I would suggest that this approach should be taken further: to provide as much certainty as possible, there should be a much more detailed list of both issues that are covered and issues that are outside the CESL. As the legal categorisation of some of the borderline issue varies from jurisdiction to jurisdiction, both lists should be drawn up in terms of factual situations rather than by purely legal categories such as "tort law" or "property law". I would include the *obligation de sécurité* on the list of matters outside the scope of the CESL, and the *garantie de vice cachée* on the list of those that are within its scope. Otherwise a trader who supplies a consumer in France might find that it is unexpectedly strictly liable to subsequent owners of the property.[52] Of course, a policy decision might be made to extend the reach of the CESL to such subsequent owners, but any such extension should be made only after

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[49] The law of prescription was reformed in France in 2008, reducing the differences between the types of claim. See arts 2219–2279 Code civil, introduced by Loi de 17 juin 2008.

[50] For a discussion in English, with translations of some of the principal cases, see H Beale, B Fauvarque-Cosson, J Rutgers, D Tallon and S Vogenauer, *Ius Commune Casebooks for the Common Law of Europe: Cases, materials and text on Contract Law*, 2nd ed (Hart, 2010), 1242–1247.

[51] See Am.14, which would add the following to Recital 27: "In the interest of clarity and legal certainty, the Common European Sales Law should clearly refer to those issues which are, and those which are not, addressed therein", and Ams 75 and 76, adding Art 11a (Matters covered by the CESL). Art 11a(1) would list matters that are covered by the CESL, Art 11a(2) those that are not addressed by it.

[52] If the matter is governed by the otherwise applicable law, the seller might become liable unexpectedly if either (1) the seller agreed that French law should be the otherwise applicable law and did not exclude its liability under the *garantie*, or (2) (in the case where the trader directed its activity towards French consumers and the subsequent owner is a consumer habitually resident in France) were a French court to treat the liability to the subsequent owner as a mandatory rule of French law: in the latter case, the consumer would be entitled to claim on the *garantie* whatever the otherwise-applicable law as a result of Art 6(2) of the Rome I Regulation (Regulation (EC) No 593/2008 of 17 June 2008).

a fuller discussion than is possible here, and it should be transparent, ie there should be an explicit provision in the CESL, so that traders using the CESL would be aware of this responsibility.

6.15 Conclusion

This survey of the sources of contractual terms under the CESL shows that the topic is not as straightforward as one might think at first glance. There are many provisions that need to be taken into account, and the structure adopted by the CESL may not be one that all readers will find familiar or intuitive. Nonetheless, the list of sources of terms contained in Article 66 is a good starting point; and once the reader is used to the terminology and concepts employed, it is hoped that it will be relatively easy to ascertain what the relevant terms are. The most difficult issues relate to the scope of Article 2 (Good faith and fair dealing), and to the question of the scope of application of the CESL. Given the various uses of the concept of good faith found across the different Member States, some uncertainty over the first question is inevitable, but it is hoped that a detailed semi-official Commentary on the CESL – which was largely prepared before the proposal was withdrawn and may yet be published – will provide some guidance. On the question of scope of application, it is very much to be hoped that in whatever instrument is to replace the CESL the European Commission will find a way to make the position more transparent.

Chapter 7
Art. 66–68: Implied Terms in the CESL: Different Approaches?

Bart Krans

Abstract This chapter concerns implied terms under the CESL, with particular emphasis on how to establish their content. An analysis of a Dutch case and an English case concerning termination of a long-term agreement gives rise to the impression that there is not the same approach for implied terms in these two countries. The intended European database is therefore a good idea.

7.1 Ambiguous Terms

What constitutes contractual terms? Not all international contract law systems deal explicitly with the sources of contractual terms.[1] The Proposal for a Common European Sales Law (CESL) deals with this topic. The chapter in the CESL on the content and effect of contracts contains a rule on implied terms.[2] This chapter focuses on implied terms. Implied terms have an ambiguous character: parties did not make explicit arrangements on their topic, but they can nevertheless be obliged to perform according to these terms.

In this chapter, I will go into implied terms under the CESL (§ 7.3 and 7.4) and discuss two cases, an English case (§ 7.5) and a Dutch case (§ 7.6). This will demonstrate that it is likely that the outcome of these decisions on implied terms is

[1] The 'Principles of European Contract Law' (PECL), prepared by the Commission on European Contract Law (The Hague 1999); the International Institute for the Unification of Private Law 'Unidroit Principles of International Commercial Contracts' (Unidroit, Rome, 2010) (Unidroit Principles) and the United Nations Convention on Contracts for the international Sale of Goods 1980, *United Nations Treaty Series*, vol. 1489, 3 (CISG) do not contain provisions that explicitly deal with the issue of the sources of contractual terms. The Research Group on the Existing EC Private Law's 'Draft Common Frame of Reference'(DCFR) states that the terms of a contract may be derived from the express or tacit agreement of the parties, from rules of law or from practices established between the parties (Article II-9:101, para 1).

[2] European Commission 'Proposal for a Regulation of the European Parliament and of the council on a Common European Common European Sales Law' (2011) SEC 1165 final.

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not necessarily the same in these two legal systems (§ 7.7). I will raise the question of how to proceed with the proposed regulation on implied terms in the CESL. These findings will lead to a more general suggestion to keep the application of the CESL by the courts manageable in the multi-level system of governance (§ 7.8). I will start with a brief consideration of the terms of contracts in general (§ 7.2).

7.2 Terms of a Contract

The CESL prescribes the sources of contractual terms. Article 66 of the CESL states that the terms of the contract are derived from (a) the agreement of the parties, subject to any mandatory rules of the Common European Sales Law, (b) any usage, or practice by which parties are bound by virtue of an agreement of the parties to the contrary, and (c) any contract term implied by virtue of Article 68.

This chapter of the CESL, on Contents and Effects, contains 11 other articles. These articles concern, for example, usages and practices in contracts between traders (Article 67), a duty to raise awareness of non-individually negotiated terms (Article 70), on merger clauses (Article 72) and on contract terms in favour of third parties (Article 78).

The rule on contract terms in the CESL (Article 66) may lead to several questions. For example, it might not be clear if is there a hierarchy between the sources mentioned in Article 66 CESL. To the contrary, the regulation of Article 66 CESL that a rule of the CESL may apply in the absence of an agreement of the parties demonstrates that there is at least some kind of hierarchy. An agreement of the parties prevails over a rule of the CESL. In general it seems to make sense that an agreement of the parties prevails over a usage or practice by which the parties are bound.[3] Nevertheless, it is not entirely clear that a usage or practice comes in second place by definition compared to an expressed agreement. Additionally, is a rule of the CESL, which applies in the absence of an agreement of the parties to the contrary, always a step downstream in the hierarchy compared to any usage or practice by which parties are bound? Another question might be whether a rule of the CESL also prevails over a usage or practice? Is there a difference between a usage and a practice, and if so, is that difference relevant, and in what way? Another question concerns the drafting of the contract: is it advisable to make clear in the contract that the agreement of the parties takes precedence over the other sources? The sources of contractual terms may therefore very well be the topic of several discussions in case the CESL will come into force.

[3] Article 66(a) CESL.

7.3 An Auxiliary Instrument: Implied Terms

The CESL explicitly deals with the topic of contract terms that may be implied. First, Article 66, paragraph d of the CESL makes it clear, as stated, that the terms of a contract can be derived from implied terms.[4] In addition, Article 68 CESL is entirely dedicated to contract terms that may be implied.

Several other international contract law codifications also provide rules for implied terms. The PECL address implied terms briefly in Article 6:102.[5] From Article II-9:101, paragraph 2 DCFR it follows that where it is necessary to provide for a matter which the parties have not foreseen or provided for, a court may imply an additional term, having regard in particular to several circumstances, among which the nature and purpose of the contract (sub-paragraph a).[6] Article 5.1.1 Unidroit Principles states that the contractual obligations of the parties may be express or implied. According to the Comment to this Article its restates the widely accepted principle according to which the obligations of the parties are not necessarily limited to that which has been expressly stipulated in the contract. This Comment also states that insofar rules on interpretation (Chap. 4 Unidroit Principles) provide criteria for filling lacunae (besides criteria for solving ambiguities) those rules may assist in establishing the precise content of the contract and therefore in establishing the terms which must be considered as implied.[7]

In the CESL, implied terms are governed by Article 68. An additional contract term may be implied if it is necessary to provide for a matter which is not explicitly regulated by the agreement of the parties, any usage or practice or any rule of the CESL. Implying an additional term must be done having regard in particular to (a) the nature and purpose of the contract, (b) the circumstances in which the contract was concluded, and (c) good faith and fair dealing. The matter can be put in perspective. As Kieninger has remarked, the need to imply terms will rarely arise since the CESL only covers types of contracts that are specifically regulated (sales and related services).[8] Nevertheless this need may arise. As will be seen below, case law provides examples of matters in which the question may arise whether an implied term is necessary.

There is a precondition for implying an additional term. An implied term can only concern a matter which is not regulated by the agreement of the parties, usages, or practices of the CESL itself, following the wording of Article 68 CESL. As Kieninger has underlined, recourse to implying additional contract terms can only be taken in the absence of a solution from these sources (including their

[4] It also contains a provision on usages and practices in contracts between traders (Article 67).

[5] EM Kieninger, in R Schulze (ed) *Common European Sales Law (CESL): A Commentary* (CH Beck, Hart, 2012) 327.

[6] The circumstances in which the contract was concluded are also mentioned (sub-paragraph b), as well as the requirements of good faith and fair dealing (sub-paragraph c).

[7] Unidroit Principles (n 1) Comment to Article 5.1.1, 148.

[8] Kieninger (n 5) 334.

interpretation).[9] Therefore tacit agreements prevail. That is a logical starting point. It also makes clear that there is a clear structure in this 'system' of contractual terms: first it must established if there is a tacit agreement, and if that route turns out to be dead end, one can wonder if an implied term is appropriate. With good reason it is remarked that implied terms are an auxiliary instrument, only to be used when all else fails.[10] The hierarchy between tacit agreements and implied terms is clear.

7.4 Establishing the Content of Implied Terms

If there is no tacit agreement between the parties on a topic, and there is a need for an implied term, the question arises how to establish the content of an additional term. That matter is also touched upon by Article 68 of the CESL: an additional contract term may be implied having regard to (a) the nature and purpose of a contract (b) the circumstances in which the contract was concluded, and (c) good faith and fair dealing. This list of parameters for identifying the content of the implied term is in line with the precursors of the CESL. Article II.- 9:101 DCFR uses more or less the same words as Article 68 of the CESL to determine an implied term. According to Article 6:102 of the PECL a contract may contain implied terms which stem from the intention of the parties, the nature and the purpose of the contract and good faith and fair dealing. In the CESL the starting point must be the existing contract terms and the party's aim in concluding the contract.[11] Implied terms need to be in line with tacit agreements of the parties. This refers to what parties would probably have agreed had they provided for the matter must be guideline when filling the gap.

These main points on implied terms seem to be understandable in general. But what happens if we try to find examples? Cases from different countries cannot be compared without realising that the applicable legal systems may differ in various ways. The outcomes cannot be placed next to each other without attention for the different legal fields the cases were born in, especially if it concerns a case from a common law system and a case from a civil law system. Discussing cases from different systems may also lead to cherry picking, missing the context and focusing on outdated cases. Nevertheless, these hurdles do not have to be too burdensome for the comparison I am aiming at. In this chapter I want to consider two cases, one from English law and one from Dutch law, to see how they have turned out as far as the implied terms are concerned.

[9] Kieninger (n 5) 335.

[10] C Von Bar and E Clive (eds), *Draft Common Frame of Reference*, Full Edition (Sellier, 2009) 579 et seq; O Lando and H Beale (eds), *Principles of European Contract Law, Part I and II* (Kluwer Law International, 2000) 302 et seq, Kieninger (n 5) 335–336.

[11] Kieninger (n 5) 336.

7.5 An English Case: *Baird Textile Holdings Limited v Marks &Spencer plc*

Baird Textile Holdings Limited v Marks & Spencer plc (*Baird/M&S*) concerns termination of a contract.[12] Baird was a principal supplier of garments to Marks & Spencer (M&S) for 30 years. After these 30 years, without warning, M&S terminated all supply arrangements between them. In reaction, Baird contended that M&S could not end the arrangements between them without reasonable notice, because M&S was precluded by contract (and by estoppel). On appeal, the commercial relation between Baird and M&S was considered as close. Baird alleged that in the circumstances of this case, among which was the 30-year-long relationship, the period of reasonable notice was not less than 3 years. They also claimed £38.5 million for lost profits and reimbursement for an anticipated expenditure of £15.1 million. These sums are claimed as damages for breach of contract, and as a sum equivalent to the aforesaid damages to avoid the injustice of M&S acting inconsistently with the aforementioned belief by terminating the relationship without notice.[13]

Baird argued that the summary termination of the relationship by M&S was in breach of their contract. The judge of first instance, Justice Morrison, disagreed. He ruled that a court will only imply a contract by reason of the conduct of the parties if it is necessary to do so. He added that it must be possible to infer a common intention for parties to be bound by a contract which has legal effect. Furthermore, the judge ruled that to be enforceable all contracts must be sufficiently certain to enable the courts to give effect to the parties' intentions rather than to give effect to a contract which the court has to write for them. On the other hand, 'the Courts do not incline to adopt a "nit-picking" attitude to such matters and will endeavour, where possible, to construe the obligations in a way which gives effect to the parties' bargain'.[14] A distinction is to be made between 'a generous attitude to making contracts work and striking them down on grounds of uncertainty.'[15] The judge ruled that there was no implied term as stated by Baird, who had pleaded that M&S had deliberately refrained from concluding any express contract because it could achieve greater flexibility without one. The judge ruled therefore there was no implied common intention to create legal relations between Baird and M&S.

On appeal, several cases on implied terms were brought forward. One of them was the case of *The Aramis* on the question whether a contract could be implied between the transferee of a bill of lading to whom the goods had been delivered and

[12] *Baird Textile Holdings Limited v Marks & Spencer plc*. [2001] EWCA Civ 274 (Court of Appeal, Civil Division) 28 February 2001 This case has its own page on Wikipedia, www.en.wikipedia.org/wiki/Baird_Textile_Holdings_Ltd_v_Marks_%26_Spencer_plc

[13] *Baird/M&S* (n 12) para 11.

[14] *Baird/M&S* (n 12) para 13.

[15] These considerations of Justice Morrison are cited in *Baird*/M&S, para 13, see (n 2).

the carriers.[16] Bingham LJ accepted that 'a contract will only be implied if it is necessary to do so'. He also considered that 'it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract'.[17] *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* was brought forward by counsel for Baird.[18] This case concerned the implication of a contract from a request for tenders and a submission in response. In this case Bingham LJ referred to 'confident assumptions of commercial men'.

In *Baird*, Vice Chancellor Morrit determined the crucial point to be whether the obligations arising from the alleged implied contract would be sufficiently certain to be contractually enforceable.[19] He referred to the decision of the House of Lords in *Hillas v Arcos*.[20] This decision, dating from 1932, concerned the question whether an option to buy '100.000 Standards for delivery in 1931' was sufficiently certain against the background of a contract performed the previous year for the purchase of 22.000 standards softwood goods of fair specification over the season 1930'. According to the House of Lords, the contract was sufficiently certain.[21]

In *Baird/M&S* Vice Chancellor Morrit came to the conclusion that there was a lack of certainty of the implied term. The alleged obligation on M&S to acquire garments from Baird is 'insufficiently certain to found any contractual obligation, because there are no objective criteria by which the court could assess what would be reasonable either as to quantity or price.' Vice Chancellor Morrit considered that 'rather it is a case in which the lack of certainty confirms the absence of any clear evidence of an intention to create legal relations.'[22] The Vice Chancellor also stated that the implication of the alleged contract is not necessary to give business reality to the commercial relationship between M&S and Baird. LJ Judge and Mance LJ agreed with the line of reasoning and the conclusion of Vice Chancellor Morrit. Mance LJ said that the more he had heard and read about the closeness of the parties' commercial cooperation in the past, the less able he felt to see how its effect could be expressed in terms having any contractual certainty. The counsel for Baird had pleaded that the court could work out whatever might be the minimum purchase obligations that M&S should be taken to have committed itself to place and Baird to have committed itself to supply during a three year period of notice.[23]

It is therefore the lack of certainty of the implied term that turns out to be crucial for the absence of this implied term. An agreement to keep up the purchase of clothes, subject to reasonable notice for termination, would be too uncertain.

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[16] *The Aramis* [1989] 1 LIoyd's Rep. 213.

[17] Bingham LJ, *The Aramis* (n 16) 224.

[18] *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195.

[19] *Baird/M&S* (n 12) para 24.

[20] *Hillas v Arcos* (1932) 147 LT 503.

[21] See on this case also Vice Chancellor Morrit in *Baird/M&S* (n 12) para 26.

[22] *Baird/M&S* (n 12) para 30.

[23] *Baird/M&S* (n 12) para 67–68.

7.6 A Dutch Case: *Vodafone v ETC*

The facts in the Dutch case *Vodafone v ETC* are quite technical and rather detailed. The core of the facts is the following.[24] ETC bought approximately 30.000 prepaid packages from Vodafone. These prepaid packages contained credits for making phone calls. ETC used these packages to call a phone number that they had put up themselves for this purpose, a so-called premium-rate number. They used a phone computer to accomplish very short connections with their own phone number. Vodafone debited the phone credit on the package with fl[25] 2.50 per minute. According to Vodafone, the average connection time with premium rate number of ETC was 15 s, which meant that each connection with that number the phone credit of ETC was diminished with approximately fl0.625, while Vodafone had to pay fl2.01 to KPN for that number. Vodafone discovered this and increased the rate for connection with the premium number of ETC from fl2.50 per minute to fl2.60 per connection.

In court Vodafone asked for a declaratory judgment that ETC had used the telecom services provided by Vodafone just to gain financial benefits at the cost of Vodafone, instead of normal telephone use, acting in conflict with their contractual obligations towards Vodafone, and/or acting unlawfully towards Vodafone. On appeal, the court found that the manner ETC had used the services of Vodafone was not foreseen by the parties as 'communicative use' as referred to in the general terms of Vodafone and that this was not the type of use that Vodafone had meant with the prepaid packages. The court also ruled that the General Terms did not stipulate that use of these packages other than for communication is forbidden, and that this inappropriate use is not impermissible. There was no indication that the phone credits may only be used for the communicative use as foreseen by Vodafone.[26] The Court of Appeal ruled that this situation was unregulated in the general terms. It might be improper use, but this use was not forbidden by the general terms.

The Dutch Supreme Court did not agree with the Court of Appeal. The Supreme Court ruled that the Court of Appeal had applied a wrong standard, or had not motivated the application of the appropriate standard correctly.[27] The Supreme Court stipulated that the Court of Appeal had failed to recognise that the question of how the contractual relationship between parties is regulated is to be answered not only by a purely linguistic explanation of the contract.[28] This line of reasoning is far from new in Dutch contract law. To the contrary, in the well-known decision in the *Haviltex* case, the Dutch Supreme court ruled that the question how the relation between the parties is regulated in a written contract and whether the contract contains a gap that needs to be filled cannot be answered on the basis of just a pure

[24] Dutch Supreme Court 19 October 2007, NJ 2007/565 (*Vodafone/ETC*).

[25] Former Dutch currency.

[26] See *Vodafone/ETC*, among others para 3.3.

[27] *Vodafone/ETC*, para 3.3.

[28] *Vodafone/ETC*, para 3.4.

linguistic interpretation of the articles in the contract. To answer that question it comes down to the way both parties in these circumstances could reasonably understand this article and to what they could reasonably expect from each other. In applying this standard, it can also be of importance to know to which social circles the parties belong and what legal knowledge can be expected of such parties. [29]Since this landmark decision, it is a starting point in Dutch contract law that the interpretation of contracts cannot be based solely on a purely linguistic interpretation. For the explanation of the contract, what the parties expected from each other and what they could reasonably expect from each other is also important.

In *Vodafone*/ECT the Dutch Supreme Court refers to this starting point.[30] The Dutch Supreme Court stipulated that the Court of Appeal could not have limited itself to the question whether the improper use by ETC was not aimed at communication with other telephone subscribers, but obviously only at gaining financial profits at the expense of Vodafone was forbidden by the text of the general terms of Vodafone. The Court of Appeal failed to investigate whether ETC should have understood that this kind use was forbidden regarding the nature and purpose of the agreement and that it had to refrain from acting as it did.[31] Therefore it is not enough to state that the improper use is not forbidden by the general terms.

According to the Supreme Court, the Court of Appeal also failed to appreciate that the rights and obligations of the parties towards each other are not only established by their tacit agreements, but also by the principles of good faith and fair dealing that control their relationship. The way parties behave must also depend on justified interests of the other parties. This can mean, still according to the Supreme Court, that ETC was not allowed to make improper use of the phone credit because they knew or should have known that this type of use was not foreseen in the agreement and was an unacceptable disadvantage for Vodafone. In addition, the Dutch Supreme Court also said that it was not clear why the Court of Appeal did not consider the way of operating by ETC (driving around in a van with the phone computer establishing very much short but non-functional connections) as an indication that ETC realised that the improper use of the phone credits was also unlawful against Vodafone.

7.7 Two Cases: Different Approaches?

Comparing cases from different countries can be difficult, as stated, especially if it concerns cases from a common law system and a civil law system. There is the above-mentioned risk of ‘cherry picking’.[32] In addition, the legal questions in the

[29] Dutch Supreme Court 13 April, 1980, NJ 1981/635 (*Haviltex*).

[30] *Vodafone/ETC*, para 3.4.

[31] *Vodafone/ETC*, para 3.4.

[32] In both countries there are more cases concerning termination of long-term agreements.

English *Baird/M&S* case and the Dutch case between Vodafone and ETC are not exactly the same. Nor are the legal systems and applicable rules. Of course, differences in outcomes of cases can in general very well be reducible to applicable rules. This chapter does not deal with the question of what legal concept and exact rules would be applicable to the *Baird/M&S* case under Dutch law and for the *Vodafone* case under English law.

Comparing these two cases, one has to bear in mind that in Dutch contract law the concept of good faith and fair dealing ('*redelijkheid en billijkheid*') can be decisive in contractual cases. Good faith and fair dealing can be a source of contracts terms according to Dutch law.[33] The principle of good faith and fair dealing may also lead to the conclusion that a party cannot invoke a valid contractual term.[34] There is a large amount of case law on good faith and fair dealing in Dutch law. In English law, in general the principle of good faith and fair dealing seems to play a much less important role. For example, in the 2013 case of *Yam Seng v International Trade Corporation* (*Yam Seng/ITC*) Justice Leggatt stated: 'I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts.'[35] This general distinction between the two legal systems might be important in this comparison.

Baird/M&S concerns a long-term agreement. As far as the termination of long-term agreements is concerned the principle of good faith and fair dealing plays an important role in Dutch case law. In fact, the Dutch Civil Code (DCC) does not contain any special provisions for termination of long-term agreements in general. Nevertheless, questions on the termination of long-term agreements that are individually regulated are dealt with in the framework of the article on good faith and fair dealing in contract law in general.[36] Case law of the Dutch Supreme court has led to a distinction between long-term agreements for a fixed period and long-term agreements for an indefinite period. The first type of agreements (long-term, and for a fixed period) cannot be terminated during that fixed period.[37] As a starting point, long-term agreements for an indefinite period can be terminated, but the requirements following from the principle of good faith and fair dealing in connection with the nature and the content of the agreement and the circumstances of the case may lead to the conclusion that termination is only possible if there is a sufficiently compelling reason for termination.[38] In addition, the principle of good faith and fair

[33] Article 6:248, para 1 DCC.

[34] Article 6:248, para 2 DCC.

[35] High Court of London (Queen's Bench Division), 1 February 2013, *Yam Seng Pte Limited v International Trade Corporation Limited*, [2013] EWHC 111 (QB), sub 131. This quote of Justice Leggatt is also cited by CE Drion, NJB 2013/793, 1029.

[36] Article 6:248 DCC. For contracts such as on rent or employment there are special provisions for terminations. Article 6:248, para 2 DCC is the relevant legal basis for long term agreements for which no 'special' regime is applicable.

[37] Dutch Supreme Court, 21 October 1988, NJ 1990/439 (*Mondia/Calanda*).

[38] Dutch Supreme Court, 28 October 28 2011, NJ 2012/685 (*Gemeente De Ronde Venen/Stedin*).

dealing may lead to the conclusion that a reasonable notice must be used. The same principle may lead to the conclusion that termination must be accompanied by the offer to compensate damages.[39] The principle of good faith and fair dealing therefore plays an important role in the termination of contracts in Dutch law. The rules on this topic can be considered, at least from a certain perspective, as implied terms.

There are more differences between the cases. In *Baird/M&S* the lack of certainty on the implied term turned out to be crucial for the absence of this implied term. In *Vodafone/ETC* the Supreme Court underlined that obligations of the parties towards each other are not only established by their tacit agreements, but also by the principles of good faith and fair dealing that control their relationship.

Nevertheless, looking at these two cases 'from a distance' and leaving the technicalities of the different legal systems aside, the impression may be created that English courts and Dutch courts do not have the exact same approach for implied terms. My impression is that the *Baird/M&S* case and the case between Vodafone and ETC demonstrate a different attitude of the courts in England and the Netherlands towards implied terms.[40] In the *Baird/M&S* case it seems that the English judges were reluctant to establish an implied term. In *Vodafone/ETC* the Dutch Supreme Court underlined that a purely linguistic interpretation does not suffice to judge on the behaviour of ETC in that case. The approach that the Dutch Supreme court chose in this case demonstrates that implied terms are far from impossible in Dutch law, at least insofar that one is willing to accept that the requirements of good faith and fair dealing may be the basis for implied terms. Perhaps the difference in perspective of the courts is not as large as it seems. In the *Yam Seng/ITC* case Justice Leggatt concluded by saying: 'I respectfully suggest that the traditional English hostility towards a doctrine of good faith in the performance of contracts, to the extent that it still persists, is misplaced.'[41]

7.8 The Usefulness of a Database

Let us now turn back to the CESL. The proposed Regulation on the CESL creates a second contract law regime within each member state's national law. The CESL does not require amendments to pre-existing national law, but creates a second regime within the member states. Contracts under such a second regime may lead to disputes, for instance on implied terms. Who is deciding on disputes arising from claims under this second regime? Disputes arising from claims under the CESL or

[39] Dutch Supreme Court, 28 October 28 2011, NJ 2012/685 (*Gemeente De Ronde Venen/Stedin*).

[40] The fact that for the specific type of contract in *Baird/M&S* there might be a specific provision under Dutch Law does not affect this general statement.

[41] Justice Leggatt in *Sam Yeng/ITC*, para 153. Drion has called this decision bold ('*een gedurfde steen in de vijver*'), (n 33) 1029.

other new EU instruments of the same kind will primarily be raised and resolved in member state courts. It is primarily up to the national courts to decide disputes under this second regime. Cases can be taken to the CJEU, if necessary, but it is not likely that a lot of disputes will end up in Luxembourg.

Looking at the *Baird/M&S* decision on the one hand and the *Vodafone/ETC* case on the other hand, I am not convinced that there will be a uniform application on the topic of implied terms. A lack of complete uniformity is not by definition a problem. Nevertheless, how can one promote a uniform interpretation of the CESL across the EU?

The European Commission intended to set up a database on CESL cases.[42] This database should have comprised the final relevant decisions. To facilitate this database the Member States should have ensured that national decisions that are relevant and final are communicated quickly to the Commission. According to the Regulation final judgments are communicated without undue delay to the Commission.[43] The CESL as proposed in 2011 will not come into force. If it had been enacted, such a database in my view would have been a good step.[44] Information on how judges in other countries apply this type of law can be very useful. If judges know what their colleagues in other countries will do, they will not by definition shape their opinion to foreign decisions. It is far from a guarantee that national judges will change or adjust their decisions knowing what judges in other countries do. In addition, who would have to adjust to whom? Nevertheless, it can be useful for courts to know what courts in other countries think on a certain topic. The database can also be useful for contracting parties. It could promote them to consider options for dispute settlement in certain countries. It might also have consequences for the drafting phase: for parties who want to avoid disputes on implied terms, it might be useful to make tacit agreements. Perhaps, the idea of such a database can be used for a possible new supranational instrument.

[42] See Recital 34 CESL and Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (n 2) para 5 (Additional information).

[43] This is governed by Article 14 Regulation and Recital 34 CESL.

[44] It will not be the first database. For example, there was the database CLAB (clause abusive), The European Database on Unfair Terms in Consumer Contracts. Other examples are the databases on the CISG from Pace Law School and Unilex.

Chapter 8
Art. 67: Contract Interpretation and the Role of 'Trade Usage' in a Common European Sales Law

Vanessa Mak

Abstract Article 67 of the initial proposal for a Common European Sales Law (CESL) stipulates that usage and practices are binding on traders. It follows that, if such customs can be referred to in the interpretation of contracts, they create flexibility in the understanding of contractual agreements and therefore introduce a factor of uncertainty in commercial dealings. One may wonder whether a flexible rule like this is appropriate for the context in which the CESL, according to this initial proposal, is meant to operate – B2B contracts in which at least one of the parties is a small or medium-sized enterprise (SME). A particular concern for the European market, in which many businesses are SMEs, is that local usage is likely to be unknown or even unknowable to one or both of the parties. If a similar rule were to be included in the digital single market package its appeal as an alternative contract regime therefore may be diminished.

This chapter addresses the question whether the CESL's reference to trade usage in contract interpretation is indeed a weakness. A comparison is made with US literature in which two theories – the plain meaning rule and the incorporation theory – support different views on the role of usage in trade contracts. Applied to two existing uniform regimes for commercial contracts, the Uniform Commercial Code (UCC) and the Vienna Convention on Contracts for the International Sale of Goods (CISG), these theories reveal the strengths and shortcomings of the application of usage in specific market contexts. Distilling a number of parameters from earlier studies on these instruments, a comparison is made to test whether the CESL can safely make use of trade usage as a means of contract interpretation.

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It will be argued that the particular context in which the CESL operates – ie cross-border contracts involving SMEs – implies that the role of usage should be clarified in order to guarantee legal certainty. Such clarification can either mean that usage is only referred to in a very limited sense (eg only international usage widely observed in the particular area of trade in which the parties operate and which could be known to both parties to the contract), or that other means are created by which parties can become aware of trade usage in a particular market or area (eg databases of guidelines or trade practices).

8.1 Introduction

Legal certainty is important in international trade. English case law, reflecting a history of overseas trade and commerce, is still one of the best sources to find support for this statement. It was once famously said in one of those maritime trade cases, *Vallejo v. Wheeler*, that[1]:

> in all mercantile transactions the great object should be certainty. And therefore it is of more consequence that a rule should be certain than whether the rule is established one way or the other: because speculators in trade then know which ground to go upon.

Another famous quote ruminates on certainty as a ground for estoppel[2]:

> a man shall not be allowed to blow hot and cold – to affirm at one time and deny at another … Such a principle has its basis in common sense and common justice, and whether it is called 'estoppel,' or by any other name, it is one which courts of law have in modern times most usefully adopted.

Legal certainty is also often hailed as an important value in other commercial law regimes, such as the Uniform Commercial Code (UCC) and the Vienna Convention on Contracts for the International Sale of Goods (CISG). The very essence of commerce, these instruments underscore, is that traders should be able to assess risks and to predict likely outcomes so that they can make decisions that lead to advantageous deals and, if all goes well, profitable trading.

This article addresses the question whether a Common European Sales Law (CESL) can guarantee such certainty for traders in Europe focusing in particular on 'trade usage'. Whilst it is yet not clear whether a new proposal for a CESL, tailored to the needs of the digital single market, will follow the text of the initial CESL proposal on this point, lessons may be learnt from the approach suggested there.[3] Apart from a rather general reference to good faith in that initial proposal, to which

[1] *Vallejo v Wheeler* (1774) 1 Cowp 143, Lord Mansfield at p 153.

[2] *Cave v Mills* (1862) 7 Hurlstone & Norman 913, 927, as quoted by Andrew D Mitchell, 'Good Faith in WTO Dispute Settlement' (2006) 7 *Melbourne Journal of International Law* 339, n 57.

[3] Notable is also that the new Commissioner for Justice, Consumers and Gender Equality, V**ě**ra Jourová, has expressed a need for legal certainty for especially SMEs in the digital single market; see her speech of 13 July 2015, available at: https://ec.europa.eu/commission/2014-2019/jourova/

some criticism has already been directed,[4] one other potential weakness of the regime is the reference to customary law in the interpretation of contracts. Article 67 stipulates that trade usages and practices are binding upon traders. This provision poses a particular challenge in the context of the initially proposed CESL. The scope of that instrument was limited: if the CESL was to be chosen as the applicable law by the parties in a business-to-business contract, at least one of the parties would be a small or medium-sized enterprise (SME).[5] For several reasons, traders of such a small size are likely to have difficulties with ascertaining whether, and if so which, trade usage may apply to their transactions with parties in other EU Member States. This may diminish legal certainty and hence the potential appeal of a CESL that includes such a rule to European traders.

I will briefly set out the position of SMEs in the EU and the reasons why legal certainty may be diminished by Article 67 of the initially proposed CESL. The subsequent parts of this article seek to establish if trade usage can be applied in a useful manner in the context of a CESL, using experiences with existing cross-border sales laws as a touchstone. It appears that usage can be a helpful tool from a viewpoint of efficiency and risk assessment in cross-border contracting. However, to ensure legal certainty for SMEs, a CESL would be much helped by methods that enable parties to ascertain which usage and practices will apply should they decide to enter into a cross-border contract.

8.2 CESL and Legal Certainty

A particular feature of the European market is that many businesses are small or medium-sized enterprises (SMEs). The EU defines small or medium-sized enterprises as businesses with fewer than 250 employees and with an annual turnover not exceeding 50 million euros or a balance sheet not exceeding 43 million euros.[6] A more refined distinction can be made in which also micro-sized enterprises (with fewer than 10 employees) are taken into account.[7] In the EU, the majority of businesses fall within the SME category. More than 98 % of businesses are in fact SMEs and within this category, nine out of ten businesses are micro enterprises employing

announcements/commissioner-vera-jourovas-remarks-european-parliaments-legal-affairs-juri-committee_en

[4] The principle of good faith could become an important factor in contract interpretation seeing that judges are obliged to apply the CESL in an autonomous manner (Art 4), even where specific clauses are lacking in the instrument itself. See on this problem eg S Whittaker, 'The Proposed "Common European Sales Law": Legal Framework and the Agreement of the Parties' (2012) 75 *Modern Law Review* 578, 587.

[5] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final, Art 7(1).

[6] Proposed Regulation (n 5), Art 7.

[7] Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises [2003] OJ L124/36, Annex, Art 2.

fewer than 10 employees.[8] They continue to be the backbone of the European economy.[9]

One may wonder whether the CESL's reference to[10] trade usage makes sense in this particular context. SMEs would be able to choose the CESL as the applicable law if the contract they conclude is of a cross-border nature.[11] This implies that any usage that they will be confronted with is likely to be international usage, or the national or local usage practised in another Member State. That usage, however, is not likely to be known or even knowable by small or micro enterprises. Most usage is learnt through trading experience or through business ties in the community. For SMEs seeking to enter new, cross-border markets for the first time – which are exactly those at which the CESL is aimed – this information will likely not be known.[12] Reference to usage in the interpretation of contracts, for them, will hamper legal certainty and is therefore likely to be a significant deterring factor.

If a similar rule is adopted in a new instrument for the digital single market, and if traders come to realise this, the appeal of such an instruments an alternative contract regime is likely to be diminished. The proposed CESL was envisaged as an 'opt in' regime which could be chosen as the applicable law to a contract and therefore as a self-standing regime.[13] The regime would be particularly attractive to traders who are looking for a 'neutral' law to apply to a cross-border transaction, and moreover: one that enables traders to circumvent differences between national laws in the EU if they use the CESL as a default regime for all of their cross-border sales contracts. Anything that can harm the integrity of the instrument, such as a lower degree of legal certainty through the use of open norms, however is likely to diminish its appeal. The question therefore is whether a provision like Article 67 on trade usage will indeed be likely to have such an effect.

In order to assess the function that a provision like Article 67 would have in potential disputes arising under the CESL, I will look to earlier examples of uniform laws in which such references to usage are included. The most notable examples for cross-border or cross-State trade are the CISG and the UCC. Their use of usage, practices and custom has been widely discussed in US literature and a useful theorisation has emerged in which a distinction is made between a 'plain meaning' rule and a theory of incorporation in which not only the text of the agreement but also other contextual aspects are taken into account in contract interpretation. A number

[8] Cf. Ecorys, 'EU SMEs in 2012: at the crossroads. Annual report on small and medium-sized enterprises in the EU, 2011–2012', p 9.

[9] It is estimated that SMEs accounted for 58 % of growth measured by the 'growth added value'(GVA); see Ecorys report (n 8) at 9.

[10] One could refer to this as the 'cognosibility' of law; see Raoul Van Caenegem, *Judges, legislators and professors* (CUP, Cambridge) 161.

[11] Proposed Regulation (n 5), Art 4.

[12] Compare Lisa Bernstein, 'An (Un)common Frame of Reference: An American Perspective on the Jurisprudence of the CESL' (2013) 50 *Common Market Law Review* 169, 179.

[13] European Commission, 'Green Paper on policy options for progress towards a European Contract Law for consumers and businesses', COM(2010) 348 final, p 9.

of parameters for the successful application of trade usage and practices in contract interpretation can be distilled from the study of these instruments (see part 4). What is noteworthy is that this success is largely dependent on the type of market within which parties operate, eg whether it is a local or relatively closed market in which participants know one another well.

The findings from this overview will be related back to the context in which the originally proposed CESL is meant to operate, ie cross-border contracts between traders in which at least one of the parties is an SME.I will seek to identify under which circumstances the role of usage can be clarified so that it can ensure legal certainty for contracting parties. In this exercise, I will take note of alternative approaches found in the national laws of EU Member States, to which parties may of course also turn if they make a choice of law. Overall, it appears that usage may be a useful tool if reference to it can be sufficiently circumscribed or if its content can be made transparent to SME traders operating in the EU.

I will begin, however, with a brief comparative overview of the role of usage in international trade contracts. The problems that are identified in this part set the stage for the subsequent discussion of theory and of the parameters for a useful role for usage in the CESL (part 4).

8.3 Usage and Practices in International Contracts – The Rules

Articles 67–69 of the initially proposed CESL lay down a set of rules that indicate how to determine the content of contracts. Sources from which the terms of the contract are derived are the following four, or five if mandatory rules are counted separately: the agreement between the parties subject to mandatory rules of the CESL; usage and practices in accordance with Article 67; default rules of the CESL to be applied if the parties have not between themselves agreed on terms; contract terms implied by virtue of Article 68.[14]

The reference to usage, or in a broader sense custom, is not uncommon. Many contract laws recognise this as a source of obligation beside the agreement between the parties or rules of written law laid down in legislation or following from the case law. Nevertheless, the circumstances in which customary law is used as a tool for interpretation can differ depending on the extent to which a usage is known or observed in a particular area of trade. In an international context it is moreover important to consider whether the level or area where usage develops – international, national or local? – justifies it being regarded as binding on the parties. A brief comparison with the UCC, the CISG and the CESL can illustrate these points.

Article 67 of the initially proposed CESL distinguishes the following instances in which usage may be invoked as a tool for contract interpretation:

[14] See Art 66 CESL. Compare also Art 59 CESL on interpretation.

Article 67

Usages and practices in contracts between traders

1. In a contract between traders, the parties are bound by any usage which they have agreed should be applicable and by any practice they have established between themselves.
2. The parties are bound by a usage which would be considered generally applicable by traders in the same situation as the parties.
3. Usages and practices do not bind the parties to the extent to which they conflict with contract terms which have been individually negotiated or any mandatory rules of the Common European Sales Law.

Sub 1 stipulates that usage and practices that have become established between the parties are regarded as binding. One can think of agreements that the parties have made with regard to the time period for delivery or for payment of goods. In long term contractual relationships, those terms are often similar for subsequent dealings. That also makes sense from the perspective of cost-effectiveness, since parties will not have to negotiate about this term separately for each consecutive contract.[15] Similar provisions can be found in§ 1-303(b) of the UCC ('course of dealing') and in Article 9(1) of the CISG.

Sub 2 refers to trade usage in a broader sense, namely usages that are generally applicable to traders in the same situation as the parties. This refers to practices that are customary in a particular branch or trade. What makes this provision stand out from similar rules is that, as it appears, it applies to *local, national and international* usages. That scope is explicitly given to the corresponding provision found in Article II. – 1:104 of the Draft Common Frame of Reference (DCFR),[16] on which the text of the initially proposed CESL was based. Without evidence to the contrary, it is a reasonable assumption that the drafters of the CESL intended to give the same content to the rule laid down in Article 67. What does this tell us about the effect that the CESL gives to usage?

8.3.1 When Is Usage Binding?

Generally speaking, the CESL adopts a rather broad approach to the types of usage that can bind the parties, in particular when compared to other regimes. First, the inclusion of local and national usages – for contracting in a cross-border context! – is not an obvious choice. The CISG, by contrast, takes a more limited approach. Article 9(2) stipulates that a usage is considered binding on the parties if it is one of which they 'knew or ought to have known and which in international trade is widely

[15] Compare CP Gillette, 'The Law Merchant in the Modern Age: Institutional Design and International Usages under the CISG' (2004) 5 *Chicago Journal of International Law* 157, 164.

[16] Study Group on a European Civil Code/Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full Edition* (Sellier, Munich 2009), vol 1, commentary to Art II. – 1:104, 140 and 144.

known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.' The Convention therefore only takes account of usages that are *internationally* known. This does not mean that reference to regional usage is completely excluded; however, it can only be applied under strict circumstances. The prevailing view appears to be that a regional usage will only bind a party if their place of business is located in that particular geographical area or, if is not located there, they do business in that region on a continuous basis.[17] Of course the parties can also include an explicit reference to regional or local usage in the terms of the contract.[18]

Second, for these usages to be binding it needs to be established that they are not only widely known but also *regularly observed* in the particular trade concerned. That means that the usage in question as a matter of fact needs to be regularly applied in a particular branch. It is not necessary, however, that the relevant commercial circles themselves believe that the usage is binding.[19] The UCC contains a similar rule on trade usage needing to be regularly observed in order to be binding.[20] Of course – since it applies to US domestic contracts – it does not contain a requirement of internationality.

Finally, the CESL – unlike the CISG – does not explicitly require that the parties 'knew or ought to have known' the usage. The test is whether the usage is applicable to traders in the same situation as the parties. By not enquiring into the 'knowability' or observability of the usage, the test becomes even more objective than the CISG rule. It does not matter whether the usage was in the minds of the parties at the time of contracting, either subjectively (they knew of it) or objectively (they ought to have known). Instead it seems to be enough that the parties find themselves in a particular *situation* in which the usage is normally applicable.

The CESL therefore takes a markedly open stance on the types of generally applicable usage that can be regarded as binding on the parties. In terms of scope, as already said, usage can be binding on the parties if it is international but also if it is national, local or even regional. Further, the conditions under which a usage can be held binding are that the usage has such general application in a particular branch or trade that traders in the same situation as the parties would consider it applicable.[21] As a practical consequence, a local or national usage which operates at the place of business of one of the parties but not that of the other party could be binding upon the parties, provided that it is generally observed in their area of trade.[22]

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[17] ObersterGerichtshof Austria 21 March 2000, CISG-Online No. 641; P Huber and AMullis, *The CISG. A new textbook for students and practitioners* (Sellier, Munich 2007) 17.

[18] F Ferrari, 'What Sources of Law for Contracts for the International Sale of Goods? Why One Has to Look Beyond the CISG' (2005) 25 *International Review of Law and Economics* 314, 333.

[19] *ibid.*

[20] See § 1-303(c) UCC.

[21] Cf DCFR (n 16), commentary to Art II. – 1:104, 140.

[22] It has been suggested that where a usage is generally observed in the jurisdiction of one party but not that of the other, the matter should be referred to the applicable law as determined by the conflict of laws rules of the forum; compare R Goode, 'Usage and its Reception in Transnational

8.3.2 Beyond Observability: Another Value?

One other point is noteworthy. The DCFR contains an open norm which states that parties will not be bound 'where the application of such usage would be unreasonable'.[23] That addition seems to imply that it is not sufficient that a certain usage is observed but also that there is an additional element, a subjective 'value' that makes it binding. It is not unusual to refer to an additional value besides the (objective) fact that a usage or custom is observed in practice. Examples of such values can be found in existing legal discourse, eg in the form of *opinio iuris* in public international law or references to efficiency or social utility in commercial law.[24] Whether such an extra element is necessary to make custom or usage binding and if so which value it should be may nevertheless differ from one legal area to another. It could be that in commerce that value is efficiency,[25] though one could also argue that contract law is based on a broad range of other – moral, doctrinal or sociological – values. Whatever view is taken, it does raise the question whether the DCFR's exclusion of 'unreasonable' usage reflects a legitimate choice, or whether it is a necessary requirement for usage to be applicable to a specific contract. This point will be returned to in Part 4 below.

8.3.3 Boundaries to Usage

Finally, even if trade usage can bind parties, there is in every regime at least some form of escape that protects parties from being bound to trade usage in the sense of Article 67(2) of the initially proposed CESL – that is, usage that is generally applicable in a particular branch or trade – if to do so would go against their agreement or would be unreasonable on other grounds. There is broad consensus that such usage under the CISG does not trump usage or practices established between the parties, or otherwise individually agreed terms of the contract.[26] A similar rule is laid down in Article 67(3) of the CESL, which dismisses usage that would be directly at odds with the individually negotiated terms of the contract or with

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Commercial Law' (1997) 46 *International and Comparative Law Quarterly* 1, 16. However this compares to the CISG, it would in any event not work under a self-standing regime, such as the CESL was intended to be (Art 4 CESL).

[23] DCFR, Art II. – 1:104(2).

[24] For further examples, see DJ Bederman, *Custom as a Source of Law* (CUP, Cambridge 2010) 173.

[25] *ibid*., 174.

[26] Cf Ferrari (n 18), 335 and sources there cited. For an interesting contrary view, see WP Johnson, 'The Hierarchy That Wasn't There: Elevating "Usage" to its Rightful Position for Contracts Governed by the CISG' (2012) 32 *Northwestern Journal of International Law and Business* 263.

mandatory provisions of the applicable law, ie the CESL.[27] This seems a fairly clear rule, although some discussion is possible on whether usage should be trumped by non-individually negotiated (standard) contract terms.

Another boundary worth mentioning is that the initially proposed CESL does not include usage as a source of contract interpretation for B2C contracts; it applies only to B2B contracts. That may be somewhat strange as usage (or custom) is also a means by which contractual obligations in consumer contracts can – and often are – coloured.[28] Such reference to custom, moreover, may even be favourable to consumers. An example may be where X, an English buyer, buys a birthday present for a friend in a Dutch shop and tells the shop assistant that it is a gift. Whereas shops in the UK usually do not offer gift-wrapping in this situation, Dutch shops normally will offer this extra service and will do so free of charge.

From this overview, it can be seen that the CESL adopts an approach to usage that is broader than other cross-border regimes, including national, local and regional usage as customary sources that can bind traders. This broad approach could be problematic in a market where the majority of traders are SMEs who are unfamiliar with such usages. They may be confronted with usages which are, practically speaking, impossible for them to know. Although it is a usual feature of contract laws that risks are allocated to parties on the basis of (presumed) knowledge, one may wonder whether this result fits the EU market and in particular whether it does not diminish legal certainty to such an extent that it would make an instrument like the CESL unattractive to SMEs.

At the same time, however, the CESL's rules on usage are in some respects very similar to the CISG and the UCC. In order to determine whether the reference to trade usage as such makes sense in this market it is helpful to look at these existing instruments and see what lessons can be learnt from the experience with the CISG and the UCC. Is trade usage a valuable tool for contract interpretation? To what degree does it ensure legal certainty, and which other considerations should be taken into account?

8.4 Theorising Usage

For usage to be useful as an interpretative tool in commercial contracting, it is important to realise that legal certainty should be regarded as a matter of degree, rather than a binary measure. The benchmark is whether reference to usage, although it implies an inherent flexibility in the interpretation of contracts, can save costs eg by enabling parties to limit the time and costs of negotiations by leaving some of the terms of the contract undefined or open. Cost saving, however, is balanced by the need to prevent errors from slipping into the agreement where the contract does not

[27] See Art 67(3) CESL. The same is implicit in Art. II. 1:104 of the DCFR; see DCFR (n 16), commentary to Art II. – 1:104, 139.

[28] I would like to thank Hugh Beale for pointing me to this issue.

explicitly define all terms and conditions.[29] Not only would that lead to more costs – *ex post*, when the terms of the agreement have to be fought out in front of a court – but also because it may do an injustice to a contracting party who is unable to rely on the agreement because of its vagueness or ambiguity. Usage should not lead to unwanted surprises.

8.4.1 Two Competing Viewpoints

In US literature two contrasting approaches have been advocated, each seeking to balance these competing interests. On the one hand, the contextual approach, or 'incorporation theory', is regarded as the most current method for the interpretation of contracts. In this view, a contract is interpreted within its entire context, which may include pre-contractual statements by parties made in the course of negotiations or other circumstances – such as usage. It is the approach adopted by the UCC, which 'applies a lax parol evidence rule, and looks to usage of trade, course of performance, and course of dealing to interpret contracts, fill contractual gaps, imply warranties, modify agreements, waive obligations, and give meaning to many of the Code's own standard like default rules'.[30] It also fits with the ways in which contract interpretation takes place in the courts of California which, in contrast to New York, are more willing to reform contracts on grounds of fairness, equity, morality or public policy.[31] Finally, it fits with interpretation in accordance with Article 9(2) of the CISG.

The opposite view is that contracts should be interpreted as closely as possible to the terms stated in the agreement, in other words to interpret them on their 'plain meaning'. This is a formalist approach which considers common understandings of a contract term's meaning independent of its context.[32] It fits with the attitude of New York law, which is often chosen by commercial parties because of its presumed efficiency and legal certainty with regard to the interpretation of contract terms.[33]

The benchmark that is chosen, therefore, is efficiency. The efficiency perspective, briefly explained in Part 2.2 above, is generally accepted in US literature as a benchmark for testing rules of commercial law.[34] It would also seem appropriate for

[29] Cf Gillette (n 15) 164.

[30] L Bernstein, 'Merchant Law in a Modern Economy', Chicago Coase-Sandor Institute for Law and Economics Working Paper No 639, p 1. Available at: https://ssrn.com/abstract=2242490

[31] GP Miller, 'Bargains Bicoastal: New Light on Contract Theory' (2010) 31 *Cardozo Law Review* 1475. See also Bernstein (n 12) 186.

[32] Gillette (n 15) 157.

[33] Miller (n 31).

[34] All three scholars whose work has been discussed so far work from this position. See Bernstein (n30), Gillette (n 15) and AW Katz, 'The Relative Costs of Incorporating Trade Usage into Domestic versus International Sales Contracts: Comments on Clayton Gillette, *Institutional*

cross-border trade in the EU, from the perspective of the commercial and profit-seeking aims normally pursued by businesses. It may be in the EU context that for weaker parties like SMEs some adjustment should be made where adhering to efficiency would lead to unreasonable results.[35]

8.4.2 The Tradeoff with Regard to the CESL

Which one is the better view, incorporation theory or the plain meaning rule? Opinions on which view should prevail, not surprisingly, differ considerably. Usage is a well-established factor in commercial dealings and it can lead to *ex ante* cost-savings in drafting contracts.[36] At the same time, the flexibility that it allows in interpretation may diminish legal certainty.

Compelling pleas have been made to adopt the clear-cut way of interpretation offered by for example the New York courts. Bernstein suggests that this should be the way forward for the UCC, as it would much better fit the needs of modern-day business in the US. Usage is in this view not entirely ruled out as a source of interpretation but its scope is much restricted. Practically, it seems that usage will remain geographically local or confined to a particular network of repeat players.[37] For business in general, a more formalist approach would in particular support the model of outsourcing which is applied by many firms, as it would enable information to be shared more effectively in the hierarchy of an organisation. It would also enable firms to use contract as a means of regulating their relationships internally, eg by creating contract governance structures that rely on interior remedies and non-legal sanctions and by supporting cooperative contractual relationships that can respond to changes or make mid-course corrections.[38] This approach seems to fit with attitudes towards modern day business relationships, in particular where there is a certain degree of organisation, cooperation or interdependency between actors.[39]

Whether usage should have a role in an instrument like the CESL, however, is a more narrowly defined question. As with the CISG, we are looking at cross-border

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Design and International Usages under the CISG (2004) 5 *Chicago Journal of International Law* 181. Although the emphasis on law and economics considerations may be particular to US legal scholarship, it may in this case also be transferable to the EU debate on the CESL's application to B2B cross-border contracts. See further below, Part IV.2.

[35] Daniela Caruso gives an excellent overview of the different attitudes in US and EU scholarship, with the former strongly based in law and economics traditions and the latter grounded in the welfarist traditions shared – albeit it to differing degrees – by the EU Member States. See D Caruso, 'The Baby and the Bath Water: The American Critique of European Contract Law' (2013) 61 *American Journal of Comparative Law*. To pay heed to the protection of SMEs, a solution may in the CESL for example be found in a (limited) recourse to the good faith principle.

[36] Cf Gillette (n 15). See also Katz (n 34) 184.

[37] Bernstein (n 12) 175.

[38] Bernstein (n30) 30.

[39] See also Bernstein (n 31) 181–183.

sales contracts between traders which do not by definition take place in a wider organisational context. The CESL, as it was drafted, is in this regard simply an alternative option to national laws. Traders in the EU entering into cross-border contracts will have the choice whether they contract under a national law or opt for the 'neutral' regime offered by the CESL. The trade-off, therefore, is whether the CESL gives traders a better framework for risk assessment than alternative national law choices would give them.

I am inclined to agree with Katz that in this context a case can be made for the incorporation of usage as it would be less costly – and perhaps as Katz says 'more sensible' – than a formalist approach.[40] A number of considerations can influence the overall costs of transactions. These include the costs of writing more detailed contracts *ex ante*; the costs of rent seeking, which does not increase the overall wealth of society[41]; the parties' attitudes towards risk and the distribution of information among potential tribunals; the need to make specific investments, the value of which depends on a particular contractual interpretation.[42]

How these considerations are evaluated depends in part on the contracting parties' practical experience and risk assessment. They are in the best position to assess their own options and their willingness and ability to take losses, should risks materialise. On this basis they may seek to circumscribe their vulnerability to risks through the terms of the contract, for example by stipulating if and how trade usage may play a part in the interpretation of their contract.[43] An option often used in practice is the 'entire agreement clause', which can offer some protection against the consideration of statements made or customs that are 'outside the four corners of the contract'.[44]

For B2SME contracts for which the CESL was written, however, the likelihood of the parties stipulating the modalities for contract interpretation at the outset seem slim. If they choose to apply the CESL, it is probably on the basis of pragmatic considerations rather than a substantive evaluation of the CESL's content in comparison to national laws. Smaller parties will not normally have the resources or

[40] Cf Katz (n 34) 184.

[41] See GTullock, 'Welfare Costs of Tariffs, Monopolies and Theft' (1967) 5 *Western Economic Journal* 224, which is generally regarded as the starting point for rent seeking literature. For an overview of further sources, see RD Congleton, AL Hillman, and KA Konrad, 'Forty Years of Research on Rent Seeking: An Overview' in *Forty Years of Research on Rent Seeking* (Springer, Heidelberg 2008) 1.

[42] Katz (n 34) 185. Katz also refers to interests of third parties, which may play a part in international trade but perhaps not so much in B2SME contracts, assuming that contracts involving SMEs are mostly simpler two-party transactions.

[43] *ibid*.

[44] The effect of entire agreement clauses however appears to be limited to defining the scope of the terms of the contract and does not prescribe how, objectively, the substance of the contract terms is evaluated by the courts. In civil law systems it is still possible that the agreement (including the entire agreement clause) is considered in its entirety in the light of general obligations arising from the principle of good faith/reasonableness. See in Dutch law: Dutch Supreme Court, 5 April 2013, LJN: BY8101 (*Lundiform/Mexx*). See also Castermans, De Graaff and Haentjens in this volume.

perhaps even the inclination to make such an evaluation. Existing studies on choice of foreign law indicate that businesses in the EU when they choose foreign law often opt for English or for Swiss law. That choice seems to be influenced by perceptions on the characteristics of these laws (eg their perceived legal certainty) as much as on their actual content.[45] Other reasons that are likely to influence the parties' choice with regard to the CESL, therefore, can be that they regard the CESL as a neutral instrument that does not give one party an advantage over the other (as a choice for one party's national law may do), or that it keeps open the possibility to litigate before national courts rather than to end up in a more distant and/or more expensive forum.[46]

Therefore, the main consideration becomes whether the parties can predict what the outcome will be if a court applies trade usage in case of a potential dispute. If this – the third consideration in the list of Katz reproduced here, and the main one in Gillette's analysis of the CISG – is relatively predictable, there may be a case for trade usage in contract interpretation under the CESL. The costs of *ex post* administration and error costs will then be low enough to assume the risk of leaving contract terms open or making them not very detailed (which as we have seen can lead to *ex ante* gains). Such predictability can exist, as a study of CISG case law reveals, where usages emerge 'out of international mercantile associations or from unwritten practices that condition on readily verifiable events'.[47] Examples of the first kind of usage are INCOTERMS or industry guidelines for specific markets (eg the fish market or the London Stock Exchange). The second kind refers to binary questions such as whether a party has responded to a communication by the other party in order to object to proposed terms of the contract; if not, usage may prescribe that a party's silence results in them being bound by those terms.[48]

The problem remains then for cases in which usage is not predictable. There are many instances in which the question is not of a binary nature, or where there are no industry guidelines to fall back on. As said, a trader who enters a foreign market will under the rules of the proposed CESL normally be regarded as bound to local usage in that market.[49] Anything from a 'reasonable' time for giving notice of a complaint (a week? a month?) to methods of payment or specifications of the performance of a service can be subject to local custom which for an outsider SME will be hard to determine. The disadvantage may be exacerbated, even, in case the parties end up litigating in the jurisdiction in which the market at which the parties operate is located. Experience with existing rules of international trade – such as the CISG –

[45] S Vogenauer, 'Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence' (2013) 21 *European Review of Private Law* 13, 20 ff.

[46] Eg if the parties have opted for English law as the governing law of their contract it makes sense to litigate in the Commercial Court in London rather than in front of a national court unfamiliar with English law. Procedural costs are high in the UK, which may be a reason for wanting to avoid this forum.

[47] Gillette (n 15) 174.

[48] *ibid*., 174–76.

[49] Above, p 4.

reveal that courts often tend implicitly to draw on their own law in the interpretation of open norms in uniform laws.[50] This 'homeward trend' increases the dependency on the local context that parties experience with regard to usage. This, in combination with different rules of procedural law, makes trading across the border a whole lot more risky than trading within one's own country. Does this mean that parties are forced to spend considerable time and resources beforehand, ie before entering into a cross-border trade contract, to find out what local usages exist and which forum would be their safest bet in case of litigation? For the CESL, with its focus on SMEs, this would sound the death knell for it ever to be chosen by EU traders.

In sum, a mixed image emerges for the potential use of usage as a term for contract interpretation under the CESL. On the one hand, it may be cost saving in cases where usage is easily verifiable and the outcomes of court disputes are therefore fairly predictable. On the other hand, many instances exist in which usage is local and not laid down in (verifiable) trade guidelines, or in which courts may fall back on a homeward bias in the interpretation of open norms like usage. The logical consequence to deduct from this analysis is that (i) usage can have a cost saving function in contract interpretation under the CESL, but (ii) for a CESL that includes a provision like Art 67 to ensure legal certainty something more is needed to enable parties to find out about foreign usages, in particular those that are not international but only local. It is to that 'something more' that I now turn.

8.5 CESL and Usage in the European Market

The CESL needs to strengthen its capacity to ensure legal certainty even where usage – with its relative flexibility as an open norm – is used to interpret the agreement between contracting parties. Several ways in which this can be done present themselves. I will discuss two alternatives that fit with developments in EU legislative action and international trade: first, 'flanking measures' to the initially proposed CESL suggested by the EU legislature as a means to steer the concrete application of the CESL in practice; second, initiatives emerging from self-regulation in international trade.

[50] Cf Bernstein (n 31) 177–78; LA DiMatteoc.s., 'The Interpretive Turn in International Sales Law: An Analysis of Fifteen Years of CISG Jurisprudence' (2004) 34 *Northwestern Journal of International Law and Business* 299; Gillette (n 15) 169.

8.5.1 Flanking Measures

In its Communication of 2011 on the CESL, the European Commission indicated that it would pursue three supporting measures – or 'flanking measures' – to ensure the effective application and uniform interpretation of the CESL.[51] They are the creation of 'European model contract rules' for specialist areas of trade or sectors of activity; the establishment of a publicly accessible database of European and national judicial decisions which relate to the interpretation of the CESL; and training sessions for legal practitioners. Although the first initiative, which has close ties with self-regulation, seems promising, the other two are not per se an answer to the question of ensuring legal certainty.

To start with the second measure, the creation of a database of judicial decisions. The drawback of this solution is of course that it will take a long time for decisions on the CESL to become available. It is hard to predict what kind of instrument will emerge for the digital single market, whether the instrument is going to be used in EU trade and, furthermore, even where parties have chosen it and a dispute arises one wonders whether the sums at stake will warrant litigation.[52] Earlier attempts at creating databases also do not bode well. The database created for judicial decisions on unfair terms, CLAB, has not managed to establish itself as a research tool for academics and practitioners in the way that it was envisaged.[53]

The third measure, the organisation of training sessions for practitioners who would be working with the CESL, seems a good way to stimulate a uniform or coherent application of the CESL in the Member States. However, as a means to provide content to an open norm like 'trade usage' it seems strange to approach the issue in this top-down manner. It is more likely that practitioners will have a view of which usages and practices are current in a particular trade and industry. Filling in the norm may therefore be better done by involving practitioners as stakeholders in sessions concerning the elaboration of guidelines on the interpretation of the CESL.

The first suggested measure, in fact, aimed to do just that. The European Commission aimed to develop model contract rules based on the CESL and intended to do so in close cooperation with stakeholders from business and industry. The Commission expressed the intention to elaborate such rules through a Group of Experts, to be installed within 3 months after the entry into force of the CESL.[54] It was envisaged that stakeholders could contribute to this project by drafting standard terms and conditions based on their experiences in their own sector.[55] The outcome

[51] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2011) 636 final, p 11.

[52] See also Bernstein (n 31) 178.

[53] Cf HW Micklitz and M Radeideh, '*CLAB Europa* – The European Database on Unfair Terms in Consumer Contracts' (2005) 28 *Journal of Consumer Policy* 325.

[54] Communication (n 51) 11.

[55] *ibid.*

could therefore be that the CESL would be accompanied by a number of sets of model contract rules from which contracting parties would be able to choose.

It is noteworthy that the suggestion to follow this approach has been made much earlier with regard to the harmonisation project. The idea of multiple alternative sets of model contracts has found following in particular with scholars who envisage this as a manner in which to enable a competition of rules, or regulatory competition. Through this process of competition the 'best' rule could come up and in this manner laws would harmonise spontaneously.[56] Whether that would be the effect of such terms remains to be seen. Until now evidence from legal practice seems to indicate that regulatory competition in contract law does not occur or in any event does not have a harmonising effect on European contract laws.[57]

The initiative of drafting model rules, nevertheless, could contribute to legal certainty by explaining in more detail which outcome can be expected if the CESL is chosen as the applicable law to a contract. Rather than diminishing the role of usage, this process could perhaps be regarded as a codification of usage in various sets of model rules. Of course usage outside these rules would still continue to exist and that factor could diminish certainty. If parties are to be aware of such usage, other ways must be found to give them access to information on usages in the Member States. One way of doing this could be through connecting the rules of the CESL to forms of self-regulation.

8.5.2 Self-Regulation

Self-regulation can be defined as a set of rules developed by non-State actors, usually in the course of a trade or business. It has no official status as law, can take various forms (eg codes of conduct, industry guidelines), and it can apply to the drafting entity only or to a group of actors in a particular branch or industry.[58] This type of regulation has burgeoned in recent years in particular as a result of the increasing cross-border operation of many businesses around the world.

Self-regulation could provide a second alternative to elaborating the open norm of trade usage in the CESL. Whereas initiatives from the European Commission are imposed in a top-down manner, the process of elaborating the norm through self-regulation would take a bottom-up approach.

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[56] CfN Reich, 'Competition between Legal Orders: A New Paradigm of EC Law?' (1992) 29 *Common Market Law Review* 861; J Smits, *The Making of European Private Law; Towards a Ius Commune Europaeum as a Mixed Legal System* (Intersentia, 2002).

[57] Vogenauer (n 45); contrast G Rühl, 'Regulatory Competition in Contract Law: Empirical Evidence and Normative Implications' (2013) 9 *European Review of Contract Law* 61.

[58] LSenden, 'Soft Law, Self-Regulation and Co-Regulation in European Union Law: Where do They Meet?' (2005) 9.1 *Electronic Journal of Comparative Law*, available at http://www.ejcl.org/91/art91-3.PDF, 23.

Its most important contribution, in my view, would be to make usage accessible or 'knowable' to traders in the EU, of which the majority are SMEs. In order to ensure legal certainty, the aim does not have to be that rules are applied everywhere in a completely uniform manner. Instead, the main factor is that the outcome of potential disputes in various EU jurisdictions becomes predictable.[59] Connecting the open norm of 'trade usage' with self-regulation in various countries and industries could help to achieve that. One way of doing this is through the creation of a database – however, not a database of judicial decisions as suggested by the Commission but rather a database of existing rules relating to trade usage. Such rules could come from any instrument of self-regulation, provided that they reflect a regularly applicable usage in a particular trade or industry. Laying them down in a publicly accessible database enables traders to check before entering into a contract whether they have to reckon with particular local or national usages.

Guidelines and codes of conduct for B2B contracts already exist for a number of industries in the EU, such as the food industry and the motor vehicle industry, and in the Netherlands more generally with regard to advertising.[60] In addition, the standardisation of rules for particular types of services is becoming increasingly common.[61] All of these rules reflect relevant practices in particular areas of trade. The more information on such rules that can be gathered and made accessible through a database, the better prepared traders will be when they enter a foreign market.

8.6 Conclusion

In sum, the CESL's reference to trade usage can be a cost-effective solution and for that reason deserves to be maintained. At the same time, referring to an open norm bears the risk of uncertainty. In this chapter, I have suggested various ways in which greater certainty – or more precisely: predictability of the outcomes of legal disputes – can be ensured.

The main problem for SMEs in Europe under an instrument like the initially proposed CESL is that if they choose to apply the CESL, there is a real likelihood that they are confronted with local usage of which they were unaware when entering into the contract. This, I have argued, is not so much a problem of a lack of harmonisation or uniform application of law, but rather of the accessibility or knowability of usage. Parties may not need uniform rules in order to enter into a cross-border

[59] See above part 4.

[60] See eg Vertical relationships in the Food Supply Chain: Principles of Good Practice; Code of Contractual clauses and practices to be respected in Vehicle Manufacturer/Authorised Dealers and Repairer in contractual relations (CECRA Code of conduct); Dutch Advertising Code.

[61] Directive 2006/123/EC on services in the internal market [2006] OJ L376/36, recital 102 and Art 26(5). Knut Blind, 'Standards in the Service Sectors: an Explorative Study' (Fraunhofer Institute Systems and Innovation Research, April 2003), available at http://isi.fraunhofer.de/isi-media/docs/isi-publ/2003/isi03b30/standards-service-sector-summary.pdf?WSESSIONID=03e581a8101ce64a23ddd8a1fdffb416

contract with a certain degree of risk assessment. What they do need is transparency with regard to the various rules (incl. usages) that may apply to their agreement. Such clarification can either mean that usage is only referred to in a very limited sense (eg only international usage widely observed in the particular area of trade in which the parties operate and which could be known to both parties to the contract), or that other means are created by which parties can become aware of trade usage in a particular market or area (eg databases of guidelines or trade practices).

How to ensure transparency, predictability and certainty are continuing challenges for private law legislation. Self-regulation – or rather the collection of instruments of self-regulation in a database – may provide a useful mechanism through which to ensure greater transparency with regard to customs and usages that can apply to cross-border contracts in the EU. Legal certainty can in this way be ensured to a greater degree. Together with its neutrality in comparison to national laws, that may become a trait that draws traders in Europe to an instrument like the CESL rather than to alternative national regimes.

Chapter 9
Art. 69: Pre-contractual Statements Under Article 69 CESL – Remake or Revolution?

Bernd Seifert

Abstract Pre-contractual statements regarding the characteristics of the goods for sale can strongly influence the buyer's initial purchase decision. AArticle 69 of the draft proposal for a Common European Sales Law (CESL) tried to solve this problem by holding the seller liable not only for his own statements but, in certain circumstances, also for those ones made by the producer and other persons in the chain of transactions. In comparison to current European consumer law the provision would have broadened the seller's contractual obligations. Apart from several consistency issues which were not resolved until the Commission finally withdrew its draft in its Work Programme for 2015, the CESL especially failed to provide for an adequate right of redress of the final seller. Thereby it would have burdened sellers with a comprehensive duty to monitor advertising campaigns on a European scale and, in consequence, with a vast liability for incorrect statements made by third parties. As a result, this concept hardly would have encouraged professional traders to regularly choose the optional instrument as a legal basis for their business engagements Therefore, the Commission's current Digital Single Market Strategy should not revive the rules laid down in Article 69 as a whole. Instead, it should rather limit liability to pre-contractual statements made by the seller himself, his representatives, and the producer – given that the seller can be expected to know about the latter ones – while providing for an adequate right of redress up the whole chain of transactions at the same time.

9.1 Introduction

In its Recital 7 the Consumer Sales Directive (CSD)[1] states: "The principle of conformity with the contract can be regarded as common to the different national legal traditions." One can hardly argue with it: Pacta sunt servanda. It is indeed one of the

[1] Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 12.

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most fundamental principles of any functioning contract law. Therefore the goods which are delivered to the buyer must live up to all contractual specifications the parties have agreed to. However, the important preliminary question is: What exactly is 'the contract'? What are its contents and terms? And, in particular, how are these terms generated and identified? This is precisely what Annex 1 of the proposal for a Common European Sales Law[2] dealt with in Part II Chap. 7.

In general, terms of a contract are brought to life by agreement[3] of the parties involved – an at least bilateral, usually mutual declaration of intent, be it an explicit or a tacit one. This is also the general concept which was to be implemented by Articles 30, 66 (a).[4] On the other hand, unilateral pre-contractual statements which are made available to the public, especially in advertising, can strongly influence a potential buyer's decision to conclude a contract in the first place. As a consequence, in this field there is indeed reason to consider deviating from the general principle of freedom of contract as laid down in Article 1 and to look for an adequate solution on the basis of good faith and fair dealing as laid down in Article 2.

Like its predecessors – notably the CSD, the Principles of European Contract Law (PECL),[5] and the Draft Common Frame of Reference (DCFR)[6] – the CESL was indeed well advised to provide the parties of a contract with suitable rules on the subject matter. It aimed at doing so in its Article 69.[7] This provision – obviously a direct descendant of Articles II.-9:102 and IV.A-2:303 DCFR which in turn have been inspired by Article 6:101 PECL – stipulated that a statement made by the producer, the seller, or any other person in the whole chain of contracts may, in certain circumstances, bring about liability of the final seller towards his own customer.

While a general concept of this kind had already been installed in current European consumer contract law by Article 2 CSD with regard to public statements made by the producer and his representatives, the proposed Article 69 followed a slightly different approach in detail. These differences certainly would have imposed

[2] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law of 10 October 2011, COM (2011) 635 final.

[3] In practice, of course, there are cases in which the parties simply have overlooked to negotiate certain details of the agreement. In order to fill this gap, article 68 CESL allowed for additional terms to be implied by way of exception where this was necessary to complete the contractual agreement.

[4] If not stated otherwise, all articles quoted in the following refer to Annex 1 of the Proposal for a Regulation on a Common European Sales Law in the version presented by the Commission on 11 October 2011, with additional reference to the European Parliament's Legislative Resolution of 26 February 2014, P7_TA(2014)0159, where it substantially changed the Commission's draft.

[5] O Lando and H Beale (eds), *Principles of European Contract Law, Parts I and II, Combined and Revised* (The Hague/London/Boston, Kluwer Law International, 2000).

[6] C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference, Full Edition* (OUP, 2009).

[7] The draft CESL was preceded by a Feasibility Study on a future Initiative on European Contract Law, published by the European Commission on 3 May 2011 (IP/11/523), available online at http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf.

additional and at times hardly controllable risks of liability on the final seller. In the following, we will take a closer look at issues that still have to be given additional thought by the European legislator in order to create an adequate set of respective rules which are likely to be conceived on the basis of Article 69 in the course of the Commission's current Digital Single Market Strategy..[8] In this context we will also take a brief look at the CSD including the corresponding provisions of the German Civil Code,[9] the Consumer Rights Directive (CRD),[10] the DCFR, the PECL, and the CISG.[11]

9.2 The General Concept of Article 69 and Its Predecessors

The basic idea of holding a seller liable on the grounds of his own pre-contractual statements and, in certain circumstances, even because of those ones made by other participants in the respective supply chain is certainly not an entirely new concept. To a greater or lesser extent in detail, such liability has already been drafted or enacted by the PECL, the CSD, the DCFR, and national legislation[12] all across Europe.[13]

The CRD does not hold substantial provisions on the contents of a contract or on the subsequent liability of the trader for pre-contractual statements. The only relevant provision in this context, Article 6 para 5 CRD, can hardly be compared to the general rules of Article 69. Although the former also states that information given by the seller himself in order to comply with his information duties "shall form an integral part of the (…) contract" its scope of application was limited to distance and off-premise contracts in a B2C environment.[14] In addition, it only

[8] Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions of 6 May 2015: A Digital Single Market Strategy for Europe, COM(2015) 192 final, 5.

[9] Bürgerliches Gesetzbuch (BGB).

[10] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, OJ L 304, 64.

[11] United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980.

[12] Cf. F Infante Ruiz, 'The Integration of Advertising Statements into the Content of the Contract' in J Plaza Penadés and LM Martinez Velencoso (eds) *European Perspectives on the Common European Sales Law* (Springer, 2015) 67, 78 et seq.

[13] Some even doubt that setting up rules which expressly include unilateral statements into the contract is unnecessary because the same results could also be reached by means of interpretation; cf. P Hellwege, 'Allgemeines Vertragsrecht und "Rechtsgeschäfts"-lehre im Draft Common Frame of Reference (DCFR)' (2011) 211 *Archiv für die civilistische Praxis (AcP)* 665, 680.

[14] In the European Commission's original draft the CESL covered cross-border sales contracts in general including off-premises contracts. The European Parliament narrowed this scope of application down to distance contracts by amending articles 4 and 5 in its Legislative Resolution (n 4) amendments 60–61. In its Digital Single Market Strategy (n 8) the Commission again narrowed this scope down and announced to draft provisions only for online sales of digital products and tangible goods.

applied to *mandatory* information according to Article 6 para 1 CRD and not to statements in general. Therefore, Article 6 CRD corresponded rather with Article 13 para 2.

The CISG does not provide for comprehensive rules regarding the topic either. According to Article 35 CISG the seller is liable if the goods do not live up to his description or if they do not possess the qualities of goods which the seller has held out to the buyer as a sample or model.[15] In addition to this, the seller is also liable if the goods he delivers are not fit for any purpose expressly or impliedly made known to the seller by his customer himself[16] or by third persons.[17] In the end, the CISG does not stipulate that the seller is automatically liable for third party statements he did not commit to. On the other hand Article 8 CISG lays down the rule that statements made by one of the contracting parties are merely to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. This means that, in individual cases, a statement made by the seller may be interpreted in a way that it becomes a term of the contract, but it does not do so in general. Hence this provision resembles more the interpretation rules of Article 59.

In contrast, Article 2 para 2 (d) CSD explicitly deals with the subject matter by setting out that those descriptions and statements on the characteristics of the goods do not automatically end up as formal terms of the contract. They merely are, inter alia, to be *taken into account* when determining the conformity of the goods that have actually been delivered to the buyer. Thereby the CSD only creates a rebuttable presumption[18] in the sense that these goods are presumed to conform with the contract if they comply with the seller's descriptions and if they meet all the quality standards the consumer can reasonably expect, taking into account public statements made by the seller, the producer or his representative, particularly in advertising or on labelling. With respect to determining non-conformity, statements issued by other persons in the supply chain are irrelevant. Article 2 para 2 CSD has been implemented into German law by § 434 para 1 BGB. This provision states that public statements about the capacities of the goods for sale made by the seller or the producer in public are used to determine if the goods are fit for ordinary use and possess such qualities as the buyer may expect in goods of the same type.[19]

The first set of draft rules to more or less expressly consider unilateral precontractual statements as directly relevant with regard to the terms of a contract was Article 6:101 para 1 PECL. It stipulates that such a statement is *to be treated* as

[15] Cf. article 100 (c).

[16] Cf. article 100 (a).

[17] U Magnus, in H Honsell (ed) *Kommentar zum UN-Kaufrecht (CISG)* 2nd ed (2010) article 35 note 19.

[18] This has been criticised by F Faust, in O Remien, S Herrler, and P Limmer (eds) *Gemeinsames Europäisches Kaufrecht für die EU?* (2012) 161, 163, on the grounds that if the goods which have been delivered are not presumed as being in conformity with the contract in the cases set out by article 2 CSD they still do not automatically fail to conform.

[19] This wording is quite similar to article 100 (b) and (g).

giving rise to contractual obligation, given that the other party reasonably understood it in this way. In addition, statements about the quality or use of goods made by a professional supplier or some other person in earlier links of the supply chain also give rise to contractual obligation, regardless of the question if the other party reasonably understood it (Article 6:101 para 2 and 3 PECL). An offspring of this provision is laid down in Article II.-9:101 DCFR. For the first time, the DCFR explicitly states in paragraph 1 of said Article that a pre-contractual statement is to be *regarded as a term* of the contract. However, Article II.-9:101 para 2 limits liability to statements on the *specific* characteristics of what is to be provided.

Article 69 basically stood in line with the two aforementioned drafts. Thus it did not really enter uncharted waters by regulating that practically every pre-contractual statement on any characteristics of the goods up for sale *ipso iure* mutates into a term of the contract unless one of the rather few legal exceptions interferes, particularly if the buyer was or could have been aware of the fact that the statement was incorrect or if he simply did not care about certain characteristics at all. The formal incorporation of such statements as terms into a contract even between businesses may have been a rather 'revolutionary' step.[20] In addition, due to the legal consequences attached to Article 69 by Articles 99, 100 (f), and 106 practically any reasonable description of the goods for sale would indeed have served as a kind of warranty.[21] Yet the core stipulations of these Articles were not really new ones. What is remarkable about this Article from the perspective of the CSD and German law is that (1) the circle of persons whose statements may lead to contractual obligations of the seller would have been broadened and extended to all intermediaries up the whole supply chain with respect to B2C contracts and that (2) even statements made by the seller face to face with his customer seemed to be subject to the exceptions laid out in Article 69 para 1 (a) and (b).

9.3 The Relation of Article 69 and Articles 13 et seq

Article 69 dealt with the effects of certain statements made prior to the conclusion of a contract. Since such a statement must be related to the characteristics of the goods for sale, it necessarily contains information of some kind. Next to Article 69 there were a number of other provisions treating the relevance of pre-contractual information, notably the provisions of Part II Chap. 2 (Articles 13 et seq). These provisions were designed to enable the consumer to make a reasonable purchase

[20] See U Magnus, 'CISG and CESL' in MJ Bonell, ML Holle, and PA Nielsen (eds) *Liber Amicorum Ole Lando* (2012) 225, 246.

[21] DG Baird, 'Precontractual Disclosure Duties under the Common European Sales Law' (2013) 50 *Common Market Law Review* 297, 303.

decision[22] and therefore obliged the seller to provide the buyer with certain mandatory[23] information to be given in both B2C and B2B environments.

However, the two relevant provisions in this context – Articles 13 and 23 – partly overlapped with Article 69 and in this respect were redundant at least to some extent. Articles 13 para 1 (a), 23 para 1 only required information on the *main* characteristics[24] of the goods while Article 69 covered statements on all of them. As Article 13 para 3 (a) showed, the information to be given under Articles 13 para 1, 23 para 1 could only be made available directly to the buyer by the seller which means that public statements were not covered by these provisions even if they addressed the main characteristics. Finally, Article 13 only applied to B2C contracts with the exception of contracts for the supply of certain products, eg food, beverages and certain household goods (Article 13 para 5). In contrast, Articles 23, 69 covered all contracts where the seller was a professional trader.[25] In its current Public Consultation Questionnaire on contract rules for online purchases of digital contents and tangible goods[26] the Commission again raises the question wheter B2B contracts should be covered by future legislation (cf. question 35).

This rather complicated demarcation of the scopes of application raised two questions. The first one was whether mandatory information in the meaning of Article 13 would have become part of the contract by virtue of Article 69[27] which in consequence would also have meant that the exceptions of Article 69 para 1 (a) and (b) would have had to apply.[28] If the seller supplied mandatory information he necessarily would have made a statement in the meaning of this provision. On the other hand, information on the main characteristics of the goods that was in fact made available directly to the buyer by the trader usually could have been regarded – at least tacitly – as being part of the offer made by one of the parties under Article 31 para 1. Therefore, it would have become a term of the contract by mutual agreement of the parties under Article 30. In contrast, Articles 99 para 2, 100 (f) showed that

[22] S Grundmann, 'The Future of Contract Law' (2011) 7 *European Review of Contract Law* 490, 520.

[23] Article 22 prohibits any contractual exclusion or derogation from these duties to the detriment of the consumer.

[24] Articles II.-3:102 para 2 (b) DCFR and 5 para 1 (a) CRD contain similar provisions.

[25] According to the Commission's original draft proposal at least one of the parties in a B2B contract had to be a small or medium-sized enterprise ('SME') by definition of article 7 CESL Regulation. The European Parliament erased this restriction to the effect that all professional sellers would have been able to choose the CESL regardless of their size; cf. Legislative Resolution (n 4) amendment 70.

[26] The questionnaire is available online at http://ec.europa.eu/justice/contract/files/public_consultation_digital_content_questionnaire_with_annex_en.docx.

[27] See S Wichmann, in M Schmidt-Kessel (ed) *Der Entwurf für ein Gemeinsames Europäisches Kaufrecht, Kommentar* (2014) articles 13–17 note 20; F Zoll, 'Das Konzept des Verbraucherschutzes in der Machbarkeitsstudie für das Optionale Instrument' (2012) *Journal of European Consumer and Market Law (euvr)* 9, 17, with respect to article 67 of the Feasibility Study (n 7).

[28] Cf. C Wendehorst, 'Regelungen über den Vertragsinhalt (Teil III CESL-Entwurf)' in C Wendehorst and B Zöchling-Jud (eds) *Am Vorabend eines Gemeinsamen Europäischen Kaufrechts* (2012) 87, 95, who rightly criticised such a stipulation as being erroneous.

liability due to false statements under Article 69 requires the absence of such an agreement. In addition, mandatory information provided by the trader would have formed an *integral* part of the contract by virtue of Article 13 para 2 since it treated the essential features of the goods for sale. Therefore the provision did not – and could not reasonably have – set up the same exceptions Article 69 para 1 did.

In consequence, if the goods delivered would not have lived up to the main characteristics disclosed by the seller they would have been defective by virtue of Article 99 para 1 (a), irrespective of the further requirements of Articles 69, 100 (f), especially of the question whether the consumer was expected to have second thoughts about the accuracy of the information provided to him. The only case in which it seemed appropriate to exclude a statement from becoming part of the agreement under Article 13 para 2 was if the statement had been properly corrected by the seller prior to the conclusion of the contract (cf. the inserted Article 69 para 1 [aa][29]). In this case either the trader's offer could have been regarded as being revoked by virtue of Article 32 para 1[30] or his acceptance could have been deemed to have modified the terms of the offer according to Article 38 para 1. In addition, mandatory information given in order to fulfil a duty under Article 23 para 1 as well as public statements[31] relating to the characteristics of the goods including information issued in breach of the duties set out by Article 13 would only have become a term by virtue of Article 69. However, the wording of these provisions was not really clear on this matter. Should the Commission plan to incorporate rules like the ones set out in Article 69 into the amended proposal very similar problems would arise due to the fact that Article 6 para 5 CRD also stipulates that mandatory information forms an integral part of the contract.[32]

The second question concerned the relation of Articles 28, 29 and Article 69. As Articles 23, 28 para 2 showed mandatory information under Chap. 2 supplied outside of the scope of application of Article 13 para 2 would not per se have been incorporated into the contract. Here the information could indeed have become a contractual term only by virtue of Article 69 para 1 in the absence of expectable

[29] This exception was inserted the European Parliament's Legislative Resolution (n 4) amendment 140.

[30] If the statement in public would have been made in public in a way that it was to be regarded as part of a legally binding offer regardless of article 32 para 3 it also could have been revoked by the same means as were initially used to make it; cf. article 32 para 2.

[31] In contrast to article II.-4:201 para 3 DCFR the CESL even regarded a proposal made to the public not as an offer unless the circumstances indicated otherwise (article 31 para 3), eg if a time limit for answers was set or if goods were offered 'as long as stock lasts'; cf. E Terryn, in R Schulze (ed) *Common European Sales Law, Commentary* (2012) article 31 note 7.

[32] In the *ELI's* opinion, it should have been clarified that any individual statement related to the characteristics which provides information under Chapter 2 should become a term of the contract by virtue of a proposed new article 64 (a) regardless of the restrictive conditions set out by article 69 para 1 (a) and (b) while the latter should only cover public statements; European Law Institute, '*Statement on the Proposal for a Regulation on a European Sales Law 212*' (2012) ELI draft article 64 (b); available online at http://www.europeanlawinstitute.eu/projects/publications.

doubts on the part of the buyer.[33] On the other hand false information may also have given rise to indemnity claims under Article 29 para 1. However, Article 28 para 2 only awarded remedies if the buyer *reasonably relied* on the incorrect information supplied by the seller while Article 69 para 1 (a) prevented a statement from becoming a term of the contract if the buyer could at least *be expected to have been aware* of the incorrectness. In order to prevent inconsistent results with respect to the different wording of these provisions the requirements which must had to be met to invoke an exception would have had to be interpreted uniformly. There was no substantial reason to grant a buyer indemnity claims under Article 29 if he could be expected to have been aware that his decision to conclude a contract was based on misinformation.[34] In order to prevent legal uncertainty, the criteria related to the required degree of knowledge expected of the buyer should have beenexactly the same in both cases, especially because the rules on non-conformity were not meant to take priority over the indemnity rules set out in Articles 28, 29.[35] Since the Commission has announced to provide remedies for non-performance which potentially also include indemnity rules of the aforementioned kind it will be important to prevent any legal uncertainty on the subject matter when drafting the respective articles.

9.4 Pre-contractual Statements

The building blocks of liability under Article 69 para 1 were pre-contractual statements. Essentially, the provision sets up two cumulative conditions: (1) A contract had to be concluded and (2) a statement regarding the characteristics of the sold goods had to be made prior to this by somebody in the chain of transactions.

9.4.1 Conclusion of a Sales Contract

Article 69 para 1 stipulated that a unilateral statement may have been incorporated as a term of *the contract*. This means that the provision would only have been effective if a contract was in fact concluded according to the rules laid down in Articles 30 et seq. Otherwise there would have been no pre-*contractual* phase but just preliminary negotiations which were not covered by the CESL. In practice, however, the question would have arisen what the legal consequences are if the

[33] S Benninghoff, 'Die Rolle der vorvertraglichen Informationspflichten im Entwurf für ein Gemeinsames Europäisches Kaufrecht' in M Schmidt-Kessel (ed) *Ein einheitliches europäisches Kaufrecht?* (2012) 87, 103.

[34] D Looschelders and M Makowsky, 'Kapitel 7: Inhalt und Wirkungen von Verträgen' in M. Schmidt-Kessel (ed) *Ein einheitliches europäisches Kaufrecht?* (2012) 227, 237.

[35] Benninghoff (n 33) 109.

trader gives a potential buyer false information on the goods they are negotiating about but the contract ultimately never is concluded. In situations like this the customer also can suffer substantial damages. Let us assume, for instance, that a person wants to buy something and finds suitable offers at the online stores of two different traders. The first trader offers his goods with a 50 % discount for a couple of days only. However, with regard to the second seller's products which are more expensive it is publicly announced that all of them had certain characteristics which in fact they do not possess. Shortly before the customer wants to conclude the contract with the second trader, the latter informs him that the goods for sale do not live up to the characteristics held out in his advertising due to an internal mistake. By the time the buyer gets a chance to buy the goods at the first seller's store instead, the discount period has elapsed and the customer now would have to pay the higher regular price. In cases like this, no contract has been concluded at all. In consequence all claims for damages possibly arising from the incident or the false statement can only be treated as non-contractual obligations (*culpa in contrahendo [c.i.c.]*)[36] and would therefore not have been governed by the CESL but by the national law of one of the member states involved according to Article 2 para 1 of the Rome II Regulation.[37] Since the loss of the potential buyer in cases like this is directly related to a unilateral statement and the aim of Article 69 was to hold the seller liable for pre-contractual information, it should be reconsidered if scenarios like this could be covered by future legislation on the EU level and not be given over to different national laws.

Nevertheless, the authors of the CESL initially had chosen to exclude these matters from its scope of application. However, in its legislative resolution the European Parliament already altered this approach by inserting Article 11 para 1a CESL Regulation.[38] This provision stated that where the parties enter into negotiations with the aim of concluding a contract with reference to the CESL it shall also govern compliance with and remedies for failure to comply with pre-contractual information duties and 'other matters that are relevant' regardless of the conclusion of a contract unless the trader also made reference to other legal regimes. This would have meant that cases like the one laid out above would only have been governed by the CESL if the trader made a clear and unequivocal commitment to it vis-à-vis the potential buyer right from the beginning. Merely mentioning the possibility of submitting to the CESL would probably not have been sufficient. In addition, Article 11 para 1a CESL Regulation only addressed pre-contractual information duties, ie the duties laid down in Articles 13 et seq, in order to make sure that the trader complied with these in any case, even if a contract was not concluded subsequently. However, statements on the characteristics of the goods or digital content according to Article 69 did not necessarily relate to mandatory information and thus would at least not in whole have been covered by paragraph 1a. Whether the wording 'other matters

[36] Cf. Benninghoff (n 33) 117.

[37] Regulation 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 40.

[38] Legislative Resolution (n 4) amendment 74.

that are relevant' was designed to address these statements is unclear. In conclusion, it is to be doubted that the revised version of Article 11 CESL Regulation comprehensively would have covered c.i.c. issues. In the course of the current legislative process the Commission should therefore take these issues into account and propose a homogenous and unequivocal solution either in favour or against the inclusion of c.i.c. cases related to online sales contracts.

Finally, Article 69 referred to the *trader*. Thus at a first glance it only regarded sales contracts and did not explicitly apply to related services by virtue of Chap. 15. In turn, Chap. 15 itself did not provide for any explicit stipulations regarding pre-contractual statements either. Article 147 para 1 only referred to the rules of Chap. 9 on digital content but not to Chap. 7 on the contents and effects of contracts. However, Article 148 para 1 stipulated that the service provider must achieve any specific result *required by the contract*. Paragraphs 2 and 3 subsequently set up criteria of conformity in the absence of any express or implied contractual obligation. This catalogue did not comprise an express reference to pre-contractual statements. Yet it was only designed to give an overview over some criteria relevant in order to assess the conformity of a service with the contract and thus could not be deemed exhaustive.[39] In addition, Article 69 para 1 did not only refer to the characteristics of the goods but to those of *what is to be supplied under the contract* and therefore it covered all contractual items laid down in Article 13 para 1 (a) including services. As a result, a statement covered by Article 69 relating to services to be provided also may have been incorporated as a term of the contract and therefore would have given rise to a contractual obligation in the meaning of Article 148 para 2.[40] In consequence, if a statement related to a specific result to be achieved by the service provider, he would have been required to provide this service by virtue of Article 148 para 1.

9.4.2 The Legal Nature of a Statement

Like article 2 CSD the CESL neither gave any definition of the term 'statement' nor did it explicitly determine its legal nature. Yet the term appeared in a number of provisions of the draft proposal other than Articles 69, 100 (f), e. g. Articles 6, 8 para 2, 10 para 1, 30 para 2, 34 para 1, 41 para 2, 48 para 3, and 72 para 1 and 2. However, the terms appeared there in different contexts and therefore they may have been of different legal nature.

Under the German BGB a statement made by one party towards the other forms part of the declaration of intent (*Willenserklärung*) of this party. Its contents then have to be interpreted according to §§ 133, 157 BGB with respect to good faith and fair dealing. If a statement relates to the characteristics of the goods it is part of the agreement and becomes a term of the contract under § 434 para 1 sent. 1 BGB.[41]

[39] Looschelders and Makowsky (n 34) article 69 note 1.

[40] Wichmann (n 27) article 29 note 34.

[41] Looschelders and Makowsky (n 34) article 69 note 3.

This also applies to statements made in public by the trader or the producer if the parties of the contract refer to it in the course of the negotiations.[42] In this respect the same concept was laid down in the CESL.[43] A statement made face to face within the scope of Article 69 could have been qualified as a unilateral statement indicating intention in the meaning of Article 12 para 1.[44] Thus it had to be interpreted in the way in which the person to whom it was addressed could be expected to understand it, taking into account express statements as well as conduct on the part of the seller (cf. Articles 12 para 3, 59 [b] which were shifted to Article 58 para 3 [a] without substantive amendment by the Parliament's legislative resolution). Like the German *Willenserklärung* the statement was to be interpreted from the point of view of an objective addressee.[45] Since a statement according to Article 12 also would have been a notice in the meaning of Article 10[46] it must have had to reach the addressee by virtue of its paragraphs 3 and 4 in order to become effective.

On the other hand, additional public statements especially made by a third person in the meaning of § 434 para 1 sent. 3 BGB that were not addressed during the negotiations do not form part of the agreement under § 434 para 1 sent. 1 BGB[47] and therefore cannot per se be regarded as a term of the contract. However, they influence the customary use and the quality that is usual in products of the same nature which the buyer may expect (§ 434 para 1 sent. 2 no. 2 BGB)[48] and therefore they still can give rise to contractual obligations regarding the characteristics of what the seller has to supply. In contrast, Article 69 incorporated any pre-contractual statement as a formal term of the contract even if it was made in public. In the end this provision generally seemed to deem such a statement to be a unilateral statement indicating intent on the part of the seller in the meaning of Article 12 even it was made by third persons in the chain of transactions.[49] With respect to public statements the concept laid down by Article 69 rather resembles, from a dogmatic point of view, the respective provisions of Spanish and Italian law.[50] However, the

[42] A Matusche-Beckmann, in Staudinger (ed) *Bürgerliches Gesetzbuch, Kommentar, new edition* (2014) § 434 note 96.

[43] In so far as a statement is regarded as part of the agreement by means of interpretation the rules laid down in article 69 para 1 were indeed superfluous because the statement would already have formed a term of the contract under article 66 (a); cf. Hellwege (n 132) 680 with respect to article II.-9:102 DCFR.

[44] PC Müller-Graff, in M Schmidt-Kessel (ed) *Der Entwurf für ein Gemeinsames Europäisches Kaufrecht, Kommentar* (2014) article 12 note 6; H Schulte-Nölke, in R Schulze (ed) *Common European Sales Law (CESL), Commentary* (2012) article 12 note 8.

[45] Müller-Graff (n 44) article 12 note 4.

[46] Schulte-Nölke (n 44) article 10 note 3.

[47] Matusche-Beckmann (n 42) § 434 note 96.

[48] Looschelders and Makowsky (n 34) 235.

[49] As the comments to article II.-9:102 DCFR show, this rule was designed to provide a 'focussed way of achieving reasonable results in a common type of situation', admitting at the same time that these results could often also be achieved by relying on the rules of unilateral promises and other juridical acts; von Bar and Clive (n 6) article II.-9:102 comment A., 583.

[50] Cf. Infante Ruiz (n 12) 71, 83 et seq.

practical results of each of these concepts will differed to only a very limited extent, if any.

9.4.3 The Required Form of a Statement

According to Article 6 the CESL was governed by the general rule that a contract, a statement, or any other relevant act need not be made in or evidenced by a particular form unless otherwise stated in the CESL's provisions. Some of these provisions did indeed prescribe a certain form, such as making information available on a durable medium, eg in writing or in an e-mail, and in alphabetical or other intelligible characters (Articles 19 para 5, 24 para 4). Mandatory information by virtue of Articles 13–24 had to be given or made available to the other party by any means appropriate to the situation (Articles 10 para 2, 13 para 3 [a]). In addition, information had to be conveyed in a manner appropriate to the means of distance communication (cf. Articles 13 para 3 [a], 19 para 2), which usually will require some kind of text message. Furthermore, a distance contract concluded by telephone additionally required the offer to be signed by the consumer or his written consent indicating the agreement to conclude a contract be sent to the seller (Article 19 para 4).[51] Finally, according to Article 19 para 5, the trader had to give the consumer all the information referred to in Article 13 on a durable medium.

Since Article 69 did not state otherwise, no formalities whatsoever were to be observed. This means that a statement in this sense could have been issued in writing on paper or in electronic text form regardless of whether it was presented on a durable medium (especially on the Internet[52] or via E-Mail), verbally or tacitly by way of conduct. Even the labelling of goods would have been sufficient to communicate a relevant statement,[53] provided that it was made available directly to the consumer or in public, eg by sending the customer samples bearing the label before the conclusion of the contract or by making the label publicly available in an online catalogue on the seller's or the producer's website. On the other hand, as Article 100 (c) showed, the features of a model or a sample held out to the buyer were not to be covered by Article 69 even though they could be treated as statements under § 434 para 1 sent 3 BGB as well.[54] Furthermore, in contrast to mandatory information in the meaning of Article 13, the information contained in a statement under Article 69 did not have to be handed over to the buyer on a durable medium after the conclu-

[51] Article 8 para 6 CRD contains a similar provision.

[52] The Internet is not regarded as a durable medium in the sense of articles 19 para 5, 24 para 4; cf. G Howells and J Watson, in R Schulze (ed) *Common European Sales Law Commentary* (2012) article 13 note 18.

[53] Article 2 para 2 (d) CSD particularly regards labelling as a means of making a relevant public statement about the specific characteristics of the goods.

[54] C Schuller and A Zenefels, 'Obligations of Sellers and Buyers' in G Dannemann and S Vogenauer *The Common European Sales Law in Context* (2013) 581, 601.

sion of the contract. Yet it had to reach him prior to this point of time by virtue of Article 10 para 3 and 4 to be effective.

Finally, a statement within the scope of Article 69 at least required some kind of active and unequivocal conduct on the part of the seller. A mere omission to react to a respective pre-contractual statement made by the buyer himself would by no means have been sufficient.[55] For instance, if a trader offers digital cameras on the Internet, a potential customer may place an order stating at the same time that he intends to take the camera he wants to buy with him and use it on a journey to Norway the following winter. If the seller fails to inform him that the camera he chose does not work in an environment dominated by temperatures below −20° Celsius, this failure cannot be regarded as some kind of 'statement by omission.' Cases like this could not have been solved by falling back on Article 69. Instead, they could onlyu have to be judged depending on the seller's reaction to the statement. If he starts talking about the characteristics mentioned above in the course of the negotiations the statement may have become part of his offer or acceptance and may have generated a respective term of the contract by virtue of Article 66 (a). If the seller keeps silent the particular purpose made known to him at the time of the conclusion of the contract was to be taken into account when assessing the conformity of the delivered goods by virtue of Article 100 (a). This is quite a suitable solution to the problem at hand and should be refleted in the Commission's next draft.

9.4.4 The Proper Location of a Public Statement

As Article 69 para 1 set out a statement could have been made publicly which in practice usually means these days that it is issued by means of electronic advertising media, especially on TV, on the Internet, or via mobile phone communication. *Public* in this sense means that the statement must be made available to an indefinite number of persons regardless of the question how many people actually took notice of it. For example, this can be achieved by placing an advertisement on a website[56] or in an Internet auction,[57] by making announcements at a public trade show or other event or by issuing a catalogue.

However, the crucial question is whether there are geographical restrictions to the relevance of a statement. Since the CESL could only have been chosen in the first place if the seller and the buyer were located in different EU countries (cf. Article 4 CESL Regulation), the buyer may also have taken notice of and rely

[55] In contrast to this, articles II.-9:102 para 1 DCFR and 6:101 para 1 PECL set out that a relevant statement can be made by either party of the contract.

[56] Cf. Amtsgericht (Regional Court) Freising, 20/02/08, (2008) *Neue Juristische Wochenschrift-Rechtsprechungsreport (NJW-RR)* 1202 with regard to § 434 para 1 sent 3 BGB.

[57] Cf. Oberlandesgericht (Regional Higher Court) Celle, 20/10/05, (2005) *Deutsches Autorecht (DAR)* 269 with regard to § 434 para 1 sent 3 BGB.

on advertising campaigns conducted or other information made available in the seller's state of origin. Therefore the seller could at least have been held responsible for all statements issued in these two countries.

A further question is whether an advertising campaign aiming at the market of a third country may have been relevant in this context. Since the wording of Article 69 focused on *public* statements in general there were at least no explicit geographical restrictions as to which local public had to be addressed. For instance, would there have been a statement the customer could rely on under Article 69 if he lived in Great Britain and boughtgoods from a seller in the Netherlands while the latter or the producer who located in Germany also advertised the products on the German, the French, and the Spanish markets in a different way than in the countries of origin of the parties of the contract? What if in this case the buyer, being on vacation in Spain, learned of an advertising statement issued there which was not made available to the public in his home country? In cases like this the originator of the statement may very well generate the same degree of confidence in the recipient of the message as if the latter would have heard of it in his country of origin. There is indeed no reason why statements on the qualities of a product that is marketed in different EU countries or even all across Europe should per se have been excluded from the scope of application of Article 69 since they also can influence the buyer's decision to purchase the advertised products.

In practice this would have meant that literally every public statement aiming at a market at least within the borders of the European Union may have become a term of the contract. In order to prevent the seller from bearing a potentially excessive and unfair liability a solution could only have been found in the exceptions of Article 69. Especially if the statements issued in different countries were inconsistent with one another, the buyer could have been expected to know that he could not rely on either of them (cf. Article 69 para 1 [b]).

9.4.5 Language Requirements

According to Recital 27 and the amended Article 11a para 2 (c) CESL Regulation[58] the determination of the language requirements with regard to a contract in general was not to be governed by the CESL but by pre-existing national law applicable under the Rome I[59] and Rome II Regulations. In consequence the CESL, as well as the PECL, the DCFR, the CSD, and the CRD,[60] did not lay down comprehensive

[58] The article was inserted by the European Parliament's Legislative Resolution (n 4) amendment 76, in order to clearly refer to those issues which were or were not to be addressed by the CESL.

[59] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 6.

[60] Recital 15 and article 6 para 7 CRD explicitly exclude language requirements with regard to contractual information and contractual terms from the scope of application of the directive.

rules regarding the proper language in which pre-contractual statements can or even have to be made in order to be legally binding.[61]

In contrast to this, the CESL did indeed focus on creating solutions to the language problem for certain situations arising after the contract has been concluded.[62] In accordance with Article 61 concerning the interpretation of contracts the language in which the contract was originally drawn up was to be treated as the authoritative one if a contract document was provided in two or more versions.[63] In addition to this, Article 61 para 1a set out that if a contract document in the consumer's national language has been used that version was to be considered as the authoritative one.[64] Finally, Article 76 stipulated that where the relevant language could not otherwise be determined, the language used for the conclusion of the contract would have prevailed.[65]

The only provision that explicitly dealt with language issues related to pre-contractual communication was Article 24 para 3 (d).[66] It stipulated that a trader who provides certain electronic means for concluding a contract had to inform the potential customer about the languages offered for the conclusion of the contract.[67] Yet the provision did not prescribe a certain language in which mandatory information had to be given. In consequence, the buyer would have been able to generally rely on a pre-contractual statement made in any of those languages, even if he chose one of them for the conclusion of the contract in the end. On the other hand this does not mean that further languages were not eligible for relevant statements.

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[61] The question whether the CESL should have laid down rules on language requirements related to the formation and interpretation of the contract had become a controversial topic of discussion; cf. D Looschelders, 'Das allgemeine Vertragsrecht des Common European Sales Law' (2012) 212 *Archiv für die civilistische Praxis (AcP)* 581, 587; EM Kieninger, in R Schulze (ed) *Common European Sales Law, Commentary* (2012) article 76 note 7; G Howells, B Marten and W Wurmnest, 'Language of Information, Contract, and Communication' in G Dannemann and S Vogenauer (eds) *The Common European Sales Law in Context* (2013) 190, 207; MBM Loos, 'The Regulation of Digital Content B2C Contracts in CESL' in K Purnhagen and P Rott (eds) *Varieties of European Economic Law and Regulation* (2014) 611, 619; F Zoll, in R Schulze (ed) *Common European Sales Law, Commentary* (2012) article 76 note 6–7.

[62] F Faust, 'Der Vorschlag für ein Gemeinsames Europäisches Kaufrecht' (2012) 02 *Bonner Rechtsjournal (BRJ)* 129 note 48, assumed that the general exclusion of language matters from the cope of application of the CESL in Recital 27 apparently wais an editorial error.

[63] This wording is almost identical to article II-8:107 DCFR. According to the slightly different wording of article 5:107 PECL the language in which the contract was originally drawn up is not per se the authoritative one. There merely is a preference for the interpretation in accordance with this version. The CSD and the CRD remain silent about the subject matter.

[64] The paragraph was inserted by the European Parliament's Legislative Resolution (n 4) amendment 129.

[65] The wording obviously stems from article II.-9:109 DCFR. The PECL, the CISG, and the CSD do not contain respective regulations.

[66] Article II.-3:105 DCFR holds a similar provision.

[67] In contrast, article II.-3:102 para 2 (c) DCFR sets up the rule that in a B2C relationship the business only has to inform the consumer about the language to be used for post-contractual communications.

In addition to this, it has no be noted that under the CESL national law would not have been authoritative with respect to language requirements when referring to contractual agreements between the seller and the buyer regarding language issues. According to Article 69 para 4 any agreement to the detriment of the consumer excluding the effects of Article 69 was prohibited. If the seller would have stipulated that pre-contractual statements made in certain languages were not to be binding such an agreement would not have been valid by virtue of Article 69 para 4 without falling back on national law. In addition, the whole question is also connected to the question of where a relevant statement can be made. As seen before, there really was no geographical restriction as to where a public statement could have been made by the seller or another person within the chain of transactions. If that is so, there also is no reason to limit the number of relevant languages in general.

As can be seen from the above reflections, language issues cannot be regarded as being comprehensively excluded from the CESL's scope of application. In contradiction to Recital 27 they very well would have fallen within this scope at least with regard to statements under Article 69.

9.4.6 The Relevant Timeframe

As Article 69 para 1 clearly set out, a relevant statement could only be made before the conclusion of the contract. According to Article 30 para 1 a contract was concluded if the parties reached an agreement. This means that there had to be an offer in the meaning of Article 31 and that the acceptance of this offer had to reach the other party by virtue of Article 35 para 1. In the distance contract environment such declarations of intent these days are primarily processed by electronic means. In consequence, there practically is no significant mail delivery delay any more as there was in classic distance selling. Therefore, the time elapsing between the dispatch of the offer and the arrival of the acceptance usually boils down to a working day or even less than this.

However, even in the world of electronic selling it still may happen in certain cases that a substantial period of time elapses before an offer is answered or that the final conclusion of the contract is delayed due to the nature of the 'negotiations'. This is, for instance, the case when a contract is concluded using an auction website on the Internet. Here, the seller himself makes an offer by listing his product in an auction. The contract is ultimately concluded with the person who placed the highest bid which forms the acceptance at the time the auction ends.[68] In these cases, the timeframe between the offer and the acceptance can span several weeks. So the

[68] See Bundesgerichtshof (German Federal Court of Justice), 13/11/04, (2004) *Neue Juristische Wochenschrift (NJW)* 854. These online auctions must not be confused with auctions in the traditional sense of the word referred to in article 2 (u) CESL Regulation where the bidder is present in person and makes the offer himself.

question arises what happens if somebody from the seller's sphere of responsibility makes a statement before the auction ends? If the seller issues this statement himself, whether directly to the potential buyer or in public (eg by amending his auction's description), it still is a pre-contractual statement and there is no reason not to hold him liable for it even though the buyer could not have known about the statement by the time he placed his bid. But even if the statement is made by a third party in the meaning of Article 69 para 3 it is still being issued before the conclusion of the contract.

In this context one might argue that especially public statements issued after the buyer has placed an offer could not have influenced his decision to conclude the contract in the meaning of Article 69 para 1 (b) any more. However, as Article 32 para 1 set out, an offer could have been revoked until the other party has dispatched a declaration of acceptance in the meaning of Article 34 para 1.[69] During this period of time the potential buyer might still be influenced by announcements regarding the product he is willing to buy in the way that he simply does not legally revoke his offer. Therefore all statements issued up to the point of time set out in Article 35 para 1 still could have been relevant under Article 69. Since the Commission has announced that its new proposal will mainly focus on a set of mandatory contractual rights[70] it is rather unlikely that this draft will also cover the legal requirements of the conclusion of a contract in general. However, with regard to pre-contractual statements this would lead to the result that the relevant timeframe in which these statements can be made would depend on whether and under what circumstances national law allows the buyer to revoke his declaration of acceptance. Therefore it should at least be clarified that a pre-contractual statement can only be relevant if it was made before the buyer's initial declaration was dispatched, regardless of the question if and up to which point of time he may revoke it according to national law.

At times a relevant statement related to the characteristics of the products for sale is truly made after the conclusion of the contract, eg in a user manual that comes with the goods. Such statements do not – and cannot – become terms of the contract by virtue of Article 69 or similar provisions. Yet they would not have been irrelevant after all. Although they were not a formal part of the contract they could still have been taken into account when interpreting its terms because they would have formed part of the subsequent conduct referred to in Article 59 (b). This is a suitable solution that should also be incorporated in the Commission's future draft.

[69] In contrast, an offer can only be revoked under German law before or at the same time it has reached the offeree (§ 130 para 1 sent 2 BGB).

[70] Digital Single Market Strategy (n 8), 5.

9.4.7 The Originator of a Statement

As to the originator of the statement, Article 69 differentiated between the seller himself including his representatives (paragraphs 1 and 2) and third persons in the chain of transactions (paragraph 3). In contrast, the buyer himself could not have made a relevant statement under this Article.[71]

9.4.7.1 The Trader and His Representatives

According to Article 69 para 1 the trader – i. e. the person or legal entity which concludes the sales contract with the customer – could have made a relevant statement by himself. Article 69 para 2 broadened this scope of application by setting out that a statement made by a person engaged in advertising or marketing for the trader was to be regarded as being made by the trader himself. It is to be noted that paragraph 2 only referred to the individual status of this person as currently being assigned with marketing activities by the trader. Whether the trader actually knew or approved of the details of these activities or whether the assigned person internally acted within the limits of its contract with the trader rightly was irrelevant.

In addition to this, a lot of statements that are being issued in TV or Internet commercials and other electronic advertising media are created by or on behalf of the producer or the importer of the goods. In practice they often are also made available to traders who sell these products to other traders or to consumers. If a trader takes this material and publishes it, especially on his website or in his own accounts on other Internet platforms, he adopts the contents of the statement as his own and thus can be held liable for any defect of the goods he delivers resulting from false statements in the advertising material. In this case, the statement is his own and not (only) made by a third party. Therefore it is irrelevant if the producer of the advertising material stands within the chain of transactions or acts on behalf of the seller. In this respect, article 69 merely reflected the provisions of Article 2 para 2 (d) CSD.

9.4.7.2 Third Persons

According to Article 69 para 3, relevant statements could also have been issued by the producer of the goods or any other person 'in earlier links of the chain of transactions leading to the contract.' This provision was a direct descendant of Article II.-9:102 para 4 DCFR. Article 6:101 para 3 PECL also contains a very similar rule.

[71] Article 67 para 1 of the Feasibility Study (n 7) also laid down that the person making the relevant statement could only have been a business, thereby implying that a professional buyer could also make a binding statement. In this respect the wording of article 69 was indeed clearer bearing in mind that the CESL could not have been chosen in a C2B environment, scil. if the seller was a consumer; cf. Zoll (n 27) 17.

Although the producer usually does not act on behalf of a seller, all the traders in the chain of contracts would have been bound to any statement he made regarding the characteristics of the goods for sale. This personal scope of application is already known from European consumer contract law by Article 2 para 2 (d) CSD. While this provision only applies in a B2C environment the respective provision implemented into German law, § 434 para 1 sent. 3 BGB, does not know of such a restriction. Instead, the German legislator made the provisions of the CSD in this respect applicable to all contracts.[72]

In this context, an important question these days is whether postings made by consumers in an online forum on the producer's website can be treated as the producer's own statements. These statements are indeed made available to the public by the producer by simply offering the possibility of posting in the first place. Since the producer can remove postings at will if they are incorrect or inadequate it may be argued that if he does not do so, the statement may be regarded as an implied statement made by the producer himself. On the other hand, it may also be argued that consumer reviews are often very subjective and do not necessarily reflect the general public's opinion or even the objective quality of a product. Often there are also reviews which offer conflicting statements and results with respect to the same reviewed product. Finally it may be a producer's policy to grant consumers freedom of speech on his website and therefore does not remove their postings at all. In the end, as *Loos* rightly pointed out, it is important with regard to rules like the one laid out in Article 69 that postings by consumers may not contribute to the legitimate expectations that other consumers might have of the product for sale.[73] As a result, a statement made by a third person on a producer's website cannot generally be regarded as made by or on behalf of the producer. However, if a posting is made in a moderated forum on such a website and one of the moderator's comments on the statement, things may be different. Depending on the contents of such a comment, the statement may in certain cases very well be attributed to the producer, especially if the comment shows that he committed to the contents of a posting.

Next to the producer, there are other persons who also could have made a relevant statement to the advantage of the seller. The German version of the draft proposal created some irritation on this matter because it did indeed speak of just 'einer anderen Person' ('another person') without referring to the chain of contracts at all. This obviously also led to a correspondent misunderstanding in the European Parliament's IMCO committee since members of this committee initially had proposed to revise Article 69 para 3 on the grounds that "it is impossible to accept

[72] The primary reason for this was that it was to be avoided that the requirements of the definition of a defect of the goods be split up depending on the respective type of the contract (B2B or B2C); see Begründung zum Entwurf eines Gesetzes zur Modernisierung des Schuldrechts (explanatory memorandum to the proposal for a modernised law of obligations) of 14 May 2001, *Bundestags-Drucksache* 14/6040, 214. This act implemented the CSD into German law.

[73] Cf. Loos (n 61) 629. Loos discusses this issue with regard to the question whether the seller is deemed to be aware of the statement in the meaning of article 69 para 3. In my opinion, this is rather a question of objective attribution of a third party's statement to the producer.

unlimited liability for an 'other person', since this could be anybody."[74] Although it is certainly true that nobody has to bear the burden of being liable for statements made by random third persons, there merely seemed to have been a translation error in the German version. As already seen, the English version spoke of 'persons in earlier links of the chain of transactions' and so did the other linguistic versions, eg the Dutch, the French, the Italian, and the Spanish ones: 'een andere person in een eerdere schakel van de keten van transacties'; 'une autre personne située plus en amont de la chaîne de transactions'; 'altri soggetti in un momento anteriore della serie di transazioni commerciali'; 'por otra persona en un eslabón anterior de la cadena de transacciones'. Therefore, the broader German version could surely not have been the authoritative one on this matter.[75] The new draft in all its linguistic versions would, of course, be well advised to prevent such misunderstandings.

In the end, by including third party statements without providing for an adequate right of redress at the same time the CESL did in fact, to a certain degree, impose the manufacturer's product liability not on the manufacturer or the importer alone – like the Product Liability Directive[76] does – but on any seller within the chain of transactions. There is no reason to do so in general.[77] As we can see from Article 2 para 2 CSD it is adequate and sufficient if public statements made by a producer or his representatives are taken into account when determining if the goods delivered are in conformity with the contract, combined with a recourse option for the seller (article 4 CSD). This would also avoid inconsistent and unfair results regarding the fact that the final seller exclusively would have borne the burden of liability for statements issued by a producer or other persons who would not even have been subject to the CESL at all.

9.4.8 Necessary Contents of the Statement

In contrast to Articles 13 et seq which covered a vast variety of mandatory information, Article 69 para 1 only focused on statements on the *characteristics of what is to be supplied* under the contract. Although this term is already known from the

[74] Committee on the Internal Market and Consumer Protection, Amendments 16–338 of 27 February 2013 to the Draft Opinion of the Committee, PE506.126v01-00, 73 amendment 150.

[75] It is to be noted, however, that the incomplete wording was not corrected in the German version of the European Parliament's Legislative Resolution (n 4) amendment 142, since it was still limited to 'another person' without reference to the chain of transactions.

[76] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member states concerning liability for defective products, OJ L 210, 29.

[77] Cf. F Faust (n 18) 167 who rightly called the whole idea 'inappropriate'; cf. also S Lorenz, 'Das Kaufrecht und die damit verbundenen Dienstleistungsverträge im Common European Sales Law' (2012) 212 *Archiv für die civilistische Praxis (AcP)* 702, 728.

CSD and the DCFR,[78] neither of those sets of rules give a definition and therefore they are indeed a bit vague[79] and maybe even a little enigmatic in this respect. Article 2 para 1 (a) CSD avoids this abstractness by relating to the *description* given by the seller, a term that was also used in Article 99 para 1 (a) in order to describe a criterion of conformity with the contract. Article 6:101 para 2 PECL does not use the term 'statement' either but is a bit more specific by setting out that the statement must relate to *information about the quality or use* of the goods or services. In a similar way Article 100 (f) concretised the term by stating that the goods must possess the *qualities and performance capabilities* indicated in a pre-contractual statement. This, of course, only meant that mere sales talk, boasting, and gross overstatements like 'The goods will make your customers happy' or 'We will give you a royal treatment' should not have been regarded as information at all.[80] The same applies to very general statements like 'good protection against rain' or slogans like 'top-quality product'.[81] Statements of this kind are indeed too subjective and too unspecific to convey any relevant information.[82] Finally, Articles IV.A.-2:303 and II.-9:102 para 2 DCFR require information on the *specific* characteristics, a wording that does not really contribute to the avoidance of legal uncertainty. In the end it must be assumed that every feature of a product may have been subject to Article 69 if it was not to be regarded as grossly overstated or too unspecific to generate any reasonable expectation on the part of the seller.

Since a statement incorporated into the contract under Article 69 would have constituted a formal term of the contract, its content had subsequently to be interpreted with regard to the general rules laid down in Articles 58 et seq. This especially meant that not only the wording of a statement had to be looked at but all the circumstances of the formation of the contract including the preliminary negotiations, the conduct of the parties and so on (see Article 59).

As set out above, a unilateral statement indicating intention in the meaning of Article 12 para 1 had to be interpreted from the recipient's point of view, scil. in the way in which a person to whom it is addressed can be expected to understand it. Whether the individual buyer understood it in a different way was not relevant. Furthermore, if there was doubt about the meaning of a contract term, Article 64 would have applied. As paragraph 1 sets out, in this case the interpretation most

[78] The DCFR regards this wording as deliberately being expressed in wide terms so as to catch whatever might be supplied under the contract; see von Bar and Clive (n 6) article II.-9:102 comment B., 583.

[79] Magnus (n 20) 245.

[80] Cf. Lando and Beale (n 5) article 6:101 comment D., 300; CM Bianca and S Grundmann, *EU Sales Directive, Commentary* (2002) article 2 note 37 with regard to article 2 para 2 (d) CSD.

[81] Even though such a statement may not have been incorporated as a term of the contract, it still could have been relevant with regard to article 100 (b) when assessing if the product was fit for the purposes for which goods or digital content of the same description would ordinarily be used.

[82] It is to be doubted, however, that it would have been adequate to delete the whole article as had been proposed by members of the European Parliament's IMCO committee; see Committee on the Internal Market and Consumer Protection, draft opinion of 25 April 2013, Amendments 339–517 (PE510.531v01-00 + 506.126v01-00), amendment 433.

favourable to the consumer should have prevailed since the consumer did not supply the statement and with it the term to be interpreted. Article 65 provided for a respective rule with regard to B2B contracts.[83]

Taking all of this into account, in practice it would have become very difficult for a seller to anticipate whether a certain statement becomes a term of the contract at all and what its individual contents – ultimately resulting in specific contractual obligations – might be. In this context it may be useful to take a look at a TV commercial for a French car that was broadcast all across Europe a couple of years ago. In it we see a young man, apparently a craftsman, who is standing on the edge of a balcony on the fourth or fifth floor of an apartment building and is working there. Right below the balcony a car is parked. In a moment of inattention the man slips and falls down. He makes a hard landing on the roof of the car, his back first. For a moment he lies there motionlessly and the audience apparently is supposed to think that he is dead or at least unconscious and heavily injured. However, after a few seconds, the man sits up, climbs off the car down to the street and walks away as if nothing had happened at all. At this point, the audience obviously is expected to believe that the car's hydraulic damper system had softened the impact so effectively that the man survived without significant injury. The spot ends with a voiceover announcing that the new damper system of this car 'can save your life.'

This TV spot undoubtedly was produced and broadcast on behalf of the producer of the car. Since it ran on television for months the average dealer selling cars of this brand could have been expected to have watched it and thus know about its contents. Apart from the question if a potential buyer could rely on the plausibility of the spot's contents, the preliminary question is what statements are made in it at all. The only explicit statement is the one in the voiceover at the end. Other than this, the spot implies everything else by its images which are quite powerful and therefore they can also convey information.[84] The question in this case, however, is what the contents of possible statements may be. Is it that the car absorbs a vertical impact so effectively that you can crash on its roof without being hurt? Is it that the roof cannot be damaged even if you drop a load of more than 70 k onto it? And: Is all of this really information or is it exaggeration? A judge up to the challenge of making a court decision in this case would be obliged to pin-point exactly what relevant statements can be identified before asking if they are false and subsequently if the buyer could have been expected to disbelieve them.

This example shows that under Article 69 advertising could have become quite a problem for the producer and every seller in the chain of transactions. Advertising is only effective when it is creative and sometimes exaggerates in order to reach the viewer and be remembered by him. Otherwise there is no point in advertising products at all. Taking this into account, a seller will have a hard time anticipating in practice when he crosses the thin line between mere (irrelevant) sales talk and a legally binding term of the contract. Although this issue is already known in present

[83] Article II.-8:103 DCFR holds a similar rule stating that if a term has been established under the dominant influence of one party an interpretation of the term against that party is to be preferred.

[84] Cf. Bianca and Grundmann (n 80) article 2 note 37 with regard to article 2 para 2 CSD.

legislation, from the perspective of a professional seller it was not sufficiently solved by Article 69 either.

9.4.9 Exceptions by Law

The authors of the CESL rightly recognised that a statement alone – especially one that is made by a third person even within the chain of contracts – cannot generate a term of the contract and lead to a practically unlimited subsequent liability of the seller because this would simply be in line neither with the principle of good faith and fair dealing nor with the *justified* expectations of a reasonable buyer. Therefore, Article 69 had to list a number of cases in which a statement was irrelevant by law. All of these exceptions are already known from Articles 2 CSD, 434 para 1 sent. 3 BGB, 6:101 PECL and II.-9:102 DCFR and in part even from Article 35 para 3 CISG and thus they did not represent an entirely new concept. However, like their predecessors they were burdened with a couple of interpretation problems thatwill have to be addressed in future legislation.

9.4.9.1 The Buyer's Positive Awareness

According to Article 69 para 1 (a) and in keeping with the respective rules set out in Articles 6:101 para 2 PECL, II.-9:102 para 2 (a) DCFR, 2 para 4 CSD, and § 434 para 1 sent. 3 BGB a statement did not become a contractual term if the buyer was aware when the contract was concluded that he has received false information on the characteristics of what he has bought. Here, the buyer had to have positive knowledge that the information given by the seller or another person within the supply chain was definitely incorrect.

The buyer's knowledge also was relevant under Article 104. The provision stated that in a B2B contract[85] the seller would not have been liable for lack of conformity if the professional buyer knew or could not have been unaware of it. The European Parliament redrafted this Article and added the rule that in a B2C contract the seller would not have been liable as well on condition that the consumer knew of the defect.[86] It has already been criticised that Article 69 par 1 (a) in this respect would have been redundant with Article 104 because if the buyer is expected to know of the incorrect statement its contents do not become part of the contract in the first place and thus cannot give rise to any liability due to non-conformity.[87] While this is certainly true it has to be noted that the rules laid down in Article 104 did not only cover defects of the goods that arise from false pre-contractual statements. Since the

[85] The respective article 2 para 3 CSD only addresses B2C contracts while article IV.A.-2:307 DCFR also covers B2B agreements.

[86] Legislative Resolution (n 4) amendment 188.

[87] Looschelders and Makowsky (n 34) 237.

provision also applies if the goods are not fit for ordinary use (Article 100 [b]) and no respective statements were made prior to the conclusion of the contract or if they are not packed properly (Article 100 [d]) the rules laid down in Article 104 were not entirely superfluous and they should therefore be incorporated in the Commission's new draft.

9.4.9.2 Timely Correction of the Statement

According to Article 69 para 1 (aa) – in keeping with Article 2 para 4 CSD and § 434 para 1 sent. 3 BGB but in contrast to Article 6:101 PECL[88] and Article II.-9:102 DCFR[89] – a false statement was irrelevant if it had been corrected by the time of the conclusion of the contract.[90] This wording does not specify in which form the correction had to be made. Since it was designed to obliterate the potential customer's confidence previously generated by the statement, the correction would have had to be made in an adequate way which could have given the buyer a realistic chance of actually taking notice of it.[91] On the other hand, it was not necessary that he really did take notice[92] or even believe the corrective statement to be true. Otherwise paragraph 1 (aa) would have been completely superfluous with respect to paragraph 1 (a) since the buyer then would at least be expected to be aware of the incorrectness.

Therefore, the correction did not in any case have to be made in the same way in which the original statement was issued. If, for instance, the false statement was made on a publicly accessible website maintained by the producer it could still have been corrected by the seller face to face with his customer, especially if the website contained an advice stating that the products are 'subject to modifications' or that 'illustrations shown are similar.'[93] In these cases the seller still has to have the opportunity to correct the statement himself at the latest when he issues his contractual offer or acceptance.

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[88] Article 6:101 PECL only refers to the knowledge or assumed knowledge of the buyer.

[89] Both articles treat the correction of a statement as a subcategory of article 69 para 1 (a); cf. Lando and Beale (n 5) article 6:101, comment G., 301 and von Bar/Clive (n 6) article II.-9:102, comment B., 583.

[90] In addition to this § 434 para 1 sent. 3 BGB requires the corrective statement to be made in an equivalent way which seems to require more than just a correction adequate to the situation at hand.

[91] Cf. Bianca and Grundmann (n 80) article 2 note 42 with regard to article 2 para 4 second indent CSD.

[92] Looschelders and Makowsky (n 32) article 69 note 12.

[93] Cf. Bundesgerichtshof (German Federal Court of Justice), 04/02/09, (2009) *Neue Juristische Wochenschrift (NJW)* 1337, 1338, with regard to § 434 para 1 sent. 3 BGB.

9.4.9.3 Expected Awareness

Usually the buyer will not be aware that a relevant statement issued by the seller or the producer is incorrect and buy the goods anyway. The more important exception in practice would therefore have been the exception on the grounds of an expected awareness of the customer. Article 69 para 1 (a) provided for such an exception on condition that the buyer could be expected to have been aware when the contract was concluded that the statement was incorrect or could not otherwise be relied on. This rule is already known from Articles 2 para 4 CSD, 6:101 para (2) PECL, and II.-9:102 para 2 (a) DCFR. The reason is that if the buyer may invoke a false pre-contractual statement because his trust in it has allegedly been disappointed he can only do so if his confidence is worthy of protection.

At first glance, the wording of paragraph 1 (a) seemed to impose a lower level of what was to be expected from the buyer since it only spoke of a simple expectation on his part. In comparison, Articles 2 CSD and II.-9:102 DCFR both demand that the buyer can *reasonably* be expected to have known better than to believe in the statement. This, however, is merely an editorial deviation. There really is no difference between being expected to be aware and being reasonably expected to be aware since no one can be expected to 'unreasonably' know about something. As Article 5 para 2 showed, any reference to what can be expected of a person could only have been a reference to what could reasonably have been expected.

In addition, there also is no substantial difference between being expected to know of the incorrectness of the statement and that it could not otherwise be relied on.[94] If a statement is so far-fetched that it can by no means be relied on then every sensible person naturally can be expected to know.

Furthermore, the question of whether the buyer can be expected to have been aware of the false information is not primarily a question of fault on his part. From the point of view of German law one would indeed have to ask if the buyer's ignorance is due to negligence whereas even ordinary negligence would be sufficient according to the definition laid down in § 122 para 2 BGB. However, the reason for incorporating pre-contractual statements as terms into a contract is that the buyer's confidence in them must be protected. This confidence only deserves protection if the buyer's expectations are objectively justified. Therefore, if the buyer is a consumer, he also has no general obligation to verify or investigate the information given to him[95] except checking it for an evident lack of plausibility.[96] In the end, of course, this indeed leads to a scenario where ignorance of the individual buyer is relevant if it is due to gross negligence.[97] As a result, a statement on the characteristics of the goods would rarely have been excluded as a term of the contract in practice

[94] This wording was rightly criticised as being 'cryptic' by Kieninger (n 61) article 69 note 5.

[95] Looschelders and Makowsky (n 34) article 69 note 10.

[96] If the buyer is a trader himself, there may of course be reason to impose a stricter obligation to ascertain the accuracy of the information provided by the seller due to his own expertise. Cf. article II.-9:102 para 1 (c) DCFR.

[97] Cf. Looschelders and Makowsky (n 34) 236; Kieninger (n 61) article 69 note 11.

with respect to Article 69 para 1 (a). A possible example might have been the case that an advertisement obviously is substantially outdated.[98]

Finally, the buyer cannot rely on a statement if there are different conflicting statements made by his seller or other persons in the supply chain. For instance, if a wholesale merchant states in advertising that the tiles he sells are frost-proof down to a temperature of −15° Celsius while the final seller informs the reader in his online catalogue that they are designed for indoor use only, the customer must at least be expected to have second thoughts about the accuracy of either of these statements. In cases like this, even a consumer does not deserve to be protected because he cannot rely on the information made available to him. In addition, the buyer can also not be granted a choice between these statements.

This result would not have been affected by Article 64 para 1 whereby terms of the contract were to be interpreted in favour of the consumer if there was doubt about their meaning. If the consumer is expected to question the correctness of differing information supplied to him neither of the statements can generate any justified expectation in him. Although Article 64 was applicable to unilateral statements by virtue of Article 12 para 3, it is to be noted that it regarded each statement separately. If a statement in itself was unclear it certainly could have been interpreted in a way favourable to the consumer. However, where there were several separate statements which in themselves were clear but their contents conflicted with each other, they could only have been regarded in whole. In consequence, neither of the statements would have become a term of the contract and thus there would have been nothing left to be interpreted under Article 64.

9.4.9.4 Missing Influence on the Buyer's Decision

According to Article 69 para 1 (b) a statement did not become a term of the contract if the buyer's decision to conclude it could not have been influenced by the statement. This wording obviously stems from Article 2 para 4 CSD. In contrast, Article II.-9:102 para 2 (b) DCFR[99] excludes only statements by which the buyer *was* not influenced in order to introduce a causal connection between the statement and the decision to conclude the contract.[100]

This little distinction in the wording would indeed have made quite a difference as to the practical results. With regard to the DCFR rule it is to be asked if the statement has *in fact* had any causal influence on the buyer's decision. For example, this is not the case if the buyer did not care about a certain feature of the goods held out to him in advertising. In contrast, the question with regard to Article 69 para 1 (b)

[98] Cf. von Bar and Clive (n 6) article II.-9:102 comment B., 583.

[99] Article 6:101 PECL does not set up a respective rule. However, as the comments show, the provision also is guided by the underlying principle that the buyer is only worthy of protection if the statement in fact has influenced his decision, even though this is not reflected in the wording; cf. Lando and Beale (n 5) article 6:101 comment B., 300.

[100] von Bar and Clive (n 6) article II.-9:102 comment B., 583.

would have been whether the statement could have had any *potential influence* on the customer. So here the question was totally hypothetical leading to the result that a statement would not have been ruled out even if the buyer was in fact not influenced by it.[101] This means that the buyer could still have raised claims due to non-conformity even if he simply and maybe even explicitly did not care at all about the characteristics in question at the time of the conclusion of the contract. Taking into account that the reason for holding a seller liable for incorrect pre-contractual statements is that the customer's confidence in what he can expect to be delivered is disappointed there is no reason to grant him any rights on the grounds of hypothetical choices he did not make in reality. Therefore, the exception laid down in Article II.-9:102 DCFR is indeed more adequate.[102]

In practice however, this exception presumably would not have played a significant role anyway. The number of potential situations in which it could have been relevant is very limited as is shown by the role the respective exception in the meaning of Article 2 para 4 CSD and § 434 para 1 sent. 3 BGB plays in current jurisdiction. In the last twelve years since the latter has now been effective in Germany, very few relevant judgements have been published in which a court had to at least superficially deal with a statement that could not have influenced the buyer's purchase decision.[103] As a result, rules like the one set up by Article 69 para 1 (b) can surely be neglected with respect to their practical impact.

9.4.9.5 Awareness of a Third Person's Statement

According to Article 69 para 3 the seller was not bound by a third party's statement unless he did not know and could not have been expected to have known of it at the time of the conclusion of the contract. Articles 2 para 4 CSD, 6:101 para 3 PECL, and II.-9:102 para 4 DCFR provide for identical or very similar rules. In contrast to the consumer who was allowed to rely on such a statement under Article 69 para 1 unless he could have known that it was incorrect the seller would already have been bound by the statement if he could have been expected to have gained knowledge of its mere existence. Whether he could also reasonably believe it to be accurate or not was irrelevant.

As a result the seller would have been confronted with a much broader scope of potentially relevant statements. Statements on the part of the producer or of other intermediaries in the chain of contracts can be issued in different cross-border media, especially on TV, on the Internet or via smart phone all across Europe.

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[101] Looschelders and Makowsky (n 34) 238.

[102] Faust (n 18) 167; Looschelders and Makowsky (n 34) article 69 note 13.

[103] See Oberlandesgericht (Regional Higher Court) Munich, 10/04/13, (2013) *Neue Juristische Wochenschrift-Rechtsprechungsreport (NJW-RR)* 1526. Usually, corresponding judgements only deal with the question whether the seller was not aware or could not be expected of have been aware of a producer's statement; cf. Oberlandesgericht Munich, 15/09/04, (2005) *NJW-RR* 494; OLG Hamm, 15/12/08, (2009) *Neue Juristische Online-Zeitschrift (NJOZ)* 1588.

Especially on the Internet there are hundreds and thousands of potential sources that convey information on all sorts of products currently for sale. These could be producers' websites, product rating websites, social media networks, and some more. For a seller, the crucial question is to what extent he has to monitor all of these sources of potential liability. It is quite obvious that he must check all relevant advertising issued by the producer and the wholesale merchant of the goods he offers.[104] He also has to check on advertising campaigns conducted by them not only in his own country of origin but at least also in the countries where the producer, the consumer, and all the intermediaries are located.

Another question is whether the seller is also obliged to monitor additional sources of information like websites where products related to those ones the seller offers can be purchased. For instance, is the seller of software obliged to monitor not only the website of the distributor of this software but also websites of producers of paraphernalia like the hardware needed to run the software? If the seller does not offer the related products himself, he cannot be expected to monitor every website of producers or merchants who sell accessories to his goods.[105]

Beyond these cases in which the duties of the seller are quite clear, there would be great legal uncertainty. Nobody can clearly define where the threshold lies between what the trader is expected to know and what he is not expected to be aware of. If a trader wants to avoid liability related to statements made by others he would have to build up a comprehensive monitoring system which would allow him to not overlook relevant information. Article 69 practically would have imposed a duty on the seller to gain extensive knowledge about the product's complete transaction history including all the persons involved in the supply chain and their potentially relevant statements regarding the goods. In a way, Article 69 would thereby also have imposed on him a kind of duty to observe the market known only from product liability law. In the context of contract law this would hardly have been adequate.

9.4.9.6 Burden of Proof

A decisive issue in civil procedure is the question who is obliged to prove the relevant facts of a case. The CESL contained a number of provisions which indicated rules on the burden of proof, eg Article 21, 26, 41 para 5 and 85 (a). The original draft of Article 69 had not laid down explicit rules on the subject matter. However, the European Parliament added such rules in its legislative resolution.[106]

Firstly, and in accordance with articles 2 para 4 CSD and 6:101 para 2 PECL, Article 69 para 1 had been amended in the way that it then clearly stated that the trader had to *show* that the requirements of one of the exceptions of paragraph 1 (a),

[104] Loos (n 61) 629, with regard to digital content; Bianca and Grundmann (n 80) article 2 note 42 with regard to article 2 para 2 (d) CSD.

[105] See Loos (n 61) 629.

[106] Legislative Resolution (n 4) amendments 140 and 142. Article 2 para 4 CSD clarifies this point in the same wording.

(aa) or (b) were met. By implication, this also meant that the buyer bore the burden of proof with regard to the existence and the incorrectness of the statement in question. Furthermore, the trader also would have had to show that he did not know and could not have been expected to have known of a third person's public statement in the meaning of paragraph 3.[107] This concept basically stood in line with German civil procedure rules since the plaintiff as well as the defendant in principle have to prove all the facts favourable to themselves. However, it has been pointed out that the trader would have had the greatest trouble in proving that a statement could not have influenced the buyer's decision to conclude the contract[108] or that he could not have been aware of a third party's advertising announcements.[109] In the latter case it would have been especially hard to present substantial evidence because if the buyer would have infered a statement he obviously would have had no difficulties taking notice of it which would instantly have raised the question why the seller should not be expected to have been aware.

This example also shows that the core problem in many cases related to Article 69 would not even have been that the seller might not have been able to evidence the relevant facts. Before being compelled to prove anything he would first have been obliged to make a substantiated argument leading to the conclusion that his actual efforts – which in practice may not even be disputed at all – in order to prevent himself from overlooking relevant statements were sufficient enough. This aspect of the problem is not primarily connected to the burden of proof but rather to the legal assessment of the adequacy of the seller's efforts. If for instance, a trader located in France sells goods produced by an Italian manufacturer to a British customer under the Articles of the CESL he might very well have argued and even have been able to prove that he monitored all relevant advertising campaigns in France, Italy, and Britain. However, this proof would have been of no use to him if the judge came to the conclusion that this was not enough and the seller would have been expected to also observe the producer's advertising issued in other EU countries. In this context the wording of Article 69 was quite clear when it demanded that the seller did not only have to prove but that he had to *show* that one of the provision's exceptions was at hand.

9.4.10 Contractual Exclusion of Liability

Keeping in mind that considerable liability risks were connected to the fact that a statement could become a term of the contract by virtue of Article 69, professional sellers would have certainly striven to avoid these risks by excluding this provision or restricting its consequences in the individual agreement or in related standard contract terms. As far as statements which include mandatory information on the

[107] Any deviation from these rules is strictly prohibited by article 69 para 4.

[108] Looschelders and Makowsky (n 34) 238.

[109] Infante Ruiz (n 12) 77.

main characteristics of the goods are concerned, the statement would have formed an integral part of the B2C contract according to Article 13 para 2. Here the parties of the contract would not have been allowed to agree otherwise to the detriment of the consumer when the contract was concluded (Article 22). Only after the conclusion of the contract they would have had the opportunity to *expressly* agree otherwise which means that they individually could have changed the contents of the contract.[110] In practice, however, this is not an option for the seller since the consumer would have to agree to change the contract to his own detriment and he usually will have no reason to do so.

As far as information other than mandatory information was concerned, Article 69 para 4 also forbade any exclusion or derogation to the detriment of the consumer. Thus the seller would not have been allowed – neither in his standard contract terms nor by means of an individual agreement with the buyer – to deviate from the provisions of Article 69 and exclude statements from becoming part of the contract. However, according to Article 99 para 3 the parties could very well have excluded the liability of the seller for non-conformity of the goods with respect to Article 100 (f) if the consumer knew of the 'specific condition' of the goods at the time of the conclusion of the contract and accepted them as being in conformity with it. Given the consumer's knowledge of the state of the product he bought it can usually also be assumed that he knew or could have been expected to know that a conflicting pre-contractual statement on the characteristics was incorrect so that the statement and with it the characteristics in question would not have formed part of the contract in the first place. In this respect Article 100 (f) was indeed superfluous.[111] Even more, this raised the question whether Article 99 para 3 was to set a different standard as to the requirements of an agreement to the detriment of the consumer since on the one hand it only referred to the positive knowledge of the consumer – ignoring the question whether he could have been expected to have known as was relevant under Article 69 para 1 (a) – and on the other hand it required him to accept the goods as being in conformity with the contract while Article 69 did not. In order to avoid any misgivings as to the validity of such an agreement the upcoming legislation should not include a provision like the one laid down in Article 100 (f).[112]

Since Article 69 para 4 only covered consumer contracts the seller would not have been prohibited to exclude the rules of said Article in a B2B contract. However, such if such an agreement was to be installed in standard contract terms the seller

[110] As article 85 (i) and (j) showed, such an agreement especially could not have been made in advance in standard contract terms supplied by the trader. This provision has been moved to article 84 (fa) and (fb) by the European Parliament's Legislative Resolution (note 4 above) amendments 159–160. In consequence, the agreement was not only presumed to be unfair but was unfair in any case.

[111] Zoll (n 61) article 100 note 14; Infante Ruiz (n 12) 77; MP Garcia Rubio, 'Non Conformity of Goods and Digital Content and its Remedies' in J Plaza Penadés and LM Martinez Velencoso (eds) *European Perspectives on the Common European Sales Law* (2015) 163, 168.

[112] Cf. B Gsell 'Fehlerbegriff und Beschaffenheitsvereinbarung im Gemeinsamen Europäischen Kaufrecht' in H Schulte-Nölke, F Zoll, N Jansen, R Schulze (eds) *Der Entwurf für ein optionales europäisches Kaufrecht* (2012) 229, 246.

provides, it could still have been challenged by the buyer according to Articles 79 para 1, 86 if it was found to be unfair, especially if it grossly deviated from good commercial practice or if it was contrary to good faith and fair dealing (cf. Article 86 para 1). This usually is the case if important characteristics of the sold goods are concerned since it certainly cannot be regarded as good practice if the seller makes a promise on essential qualities and capabilities of his products and then tries to completely evade liability.

Finally so-called merger clauses in the meaning of Article 72[113] had to be taken into account. According to Article 72 para 1 such clauses stipulate that a contract in writing contains all terms of the agreement. In this case pre-contractual statements which are not contained in the document itself are not a term of the contract. According to Article 72 para 2 the parties of a contract may also have agreed to prevent these statements from being used to interpret the contract. Merger clauses that were not individually negotiated would not even have been submitted to a judicial control of unfairness under Articles 79 et seq[114] because and in so far as they were expressly allowed by the CESL.[115] In a B2B environment merger clauses could indeed have been used practically without restriction in order to circumvent the effects of Article 69. In a B2C contract, however, the consumer was not bound by such a clause by virtue of Article 72 para 3 and could not even have agreed to waive this provision (see Article 72 para 4)[116] while the trader himself would have been bound to the merger clause in any case.[117] In consequence, such a clause would have been quite futile when used against a consumer.

9.5 Legal Consequences

In case of non-performance on the part of the seller the buyer may have resorted to the remedies set out in Article 106. In a B2C contract these remedies could not have been excluded or restricted before the defect of the goods giving rise to the seller's liability was brought to his attention by the consumer (Article 108).[118] Non-performance in this sense was any failure to comply with the contractual obligations including the supply of goods which were not in conformity with the contract (Article 87 para 1 [c]). In order to conform with the contract the goods or digital content had to be, inter alia, of the quality and description required by the contract (Article 99 para 1 [a]). In addition, Articles 99 para 2, 100 (f) stated that in the

[113] Articles 2:105 PECL and II.-4:104 DCFR contain mostly similar provisions. However, these articles state that a merger clause that was not individually negotiated it will only establish a rebuttable presumption that the parties intended their prior statements not to form part of the contract.

[114] Kieninger (n 61) article 72 note 8.

[115] In contrast, merger clauses can be challenged under German law by virtue of § 307 BGB.

[116] Neither the PECL nor the DCFR contain a comparable provision.

[117] Kieninger (n 61) article 72 note 8.

[118] Article IV.A.-2:309 DCFR and article 7 CSD hold similar provisions on the subject matter.

absence of a respective agreement of the parties[119] the goods *also* had to possess the qualities and performance capabilities indicated in any pre-contractual statement which was part of the terms by virtue of Article 69.

A failure to comply with a pre-contractual statement in the meaning of Article 69 could also have become relevant with respect to Article 122. According to its paragraph 1 the buyer would not have been allowed to rely on a lack of conformity in a B2B contract if he did not give notice to the seller within a reasonable period of time specifying the nature of the lack of conformity. However, the seller was not entitled to rely on this requirement according to Article 122 para 6 if the lack of conformity related to facts of which the seller knew or could be expected to have known and which he did not disclose to the buyer. The same applied to related services in accordance with Articles 155 para 5 (c), 156 para 3. These exceptions did not only concern the failure to give correct mandatory information under Articles 13 et seq.[120] but also applied to false statements under Article 69. In this context it is to be noted that the seller would also have been liable for misleading public statements made by third persons if he knew or could have been expected to know of the bare existence of such a statement. Whether he also could have been aware that it was incorrect was irrelevant with regard to Article 69 para 3. Therefore the question arose whether the 'fact' related to in Article 122 para 6 was to be the fact that there was a relevant statement at all or the fact that it was inaccurate. In this context it has to be noted that the reason why non-conformity is at hand in cases like this is that the goods or digital content delivered by the seller do not live up to the announcements of the third person and therefore they do not comply with the terms of the contract. On the other hand the question whether the seller could be expected to have known of the mere existence of the statement can only be relevant with regard to the incorporation of the statement into the contract. As *Wiese* rightly pointed out, the purpose of Article 122 was not to make the seller disclose anything at the time of the conclusion of the contract but rather to encourage him to notify the buyer of the obstacle to performance at the time when performance is due.[121] In addition, the comments on Article IV.A.-4:304 DCFR show that the relevant fact in this context is the fact that the goods do not live up to the promises made by the seller at the time of the conclusion of the contract.[122] After all, the buyer would only have been entitled to infer the exception laid down in Article 122 para 6 if the seller was expected

[119] Unlike articles IV.A.-2:301 et seq DCFR, the CESL's system of conformity was guided by the principle of primacy of the agreement. In this respect the provision stood in line with article 2 CSD; cf. Bianca and Grundmann (n 80) article 2 note 43.

[120] Benninghoff (n 33) 115.

[121] V Wiese, in M Schmidt-Kessel (ed) *Der Entwurf für ein Gemeinsames Europäisches Kaufrecht, Kommentar* (2014) article 122 note 43.

[122] The rules laid down in Article IV.A.-4:304 DCFR are based on the assumptions that (1) many traders these days increasingly serve as a mere point of sale for highly specialised mass-produced goods and thus they often will lack essential information about the product while (2) they are nonetheless expected to have at least a certain minimum of expertise with regard to the goods they sell, not at least because they usually also handle complaints by the customers; cf. von Bar and Clive (n 6) article IV.A.-4:304 comment B., 1365.

to know of the incorrectness of the third party's statement. If the Commission plans to include such a rule in its next draft this should be expressly reflected in the wording of the respectice article.

A similar problem arose with respect to the right to damages under Articles 106 para 1 (e), 159 et seq. According to Article 159 para 1 the buyer was allowed to claim damages for any loss caused by the non-performance of an obligation unless the seller proved that it was excused. Under the respective German provisions (§§ 437 no. 3, 280 para 1, 281, 276 BGB) the seller is excused if he did not know and could not be expected to have known of the defect of the goods as such[123] while the mere knowledge of a third party's statement in the meaning of § 434 para 1 BGB in itself is not sufficient to generate liability. With regard to damages, however, it is questionable whether the same results would have been achieved since the requirements of an excused non-performance set up by Article 88 – which obviously was inspired by Articles 79 CISG, 8:108 PECL and III.-3:104 DCFR – differ considerably from the ones laid down in the BGB. According to Article 88 para 1 a party's non-performance was only excused if it was due to an impediment beyond this party's control and if that party could not have been expected to have taken it into account at the time of the conclusion of the contract. As can be seen from this wording, the provision sets up a strict liability and followed a 'no-fault approach'.[124] As the respective comments on Article 8:108 PECL show the seller shall only be excused in cases of *force majeure* which, first of all, means that the obstacle to performance must have come without the fault of the seller himself.[125] This interpretation was likely to be applied to Article 88 as well[126] to the effect that the provision would have set a high standard with regard to the chances of a seller to be excused.[127] Therefore an effective excuse could have been ruled out if the seller was expected to know about the incorrectness of the third party's statement because in these cases the seller failed to gain awareness of the defect due to at least ordinary negligence.

But also if the seller could not have known of the incorrectness of the statement it would still have been questionable if this impediment lied beyond his sphere of control in the meaning of Article 88 para 1. As the comments to Article 8:108 PECL show the seller's sphere of responsibility includes his sub-contractors as well, leading to the result that the impediment must also lie beyond their control in order to excuse the seller's non-performance.[128] This rule was reflected in Article 92 para 2. Even though the producer and the traders in earlier links of the chain of transactions

[123] Cf. W Weidenkaff, in Palandt (ed) *Bürgerliches Gesetzbuch (Commentary)* 73rd ed (2014) § 437 note 37.

[124] O Remien, in M Schmidt-Kessel (ed) *Der Entwurf für ein Gemeinsames Europäisches Kaufrecht, Kommentar* (2014) article 159 note 6.

[125] Lando and Beale (n 5) article 8:108 comment C., 379 et seq.

[126] Zoll (n 61) article 88 note 8.

[127] M Schmidt-Kessel and M Kramme, in M Schmidt-Kessel (ed) *Der Entwurf für ein Gemeinsames Europäisches Kaufrecht, Kommentar* (2014) article 88 note 6.

[128] Lando and Beale (n 5) article 8:108 comment C. (i), 380. Article 79 para 2 (b) explicitly sets up this rule.

can hardly be regarded as persons entrusted with performance on the part of the seller[129] it would still have been questionable if the seller would not have been responsible for their actions after all. With regard to Article 79 CISG the German Federal Court of Justice has already found that a defect caused by a supplier may very well fall into the sphere of responsibility of a subsequent trader on the grounds that the latter bears the risk of procurement of the goods.[130] Although the opinion of a national court certainly would not be authoritative in this respect[131] it still could not have been ruled out that Article 88 para 1 would have been interpreted in the same way.[132] Future European legislation should take this into account and provide for unambiguous rules on the subject matter.

In addition, this result would also have been consistent with the underlying concept of liability for third party statements. Article 69 para 3 held the seller liable for all statements of a third person which he could have been aware of regardless of the question whether he could also have known of its incorrectness. If the seller failed to comply with his duty to know the buyer would have been entitled to all remedies listed in Article 106 para 1. These consequences would at least partly have been circumvented if the seller was allowed to infer his lacking knowledge of the incorrectness of the statement as a reason to be excused under Article 88 because according to Article 106 para 4 he would in this case not only have been free of damage claims but would also not have been required to perform his primary contractual duties as laid down in Article 106 para 1 (a). Such a result would have been in diametric contradiction to the concept of Article 69 since it would have deprived the buyer of his most fundamental remedy.

Finally, and again unlike the rules on liability for damages laid down by the BGB, the seller would have had an obligation to inform the buyer about the incorrectness of the statement even after the conclusion of the contract if he became aware or could have been expected to be aware of the fact that is was false (cf. Article 88 para 3). For instance, if the seller knew about an advertising statement made by the producer he would have been liable under Articles 69 and 106 even if he could not be expected to have known that the statement was incorrect at the time of the conclusion of the contract. Even if he might have been excused at this moment by virtue of Article 88 para 1 he may still have gained knowledge of the defect of the goods later on, e. g. because his other customers complained to him about the fact that the product did not live up to the producer's announcements in advertising. If he failed to inform the buyer in this situation he may not have been subsequently liable for non-performance. However, Article 88 para 3 provided the buyer with damage claims independent of non-performance and regardless of the question whether the impediment was beyond control of the seller.[133]

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[129] Cf. Faust (n 18) 181.

[130] Bundesgerichtshof, 24/03/99, (1999) *Neue Juristische Wochenschrift (NJW)* 2440, 2441; cf. also Magnus (n 17) article 79 note 19.

[131] Faust (n 18) 181.

[132] Zoll (n 61) article 88 note 9.

[133] Zoll (n 61) article 88 note 17.

9.6 The Missing Right of Redress

If a professional trader would have been held liable by his customer under the Articles of the CESL due to non-conformity of the sold goods he would instantly have brought about the question of whether there is a chance for him to be reimbursed for his loss by somebody else. Bearing in mind that every trader has to earn money in order to maintain his business, this is indeed a very crucial question. An adequate answer to it would most certainly have been a decisive factor for whether it would have been prudent for a professional merchant to choose the CESL or any other optional instrument still to be presented at all.

In case the false statement was initially made by the trader himself and thus it was his own responsibility there is, of course, no room for any redress at all. But what if the originator of the statement in question is in fact the producer, the wholesale merchant or some other intermediary connected to the supply chain? In a situation like this, Article 4 CSD provides for a solution: The final seller is entitled to pursue remedies against the person that made a statement if it proves to be incorrect. Article II.-9:102 para 5 DCFR also addresses the topic by stating that a seller who is held liable by his customer due to another person's statement has a right to be indemnified by this person if he did not know and could not reasonably be expected to have known of the incorrectness of the statement. This so-called right of redress indeed is an important means of allocating the ultimate liability with the person who is actually responsible for the whole problem. In contrast, the CISG and the PECL do not hold specific provisions on this issue.

The draft proposal of the CESL simply ignored the topic as well. It obviously did not even aim at providing a seller with adequate remedies against his contractual partner or direct claims against third parties in case of non-conformity caused by others. In practice this would have lead to the result that the entire liability would have fallen upon the final seller unless national law provided him with a solution. As Recital 20 indicates, this was obviously a consequence of the fact that persons who are no direct parties of the contract in question were not subject to the CESL but only to their national law. Yet the draft proposal did not exclude third parties from the CESL's scope of application in general. As Article 78 showed, persons outside of the individual contract could very well have acquired rights under the CESL even if they were not subject to it in whole because they did not commit to the optional instrument. In addition, a producer or wholesale merchant of goods who did not choose the CESL for his own contractual engagements could still have directly and strongly influenced the contents of a contract governed by the CESL by virtue of Article 69 para 3. In the end the scope of application of the CESL was not entirely confined to the parties who in fact chose it. On the other hand, the CESL could not set up general rules of redress to the detriment of persons who did not submit to it in the first place but it could, of course, at least have obliged the national legislators to provide for an adequate right of redress like the CSD does.

After all the final seller would have had no other option but to rely on national law in order to solve the problem. At first glance, Article 4 CSD and the respective

provisions of German civil law might help out. According to §§ 478 para 1, 479 BGB[134] the trader can practically pass on the consumer's claims to his own seller within a period of up to more than five years without being restricted to a right to cure on the part of his supplier which essentially means that he can demand immediate termination of the contract (cf. §§ 478 para 1, 323 para 1 BGB). Yet upon closer inspection it has to be noted that §§ 478 et seq BGB only grant a right of redress if the final seller is bound by law to the remedies exercised by his buyer under the Articles of the CSD and the respective provisions of the BGB,[135] notably §§ 437 et seq, 323, 281 BGB, while the contract concluded by him and his customer would have been governed by the CESL alone (see Article 11 CESL Regulation). Therefore, the provisions of the BGB would not have applied at all with the result that the basic requirements of § 478 BGB would simply not have been fulfilled.

But even if the rules of the CESL on non-conformity would have been substituted by the respective ones of the BGB for the purpose of assessing whether the final seller was entitled to a right of recourse there would still have been a number of cases in which he would have been saddled with the loss. Under §§ 437 no. 3, 440, 323 para 1 BGB the buyer does not have the right to terminate the contract or to reduce the price without allowing the buyer to cure the non-conformity first. If the seller grants him such a right anyway, thereby waiving his own right to cure, he would do so as a gesture of goodwill and therefore he could not claim his right of redress under §§ 478, 479 BGB because he was not obliged to accept the termination of the contract. In contrast, according to Article 106 paras 1 (c), 3 (a) the consumer's remedies were not subject to cure by the seller since the CESL did not know of a general right to cure in a B2C environment.[136] Since the final seller voluntarily chose the CESL he also would have waived his right to cure laid down in the above mentioned provisions of the BGB and therefore he would still not have been entitled to a right of redress under the BGB. Bearing this in mind, relying on national law in order to provide for a right of redress in general may have proved to be a blunt sword after all.

Finally, as *Illmer/Dastis*[137] convincingly demonstrated, the draft proposal would not have provided the final seller with an appropriate solution to the redress problem even if all the contracting parties in the chain of transactions had chosen the CESL. For example: If the supply chain consisted of only two links – the producer and the consumer – then the producer would have been liable for every false statement he issued by virtue of Article 69 para 1. The result would have been the same in case the producer sold his products to a retailer who in turn passed them on to a consumer. In this case, in the absence of a merger clause in accordance with Article 72, of course, the producer would also have been liable to the final seller under Article 69 para 1 because

[134] It has to be noted, however, that §§ 478, 479 BGB only refer to the sale of new goods while the CSD also addresses second-hand goods (cf. CSD's Recital 8). In addition, these provisions only apply if the last sales contract of the supply chain is a B2C contract.

[135] Cf. Weidenkaff (n 123) § 478 note 10.

[136] Zoll (n 27) 21; Piltz, 'The Proposal for a Regulation on a Common European Sales Law and more particular its Provisions on Remedies' (2012) *Internationales Handelsrecht (IHR)* 133, 135.

[137] M Illmer and JCM Dastis, 'Redress in Europe and the Trap under the CESL' (2013) 9 *European Review of Contract Law (ERCL)* 109, 133–136.

there was a contractual connection between him and the retailer. However, the chain of liability – even if governed by the CESL in whole – would instantly have been broken if at least two intermediaries stood between the producer and the consumer. Suppose the producer, still making a relevant but false statement, sold his products to a wholesale merchant who in turn passed them on to a retailer. If the retailer then sold them to a consumer the latter would have held him responsible for the false third-party statement made in public advertising on the grounds of Articles 69 para 3, 100 (f) because the goods delivered did not conform to the contract. However, in relation between the final seller and his own seller (the wholesale merchant) Article 69 para 3 did not apply because the final seller was not a consumer. In consequence, the goods did in fact conform to *this* contract and the final seller would not have been entitled to any remedies on the grounds of Article 100 (f).

In the end the final seller would simply have been left alone with his loss although he caould not personally be held responsible for the incorrect statement and the subsequent defect of the goods except for the sole reason that he was expected to know about its bare existence in the first place.[138] In combination with various other provisions of the CESL, the absence of a right of redress would also have caused companies to slide into a critical state of balance sheet overindebtedness within a matter of a few years.[139] Since the Commission apparently has dropped the idea of an optional instrument as a second legal regime next to national law[140] and since it is currently planning to harmonise further aspects of consumer contract law instead the problems related to a missing right of redress as described above could easily be solved. Such a right already is installed by article 4 CSD. If the Commission's proposal should not insert the new rules on contract law directly into the CSD but create a separate directive regarding online sales it should therein either explicitly be clarified that the CSD's rules on the right of redress also apply to the new directive or the latter should set up its own rules on the subject matter – either by providing for recourse safeguards up the supply chain like the German BGB does or by means of a direct claim against the person who is ultimately responsible for the false statement.[141] Any failure to provide for an adequate right of redress would instantly cause enormous problems in commercial practice because in contrast to the CESL a European directive harmonising consumer rights can neither be chosen nor waived by traders which would again be forced to step into the liability trapp described by *Illmer/Dastis*.[142]

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[138] Infante Ruiz (n 12) 78 rightly calls this a 'glaring lack of an indemnity rule'.

[139] Cf. B Seifert, 'Das Gemeinsame Europäische Kaufrecht – Cui bono?' in T Pinkel, C Schmid, and J Falke *Funktionalität und Legitimität des Gemeinsamen Europäischen Kaufrechts* (2014) 243, 271–278.

[140] As the Public Consultation Questionnaire (n 26, question 34) shows one could think that the Commission still thinks about alternatives such as model contracts. However, a rebirth of an optional instrument like the CESL is rather unlikely since the Commission obviously has committed to push further haromization of the different national laws in the EU by means of a directive or even a regulation on the subject matter.

[141] This solution is presented by article II.-9:102 para 5 DCFR.

[142] See above (n 137).

9.7 Conclusion

Even though it has been formally withdrawn in the meantime the proposed regulation on a Common European Sales Law as a whole may – at least in the long run – prove to be a giant leap towards a unified European contract law, maybe even towards a European Civil Code. The European Commission as well as the academic drafters of this proposal therefore deserve great respect for their efforts on the subject matter. It would not be a veritable surprise if the upcoming legislative draft regarding online sales of digital content and tangible goods would take many of the CESL's provisions including the rules on pre-contractual statements as a point of departure and integrate them to a greater or lesser extent in detail into the wording of the next proposal.

On the other hand, of course, a project of such magnitude and its potential long range effects on both European and national contract law almost inevitably attracts broad criticism in general and in detail. Yet the overall concept of Article 69 – imposing strict liability on a trader for the statements he makes to the other party or in public – was quite an adequate general approach and should be taken into account when drafting future European consumer legislation. However, it should be clarified that mandatory information directly given to the consumer by the trader cannot be not subject to exceptions like the ones set out in Article 69 para 1 (a), and (b). If a consumer as well as a professional buyer cannot rely on the essential promises made face to face to him by his future contractual partner there would really be no point in concluding contracts at all. In this respect, Article 69 was by no means revolutionary but merely a reproduction of the consumer acquis and current national contract law all across Europe.

On the other hand, it must not be overlooked that the draft CESL would have added a good deal of additional liability traps to this general concept and therefore it indeed would have put a rather heavy burden on sellers,[143] especially on the final seller in a B2C environment. This should be reconsidered by the European legislator. Apart from some minor editorial modifications it is important that the scope of relevant statements is made very clear so that every trader is enabled to calculate the risk of being held liable on the grounds of his own sales talk and his advertising campaigns. Furthermore, the rather extensive liability of a trader for third party statements, especially in combination with the substantial risk of potential damage claims in the simultaneous absence of a right of redress whatsoever, was hardly adequate and should at least be revised in the way that liability for statements made by persons other than the seller, the producer, and their representatives be deleted. The responsibility for such statements would inevitably result in a duty to keep a close look on a great deal of advertising announcements up the whole supply chain on a European level. In combination with the absent right of redress – which should clearly be installed in the announced proposal – the rules regarding liability for

[143] Magnus (n 20) 246.

third-party statements as were laid down in Article 69 would practically have imposed even the manufacturer's liability on the final seller.

In considering these unilateral obligations of the seller Article 69 was indeed revolutionary in several ways, but not always in its best sense. In addition, all of these disadvantages – from the point of view of a professional trader – were by no means compensated by the CESL's other Articles.[144] These provisions widely reflected the present consumer acquis but also set up a higher level of consumer protection in some important details, especially with regard to pre-contractual statements. In consequence, from the perspective of a legal practitioner, Article 69 did not offer any incentive for a trader to choose the CESL for his everyday business engagements. Since the Commission is currently working on an amended legislative proposal there is a chance that liability of a seller for pre-contractual statements may be given additional thought even if the Commission may take the wording of the articles of the draft CESL as a point of departure. If the announced draft is to be a success in practice, it will have to be more than just another vehicle to guarantee an even higher standard of consumer protection while at the same time at least partially neglecting the economic needs of commercial trade.

[144] See Seifert (n 139) 271 et seq.

Chapter 10
Art. 70: The Duty to Raise Awareness of Not Individually Negotiated Contract Terms

Salvatore Patti

Abstract The present chapter analyses Art 70 CESL from the background of the PECL, the DCFR, and Italian law. A rule correspondent to the one contained in Art 70 CESL has been present in the Italian Civil Code for 73 years now. In fact, Art 1341 (1) CC can be seen as a precursor of Art 70 CESL. The latter rule seems to have enriched the Italian experience, namely the insufficiency of the signature to guarantee knowledge. It is submitted that the long experience of Italian legal scholars and practitioners with reference to the latter rule may be useful to highlight the positive and negative aspects of Art 70 CESL. This chapter concludes by pointing out the inadequacy of a protection based on the mere knowledge of the standard terms. A control relating to the content of the term is essential since, as the long Italian experience demonstrates, the signing party often concludes the contract nevertheless of the knowledge of the content of the unfair terms.

10.1 Introduction

Many years ago I spent a lot of time carrying out research about standard contract terms and it is interesting to note that, despite the well-known European directive,[1] the implementing laws, and above all the huge efforts made by numerous scholars regarding all the European issues, many problems arise with the same doubts and the same difficulties when elaborating the European private law.

The present chapter deals with Art 70 CESL (Common European Sales Law). According to this Article:

[1] Dir No 93/13/ECC on Unfair Contract Terms. See generally P Nebbia, *Unfair Contract Terms in European Law. A Study in Comparative and EC Law* (Oxford-Portland, Oregon, Hart Publishing, 2007).

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1. Contract terms supplied by one party and not individually negotiated within the meaning of Article 7 may be invoked against the other party only if the other party was aware of them, or if the party supplying them took reasonable steps to draw the other party's attention to them, before or when the contract was concluded.
2. For the purposes of this Article, in relations between a trader and a consumer contract terms are not sufficiently brought to the consumer's attention by a mere reference to them in a contract document, even if the consumer signs the document.
3. The parties may not exclude the application of this Article or derogate from or vary its effects.

As it is known, the CESL proposal has been withdrawn by the Commission, which is planning to propose a new instrument. However, in the light of the preparation of such new instrument, this contribution reflecting on Article 70 could surely be conducive and helpful and should be read in this spirit. In the following, reference is made to the first set of rules of Article 70 provided by the Commission even though the contents of Article 70 had been modified by the European Parliament in the meantime.[2]

10.2 The European Level

The rules provided by Article 70 CESL have mainly been taken from the previous projects of the Principles of European Contract Law (PECL)[3] and the Draft Common frame of Reference (DCFR).[4] With regard to the contents of Article 70, the DCFR displays great similarity. In fact, as pointed out in one of the first comments to the provision,[5] Article II.–9:103 DCFR provides for the exact same rule in its first paragraph, adding a specific rule for electronic contracts in the second paragraph. Finally, the definition of the third paragraph provides the model for Article 70(2) CESL, even if the scope of the latter is limited to B2C contracts.[6]

[2] COM (2011) 635 final. The proposed Common European Sales Law (CESL) constitutes Annex I to the Proposal for a Regulation.

[3] O Lando and H Beale (eds), *Principles of European Contract Law*, parts I and II (The Hague, 2000).

[4] C von Bar and E Clive (eds), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference* (DCFR), Full Edition (Munich, Sellier, 2009).

[5] EM Kieninger, 'sub Art 70' in R Schulze (ed), *Common European Sales Law – Commentary* (Baden-Baden, CH Beck-Hart-Nomos, 2012) 344. See also P Hellwege and L Miller, 'Control of Standard Contract Terms', in G Dannemann and S Vogenauer (ed), *The Common European Sales Law in Context Interactions with English and German Law* (Oxford, Oxford University Press, 2013), 423 et seq.

[6] Article II.–9:103 DCFR (Terms not individually negotiated): "(1) Terms supplied by one party and not individually negotiated may be invoked against the other party only if the other party was aware of them, or if the party supplying the terms took reasonable steps to draw the other party's attention to them, before or when the contract was concluded. (2) If a contract is to be concluded by electronic means, the party supplying any terms which have not been individually negotiated may invoke them against the other party only if they are made available to the other party in textual form. (3) For the purposes of this Article (a) "not individually negotiated" has the meaning given

Also the PECL, in Article 2:104, provide a duty to raise awareness of non-individually negotiated terms, which from a systematic point of view forms part of the general provisions on contract formation.[7] Even if the formulation differs in some respects, the effect of the rule is the same as in Article 70 CESL and II.–9:103 DCFR: The contract party who is interested to invoke the term against the other contract partner (who was unaware of the term), could only do so if it made "reasonable attempts" to bring them to the other party's attention. Article 2:104(2) states that mere references in a document are not appropriate.

Even if there is no hard law from the EU concerning the duty to raise awareness of not individually negotiated contract terms,[8] it is possible to say that Article 70 incorporates a consolidated model on a European level based on the PECL and the DCFR.

10.3 Explanation and Comparison with the Italian Law

To begin with, I will provide my interpretation of Article 70 CESL, especially on paragraphs 1 and 2. Afterwards, I will explain the content and evolution of Article 1341 of the Italian Civil Code.

The reason for this approach is not only my Italian heritage and the fact that I am most familiar with Italian law, but also that the 73 years history of the Italian norm may be very useful to highlight the positive and negative aspects of the CESL rule.

It is important to keep in mind that the Italian Civil Code of 1942 was the first European codification to create rules for standard contract terms, based on the idea of freedom of contract. Due to this fact, the Italian Civil Code did not consider any form of control over the content of the standard forms (*Inhaltskontrolle*), as the German *AGB-Gesetz* from 1976, but instead tended to assure just the knowledge of the non-drafting party and, as a consequence, the informed consent.[9] Thus, Article 1341 of the Italian Civil Code basically contains the same concept as Article 70 CESL.

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by II.–1:110 (Terms "not individually negotiated"); and (b) terms are not sufficiently brought to the other party's attention by a mere reference to them in a contract document, even if that party signs the document".

[7] Article 2:104 PECL (*Terms not individually negotiated*): "(1) Contract terms which have not been individually negotiated may be invoked against a party who did not know of them only if the party invoking them took reasonable steps to bring them to the other party's attention before or when the contract was concluded. (2) Terms are not brought appropriately to a party's attention by a mere reference to them in a contract document, even if that party signs the document".

[8] A similar rule was contained in Article 31(2) of the Proposal for a Directive on Consumer Rights (COM (2008), 614 final).

[9] See S Patti, in G Patti and S Patti, 'Responsabilità precontrattuale e contratti standard', in *Il codice civile. Commentario*, directed by P Schlesinger, *sub* Artt. 1337–1342 (Milano, Giuffrè, 1993) 395 et seq; H Kotz and S Patti, *Diritto europeo dei contratti* (Milano, Giuffrè, 2006) 247 et seq.

Looking at Article 70 of the CESL, it refers only to those terms which are not individually negotiated. In order to determine whether the particular term was specifically negotiated, Article 70 CESL makes reference to Article 7 CESL, which says, in fact, that a contract term is not individually negotiated if it has been supplied by one party and the other party has not been able to influence its content. In the event that one party supplies a selection of contract terms to the other party, from which the latter can choose, the chosen term will not be regarded as individually negotiated merely because the other party chooses it from the offered selection.[10]

If, pursuant to the abovementioned rule, the terms have not been individually negotiated, they will not be considered part of the contract. According to Article 1341 paragraph 1 of the Italian Civil Code, standard conditions prepared (the jurisprudence also says "used") by one of the parties are effective as to the other if, at the time of formation of the contract, the latter knew of them or should have known of them by applying ordinary diligence.

The norm thus refers, just as Article 70 CESL, to all the standard terms, fair and unfair, which impose a burden upon the user to let know, today we would say to inform.

The second paragraph of Article 1341 of the Italian Civil Code instead refers to the unfair conditions listed in the same Article (unfair clauses) establishing that they are not effective, unless specifically approved in writing.

Therefore, regarding the unfair terms too one remains in the perspective of the informed consent: the party that has specifically approved the unfair terms by a so-called "second signature" is aware of them and agreed to them and thus does not need any additional protection.

However, in this context the first paragraph of Article 1341 of the Italian Civil Code, which is dedicated to all the standard terms, is relevant. It provides two alternative conditions of effectiveness of the standard terms which, regardless of the terms used, in my opinion seem to correspond to the two conditions of effectiveness foreseen in Article 70 CESL.

In fact, according to Article 1341 of the Italian Civil Code the standard terms are effective if:

1. The other party knows them at the time of formation of contract, or
2. should have known of them by using ordinary diligence (described in Article 1176 of the Italian Civil Code as the diligence used by a good family father).

Basically, the first condition of effectiveness corresponds to the first one foreseen in Article 70 CESL:

1. Contract terms supplied by one party… may be invoked against the other party only if the other party was aware of them;

[10] See generally D Mazeaud and N Sauphanor-Brouillaud, 'sub Art 7', in R Schulze (ed) *Common European Sales Law – Commentary* (Baden-Baden, CH Beck-Hart-Nomos, 2012) 105 et seq.

while the second condition of effectiveness of Article 1341 of the Italian Civil Code corresponds to the second one foreseen by Article 70 CESL:

> 2. or if the party supplying them took reasonable steps to draw the other party's attention to them, before or when the contract was concluded.

In conclusion, contrary to the assertions of Professor Kieninger,[11] Article 70 CESL does indeed have a precursor in at least one Member State: Article 1341 paragraph 1 of the Italian Civil Code.

In fact, Professor Kieninger's commentary only speaks about the second part of Article 1341 of the Italian Civil Code, which – as I said – addresses standard terms which are unfair, have not been separately signed and therefore are ineffective.

The Commentary fails to analyse the first part of Article 1341 of the Italian Civil Code, which, as I have tried to point out, actually is the precursor of Article 70 CESL. Article 70 CESL instead does not concord with Article 1341 of the Italian Civil Code as regards paragraph 2 "*For the purposes of this Article, in relation between a trader and a consumer contract terms are not sufficiently brought to the consumer's attention by a mere reference to them in a contract document, even if the consumer signs the document*".

The non-concordance is mainly due to the fact that Article 70 paragraph 2 CESL refers only to B2C contracts while Article 1341 of the Italian Civil Code refers to all contracts, thus both the B2B and B2C ones.

Besides, Article 70 paragraph 2 CESL refers to all the standard terms, fair and unfair, while Article 1341 paragraph 2 of the Italian Civil Code, which – as we have seen – provides for the signing, refers only to unfair terms. But above all, the rules are different as they ascribe a different value to the signing of the standard terms by the consumer: according to Article 1341 paragraph 2 of the Italian Civil Code the standard terms – even the unfair ones – are effective, if specifically undersigned, while, according to Article 70 CESL in the B2C contracts, even fair standard terms signed by the consumer are not effective towards the latter, if the trader does not prove to have brought them sufficiently to the consumer's attention.

In my opinion, the caution shown by Article 70 CESL has to be shared in the light of the Italian experience concerning Article 1341 paragraph 2 of the Italian Civil Code. Indeed, as anyone who has signed a contract in Italy in a bank, insurance agency or telephone agency can testify, the so-called second signature, which serves to "approve" and thus to render effective the unfair terms, is requested by the trader by marking the line of the contract where to put the signature with an "x", and this line is placed under the list of the unfair terms. Almost no one reads the terms referred to as unfair ones and therefore does not have any knowledge: it is therefore correct, as stated in Article 70 CESL, not to presume (or establish) that the so-called specific signing shall be sufficient, as the signing party should have actual knowledge about the content of those terms.

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[11] Kieninger, 'sub Art 70' (n 5) 345: "In sum, the rule in CESL (P) has no precursor in Member States' law or in the *acquis communautaire*".

10.4 Conclusion

Article 70 CESL, finally, seems to have treasured the Italian experience, namely the insufficiency of the signature to guarantee knowledge.

Obviously, however, the doubts regarding the adequacy of a protection based on the mere knowledge of the standard terms (even the unfair ones?) remain.

A control relating to the content is essential since, as the long Italian experience demonstrates, the signing party concludes the contract nevertheless of the knowledge of the content of the unfair terms. This is due to several reasons,[12] for example the lack of awareness regarding the risks associated with a clause even if considered unfavorable; or the lack of alternatives as all the general terms of contract of the traders offering a particular good or service contain the same unfair terms.

[12] See generally CP Gillette, *Standard form contracts*, in G De Geest (ed) *Encyclopedia of Law and Economics*, 2nd ed, title 6, *Contract Law and Economics* (Cheltenham, UK-Northampton, MA, USA, Edward Elgar, 2011) 115 ss.

Chapter 11
Art. 70–71: Incorporation and Making Available of Standard Contract Terms

Marco Loos

Abstract Incorporation of standard terms is a much-debated issue in almost all legal systems. Any legal instrument on contract law therefore must provide *an* answer as to when terms are incorporated – but answers may vary considerably from one legal system to the next. In this chapter the provisions of the – now withdrawn – proposal for a Common European Sales Law pertaining to the incorporation of standard terms will be compared to the incorporation rules in German and Dutch law. The term 'incorporation rules' will be used in a rather broad sense and include rules pertaining to the acceptance of standard terms imposed on the other party, to rules pertaining to surprising and unclear terms, and to rules requiring the party imposing the terms to give the other party a reasonable opportunity to become aware of their content. The focus will therefore be on Article 70 of the CESL and its functional equivalents in German and Dutch law. It is hoped that the European legislator may benefit from this analysis when developing rules on incorporation of standard terms for upcoming legal instruments, such as an instrument for the Digital Single Market.

11.1 Introduction

The central questions at the symposium for which this contribution was originally prepared were whether consumers and businesses would have been better or worse off under the Common European Sales Law (CESL) than under the corresponding national law provisions. Whether this is the case depends of course on the perspective. This is true in particular in a B2C-contract: where the consumer would have been better off under the CESL than under the corresponding national law provisions, it stands to reason that his counterpart, the professional seller, would have been worse off under the CESL. With regard to B2B-contracts, no 'consumer protection issues' are at stake, so the idea that one party – typically the buyer – should

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be protected from abuse by the other party – the seller – is at least less evident: in a commercial setting, both parties are thought to have an equal bargaining position. Therefore, neither party is in need of protection against the other party. Obviously, this is not always a proper reflection of reality. However, whereas in B2C-contracts such abuse would typically be committed by the professional seller, it is much less obvious who the stronger party in a B2B-contract is: in one case, this will be the seller, but in another case this will be the buyer. For example, where the buyer is a chain of supermarkets, such as Albert Heijn, Aldi, and Lidl, the seller may be a local farmer selling his produce to the only available retailer. Protecting the buyer against the seller, which is typically what occurs in a B2C-contract, would in such cases imply that the stronger party is awarded additional protection, whereas the party in need of protection is denied such protection.

This implies that at least in B2B-contracts, protection should not be awarded on the basis of status (buyer or seller), but rather on the basis of limiting the possibility for one party to unilaterally impose contract terms on the other party. In practice, there are two means of doing so. First, the legislator could introduce rules on the incorporation of contract terms. Second, the legislator could introduce means to control the substance of the incorporated contract terms. The second option implies some kind of unfairness control as is introduced by the Unfair Terms Directive[1] for B2C-contracts and which applies in many legal systems also to some extent to B2B-contracts. This approach was laid down in Chapter 8 of the CESL; however, the protection of businesses from unfair terms would have been rather limited given the restrictive test of Article 86 of the CESL. However, both for B2C-contracts and B2B-contracts, protection is offered only with regard to not-individually negotiated terms. This seems to imply that the mere fact that a term was individually negotiated takes away any need for protection as the weaker party is also able to understand the meaning of the negotiated term and capable of changing that term if and to the extent that it unreasonably favours the other party, or able to walk away if the other party is not willing to change the negotiated unfair term. In this view, offering protection in such cases would only mean interfering in the parties' freedom to shape their contract in accordance with their mutual interests.

The first option to protect a party from abuse by the other party implies legislation with regard to the question if and when a contract term becomes a part of the contract and may be invoked by the party imposing the term on the other party. Whereas the second approach implies action against *unfair* terms, such qualification does not apply to rules on the incorporation of terms, as these may prevent terms, which in substance are perfectly fair, from becoming part of the contract. Whereas the unfair test aims at substantive fairness, incorporation rules rather aim at procedural fairness, ensuring that a contracting party can have access to the contract terms and, if he so wishes, can read them before the contract is concluded. This suggests that incorporation rules primarily aim at enabling a party to decide whether or not to contract on the basis of an investigation of all terms of the offer made by the other party.

[1] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993, L 95/29.

Incorporation of standard terms is a much-debated issue in almost all legal systems. Any legal instrument on contract law therefore must provide *an* answer as to when terms are incorporated – but answers may (and do) vary considerably from one legal system to the next. In this chapter the provisions of the – now withdrawn – proposal for a Common European Sales Law pertaining to the incorporation of standard terms will be compared to the incorporation rules in German and Dutch law. I will use the term 'incorporation rules' in a rather broad sense: obviously, this notion includes rules which pertain to the question whether or not a contract term offered by one party is accepted by the other party. However, I will also consider rules that determine that even though a term has been accepted by the other party, the party imposing such rules may not rely on them if the other party has not been provided with an opportunity to obtain (and if he so desires: to read) these terms before the contract is concluded. On the other hand, I will not look into rules pertaining to the battle of forms, ie rules deciding which standard terms apply if both parties make use of and refer to their standard terms.[2] Moreover, I will focus primarily on standard terms. Whereas unfair control may apply to both standard terms and individually negotiated terms, incorporation rules typically focus on standard terms, as individually negotiated terms at least to some extent have been made available to the other party in order for the parties to negotiate their content.

11.2 Incorporation of Standard Contract Terms Under the CESL

At first glance, the former proposal for a Common European Sales Law does not appear to have contained specific provisions regarding the incorporation of standard terms into the contract. This implies that the provisions on the conclusion and interpretation of contracts would also have applied to the question of whether standard contract terms are part of the contract between the parties.[3] In this section I will look into the question when, and under which conditions, standard terms would have become part of the contract under the CESL. In Sect. 11.2.1, I will discuss the matter of acceptance of the standard terms. Section 11.2.2 deals with precontractual obligations to inform about contract terms; Sect. 11.2.3 then deals with the question whether and to what extent standard terms are to be provided before or at the time when the contract is concluded and what the consequences would be if the standard terms are not provided at that time. Section 11.2.4, finally, deals with the specific

[2] On the battle of forms under CESL, see MBM Loos and HN Schelhaas, 'Commercial sales: the Common European Sales Law compared to the Vienna Sales Convention' (2013) 1 *European Review of Private Law* 114-116; MBM Loos, 'Standard Terms Regulation in the Proposal for a Common European Sales Law. Comment to Nils Jansen' (2012) 4 *Zeitschrift für Europäisches Privatrecht* 778–779.

[3] Cf Loos/Schelhaas (n 2) 113.

matter of additional payments for goods and services in addition to the main subject of the contract.

11.2.1 Acceptance of the Standard Terms

According to Article 30 of the CESL, a proposal to conclude a contract amounts to an offer if it is intended to result in a contract if it is accepted by the other party and has sufficient content and certainty for there to be a contract. This suggests that all elements to be included in the contract must be determinable already from the offer. The Article does not indicate, however, how the offer should look. In particular, it does not indicate whether it must contain and specify the standard terms or whether a mere reference to the terms suffices. Article 34 then indicates that any form of statement or conduct by the offeree is to be interpreted as an acceptance if it indicates assent to the offer, but silence or inactivity does not in itself constitute acceptance. There are no specific rules with regard to the acceptance of the applicability of the standard terms apart from the provisions of Articles 38 and 39 of the CESL. Under Article 38 of the CESL, where the offered declares its acceptance of the offer made by the other party, but adds that it wishes to incorporate additional or different contract terms pertaining to, among other things, the payment, the quality and quantity of the goods, the place and time of delivery, the extent of a party's liability to the other, or the settlement of disputes, this party is presumed to in fact reject the original offer and to make a new offer including such terms. The first party would then have to accept that new offer. However, if both parties wish to include their standard terms and offer and acceptance differ *only* with regard to the applicable standard terms, Article 39 adds that in such case a contract is already concluded and that in so far as the terms are common in substance, the standard terms apply, whereas they are not incorporated in so far as they conflict. However, where a party informs the other party that it does not wish to be bound by a contract if its standard terms are not applicable, no contract is concluded. Where no such statement is issued, the parties are deemed to have agreed that the contract is concluded without the conflicting terms.

From the interplay between Articles 30, 34, 38 and 39 of the CESL one may deduce that standard terms must be agreed upon, but also that a reference to them in the offer suffices: otherwise, the text of Article 39, paragraph 1, of the CESL, which speaks of the situation where offer and acceptance 'refer to conflicting standard terms' would not make any sense. This does, however, not indicate how concrete the reference must be and how the reference may be expressed in order to ensure that the standard terms form part of the offer and therefore are incorporated into the contract. In particular in commercial contracting, much of the debate in front of courts or arbitrators is on the question whether or not the standard contract terms have been accepted by the other party. Is it, for instance, possible to have standard contract terms incorporated into the contract by consistently referring to them on invoices and thus establishing a commercial practice between the parties? Moreover,

can a party successfully argue that although it has accepted the other party's standard contract terms, it has not accepted the application of a specific term that is so unexpected that its acceptance of the set of terms in general can't be interpreted as an acceptance of also this, surprising, term? Since a provision in a non-Commission draft excluding the applicability of such a term under these conditions was not taken over by the European Commission,[4] it seems that such a term would be part of the contract unless the first party expressly rejects to be bound by such a term or the term would be considered unfair under Article 83 CESL (for a B2C-contract) or Article 86 CESL (for a B2B-contract). Either way, there is a substantive chance that national courts will be inclined to apply their ordinary national contract law to decide these matters, at least until the Court of Justice has provided guidance.[5]

11.2.2 Precontractual Obligations to Inform About Contract Terms

Where the contract is a B2C-contract, more guidance is given, as precontractual obligations to inform the consumer apply. Under Article 13, paragraph 1, under (d), of the CESL, in the case of distance contracts and off-premises contracts, the seller has a duty to provide the contract terms in a clear and comprehensible manner. This information must include at least details pertaining to payment, delivery and, where applicable, the duration of the contract, the existence and conditions for deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader and the existence of relevant codes of conduct and how copies of them can be obtained.[6] Paragraphs 3 and 4 add that the information must be provided in plain and intelligible language and be legible. A more limited obligation exists where the contract was concluded in a retail shop, as in such case only information needs to be provided on certain types of contract terms, in particular pertaining to payment, delivery and the duration of the contract.[7] In so far as the contract is

[4] See Article 87 of the Feasibility study. The Feasibility study was prepared by an Expert Group instigated by the European Commission to prepare a preliminary draft of what later became the proposal for a CESL. It is published by the European Commission as an annex to a report by the Commission and available online at www.ec.europa.eu/justice/contract/files/feasibility_study_final.pdf (last visited on 28 July 2015).

[5] See critical M Gade, *Allgemeine Geschäftsbedingungen im internationalen und europäischen Privatrecht* (Berlin: Duncker & Humblot, 2014), p. 208ff, who mentions several techniques by which a similar result can be achieved under the CESL.

[6] Cf. Article 16 CESL.

[7] Article 20 CESL pertains to the arrangements for payment, delivery of the goods, supply of the digital content or performance of the related services and the time by which the trader undertakes to deliver the goods, to supply the digital content or to perform the related services, and, where applicable, the duration of the contract, the minimum duration of the consumer's obligations or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract. The information need only be given in so far as it is not already clear from

concluded electronically, the seller must also provide information as to the languages offered for the conclusion of the contract and as to the contract terms, and the contract terms must be made available in alphabetical or other intelligible characters and on a durable medium which permits reading, recording of the information contained in the text and its reproduction in tangible form.[8] The seller bears the burden of proof that it has provided the required information.[9] And of course all of these rules are mandatory.[10]

From these Articles, it follows that at least with regard to B2C-distance contracts and B2C-off-premises contracts a duty exists for the seller to provide the standard terms prior to the conclusion of the contract. A corresponding duty for the seller in a B2B-contract does not exist. Moreover, the mere fact that there are such duties in B2C-contracts does not mean that these obligations are necessarily also effective. There is certainly reason for doubt here, as the remedies are not particularly useful: Article 29, paragraph 1, of the CESL basically requires the seller to pay damages for any damage sustained as a result of the failure to timely inform the consumer of the contract terms – but what damage could that be? Similarly, the remedies of mistake and fraud remain available,[11] but it will be difficult to prove for any consumer that he would not have concluded the contract had he received the contract terms in time or that the seller had withheld the terms *on purpose* (and not by mere negligence). In effect, this implies that there is a serious risk that these precontractual obligations are but tigers without teeth – they do not really bite.

11.2.3 Raising Awareness of Standard Terms

Under Article 70 of the CESL, standard terms may be invoked against the other party only if the other party was either aware of them, or if the party supplying them took reasonable steps to draw the other party's attention to them, before or when the contract was concluded. This provision applies both to commercial and consumer contracts and is mandatory in so far as the parties have opted for the application of the CESL, paragraph 3 provides. According to paragraph 2 of the same Article, in a consumer contract a mere reference to the standard contract terms in the written contract is not sufficient in order for the business supplying the terms to be able to rely on them, not even if the consumer signs the contract document. Since in most B2C-contracts a duty to provide the standard terms follows already from the precontractual information obligations mentioned in Sect. 11.2.2, it would stand to reason that the seller would only be able to invoke its standard terms against a

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the context – so no information needs to be given about the duration of the contract if it is clear that the contract is a one-off contract.

[8] Cf. Article 24 CESL.

[9] Cf. Articles 21 and 26 CESL.

[10] Cf. Articles 22 and 27 CESL.

[11] Cf. Articles 29, paragraph 3, 48 and 49 CESL.

consumer if he has provided them to the buyer before the contract was concluded or at that moment. Moreover, where the term – contrary to Article 13 of the CESL – would not be in plain and intelligible language or, if it is provided on a durable medium, is not produced in a form which is legible, the term could not be invoked against the consumer. This suggests that the transparency principle applies already with regard to the incorporation of standard terms in B2C-contracts.

However, since Article 70, paragraph 2, of the CESL is expressly restricted to B2C-contracts, *a contrario* one may infer from this that in a *commercial* contract the mere reference to standard contract terms in the contract document would be sufficient for the supplier of the terms to be able to rely on them.[12] This would mean that for a commercial contract it would suffice that the other party expresses its consent to the use of standard contract terms in one way or the other for them to be binding on the other party, save the possibility to invoke the unfairness of the terms. Moreover, there does not seem to be any role for the principle of transparency here either, given the fact that here are no precontractual obligations to this extent and even with regard to the unfairness test the transparency principle is not applicable.[13] Finally, not much guidance is given as regards the language in which a reference to standard terms is to be made, or in which language standard terms are to be provided, if at all: Article 76 CESL does indicate that in communications between the parties the language to be used is that used for the conclusion of the contract, but this provision only applies when the language for such communications 'cannot be otherwise determined'. As the standard terms have become part of the contract, the mere fact that they have been drafted in a particular language and the other party has not objected to the use of that language before the contract was concluded could be interpreted as a contractual agreement as to the use of that language, even if the party accepting the terms does not master that language sufficiently.

11.2.4 Additional Payments Subject to the consumer's Express Consent: Article 71 CESL

Article 71 of the CESL contains a somewhat peculiar provision for consumer contracts. It provides that in such contracts, the consumer may not be required to make any payment in addition to the sales price for the purchased goods, unless the consumer has given express consent to the additional payment before the conclusion of the contract. Article 71 is mandatory, and where the consumer has made the additional payment without having expressly consented to it before he was bound by the contract, he may recover it. The provision is based on Article 22 of the

[12] Cf. extensively Loos (n 2) 780; in this sense also Gade (n 5), p. 120–121. Different apparently F Möslein, 'Kontrolle vorformulierter Vertragsklauseln' in M. Schmidt-Kessel (ed) *Ein einheitliches Kaufrecht? Eine Analyse des Vorschlags der Kommission* (2012) 274, who does not distinguish between B2B and B2C contracts, even though the scope of Article 70, paragraph 2, CESL is expressly limited to B2C contracts.

[13] Article 82 CESL is restricted to B2C-contracts.

Consumer Rights Directive[14] and as such does not differ substantively from the German and Dutch implementations of this directive.[15] The provision intends to prevent the commercial practice of sellers offering goods or services against additional payment by the use of pre-ticked default options in the procedure of ordering specific goods. Through such defaults options, consumers tend to purchase, additional goods or services they don't really need, in particular insurance or commercial guarantees pertaining to the goods purchased. As the relevant boxes are pre-ticked, consumers may not even recognise that by not un-ticking the box, they contract for such extra goods or services, and are required to pay for them.

Since the Consumer Rights Directive is a full harmonisation directive, the German and Dutch implementation cannot add to the protection offered by the directive. Article 71 of the CESL could, but here Article 22 Consumer Rights Directive is copied almost literally. Therefore, with regard to such additional payments, Article 71 of the CESL will not lead to any differences for the position of buyers and sellers in comparison to German or Dutch law. This provision will therefore not be discussed below.

11.2.5 Conclusion Regarding the Incorporation of Standard Terms Under CESL

It is clear that under the CESL for standard terms to be incorporated into the contract, their applicability must have been included in the offer and this offer subsequently must have been accepted by the other party. It appears that a reference to the standard terms in the offer is sufficient, but the CESL does not provide any guidance as to the possibility of standard terms becoming applicable by of way the absence of protest against consistent reference to the standard terms on invoices. It seems likely that surprising terms, included in standard terms that as a set of terms have been accepted by the other party are indeed applicable to the contract. The principle of transparency most likely will have a limited role to play in consumer contracts, but none in commercial contracts. Not much clarity exists in which language the offeror may refer to its standard terms or in which language they are to be provided. In the case of a B2C-contract, in many cases the seller will be required to provide the standard terms prior to the conclusion of the contract, but this is probably not to be the case in B2B-contracts. No indication is given, however, when the seller has sufficiently raised the buyer's awareness to the standard terms to be able to invoke them against the buyer: does the mere indication that the standard terms are available at a certain place suffice? Does the seller have to send the terms to the buyer if

[14] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 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, [2011] OJ L 304/64.

[15] For Germany, see § 312e BGB, for the Netherlands, see Article 6:230j BW.

the buyer so requests? In the absence of clarity on these matters, a choice in favour of the CESL will produce a multitude of court cases on these matters.

11.3 Incorporation of Standard Terms in German Law

According to § 305 BGB, in German law standard terms become part of the contract when the party imposing them on the other party (Sect. 11.3.1) has *expressly* made the other party aware of the standard terms and (Sect. 11.3.2) offers the other party a reasonable opportunity to read the terms before the contract is concluded, and (Sect. 11.3.3) the other party has accepted their applicability.[16] The party that wishes to rely on a standard term bears the burden of proof that these conditions have been met.[17] Slightly more lenient rules apply in commercial contracts (Sect. 11.3.4). Surprising terms, however, are not incorporated into the contract (Sect. 11.3.5).

11.3.1 Express Reference to the Terms

A reference to standard terms is only then express when at the time of the conclusion of the contract it is clear for the buyer and not capable of being misunderstood by the buyer.[18] At least in a B2C-contract, the reference must be clear to the buyer and may not be hidden, which implies that the buyer may not be required to actively search for the terms.[19] This implies that the mere fact that the standard terms are printed at the backside of the offer or in a catalogue received by the buyer is insufficient if the seller does not refer to the terms.[20] The reference must point to

[16] Cf. § 305, paragraph 2, BGB. When determining whether or not a reasonable opportunity is offered to the other party to read the terms before the contract is concluded, the fact that the other party has a physical handicap is to be taken into account in so far as the party imposing the terms is aware of the handicap. See in particular § 305, paragraph 2, second sentence, BGB. Specific rules apply with regard to contracts pertaining to public transport, electricity, gas, telecommunication, postal services in so far as the other party has accepted the applicability of the terms and making them available to the other party before the contract is concluded is possible only with disproportionate difficulties for the party imposing the terms, see § 305a BGB.

[17] BGH (Supreme Court) 18 June 1986, VIII ZR 137/85, NJW-RR 1987, 112.

[18] Cf. P Ulmerand M Habersack in G Christensen, A Fuchs, M Habersack, C Schäfer, H Schmidt, A Witt (eds) *Ulmer/Brandner/Hensen, AGB-Recht, Kommentar zu den §§ 305–310 BGB und zum UKlaG*, 11th ed., no. 123 to § 305 BGB (Cologne,Verlag Dr. Otto Schmidt, 2011); J Becker in H.G. Bamberger, H. Roth (Herausgeber) (eds) *Kommentar zum Bürgerlichen Gesetzbuch, Band 1, §§ 1*–610, no. 47 to § 3–5 BGB. CISG (München: Verlag C.H. Beck, 2007).

[19] Cf. Gade (n 5), p. 76, who suggest (p. 79) that the rules are slightly more relaxed in B2B-contracts, cf. Gade, p. 79.

[20] Becker (n 18) no 45 to § 305 BGB. According to Gade (n 5) p. 79 in a B2B-contract the seller need to explicitly refer to the standard terms if he provides a copy thereof to the buyer together with the offer.

specific terms, but it suffices that the seller refers to the current edition of those terms. Where the seller only refers to specific clauses of a set of standard terms, then only these terms become part of the contract.[21] Where the seller makes use of several editions of the same set of terms and it is unclear which edition the seller wishes to incorporate in a specific case, then the reference is insufficient and does not lead to the application of the standard terms. The seller may remedy that by enclosing the relevant standard terms with its written offer.[22] Reference to standard terms *after* the conclusion of the contract, eg on an invoice, a delivery notice, or a dispatch notice, is ineffective.[23] A reference to standard terms must be made in the language used during the negotiations of the contract.[24] However, a reference in the language of the contract suffices when the buyer understands the language of the contract as well and has no real difficulties in understanding the reference.[25]

11.3.2 Reasonable Opportunity to Become Acquainted with the Terms

The second condition for the applicability of the standard terms is that the seller offers the buyer a reasonable opportunity to take notice of the standard terms.[26] Whether or not the buyer makes use of the opportunity, is not relevant.[27] The mere expectation of the seller that the buyer knows the text of the standard terms from earlier contracts or is not interested in receiving them does not free him from his *Obliegenheit*[28] to provide the buyer with the opportunity to become acquainted with the terms.[29] The condition is met when the standard terms are published in a catalogue, price list or prospectus that the buyer has had in its possession and when they have been printed in or enclosed with the offer. If, in the case of a written offer, the seller merely indicates that he has the standard terms available at his place of business, this suffices only if the place of business may easily be reached by the

[21] Cf. Ulmer and Habersack (n 18 above) no. 125 to § 305 BGB; Becker (n 18) no 47 to § 305 BGB.

[22] Cf. Ulmer and Habersack (n 18) no 126 to § 305 BGB.

[23] Cf. Ulmer and Habersack (n 18) no 127 to § 305 BGB; Becker (n 18) no 67 to § 305 BGB.

[24] Cf. Ulmer and Habersack (n 18) no 101 to § 305 BGB; H. Schmidt, in: Ulmer/Brandner/Hensen 2011, no 14 to Anhangzu § 305 BGB; Becker (n 18) no. 45 to § 305 BGB; J Basedow in W Krüger (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch; Band 2 (Schuldrecht, Allgemeiner Teil, §§ 241–432)*, 6th ed. (München: C.H. Beck'sche Verlagsbuchhandlung, 2012) no 63 to § 305 BGB.

[25] Cf. Schmidt (n 24) no. 14 to Anhang zu § 305 BGB; see also Becker (n 18 above) no. 61 to § 305 BGB.

[26] Cf. Ulmer and Habersack (n 18) n. 145 to § 305 BGB.

[27] Cf. Ulmer and Habersack (n 18) no 146 to § 305 BGB.

[28] Under German law, this implies that the seller is not in breach of contract if he does not provide the standard terms (and therefore not liable in damages), but he may not invoke the terms. On the other hand: the buyer may invoke the terms if he so wishes, cf. Becker (n 18) no 41 to § 305 BGB.

[29] Cf. Ulmer and Habersack (n 18) no 145 to § 305 BGB.

buyer and it is not reasonably possible for the seller to send the buyer the standard terms due to their length or to other technical difficulties.[30] Where the seller only produces some terms and leaves out other, he has not met his obligation with regard to these other terms, which therefore are not incorporated into the contract.[31] Where the contract is concluded orally, the seller must either provide the buyer with a copy of the standard terms or to provide the buyer with the possibility to view such copy at the place where the contract is concluded.[32] Where the contract is concluded online, the seller must offer the buyer the possibility to download and to either print or save the standard terms through a clearly visible link and free of charge.[33] In all these cases the seller has not met this obligation if he merely indicates that the standard terms will be provided free of charge upon request by the buyer.[34] Moreover, the standard terms must be made available in understandable language and readable form. This expression of the principle of transparency implies that the standard terms must be understandable for the average buyer.[35] The text of the standard terms is to be provided to the buyer in the language of the negotiations or, under the same conditions, of the contract.[36] A term in the standard terms which provides that in addition to the applicable standard terms also other standard terms apply is valid in so far as it remains clear for the average buyer which terms apply in which case.[37] However, the seller is required to also provide the buyer with these additional standard terms.[38]

11.3.3 Acceptance of the Terms

The third condition, finally, is that the buyer must agree to the applicability of the standard terms to the contract. It is not required that the buyer actually knows the content of the standard terms: in order for the terms to be incorporated into the contract, it suffices that the buyer, after having been properly informed of the applicability of the terms and having been offered a reasonable opportunity to read

[30] Cf. Ulmer and Habersack (n 18) no 147 to § 305 BGB.

[31] Cf. Ulmer and Habersack (n 18) no 147a to § 305 BGB; Gade (n 5), p. 77.

[32] Cf. Ulmer and Habersack (n 18) no 148 to § 305 BGB.

[33] Cf. Ulmer and Habersack (n 18) no 149a to § 305 BGB; Gade (n 5), p. 83. See also § 312i paragraph 1 under (4) BGB. Ulmer and Habersack, no. 149a to § 305 BGB, argue that when the terms are relatively short, it suffices that the terms may be read from the screen without the possibility to download and print or save the terms; see differently, Gade (n 5), p. 84.

[34] BGH 10 June 1999, VII ZR 170/98, NJW-RR 1999, 1246.

[35] Cf. Ulmer and Habersack (n 18) nos 150–151 to § 305 BGB. Partly different Gade (n 5), p. 78, who argues that the question whether or not the terms are understandable belongs to the unfairness test of § 307 BGB.

[36] Cf. Schmidt (n 24) no 15 to Anhang zu § 305 BGB.

[37] BGH 21 June 1990, VII ZR 308/89, NJW 1990, 3197.

[38] Cf. Ulmer and Habersack (n 18) no 152a to § 305 BGB.

the terms before the contract was concluded, indeed concludes the contract.[39] In other words: there is no form requirement that has to be met for the acceptance of the applicability of the standard terms.[40]

Under § 305 BGB the party imposing the terms, therefore, is required to expressly draw the other party's attention to the use of the terms, and to enable the other party to become acquainted with their content. Both conditions must be met before or at the moment the conclusion of the contract.[41] § 305 BGB applies to contracts where the buyer is a consumer under § 13 BGB (a B2C-contract) as well as to contracts where the buyer is not a consumer, but also not an 'Unternehmen' (commercial party) under § 14 BGB, that is not a party that, for the purpose of the concluded contract, acted in the course of its business or profession.[42]

11.3.4 Incorporation of Standard Terms in B2B-Contracts

However, § 305 BGB is not applicable where the other party itself is a commercial party or a legal person according to public law, eg a community.[43] The idea is that for commercial contracts a more flexible approach is needed than the rather strict rules of § 305 BGB.[44] Nevertheless, German law on the incorporation of standard terms still requires that the other party has accepted the terms and that he has had some opportunity to take notice of the standard terms before the contract is concluded.[45] The conditions under which these requirements are met, however, are less strict than in the case of a B2C-contract or a contract with a 'Nichtunternehmen', but where the seller has met the requirements of § 305 BGB in a commercial contract and the buyer has accepted the applicability of these terms, of course standard terms have been successfully incorporated into the contract.[46] For the incorporation of the terms it suffices that the party imposing the terms refers to them without specifically drawing the other party's attention to them. If the other party subsequently accepts the first party's offer without objecting to the standard terms, he is deemed to have accepted also the standard terms. A tacit reference to the standard terms therefore suffices as long as the other party is aware of the use of the terms and does not object

[39] Becker(n 18) no 66 to § 305 BGB; Gade (n 5), p. 79.

[40] Basedow (n 24) no 87 to § 305 BGB.

[41] Cf. Ulmer and Habersack (n 18)nos 101 and 155 to § 305 BGB.

[42] Cf. Ulmer and Habersack (n 18) no 103 to § 305 BGB.

[43] Cf. § 310, paragraphs 1 and 4, BGB. Cf. also Ulmer and Habersack (n 18) no 111 to § 305 BGB, and P. Ulmer and C. Schäfer, in: Ulmer/Brandner/Hensen 2011 (n 18) no 7 to § 310 BGB.

[44] Ulmer and Schäfer (n 43) no 8 to § 310 BGB.

[45] Cf. Ulmer and Habersack (n 18), no 169 to § 305 BGB; Becker (n 18) no 80 to § 305 BGB; Basedow (n 24) no 93 to § 305 BGB.

[46] Basedow (n 24) no 63 to § 305 BGB.

to their use. This implies that where the first party provides the standard terms together with the offer or on the backside of the offer, the other party is deemed to have become aware of the first party's intention to include the terms in the contract.[47] However, the mere fact that the other party knows that the first party normally imposes its standard terms is not sufficient, even if the terms were expressly incorporated into an earlier contract.[48] On the other hand, when the first party in an *established* commercial relation consistently has referred to its standard terms before the conclusion of previous contracts, the other party will normally be expected to be aware of the seller's intention to contract under applicability of his terms. If that is the case, the buyer is deemed to have accepted these terms also in a later contract if he has not objected to the applicability of the terms to the later contract.[49] Moreover, standard terms are not applicable by the mere fact that they are printed on invoices for goods delivered and the other party has not objected to the terms.[50] Where the offer to contract is made by the buyer it is presumed not to include the buyer's standard terms unless that party clearly indicates he only wishes to contract on the basis of its standard terms.[51] When these conditions have not been met and the seller confirms the conclusion of the contract and refers in a clear and unequivocal manner to his standard terms, the confirmation of the contract is treated as a rejection of the buyer's offer and as a new offer, which needs to be accepted by the buyer.[52] The mere sending of the confirmation letter and the enclosure of the standard terms without a clear reference to them in the confirmation letter, however, does not lead to the applicability of the seller's standard terms.[53] Where both parties are active in the same branch of commerce and the use of standard terms is common in that branch, the seller's offer is typically interpreted as including the intention to incorporate its standard terms, even if a reference to the terms is absent. The terms are then deemed to have been accepted if the other party does not expressly object to the applicability of the standard terms.[54] Where an explicit reference to the contract terms is made, the reference must be done in the language in which the negotiations took place. However, in the case of an international commercial contract, the reference may also be expressed in a world language, ie in English or French.[55]

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[47] Cf. Ulmer and Habersack (n 18) no 170 to § 305 BGB.

[48] Cf. BGH 12 February 1992, VIII ZR 84/91, BGHZ 117, 190, NJW 1992, 1232.

[49] Cf. Ulmer and Habersack (n 18) no 176 to § 305 BGB; Ulmer and Schäfer (n 43) no 30 to § 310 BGB; Basedow (n 24) no 97 to § 305 BGB.

[50] OLG (Court of Appeal) Hamburg 19 September 1984, 5 U 56/84, ZIP 1984, 1241; cf. also Ulmer and Habersack (n 18) no 176 to § 305 BGB.

[51] Cf. Ulmer and Habersack (n 18) no 170a to § 305 BGB.

[52] BGH 22 March 1995, VIII ZR 20/94, NJW 1995, 1671, standing case law.

[53] Basedow (n 24) no 104 to § 305 BGB.

[54] Cf. Ulmer and Habersack (n 18) nos 173 and 174 to § 305 BGB.

[55] Cf. Schmidt (n 24) no 16 to Anhang zu § 305 BGB.

11.3.5 Surprising Terms

Even if the seller has properly made the buyer aware of the use of the standard terms, provided the buyer with a reasonable opportunity to become acquainted with the content of the terms before the conclusion of the contract and has obtained the buyer's agreement to the applicability of the standard terms, this still does not mean that all terms have been incorporated into the contract: § 305c BGB provides that 'surprising terms' (überraschende Klauseln) have not become part of the contract. A term is surprising if, in the circumstances of the case, including the apparent image of the contract, it is so unusual that the buyer need not have expected that the standard terms included a term to this extent. The provision applies also when both parties to the contract are commercial parties, but of course a commercial party will not as easily as a consumer be surprised of the content of standard terms than a consumer will be.[56] There are two conditions for the applicability of § 305c BGB. Firstly, the term must *objectively* be unusual, taking into account the type of contract concluded and the behaviour of the seller prior to the conclusion of the contract. Not decisive is whether or not, or to what extent the term would be unfair.[57] And secondly, the term must be a surprise for the typical buyer or the typical member of a certain group of buyers,[58] leading to a significant discrepancy between the actual content of the contract and the expectations the buyer has thereof.[59] However, where the seller has given rise to a specific expectation for this particular buyer, which expectations are undermined by its standard term, the term may be equally surprising.[60] A term is surprising in particular where it is alien to the kind of contract concluded.[61] In this sense, a term in a sales contract for the purchase of a coffee machine by which the buyer is required to purchase coffee for that machine or other products is surprising, as the buyer need not expect such a term in a sales contract.[62] However, where the seller has specifically drawn the attention of *this* buyer to the otherwise surprising term – eg by using a specific colour or bold print where otherwise the terms are printed in normal print, or by discussing it with the buyer – the surprise may be taken away, and therefore the term would be incorporated into the contract after all.[63]

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[56] Cf. Ulmer and Schäfer (n 43) no 6 to § 305c BGB; Schmidt (n 24) no 3 to § 305c BGB: Gade (n 5), p. 194–195.

[57] Cf. Ulmer and Schäfer (n 43) nos 11 and 12 to § 305c BGB; Schmidt (n 24) no 11 to § 305c BGB.

[58] Cf. Ulmer and Schäfer (n 43) no 13 to § 305c BGB; Basedow (n 24) no 6 to § 305c BGB; Schmidt(n 24) no 11 to § 305c BGB; Gade (n 5), p. 191.

[59] Basedow (n 24) no 10 to § 305c BGB.

[60] Schmidt (n 24) no 11 to § 305c BGB; Gade (n 5)., p. 192.

[61] Basedow (n 24) no 11 to § 305c BGB; Schmidt (n 24) no 12 to § 305c BGB.

[62] Basedow (n 24) no 11 to § 305c BGB; Schmidt (n 24) no 12 to § 305c BGB.

[63] Cf. Ulmer and Schäfer (n 43)nos 13 and 23 to § 305c BGB; Schmidt (n 24) no 16 to § 305c BGB; Gade (n 5), p. 193. According to Basedow (n 24) no 8 to § 305c BGB, in such a case the term may even be considered as individually negotiated, implying that it also escapes from the unfairness test of § 3–7 BGB.

11.3.6 Conclusion Regarding the Incorporation of Standard Terms Under German Law

Under German law far-reaching provisions have been developed pertaining to the incorporation of standard terms into a sales contract: even in commercial contracts the seller must make the other party aware of the use of the standard terms, offer the buyer a reasonable opportunity to acquaint himself with the content of the terms before the contract is concluded, and obtain the buyer's agreement to the applicability of the terms. The transparency principle plays an important role safeguarding that the standard terms are made available in understandable language and readable form, and contract terms are normally to be provided in the language in which the negotiations have taken place, albeit that in the case of commercial contracts and where it is established that the other party is capable of understanding another language the standard terms may also be provided in another language, in particular if the terms are in English or French. Moreover, even when these conditions are met, standard terms that are surprising within the meaning of § 305c BGB are deemed not to have been incorporated into the contract.

11.4 Incorporation of Standard Terms in Dutch Law

Under Dutch law, a sharp distinction is drawn between the question whether or not the standard terms have been incorporated into the contract (Sect. 11.4.1), and whether the party introducing the standard terms to the contract has provided the other party with a reasonable opportunity to become acquainted with the terms before the contract was concluded (Sect. 11.4.3). If the latter is not the case, the terms may be voided. Such opportunity does not exist when the counterpart of the party introducing the standard terms into the contract is a large party (Sect. 11.4.5) or if the contract is an international commercial contract (Sect. 11.4.4). However, where surprising terms are normally incorporated into the contract (Sect. 11.4.2), this may be different in the case of international commercial contracts.

11.4.1 Acceptance of the Terms

Standard terms become part of the contract if the other party has accepted their applicability. The question whether or not this is the case is answered on the basis of the general rules on formation of contract. In particular, the so-called will-reliance theory of Articles 3:33 and 3:35 BW is applied: where the party that introduces the standard term into the contract may reasonably rely on the other party having accepted the applicability of the standard terms, the standard terms are deemed to have been incorporated into the contract. This is true even if the first party knows

that the other party has not read the terms, Article 6:232 BW explicitly provides. The party introducing the terms must make clear, however, which set of standard terms it wishes the other party to accept: if it refers to several sets of terms without indicating, in a manner comprehensible to the other party, which set of terms applies in which case, neither set of terms is incorporated into the contract as it cannot be objectively established which set of terms the other party was expected to accept at the time when the contract was concluded.[64]

In so far as the other party argues that it had not accepted the terms, the party introducing the terms bears the burden to prove that the other party should have been aware of the fact that it intended to incorporate its standard terms into the contract.[65] It is of no relevance which party introduces its standard terms: even terms that substantively would seem inadequate to be part of the contract apply if they are accepted by the other party. So, if a buyer in his dealings with clients makes use of standard terms for, eg, the provision of building services, and the seller does not object to the applicability of these standard terms, the buyer's terms will be incorporated into their sales contract. The mere fact that standard terms are normally being employed in a branch of industry does not suffice, not even if the other party is aware thereof and knowledgeable as to the content of the relevant standard terms, as this does not show the first party's intention to incorporate the terms into this particular contract.[66] However, it is sufficient if the other party is aware that the first party wishes to include its terms in the contract, and subsequently concludes the contract without objecting to the incorporation of the standard terms, it is deemed to have accepted the applicability of the terms.[67] This is true in particular where the other party is a professional party and the first party had included a clear reference to its standard terms in the offer or the confirmation of the conclusion of the contract and had enclosed the terms, and the other party had not reacted to the enclosure of the terms.[68] However, where the other party is a consumer, the reference to standard terms in a letter confirming the conclusion of the contract will only lead to the applicability of the standard terms if the consumer is aware of

[64] The priority between the sets of terms may also be made clear *within* the sets, ie the case where one set of terms indicates that another set of terms prevails over it, or that it prevails over another set of terms. Cf. Hof's-Hertogenbosch 16 April 2013, ECLI:NL:GHSHE:2013:BZ7927 (Poly Products/Scheldebouw).

[65] See MBM Loos, *Algemenevoorwaarden* 2nd ed (The Hague: Boom Juridische uitgevers, 2013) no 40.

[66] Hof (Court of Appeal)'s-Gravenhage 24 August 2010, ECLI:NL:GHSGR:2010:BN7767, NJF 2010, 430 (Nature Food/Euronuts Notenveredelingsindustrie B.V.). See however different Hof Amsterdam 13 October 2005, TvC 2006/4, p 121 (Willems/NV Nuon Infra West).

[67] Cf. Hof Arnhem-Leeuwarden (location Arnhem) 9 April 2013, ECLI:NL:GHARL:2013:BZ8218 (Adventure Bags/Kruidvat Retail). Even a party that indicates its agreement to an offer 'subject to the standard terms, that I have not read' is deemed to have accepted the standard terms, cf. Rechtbank (District Court, court of first instance) Arnhem 20 February 2008, ECLI:NL:RBARN:2008:BC5063, NJF 2008, 172 (Maintec Contracting B.V./Snijtech B.V.).

[68] HR 2 December 2011, ECLI:NL:HR:2011:BT6684, NJ 2011, 574 (Linthorst Installatiebedrijf/Echoput Beheer).

the fact that the first party wishes to add its standard terms to the contract and does not object to that.[69]

Where the other party is a professional party, it is also deemed to have tacitly accepted the first party's standard terms if the reference to the standard terms was included in the footer of the stationery of the first party and the other party concludes the contract without objecting to the reference. This is true also in the case of an international sales contract as a professional, internationally operating party may be expected to be aware that such a reference in the footer of the stationary may contain a reference to terms and conditions. If she concludes the contract without asking for a clarification, she is deemed to have accepted the first party's standard terms. This is true even if the negotiations took place in another language, and the other party is a foreign company who does not master the language in which the reference is made.[70]

The reference to standard terms in an invoice or a delivery notice normally does not lead to the applicability of the terms to that contract,[71] but this may be different where both parties are professional parties active in the same branch of industry and where it is common that contracts are not concluded in writing and references to standard terms are commonly included in invoices or delivery notices.[72] Where a party in an established commercial relation consistently has referred to its standard terms on invoices or delivery notices, under certain conditions the first party may rely on the other party's acceptance of the terms for later contracts.[73] Schelhaas has formulated some guidelines to determine whether this is the case: (1) the references in the invoices to the first party's terms have been consistent and sufficiently clear to the other party; (2) the references are of such nature that the other party may be expected to have been aware of the first party's intention to incorporate the terms also into future contracts concluded between the parties; (3) after having received the invoices the other party has concluded additional contracts with the first party; (4) the person that concluded those additional contracts has also personally seen the invoices (and therefore should have seen the references and reacted to them).[74] Where the other party is a consumer, no such reliance can be based on the absence

[69] Loos (n 65) no 62.

[70] HR 2 February 2001, NJ 2001, 200 (Petermann/Frans Maas). See critical Loos (n 65) no 60.

[71] Rechtbank Middelburg 13 July 2005, NJF 2005, 310 (C./Vlissingse Transportbeton Onderneming B.V.); different Rechtbank Haarlem 22 June 2005, Prg. 2005, 146 (X/ United Parcel Service Nederland B.V.).

[72] See Hof Amsterdam 19 July 2011, LJN BU1561, NJF 2011, 476 (X/ Loonbedrijf Noord-Holland Noord B.V.); Rechtbank Rotterdam 12 April 2001, S&S 2002, 63 (Schepen Onderlinge Nederland/ Machinefabriek Olthof).

[73] HR 10 June 1994, NJ 1994, 611 (Van der Breggen/TNO); HR 19 December 1997, NJ 1998, 271 (Helpman/Imbema); Schelhaas, *Algemene voorwaarden in handelstransacties, Studiekring 'Prof. mr. J. Offerhaus'* (Deventer, Kluwer, 2011) 9.

[74] Schelhaas (n 73) 9.

of a reaction to a reference to standard terms on invoices, even if the parties have concluded contracts over a longer period of time.[75]

If the standard terms include a term declaring applicable a second set of terms, the question rises whether that second set of standard terms is also applicable to the contract. In Dutch legal literature such references are usually considered to be ineffective as the first party could not rely on the acceptance of also this second set of standard terms[76]; case law is diverse on this matter, but usually seems to consider that also the second set of standard terms is validly incorporated into the contract.[77]

11.4.2 Surprising Terms

The acceptance of the standard terms pertains only to the applicability of the terms and not to their content.[78] This implies also that terms that are 'surprising' to the other party, in the sense that the other party reasonably need not have expected that the standard terms would include a term to this extent, are nevertheless incorporated in Dutch law.[79] Protection against surprising terms is offered through the unfairness control (Article 6:233 sub a BW) and by way of the information requirement (Article 6:233 sub b BW, discussed below, Sect. 11.4.3). However, in the case of international commercial contracts where the application of Article 6:233 BW is excluded, the then applicable case law from before the introduction of the standard terms legislation (the pre-1992 case law) may have consequences with regard to surprising terms (see below, Sect. 11.4.4).

[75] Hof Arnhem 5 November 2002, NJ 2003, 393 (Gerritsen/Garage Musterd Made B.V.); this is true even if the consumer previously had run a business, cf. Rechtbank Haarlem 12 December 2012, ECLI:NL:RBHAA:2012:BZ8783 (X c.s./Kortmann Art Packers & Shippers B.V.).

[76] See for instance RHC Jongeneel in B Wessels, RHC Jongeneel, ML Hendrikse (eds), *Algemene voorwaarden*, 5th ed. (Deventer, Kluwer, 2010) no 6.9.; J Hijma, *Algemene voorwaarden*, Monografieën BW nr. B-55, 3rd ed. (Deventer, Kluwer, 2010) no. 20; Schelhaas (n 73) 6. Different: Loos (n 65) no 72.

[77] Cf. Hof's-Gravenhage 6 July 2004, NJ 2004, 483, TvC 2005/4, p. 189 (HCC/Dell Computer B.V. I); Hof Den Haag 22 March 2005, ECLI:NL:GHSGR:2005:AT1762, TvC 2005/4, p. 150 (HCC/Dell Computer B.V. II); Arbitrage Instituut Bouwkunst (arbitration court, in particular dealing with claims in cases with architects) 31 August 2010, Tijdschrift voor Bouwrecht 2010, 223; different Rechtbank Arnhem 17 May 2006, NJF 2006, 479 (Berendsen Textiel Service B.V./Wetro B.V.).

[78] Loos (n 65) no 56; Hijma (n 76) no 20.

[79] Cf. Loos (n 65) nos 73–74.

11.4.3 Reasonable Opportunity to Become Acquainted with the Terms

In order to become part of the contract the standard terms need not be provided to the other party, but where the other party has not been provided with a reasonable opportunity to become acquainted with the terms before or at the time the contract is concluded, the other party may void the standard terms (or, if so chooses: specific provisions thereof)[80] under Articles 6:233 sub b and 234 BW. The possibility to void the standard terms is open to both consumers and commercial parties.[81] Where the party that has introduced the terms into the contract has provided the other party with the possibility to become acquainted with only some of the terms, the other party may void the terms that it has not received.

The information requirement is regulated in detail in Article 6:234 BW.[82] The main rule is that the terms need to be provided, ie physically handed over or sent to the other party before or at the moment of conclusion of the contract. Only when this is reasonably impossible may the first party simply inform the other party that the terms may be obtained at its place of business or at a Chamber of Commerce or the registry of a court where they have been filed to this extent, and that they will be provided free of charge upon demand of the other party. This exception is interpreted strictly: this more flexible approach is accepted only when the terms could not be sent to the other party before the contract was concluded because the contract was concluded over the telephone without prior contact between the parties, and in the case of mass contracts, such as contracts for public transport.[83] The party introducing the terms into the contract bears the burden of proof that the terms have been provided to the other party.[84] However, where the contract document contains a declaration by the other party that it has received the standard terms and that document is signed by the other party, this constitutes definitive proof thereof; the other party may, however, prove that the statement is not correct.[85]

The main rule therefore is that the standard terms must in fact be handed over or sent to the other party, in writing, before or at the moment when the contract is concluded. However, the Supreme Court has accepted that where it is established

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[80] HR 17 December 1999, NJ 2000, 140 (Breg/Makelaardij Asper).

[81] See, however, below (Sect. 11.3.4) for exceptions.

[82] In 2009, more lenient rules have been introduced where the terms are introduced by a service provider, see articles 6:230a-230f BW (implementation of the Services Directive).

[83] See the parliamentary proceedings, available in WHM Reehuis, EE Slob (red.); C.J. van Zeben, J.W. du Pon (eindred.), 1990, *Parlementaire geschiedenis van het nieuwe Burgerlijke Wetboek, Invoering Boeken 3, 5 en 6; Boek 6, Algemeen gedeelte van het verbintenissenrecht*. Deventer: Kluwer, p. 1581, 1585 (hereinafter referred to as: Parl. Gesch. Inv. Boek 6).

[84] HR 11 July 2008, ECLI:NL:HR:2008:BD1394, NJ 2008, 416 (Lommerse-Uitendaal/Atria Watermanagement)

[85] HR 21 September 2007, ECLI:NL:HR:2007:BA9610, NJ 2009, 50 (Kwekerij de Engel/Enthoven Electra); HR 11 July 2008, ECLI:NL:HR:2008:BD1394, NJ 2008, 416 (Lommerse-Uitendaal/Atria Watermanagement).

that the other party had actually in another way obtained knowledge of the standard terms, this implies that the information requirement has been met after all. This is the case, in particular, where it is established that the terms had been provided at the occasion of an earlier contract.[86] The party introducing the standard terms into the contract may also send the terms electronically (eg by e-mail), but if the contract was not concluded electronically, the express consent of the other party to electronic delivery of the standard terms is required.[87] The first party may (if need be: subject to express consent thereto) also send the other party a hyperlink (which must be sufficiently clear and recognisable as such), which the other party can click on to access the terms and download them from the first party's website.[88] The requirement is, however, not met if the other party has had to look for the standard terms itself, eg by searching for them on the internet,[89] even if the first party had indicated where on the internet the terms could be found.

Article 6:238, paragraph 2, BW reflects the transparency principle, introduced by the Unfair Terms Directive. It applies only where the other party is a consumer, although in literature it is argued it should equally apply where the other party is a business.[90] Where a term is worded in unclear and unintelligible language, this aspect will be taken into account when determining whether or not the term is unfair. The transparency principle does not play a role with regard to the incorporation of the standard terms, and in practice also not with regard to the obligation to provide the other party with a reasonable opportunity to become acquainted with the standard terms.[91] This may be different where the lack of transparency is the result from the impossibility for the other party to read the standard terms because of the font type chosen or because the standard terms are printed in such small prints that without a magnifying glass they are illegible for the average party.[92] The transparency principle may also be breached where the party introducing the standard terms provides the terms in a language that is incomprehensible to the other party, eg in Dutch where the other party is a foreigner. Such breach may occur in particular where the language in which the terms are provided differs from the language used during the negotiations or in the contract document. In my opinion, such a breach could also be sanctioned by voidability of the standard terms

[86] HR 1 October 1999, NJ 2000, 207 (Geurtzen/Kampstaal).

[87] See Article 6:234, paragraphs 2 and 3, BW.

[88] Hijma 2010 (n 76 above) no 41a.

[89] HR 11 February 2011, NJ 2011, 571, ECLI:NL:HR:2011:BO7108 (First Data B.V./KPN Hotspots Schiphol B.V.).

[90] Cf. Loos (n 65) no 241; AS Hartkamp and CH Sieburgh, *mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht; Verbintenissenrecht, deel 6-III*: Algemeen Overeenkomstenrecht*, 13th ed. (Deventer: Kluwer, 2010) no 482.

[91] Cf. Hijma (n 76) no 42; Jongeneel (n 76) no 16.2; Loos (n 65) no 160.

[92] See for instance Rechtbank. Nijmegen 23 January 1998, NJkort 1998, 27 (Citizen Watch Europe GmbH/Van Hout-Ververgaard B.V.) in a case where the letters were 1 mm small and between the lines also only 1 mm space was provided; Rechtbank Utrecht 29 February 2012, ECLI:NL:RBUTR:2012:BV8187, NJF 2012, 151 (X/Leensysteem B.V.), where the letters were even smaller.

under Article 6:233 sub b BW.[93] There is, however, no case law confirming or denying such possibility.

11.4.4 International Commercial Contracts

Even though both the unfairness test of Article 6:233 sub a BW and the breach of the information requirement of Article 6:233 sub b BW may be invoked also in the case where the other party is a business, there are exceptions to this. The first is the case where both parties to the contract act in the course of their business and neither or only of them has its seat in The Netherlands: Article 6:247, paragraph 2, BW provides that in such case section 6.5.3 BW (Articles 6:231–246 BW) on standard term is not applicable, even if the contract as such is governed by Dutch law. The exclusion is viewed critically in Dutch literature, where it is argued that the interest of furthering international commerce may justify a more flexible approach to the information requirement, but not a complete exclusion of the requirement and of the unfairness test.[94] Both in the parliamentary proceedings and in the literature it is argued that if the parties to the contract have indicated that they accept also the application of this section, such choice should be respected.[95] It is unclear whether an express choice to this extent would be required. In my view, a tacit choice should suffice, in particular where the parties in a court procedure – assisted in that procedure by legal representation – do not invoke Article 6:247, paragraph 2, BW but instead argue about the unfairness of a term or whether the information requirement has been breached.[96]

In so far as no choice for the applicability of section 6.5.3 BW has been made, the exclusion implies that with regard to international commercial contracts the case law that existed before the introduction of the legislation on standard terms in 1992 remains relevant. Under that case law, the party introducing the standard terms need only ensure that the other party was aware of the first party's desire to incorporate the standard terms before concluding the contract, but was not required to provide the terms to the other party: as long as the reference to the standard terms was clear and unequivocal, the other party could be expected to get hold of the standard terms itself at the place indicated in the reference – typically: a Chamber of commerce or the registry of a court. On the other hand: it also implies that the Supreme Court's case law on surprising terms remains applicable. According to the *Hoge Raad*, the

[93] Loos (n 65) no 161.

[94] The idea behind the exclusion is that international commerce should not be burdened with the requirements of this section, as it should not be made unattractive to Dutch companies to opt for their own legal system as the applicable law. See critical on this Loos (n 65) no 33; Schelhaas (n 73) p 8–9, 32 and 41–42; Hijma (n 76) no 6.

[95] Cf. Parl. Gesch. Inv. Boek 6 (n 81) p 1816; Asser-Hartkamp-Sieburgh 6-III*, nr. 511; Loos (n 65) no 34.

[96] Loos (n 65) no 34.

acceptance of standard terms as a whole does not exclude the possibility that among the standard terms there are terms that are *so* unexpected that the acceptance of the applicability of the set of terms cannot be interpreted as to pertain also to such surprising terms.[97] Under the pre-1992 case law, this construction served the purpose of a limited form of unfairness control. This line of case law is incompatible with section 6.5.3 BW, but may still be applied to international commercial contracts where that section is not applicable anyway.[98] For the application of this case law it is not required that the surprising term is unfair: the mere surprising nature suffices to set the term aside.

In addition, Article 6:248, paragraph 2, BW may be applied to prevent the application of a standard term in a particular case if, in the circumstances of the case, the application of that term would be contrary to the requirements of good faith and fair dealing.

11.4.5 Domestic Commercial Contracts with Large Legal Persons as Counterpart

The second case where the application of section 6.5.3 BW is excluded is the situation where the counterpart of the party introducing the standard terms is considered a 'large party' within the sense of Article 6:235, paragraph 1, BW. A counterpart is considered to be a 'large party' if it is a cooperative or a public or a limited company or a financial institution that has recently published its balance sheet and profit and loss account, or if it is a legal person (including legal persons according to public law) that either directly or indirectly employs at least 50 persons at the moment when the contract was concluded.[99] The provision is almost unanimously criticised in legal literature: the argument that large parties do not need protection from unfair terms is not accepted, and the criteria to qualify a party as a large party are considered to be arbitrary.[100]

Where a party is qualified as a large party, that party can easily be bound by the standard terms, but may invoke neither the unfairness test of Article 6:233 sub a BW nor the breach of the information requirement of Article 6:233 sub b BW in order to void the standard terms. Similar to the situation of international commercial

[97] HR 20 November 1981, NJ 1982, 517 (Holleman/De Klerk). In this sense also HR 1 July 1993, NJ 1993, 668 (Bouma/Cavo).

[98] Loos (n 65) no 34; Hijma (n 76) no 49.

[99] For the purposes of Article 6:235, paragraph 1, BW, a cleaner which is employed by a cleaning company but who is in fact regularly cleaning at the offices of the contracting party is considered to be employed by the contracting party. Similarly, any person working on the basis of a part-time employment contract is counted as a full person. See further Loos (n 65) nos 80–84.

[100] Asser-Hartkamp-Sieburgh 6-III*, no 489; Jongeneel (n 74) no 9.3; Schelhaas (n 73) p 18, 39–40; Loos (n 65)nos 86–87, all with further references.

contracts where Article 6:247, paragraph 2, BW stands in the way of the application of Article 6:233 BW, Article 6:248, paragraph 2, BW may provide some protection: in case where, under the circumstances of the case, it would be contrary to good faith and fair dealing to apply a particular standard term such clause would be set aside for the dispute at hand. The Supreme Court, however, has indicated that this provision is to be applied cautiously, in particular where the counterpart is a large party in the sense of Article 6:235, paragraph 1, BW.[101] Since Article 6:235, paragraph 1, BW does not exclude the applicability of Articles 6:231 and 232 BW the pre-1992 case law on surprising terms may not be applied here.[102]

11.4.6 Conclusion Regarding the Incorporation of Standard Terms Under Dutch Law

Under Dutch law standard terms are very easily incorporated into the contract, and only limited requirements are posed with regard to the clarity of the reference to the terms. However, the terms may be voided where the party introducing them into the contract has not given the other party a reasonable opportunity to become acquainted with them before the contract is concluded. The transparency principle only plays a marginal role with regard to the question whether such opportunity has been given: only where terms are illegible because of the font type chosen or the size of the print may the terms be voided for breach of the information requirements. It is uncertain whether this is also the case where the terms are provided in a different language than in which the contract was negotiated. In the case of international commercial contracts and when the counterpart is a large party, the terms need not be provided to the other party as long as the other party is able to get hold of the term itself – which implies that the reference should be sufficiently clear to the other party. The terms are, however, not voidable and may only then be set aside where there application would be contrary to good faith and fair dealing. In the case of international commercial contracts, there is a possibility that the courts would fall back on older case law under which surprising terms are not incorporated into the contract. Moreover, according to case law from the Dutch Supreme Court, the terms need not be available in a language the other party is capable of understanding, not even if the contract negotiations took place in the other party's language.

[101] HR 15 October 2004, ECLI:NL:HR:2004:AP1664, NJ 2005, 141 (GTI Zwolle/Zürich Versicherungsgesellschaft)

[102] See critical on the inconsistencies in the approach to international and national commercial contracts Loos (n 65) no 35.

11.5 Concluding Remarks: A Comparison Between CESL, German and Dutch Law

Although German and Dutch law have much in common, the above shows that in fact at a more detailed level there are many discrepancies between these two legal systems. Whereas Dutch law is rather lenient towards parties wishing to incorporate their terms into the contract, German law is much stricter. This is true in particular with regard to commercial contracts, where Dutch law seems willing to accept references to standard terms on earlier invoices much more easily than German law, and the obligation to provide standard terms is not applicable in the case of 'large counterparts' or in the case of international commercial contracts. German law, on the other hand, in principle requires the party making use of standard terms to provide the terms to the other party even if that other party could be expected to obtain the terms itself. Similarly, German law appears to be stricter with regard to the application of the transparency principle, and surprising terms are not incorporated into the contract, whereas they are under Dutch law (but can possibly be considered to be unfair). It seems likely that the differences with other legal systems will probably be even larger.

Given the fact that much of the debate in courts in practice pertains to the question whether or not standard terms are properly incorporated into the contract, one would expect that an international instrument such as the CESL would provide clear guidance. This is in fact only the case for *consumer* contracts, where the provisions of Article 70 of the CESL more or less force the seller to provide the terms before the contract is concluded in order to be able to rely on them. With regard to commercial contracts, this is clearly not required, but the CESL does not indicate what may be expected in this respect from sellers or buyers making use of standard terms.[103] In this sense, one must conclude that Article 70 and 71 of the CESL probably reach the same level of protection and legal certainty for consumers and sellers with regard to the applicability of standard terms in consumer contracts, but leave much uncertainty for the parties to a commercial sales contract. On the other hand, where the seller simply follows the rules applicable to B2C-contracts, he is 'safe' with regard to the applicability of his standard terms. Perhaps this may serve as an incentive for sellers to provide their standard terms to the buyer in B2B-contracts as well: at least then the seller can be sure his terms have properly been incorporated into the contract. Nevertheless, if the upcoming instrument for a Digital Single Market is intended to apply also to B2B-contracts one would hope that in the interest of legal certainty and diminishing transaction costs and litigation a more explicit regulation of this much-litigated issue would be included.

[103] In this sense, CESL is not less unclear as other existing international legal systems: such clarity is not provided by the Draft Common Frame of Reference or the Vienna Sales Convention either. See Loos (n 2) p 779.

Chapter 12
The Effect of Merger and Non-Reliance Clauses According to Art. 72 of the Commission's Draft of the Common European Sales Law (CESL) – A Model for New Instruments for International or European (Consumer) Sales Law?

Tobias Pinkel

Abstract The present chapter will critically examine Art 72 CESL on merger clauses. As a basis for this evaluation, a short comparison of the rules in England, Germany, the Netherlands, and the CISG on the validity and effects of merger clauses and, in the case of England, additionally non-reliance clauses will be provided. The chapter continues by examining the "stages of the text" which finally led to the CESL, before addressing scope of application, the interaction with other rules of the CESL and the final effect of Art 72 CESL. That will provide the basis for a separate evaluation of Art 72 CESL for B2C and B2B contracts. Finally, some concluding remarks and suggestions on how the Article should be changed will be given. Thereby, some guidance for the drafting of modern rules for business sales law, both, nationally and internationally is provided. It is also analyzed, in how far Art 72 CESL is suitable to form the basis for an optional instrument for consumer sales contracts in e- and m-commerce, as it seems to be suggested as part of the program on the digital agenda by the European Commission in the future.

12.1 Introduction

Even if parties to a contract embody the terms of their final agreement in one document, prior statements and agreements continue to influence their legal relationships in all western jurisdictions. While the exact rules vary concerning the question in which cases agreements in the process of negotiation can be considered as terms of the contract, civil law jurisdictions normally allow oral evidence to

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prove the existence of addition oral agreements but use prior statements at least as a tool to interpret the written contract[1] and common law jurisdictions give effect to all prior *representations* inducing the conclusion of a contract through the rules of (innocent) misrepresentation.

In complex contract negations, however, assumptions on which some pre-contractual statements might be founded can become abandoned later on. Reliance on pre-contractual statements, moreover, reduces the legal certainty concerning potential contractual claims, which, as an effect, could increase the likelihood and costs of court proceedings. Finally, the possibility exists of fraudulent reliance on a pre-contractual statement,[2] which is only alleged by one party or which has clearly been based on changed circumstances or abandoned assumptions.

Therefore, parties may decide to introduce a merger clause (also known as entire agreement clause or integration clause), stating that all agreements of the parties have been embodied in the final document. In common law jurisdictions this is often combined with a so called no-reliance clause, excluding liability for misrepresentation, stating that the parties have not relied on statements and representation made prior to the agreement.

However, to give unlimited effect to a merger clause would also cause several severe problems. First of all, important agreements could simply have been forgotten at the time the contract is drafted. This could endanger the effective operation thereof. Moreover, if a contract cannot be operated at all without additional terms that are not integrated in the written document the contract could even be void if further terms cannot be implied. If a merger clause is included in standard terms, the counter party is quite often unaware of the existence of the clause. A too far-reaching effect of a merger clause contained in standard terms would, consequently, be unfair in particular towards contractual partners without legal department checking the contract, such as consumers or small enterprises. In addition, a merger clause could be used fraudulently to avoid being held liable for promises made earlier with the goal to induce the conclusion of a contract but it might be still impossible *in casu* to prove fraudulent misrepresentation. Finally, if a party justified relies on a promise, it would seem to be unfair to enforce a merger clause against the justified reliance.

Even though civil law jurisdictions give more weight to pre-contractual statements and are more likely to regard agreements in the process of contract negotiations as terms of the final contract, traditionally merger clauses were almost only known in common law jurisdictions and were here in particular common in the US. In international sales, however, that has changed over the last decades.[3] By now, a rule on the validity and effect of a merger clause is, therefore, an essential part of any

[1] Cf. eg H Kötz, 'Vertragsauslegung, Eine rechtsvergleichende Skizze', in *Festschrift Albert Zeuner* (1994), 219 et seq.; K Zweigert and H Kötz, *Einführung in die Rechtsvergleichung* (Mohr Siebeck, Tübingen, 1996, 3rd edition) § 30 (pp 395 et seq.); O Meyer, 'Die privatautonome Abbedingung der vorvertraglichen Abreden' *RabelsZ* 72 (2008), 562–600, 584 et seq.

[2] Cf. Kieninger, in Schulze (ed), *Common European Sales Law (CESL) – Commentary* (Baden-Baden inter al, Nomos inter al. 2012) Art 72 CESL, para 1.

[3] Cf. eg Meyer (n 1) 562–600, 585.

modern international B2B sales law codification.[4] But also national jurisdictions, which are applicable to international sales contracts, had to deal with the issue in the last years.

The question how the effect of a merger clause should be limited has led to very different results in the legal orders of the EU Member States. Overall, common law jurisdictions seem more willing to apply a merger clause, while civil law jurisdictions often attach limitation on its effect.[5] However, in common law jurisdictions it is much more difficult to restrict liability for (innocent) misrepresentation, a concept neither known in the civil law countries nor in the CISG nor in the Commission's draft of a Common European Sales Law (CESL).[6]

The rules on merger clauses for B2B contracts contained in the CESL could be seen as a model for national and international reforms of business sales law. This is particularly true, since the issue of merger and non-reliance clauses is not expressly addressed in the CISG. However, for that potential function of the draft directive, it competes with earlier drafts of European contract law, namely the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR) and other international draft codes. A short comparison thereof is, for that reason, helpful.

In the consumer context, merger clauses are, however, so far of minor practical importance. First of all, certain pre-contractual statements are regarded as part of the contract according to consumer law based on EU directives. Secondly, consumer sales contracts are normally not negotiated over a longer period of time. Therefore, most reasons for the conclusion of a merger clause are not present and, so, they are not very common in standard terms in the context of consumer sales contracts. Nonetheless, merger clauses are sometimes included in standard terms of online-shops in Europe.[7] Since communication via e-mail or a hotline is possible

[4] Cf. Kieninger (n 2) Art 72 CESL, para 12.

[5] Cf. eg Meyer (n 1) 562–600, 587 et seq.

[6] On the fact that misrepresentation is unknown to the CESL cf. eg T Pinkel, 'Der Anwendungsbereich und zentrale Vorschriften des Kommissionsentwurfs für ein Gemeinsames Europäisches Kaufrecht sowie die Änderungsvorschläge des ELI und Änderungsanträge des Parlaments im Vergleich', *Hanse Law Review* (2014) 45–70, 65.

[7] A merger clause might be contained in sales contract concluded via http://www.apple.com/uk/. The general "Terms of Use" of the website of 2007 (online available at: http://www.apple.com/uk/legal/terms/site.html) contain a merger clause the reads as follows: "These Terms of Use constitute the entire agreement between you and Apple with regard to your use of the Site, and any and all other written or oral agreements or understandings previously existing between you and Apple with respect to such use are hereby superseded and cancelled. Apple will not accept any counter-offers to these Terms of Use, and all such offers are hereby categorically rejected."

According to the Terms of Use of 2007 they are only supplemented and not replace by the special "Apple Store Sales & Refund Terms and Conditions" (cf. Terms of Use of 2007: "Additional terms and conditions may apply to purchases of goods or services and to specific portions or features of the Site, including contests, promotions or other similar features, all of which terms are made a part of these Terms of Use by this reference."). Due to rather the complex structure of the standard terms it is, however, highly questionable whether those terms are incorporated at all in a consumer contract.

prior to the conclusion of a contract in an online shop, even a pure instrument for consumer e- and m-commerce, as it seems to be suggested by the European Commission based on the draft directive for the CESL[8] should contain a rule on merger clauses. It is, for that reason, also important to discuss in how far the rules contained in CESL are suitable for that purpose.

Against that background, Art 72 CESL on merger clauses will be critically examined. As the basis, a short comparison of the rules in England, Germany, the Netherlands, and the CISG on the validity and effects of merger clauses will be provided (Sect. 12.2). The starting point for the analyses of Art 72 CESL consists of an examination of the "stages of the text"[9] which finally led to the CESL (Sect. 12.3). Thereafter, the chapter continues by addressing the scope of application, the interaction with other rules of the CESL and the effect of Art 72 CESL (Sect. 12.4). That will provide the basis for a separate evaluation of Art 72 CESL for B2C (Sect. 12.5.1) and B2B contracts (Sect. 12.5.2). Finally, some concluding remarks and suggestions on how the rules on the validity and effect of merger clauses in CESL should be changed for future commercial and consumer sales law will be given (Sect. 12.6).

12.2 Regulation on Merger Clauses in England, Germany, the Netherlands and Under the CISG

To illustrate the different possibilities of the effect and validity of a merger clause, the solution of three EU Member States, namely England (2.1), Germany (2.2) and the Netherlands (2.3) with very different tradition of the use of extrinsic evidence and of the interpretation of contracts shall be briefly presented. Since merger clauses are of particular interests in the context of international sales contract, also the current debate in the context of the CISG will be shortly summarised (2.4). This will also illustrate the problems and possible conflicts of interest connected with rules on merger clauses.

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[8] The European Commission has withdrawn the draft regulation and wants to submit a new reduced proposal to "fully unleash the potential of e-commerce in the Digital Single Market." Cf. Annex II "List of withdrawals or modifications of pending proposals" of the "Commission Work Programme 2015: A New Start", COM(2014) 910 final of 16.12.2014, p. 12.

For more details on this issue see already T Pinkel, 'Der Anwendungsbereich und zentrale Vorschriften des Kommissionsentwurfs für ein Gemeinsames Europäisches Kaufrecht sowie die Änderungsvorschläge des ELI und Änderungsanträge des Parlaments im Vergleich' (2014) *Hanse Law Review* 45 (online available at http://www.hanselawreview.org/pdf14/Vol10No01Art03.pdf) and T Pinkel, 'Book Review: Javier Plaza Penades and Luz M. Martinez Velencoso (eds.), European Perspectives on the Common European Sales Law, Springer 2015' (2014) *Hanse Law Review* 99 (online available at http://www.hanselawreview.org/pdf14/Vol10No01Art05.pdf).

[9] "Stages of the text" is an attempt to translate the German term "*Textstufen*", which has been introduced by Reinhard Zimmermann in his article R Zimmermann, 'Textstufen in der modernen Entwicklung des Europäischen Privatrechts', *EuZW* (2009) 319–323 and which is used in the German debate on CESL regularly since then.

12.2.1 The Effect of Entire Agreement and Non-Reliance Clauses Under English Law

To understand the effect of a merger clause, which is in England usually called "entire agreement clause"[10], one has to discuss the general rules on the interpretation of contract and the interaction of contract law with the principles of misrepresentation. Shortly summarised an entire agreement clause in a B2B contract only reinforces the *parol evidence rule* clarifying in a legally binding way that the contract has been reduced to writing (2.1.1). Pre-contractual statements are, anyhow, not permitted as evidence for the interpretation of a contract term. To that respect, a merger clause has, therefore, no effect (2.1.2.). The principle of implied terms, which *inter alia* could be seen as a very limited functional equivalent of good faith in the interpretation and operation of a contract in civil law countries, could be affected by an entire agreement clause. It seems, however, that the doctrine of *implied terms by court/in fact* could not completely be excluded (2.1.3.). Furthermore, the exclusion of liability for misrepresentation, which protects contractual parties in tort against negative effects of any incorrect representation made during contract negotiations, which induced the conclusion of a contract,[11] is much more difficult, not included in a simple entire agreement clause and often impossible (2.1.4).

In B2C contracts merger clauses would be generally considered as unfair and, therefore, inapplicable.[12] They will not be discussed any further.

12.2.1.1 The Exclusion of Additional Agreements Not Contained in the Written Contract

As a general principle, the parol evidence rule applies to English contract law. It states that if a contract has been reduced to writing no extrinsic (*parol*) evidence is permitted "to contradict, vary, add to or subtract from the terms of a written contract".[13] Having a strong influence traditionally applying almost in every case where the contract had been summarised in a written document after the conclusion of the contract, the exceptions gained importance throughout the last years.[14] Therefore, it seems that the parol evidence rule has been, in fact, almost reduced to a rebuttable presumption. The English Law Commission suggested, therefore, in

[10] Cf. eg Meyer (n 1) 562–600, 577.

[11] Cf. E Peel, *Treitel on The Law of Contract* (13th edition, Sweet & Maxwell, London 2011) 630 et seq.

[12] Cf. G McMeel and C Grigoleit, 'Interpretation of Contracts' in G Dannemann and S Vogenauer (eds), The *Common European Sales Law in Context* (OUP, Oxford 2013) 341–372, 365.

[13] *Bank of Australasia v Palmer* [1897] A.C. 540, 545.

[14] Cf. eg Meyer (n 1) 577 et seq; Peel (n 11) 211 et seq.

1976[15] to disestablish the parole evidence rule and pointed out in 1986[16] that the rule had been destroyed in fact by the many exceptions introduced in case law.[17] However, if it is the intention of the parties that a written contract should be conclusive, the parol evidence rule continues to exist normally at least in business cases. For that reason, entire agreement clauses have become quite popular since the 1990s.[18] Due to the fact that an entire agreement clause in that sense only effects the terms of a contract but has no effect on the possibility to rely on representations, the Unfair Contract Terms Act of 1977 ss 8, 11(1) has no relevance for the question of the validity of an entire agreement clause.[19] However, recently courts and text books start to suggest that merger clauses in standard terms could be subject to some of the exceptions generally known to the parol evidence rule.[20]

12.2.1.2 The Interpretation of Contractual Terms

As a matter of principle it is not allowed to refer to the contract negotiation to interpret a term of a contract in English law.[21] Only in regard to the "matrix of facts" that was commonly known to the parties to a contract at the time of its conclusion, the House of Lords in *Prenn v Simmonds*[22] allowed that extrinsic evidence can be used to interpret a term of a contract or even alternate the wording thereof. This concept has been stressed in recent years.[23]

It cannot be argued that it is desirable to exclude the factual background know to the parties at the time of the conclusion of the contract as a tool to find out the meaning the parties were giving to a contractual term. The exclusion of pre-contractual statements as a method of interpretation of a contract is already part of the general principles of the interpretation of contracts. Therefore, the rules on interpretation of a contract do not need to be part of a merger clause, which has the goal to set aside

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[15] Law Commission Working Paper No 70, *Law of Contract: The Parol Evidence Rule*, English Law Commission (1976).

[16] Law Commission Report LC154 – *Law of Contract: The Parol Evidence Rule*, English Law Commission (1986).

[17] Cf. eg AL Zuppi, 'The Parol Evidence Rule: A Comparative Study of the Common Law, the Civil Law Tradition, and Lex Mercatoria', *Ga. J. Int'l & Comp. L.* 35 (2007), 233–276, 242.

[18] Cf. eg Meyer (n 1) 577.

[19] Cf. eg Meyer (n 1) 579–580.

[20] In this context the case *Pro Force Recruit Ltd. v Rugby Group Ltd.* (2006) EWCA Civ. 69 is of high importance. Cf. also AK Fricke, 'Die Berücksichtigung von Begleitumständen bei der Auslegung schriftlicher schuldrechtlicher Verträge' (Berlin, Logos Verlag 2012) 177.

[21] Cf. *Prenn v Simmonds* [1971] 1 W.L.R. 1381, 1385; *Youell v Bland Welch & Co. Ltd.* [1992] 2 Lloyd's Rep. 127.

In the literature cf. eg Meyer (n 1) 579.

[22] *Prenn v Simmonds* [1971] 3 All E.R. 237 (Lord Wilberforce).

[23] Cf. eg McMeel and Grigoleit (n 12) 341–372, 354 et seq.; (n 17) 242; Meyer (n 1) 579.

any effect of statements made and agreements reached during the face of contract negotiations.[24]

12.2.1.3 The Doctrine of Implied Terms and the Effect of Entire Agreement Clauses

The concept of implied terms is a wide concept with different functional equivalents in civil law countries. It includes the concept of terms implied by courts (also called terms "implied in fact"),[25] terms implied by custom and terms implied by statute. While terms implied by customs and statutes dogmatically integrate mandatory provisions of law or (trade) customs as terms of a contract, terms implied by courts seem to have more the function of a very restrictively used doctrine of good faith in the interpretation and application of a contract.[26] In *Shirlaw v Southern Foundires Ltd*[27] it was defined that terms implied by courts are terms that state "something so obvious that it goes without saying; so that, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common 'oh of course!'". Such terms could be implied for reasons of "business efficacy" because they are necessary to insure that the contract operates at all or to make the contract more efficient. In *Luxor (Eastbourne) Ltd. v Cooper*[28] a different test for a court to imply a term was laid down, stating that terms can be implied if they are needed "to give the transaction such business efficacy as the parties must have intended".[29] At the end, the implication of such terms can be utilised in cases in which the operation of a contract under the given circumstances would be grossly unfair otherwise.[30]

In *Exxonmobil Sales and Supply Corp. v Texaco Ltd.*[31] it was decided that if a merger clause excludes any "usage" to add to the contract, implied terms by costumes are excluded from the contract. The effect on terms implied by court (terms implied in fact) was, however, not decided. While entire agreement clauses might have an effect on the question whether the parties would have agreed on a particular term which could be regarded as implied in fact, it is clear that the possibility of the courts to imply terms cannot completely be excluded through a contractual clause.[32]

Summing up, the possibility for the court to imply terms that have been agreed on in the negotiation but have been forgotten to be recorded in the written contract,

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[24] Cf. eg Meyer (n 1) 579

[25] Cf. eg Zweigert and Kötz (n 1) § 30 IV (p 404).

[26] Cf. eg L Russi, 'Substance or Mere Technique? A Precis on Good Faith Performance in England, France and Germany', *Hanse Law Review* (2009) 21–30, 25–26.

[27] *Shirlaw v Southern Foundries Ltd* [1939] 2 KB 206 (CA) 227.

[28] *Luxor (Eastbourne) Ltd v Cooper* [1941] A.C. 108, 137.

[29] On this topic cf. eg Zweigert and Kötz (n 1) § 30 IV (p 404).

[30] In this direction Russi (n 26) 25–26.

[31] *Exxonmobil Sales & Supply Corporation v Texaco Ltd* [2003] EWHC 1964 (Comm).

[32] Cf. eg Meyer (n 1) 581–582.

continues to exist even if a entire agreement clause has been integrated in the written document. This, in fact, empowers the courts to imply terms to the written contract on which the parties agreed in the pre-contractual face if the result would be grossly unfair and, therefore, inefficient otherwise.

12.2.1.4 Non-Reliance Clauses and Misrepresentation

To exclude the impact of innocent misrepresentation and thereby the effect of pre-contractual representations, which induced the conclusion of a contract, a mere entire agreement clause will not be helpful. Instead, a non-reliance clause is required, stating that the parties have not relied on any representations made prior to the contract at the time of its conclusion which have not been included in the contract itself. The legal nature of such a clause is subject to debate in the literature. While one position finds that this clause is an exclusion of liability clause imposing the restrictions of s 3 Misrepresentation Act, s 11(1) Unfair Contract Terms Act 1977, the other position sees in the clause a procedural agreement on the reduction of the permissible evidence in a court of law, imposing the restriction of civil procedural law.[33] While this subject cannot be discussed in the scope of this Article, it is clear that non-reliance clauses are further restricted.

12.2.2 The Effect of Merger Clauses in Germany

Under German Law the validity and effect of merger clauses is not expressly regulated. The issue is also not subject to an intensive academic debate or has been an important issue in court decision of the federal courts. The validity is generally questioned for both B2B and for B2C contracts.[34]

According to the rules of interpretation of contracts in German law it can even be proven that a contract, which requires the form of a notarial deed in order to be valid, is not completely integrated in that deed. So, it can be proven that oral side agreements exist.[35] Against this background it is clear that a merger clause can only have the effect of a rebuttable presumption.[36] Every contract put in writing has,

[33] Cf. eg Meyer (n 1) 582–583.

[34] Cf. eg D Looschelders and M Makowsky, 'Inhalt und Wirkung von Vertärgen', *GPR* (2011) 106–114, 108; idem, in M Schmidt-Kessel (ed), *Der Entwurf für ein Gemeinsames Europäisches Kaufrecht – Kommentar* (Sellier, Munich 2014), Art 72 GEK-E, para 1; McMeel and Grigoleit (n 12) 364–365; Looschelders and Makowsky (n 34) 227–254, 242; Meyer (n 1) 587; DCFR Full Edition, Kaufmann, *Parol Evidence Rule und Merger Clauses im internationalen Einheitsrecht* (2004) 204 ff.

[35] Cf. BGH *NJW* (1989), 898–899.

[36] Cf. McMeel and Grigoleit (n 12) 364.

however, this effect.[37] Therefore, a merger clause is generally not needed if a contract is governed by German law.[38] It can be said that it does not have any effect on the interpretation of the contract in most cases.[39]

According to the leading opinion in Germany, it is very clear that merger clauses contained in standard terms will not, in fact, have any influence on the interpretation of a contract. Dogmatically this is due to the fact that according to § 305b BGB (*Bürgerliche Gesetzbuch*, German Civil Code) individually negotiated terms will take priority over standard terms. Therefore, also orally negotiated additional terms will take priority over merger clauses in standard terms.[40] Only merger clauses that reinforce the rebuttable presumption that the written contract is complete are permitted.[41] In addition, it has been suggested that merger clauses would be against the general rule on unfair standard terms contain in § 307 BGB.[42]

For individually negotiated merger clauses it is of importance that the principle *venire contra factum proprium* is part of the general principle of good faith (§ 242 BGB).[43] It has been suggested that it is in violation of this principle if one party relies on a merger clause to step back from any promise made during the negotiations of the contract.[44]

Moreover, it is the majority opinion that it is not permitted to derogate for the general principles of the interpretation of contractual terms according to which pre-contractual behavior and agreements can be used as a tool to interpret written contract terms.[45] That could also lead to the interpretation of a term which is not in line with the general meaning of the wording thereof.[46]

12.2.3 The Effect of Merger Clauses in the Netherlands

In the *Burgerlijk Wetbook* (Dutch Civil Code, BW) no provision on merger clauses exists. As a starting point it is, therefore, subject to the freedom of contract of the parties to agree on a merger clause. However, it is debated what the effect of such a clause will be in front of a court of law. This question is not finally settled in Dutch law so far. The effect will, however, be limited. It is clear, in addition, that one has to distinguish between merger clauses contained in standard terms and merger

[37] BGH *NJW* (2002) 3164. Cf. also R Boergen, 'Die Effektivität von Schriftformklauseln', *BB* (1971) 202, 204.

[38] Cf. McMeel and Grigoleit (n 12) 364.

[39] Cf. Fricke (n 20) 174.

[40] Cf. eg Grüneberg in *Palandt-Bürgerliches Gesetzbuch* (Munich, C.H. Beck, 2015) § 305b para 5.

[41] Cf. BGH *NJW* (2000) 207.

[42] Cf. eg Looschelders and Makowsky (n 34) 106–114, 108.

[43] Cf. Pfeiffer in *jurisPK-BGB*, (7th edition 2014) § 242 BGB, para 56

[44] Cf. eg Looschelders and Makowsky (n 34) 108.

[45] Cf. Fricke (n 20) 175.

[46] Cf. BGH *NJW* (1994) 850.

clauses which are individually negotiated.[47] In particular in the later case, it will make a difference whether one agrees on a merger clause in a B2B or a B2C contract.

12.2.4 Merger Clauses Under CISG

Under the CISG, the issue of a merger clause is also not addressed expressly. In addition, the general validity of any contractual clause, including merger clauses, is not subject to the CISG itself but to the national law otherwise applicable according to Art 4 lit a).[48] The validity of a merger clause can, therefore, not be guaranteed in every case.[49] If the clause is valid, its effect is to be determined in accordance with the general principles of interpretation of a contract entailed in the CISG.

If no merger clause is contained in a contract, extrinsic evidence, however, may be used to prove that a written contract has been supplemented or changed or that the written contract is incomplete according to Art 11 CISG. Art 8 CISG allows extrinsic evidence for the interpretation of a contract. Both provisions are not mandatory and can be modified by agreement through party autonomy (Art 6 CISG).[50]

If not invalid according to the national law otherwise applicable, a merger clause is, therefore, generally speaking, admissible. Its effect is, in turn, to be interpreted in the light of the rules on the interpretation of a contract contained in the CISG. The interpretation of different typical merger clauses is continuously subject to debate.[51] It is suggested by an advisory opinion[52] that a merger clause in general is not intended to modify the rules on interpretation of a contractual term (Art 8 CISG). Consequently, extrinsic evidence would still be admissible to be used for the interpretation of a contract unless explicitly stated by the parties that they want to exclude extrinsic evidence for that purpose as well.[53] This position is, however, subject to debate.[54]

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[47] Cf. W M Schrama, 'Section 1: General Provisions' in D Busch, E Hondius, H van Kooten, H Schelhaas, and W Schrama (eds), *The Principles of European Contract Law and Dutch Law – A Commentary* (Kluwer Law International, Nijmegen, 2002) 75, 94.

[48] Cf. eg Schmidt-Kessel in Schlechtriem and Schwenzer, *Kommentar zum Einheitlichen UN-Kaufrecht*, (6th edition 2013) Art 8, para 35; Münch in *jurisPK-BGB*, (7th edition 2014) Art 8 CISG, para 12.

[49] Cf. eg Schmidt-Kessel (n 48) Art 8, para 35.

[50] Cf. eg Münch (n 48) Art 8 CISG, para 12; Schmidt-Kessel (n 48) Art 8, para 35.

[51] Cf. eg JE Murray, Jr., 'An Essay on the Formation of Contracts and Related Matters under the United Nations Convention on Contracts for the International Sale of Goods', 8 *Journal of Law and Commerce* (1988) 11–51; Cf. eg Schmidt-Kessel (n 48) Art 8, para 35..

[52] CISG-AC Opinion no 3, *Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG*, 23 October 2004. Reporter: Professor Richard Hyland, Rutgers Law School, Camden, NJ, USA. Online available at: http://www.cisg.law.pace.edu/cisg/CISG-AC-op3.html#54

[53] Cf. CISG-AC Opinion no 3 (n 52) para 4.5.

[54] Cf. eg Zuppi (n 17) 268 et seq.

There is also evidence that a merger clause can have the effect that extrinsic evidence may not be used at all.[55]

12.2.5 Preliminary Conclusions for Rules on Merger Clauses in a Common European Sales Law

The short comparative overview of the basic rules on merger clauses in three EU Member States has shown that all legal orders restrict the effect of merger clauses. Even in England the courts retain possibilities in several ways to enforce promises not integrated in a written contractual document, which contains an entire agreement and non-reliance clause. This clearly illustrates that it is not in line with the tradition of the European legal orders of private law to give unlimited effect to merger clauses. That should be kept in mind when redrafting the rules on merger clauses in the CESL for other modern sales law codification in the European Union or a Member States thereof. It should also be remembered when interpreting a rule as Art 72 CESL if it is to become positive law.

Moreover, the debate on the concrete effect of merger clauses under CISG shows that a clear rule on merger clauses is required in modern codifications of international sales law. Otherwise, this will lead to legal uncertainty having the opposite effect of what is *inter alia* intended when a merger clause is included in a contract, namely increasing legal certainty concerning the content of an agreement and, thereby, reducing the likelihood of legal disputes.

12.3 The Development of Art 72 CESL

The rules on merger clauses in the "stages of the texts" in the modern evolution of a European Contract Law[56] changed severely. Art 72 CESL derogates strongly from the early texts of European Contract Law, namely Art II.-4:104 DCFR and Art 2:105 PECL. The rules in the PECL and the DCFR are nearly identical. The rule which is now contained in Art 72 CESL has only been introduced in the Feasibility Study (FS).[57] Thereafter, it seems that the rule has not been subjected to debate on the political level.

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[55] Cf. eg *MCC-Marble Ceramic Center, Inc. v Ceramica Nuova D'Agostino, S.p.A.*, 114 F.3d 1384, 1388–89 (11th Cir. 1998) at 1391.

[56] For an explanation of the term "Stages of the text", see n 11 above.

[57] 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. Online available at: http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf

12.3.1 The Rules on Merger Clauses in the DCFR and PECL

The PECL and the DCFR restrict the effect of merger clauses strongly. Thereby, Art II.-4:104 DCFR and Art 2:104 PECL unlike Art 2.1.17 UNIDROIT Principles of International Commercial Contracts differentiate between individually negotiated merger clauses and merger clauses contained in standard terms.[58] A merger clause is only given far-reaching effect if it is negotiated individually (Art II.-4:104 (1) DCFR and Art 2:105 (1) PECL). The effect of merger clauses contained in standard terms is reduced to a rebuttable presumption (Art II.-4:104 (2) DCFR and Art 2:105 (2) PECL). Moreover, it is impossible to exclude pre-contractual statements, representations and behavior from being used as a tool of interpretation of contract terms (Art II.-4:104 (3) DCFR and Art 2:105 (3) PECL). Finally, even an individually negotiated merger clause cannot be used to exclude justified reliance on a promise made during the contract negotiation. The principle of *venire contra factum proprium* is introduced by Art II-4:104 (4) DCFR and Art 2:105 (4) PECL.[59]

12.3.2 The Rules on Merger Clauses in the FS

Not one of the restrictions of the effect of merger clauses, which are contain in the PECL and the DCFR, can be found in Art 68 FS.[60] The FS does not differentiate anymore between merger clauses contained in standard terms and individually negotiated merger clauses. It is even implied by Art 68 (2) FS *e contrario* that it is allowed to exclude prior statements as a tool of interpreting the written contract through standard terms if that has been expressly stated in the merger clause. In turn, Art 68 (3) FS introduces a rule stating that consumers are not bound by a merger clause, a rule that is unknown to both the DCFR and the PECL.

Art 68 FS was converted in Art 72 CELS. Only Art 72 (4) CESL had been added, which states that it is not allowed to derogate from the Article to the detriment of consumers. That rule is, however, redundant.[61] Is sum, the Feasibility Study has radically changed the perspective on the effect of merger clauses contained in the

[58] Cf. eg N Jansen and R Zimmermann, 'Contract Formation and Mistake in European Contract Law: A Genetic Comparison of Transnational Model Rules', *Oxford Journal of Legal Studies* (2011) 1–38, 16.

[59] On Art 2:105 PECL in more details cf. eg Cf. Fricke (n 20) 180 et seq.; A Monti, 'Art 2:101-107' in L Antoniolli and A Veneziano (eds), *Principles of European Contract Law and Italian Law – A Commentary*, (Kluwer Law International, The Hague, 2005) 87, 105 et seq; McMeel and Christoph (n 12) 364–365; Canaris and Grigoleit, 'Interpretation of Contract', in Hartkampt inter al. (eds), *Towards a European Civil Code*, (4th edition, Kluwer Law International, Alpen aan den Rijn, 2011) 445, 604; Kieninger (n 2) Art 72 CESL, para 2.

[60] This rule was already contained in the first draft of the FS. Cf. on this in details Looschelders and Makowsky (n 34) 108.

[61] Kieninger (n 2) Art 72 CESL, para 4.

earlier stages of the texts of European Contract Law. Reasons for those changes are not provided in the FS or by the commission.

12.3.3 The Rules on Merger Clauses in the Alternative Draft of the ELI and the Debate in the EP

Also the alternative draft for a CESL contained in the Statement on the Proposal for a Regulation on a Common European Sales Law of the European Law Institute (S-2-2012)[62] has simply transferred Art 72 CESL to Art 71 S-2-2012 without any modifications. It seems, however, that the working party, which prepared S-2-2012, had not discussed the issue at all. Also the European Parliament in its legislative resolution[63] has not suggested any amendment to Art 72 CESL. But, again, no evidence can be found that this issue was addressed in the expert hearings or in the discussions of the committees.

12.3.4 Preliminary Conclusion for the Interpretation and the Further Development of Art 72 CESL

It can be concluded that the preparatory work before the FS, in particular the full edition of the DCFR, cannot be used to interpret Art 72 CESL. Nevertheless the full edition of the DCFR can be helpful to discuss possible alternatives. In addition, it seems to be impossible to draw inspiration for the interpretation of Art 72 CESL from the legislative preparatory work, including the FS, the Commission's draft and the legislative resolution of the European Parliament. The question of how Art 72 CESL should be interpreted and how it should interact with the other provisions of the CESL must be answered by different means.

[62] European Law Institute, *Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law* COM(2011) 635 final, online available at: http://www.europeanlawinstitute.eu/ fileadmin/user_upload/p_eli/Publications/S-2-2012_Statement_on_the_Proposal_for_a_Regulation_on__a_Common_European_Sales_Law.pdf.

[63] European Parliament legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011)0635 – C7-0329/2011 – 2011/0284(COD)) (Ordinary legislative procedure: first reading).

12.4 The Scope of Application, Interaction with Other Norms and Effect of Art 72 CESL

In order to discuss the effect of statements and agreements made prior to a written contract if a merger clause had been inserted in the final written document, it is essential to clarify the scope of application of Art 72 CESL and its interaction with other rules of the CESL. As to scope of application it is submitted that Art 72 CESL refers to any contractual term modifying the general rules on interpretation of contracts in a way that it restricts the use of any kind of pre-contractual statements, representations, behavior or agreements. The effect and validity of those clauses is, therefore, primarily governed by Art 72 CESL.

12.4.1 Effect of Art 72 CESL in General

As to the effect of Art 72 CESL in general, it is submitted that a merger clause relates only to prior agreements, which are related to the contract in such a manner that it would be absolutely natural to include them in the written document. Other agreements reached in the course of contract negotiations can, therefore, still have effect. If the subject of the additional agreement does not fall within the material scope of application of the CESL, the national law otherwise applicable will have to decide on the existence and effect of the collateral contract.[64] In that event, however, Art 72 CESL cannot have any influence in deciding the effect of a merger clause on the collateral agreement.

In contrast to the rules contained in PECL and the DCFR, Art 72 CESL does not differentiate between the effect of merger clauses, which have been individually negotiated and merger clauses contained in standard terms.[65] On the other hand, it has been newly introduced that different rules apply to B2B and to B2C contracts.[66] In B2B contracts a merger clause will be generally effective. An ordinary merger clause will, however, only ensure that no additional contractual terms are applicable, which have not been embodied in the written contract. Thereby, Art 69 CESL is excluded, which is allowed in B2B transactions (Art 69 (4) CESL).[67] An ordinary merger clause will not, according to Art 72 (1)(2) CESL, have an effect on the rules on interpretation, according to which "the circumstances in which it was concluded, including the preliminary negotiations" (Art 59 lit. a) CESL) can be used as a tool

[64] On the material scope of application and the fallback legal order in details cf. T Pinkel, 'Die Wahl des Gemeinsamen Europäischen Kaufrechts', in T Pinkel, C Schmid, and J Falke (eds), *Funktionalität und Legitimität des Gemeinsamen Europäischen Kaufrechts*, (Nomos, Baden-Baden, 2014) 457–568.

[65] Cf. Looschelders and Makowsky (n 34) Art 72 GEK-E, para 4.

[66] Cf. Looschelders, 'Das allgemeine Vertragsrecht des Common European Sales Law', *AcP* 212 (2012), 581–693, 650. Kieninger (n 2) Art 72 CESL, para 5.

[67] Cf. Looschelders and Makowsky (n 34) Art 72 GEK-E, para 2.

to interpret the contractual terms.[68] Following form Art 72 (2) CESL *e contrario*, it is possible to exclude pre-contractual representations also as a tool of interpretation if this has been expressly stated in the merger clause.[69] This is also not in violation of Art 59 CESL, which is not, to that extent, mandatory.[70]

In B2C contract the effect of a merger clause, as outlined above, will only bind the trader. The consumer can chose whether or not s/he wants to rely on the merger clause. The consumer has, therefore, still the right to try to refer to extrinsic evidence to prove additional terms of a contract.[71]

However, the seemingly far-reaching effect of merger clauses in B2B relationships is limited through other rules contained in the CESL.

12.4.2 The Interaction of the Art 72 CESL With Other Rules of CESL for B2B Contracts

12.4.2.1 Pre-Contractual Representations Made Fraudulently and Merger Clauses

First of all, it is quite evident that Art 49 CESL on fraud still applies. It states:

1. *A party may avoid a contract if the other party has induced the conclusion of the contract by fraudulent misrepresentation, whether by words or conduct, or fraudulent non-disclosure of any information which good faith and fair dealing, or any precontractual information duty, required that party to disclose.*
2. *Misrepresentation is fraudulent if it is made with knowledge or belief that the representation is false, or recklessly as to whether it is true or false, and is intended to induce the recipient to make a mistake. Non-disclosure is fraudulent if it is intended to induce the person from whom the information is withheld to make a mistake. […]*

The rule on fraudulent misrepresentation has the function to prohibit and sanction behavior that is regarded as unacceptable in business life. It can, therefore, not be modified by a rule on the interpretation of a contract. The hurdle to prove fraudulent misrepresentation is, however, quite high. The concept of innocent misrepresentation is not known to the CESL.[72] Therefore, Art 49 CESL cannot, in general, be

[68] Cf. Kieninger (n 2) Art 72 CESL, para 7; Looschelders (n 66) 650 et seq.; Looschelders and Makowsky (n 34) Art 72 GEK-E, para 6.

[69] Cf. C Wendehorst, 'Regelungen über den Vertragsinhalt', in C Wendehorst and B Zöchling-Jud (eds), *Am Vorabend eines Gemeinsamen Europäischen Kaufrechts*, (Manzsche Verlags- und Universitätsbuchhandlung, Wien, 2012) 87–105, 97. Kieninger (n 2) Art 72 CESL, para 7. Critically on this point Looschelders and Makowsky (n 34) Art 72 GEK-E, para 7.

[70] Cf. F Maultzsch, in M Schmidt-Kessel (ed), *Der Entwurf für ein Gemeinsames Europäisches Kaufrecht – Kommentar*, (Sellier, Munich, 2014) Art 59 GEK-E, para 12. Wendehorst (n 69) Art 59 CESL, para 4.

[71] Cf. Kieninger (n 2) Art 72 CESL, para 8.

[72] Cf. eg Pinkel (n 6) 65.

utilised as a functional equivalent of referring to pre-contractual conduct in the interpretation of a contract.

12.4.2.2 *The Principle of* Venire Contra Factum Proprium *Under CESL*

In addition, Art 2 CESL highlights the strong position of good faith and fair dealing in the Common European Sales Law. It states:

> *Art 2* ***Good faith and fair dealing***
>
> 1. *Each party has a duty to act in accordance with good faith and fair dealing.*
> 2. *Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, or may make the party liable for any loss thereby caused to the other party.*
> 3. *The parties may not exclude the application of this Article or derogate from or vary its effects.*

Due to the open texture and the need to interpret Art 2 CESL autonomously without recourse to any national legal order, the precise scope of application is difficult to determine.[73] It is, however, submitted that the principle of *venire contra factum proprium* as expressly contained for the question of the applicability of a merger clauses *in concreto* in Art 2:105 (4) PECL and Art II.-4:104 (3) DCFR will also apply under Art 2 CESL.[74]

Since the notion of good faith and fair dealing has very different meanings within the Member States,[75] the removal of the expressed rule in the Article on merger clauses is still very unfortunate since it will increase legal uncertainty and lead to differences in interpreting CESL throughout the European Union until the CJEU will have had the chance to develop the doctrine.

It is to be noted that this situation will not change if the more restrictive approach on the principle of good faith and fair dealing as has been suggested by amendment 83 of the EP will be accepted. According to that amendment, which was already contained in the statement of the European Law Institute on the CESL,[76] Art 2 (2) should be changed as follows: "Breach of this duty may preclude the party in breach from exercising or relying on a right, remedy or defence which that party would otherwise have, ***but shall not give rise directly to remedies for non-performance of an obligation***." Since a merger clause must be regarded as a defence, which the party in breach of the principle of good faith would otherwise have against the introduction of extrinsic evidence, this change will not have any effect on the application

[73] Cf. PC Müller-Graff, in M Schmidt-Kessel (ed), *Der Entwurf für ein Gemeinsames Europäisches Kaufrecht – Kommentar*, (Sellier, Munich, 2014) Art 2 GEK-E, para 2 et seq.

[74] Cf. Kieninger (n 2) Art 72 CESL, para 6.

[75] Cf. Schulte-Nölke, in Schulze (ed), *Common European Sales Law (CESL) – Commentary*, (Nomos inter al.: Baden-Baden inter al, 2012), Art 2 CESL, para 2.

[76] On this see already Pinkel (n 6) 60–61.

of the principle of *venire contra factum proprium* in the context of merger clauses based on Art 2 CESL.

12.4.2.3 Implied Terms in Written Contracts Which Include a Merger Clause

Furthermore, even if a merger clause has been effectively inserted in a written contract, statements made and agreements reached in the process of negotiations can still be used to fill gaps not explicitly regulated in the written contract in accordance with the implied term doctrine contained in Art 68 CESL (cf. in particular Art 68(2), (1)(b) CESL):

Art 68 CESL

1. *Where it is necessary to provide for a matter which is not explicitly regulated by the agreement of the parties, any usage or practice or any rule of the Common European Sales Law, an additional contract term may be implied, having regard in particular to:*

   (a) *the nature and purpose of the contract;*
   (b) *the circumstances in which the contract was concluded; and*
   (c) *good faith and fair dealing.*

2. *Any contract term implied under paragraph 1 is, as far as possible, to be such as to give effect to what the parties would probably have agreed, had they provided for the matter.*
3. *Paragraph 1 does not apply if the parties have deliberately left a matter unregulated, accepting that one or other party would bear the risk.*

As under English law, where is no reason to exclude the application of the doctrine of implied terms if a merger clause is inserted in a contract. Even though the way how the content of implied terms are contrived are different under English law and the CESL and "circumstance in which the contract was concluded" as well as the principle of good faith and fair dealing will have expressly influence through the backdoor, this is not contradicting Art 72 CESL. Although a merger clause is introduced to exclude the influence of the circumstances in which the contract was concluded and any kind of pre-contractual behavior, statements and agreements that function is not an end in itself. The main propos is to clarify the rights and duties of the contractual parties and, thereby, to increase legal certainty. If, however, a term is missing, this will lead to legal uncertain in any event. Filling the gaps of a contract, what is to be regarded as the function of Art 68 CESL,[77] with content which the parties have originally agreed on even if it has not been integrated in the final written document, seems to be the fairest and most predictable outcome. Therefore, the application of Art 68 CESL is not prohibited by a merger clause under Art 72 CESL.

[77] Cf. Looschelders and Makowsky (n 34) Art 68 GEK-E, para 1.

12.4.2.4 Prevalence of Individually Negotiated Non-written Terms Over a Merger Clause Contained in Standard Terms

First of all, merger clauses contained in standard terms could be subject to the rules on unfair terms in Art 86 CESL. However, Art 72 expressly allows merger clauses and regulates its effect. Therefore, the application of Art 86 CESL could only be considered in very exceptional circumstances[78] or must even be regarded as impossible.[79]

Moreover, in the context of merger clauses which have not been individually negotiated within the meaning of Art 7 CESL, Art 62 CESL states that individually negotiated terms prevail over standard terms. Since, in contrast to the rules on merger clauses in the PECL and the DCFR, Art 72 CESL does not contain special provision on merger closes in standard terms, Art 72 CESL cannot be regarded as *lex specialis* in relation to Art 62 CESL.

It is, therefore, submitted that individually negotiated (oral) terms prior to the drafting of the written agreement will take precedence over a merger clause contained in standard terms,[80] as is the case eg under German law (§ 305b BGB). As a result, this will reduce a merger clause contained in standard terms to a rebuttable presumption because it can always be proven that an individually negotiated (oral) term exists. In order to increase legal certainty, it would be preferable, however, to state this expressly in Art 72 DCSEL as is the case in the PECL and the DCFR.

12.4.3 Conclusions on the Effect of Merger Clauses Under CESL

Summing up, the effect of a merger clause in B2B contracts under CESL seems to be much more limited than Art 72 DCEL suggests at first. Full effect will, in the end, only be given to individually negotiated merger clauses. That seems to be faire in business relations. Moreover, if it is *in casu* inappropriate to allow a party to rely on a merger clause and step back from promises made earlier, even an individually negotiated merger clause would be inapplicable according to Art 2 CESL. After all, despite the very different wording the effect of Art 72 DCELS is not so different to the effect of Art II.-4:104 DCFR and Art 2:104 PECL.

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[78] Cf. Looschelders and Makowsky (n 34) Art 72 GEK-E, para 5.

[79] This position is favoured by Kieninger (n 2) Art 72 CESL, para 6.

[80] The opposite and the prevalence of Art 72 over Art 62 is advocated by Wendehorst (n 69) Art 62 CESL, para 4 and by Maultzsch (n 70) Art 62 GEK-E, para 4. As evidence, it is, however, mainly referred to comments on the PECL and the DCFR. Since the rule of Art 72 CESL has been changed and is not, anymore, referring expressly to merger causes contained in standard terms this reference cannot be used as proof at all.

12.4.4 Art 72 CESL and Rules on Proof in National Civil Procedural Law

In many national civil procedural laws special rules on evidence give priority to written documents containing the agreement. Substantive law rules, such as Art 72 CESL, can, however, serve as a functional equivalent. It is, therefore, submitted that if a merger clause is inserted, special procedural law rules should be inapplicable. Only if no merger clause is inserted in a contract, national procedural laws should decide on the effect of the written document. Although, civil procedural law in general is not touched by EU law, rules which are materially regulated by CESL should become inapplicable as it is the case if the question of limitation of action is a matter of civil procedural law in a particular country, which is also regulated by the CESL.

12.5 Evaluation of Art 72 CESL

In general, it is to be embraced that different rules on merger clauses in the B2B and the B2C context have been introduced through Art 72 CESL. Regrettably the interaction of Art 72 DCEL with other rules of the CESL causes too much uncertainty. Thereby, one of the main functions of a merger clause, to increase legal certainty, is detained from becoming operative. In this context it is to be criticised in particular that no specific rule on a merger clause contain in standard terms exist.[81] It is also very unfortunate that the operation of the general principle of good faith and fair dealing in the context of merger clauses is not specified.[82] For an evaluation of Art 72 CESL on its substance, one has to differentiate between B2C and B2B contracts.

12.5.1 Art 72 CESL in Consumer Contracts

Even though Art 72 CESL has some weaknesses, it seems to work almost perfectly for consumer contracts.[83] It is submitted that consumers tend to be more likely to trust oral assurances. Furthermore, even if a clause would have no legal effect, it may still have some practical effect since most conflicts will not reach the level of court proceedings and traders could, therefore, successfully refer consumers to a void contractual clause. Moreover, also the consumer could trust in the applicability of a merger clause, and s/he should be allowed to do so. Therefore it is, in general, the right choice to make a merger clause binding for the trader only. In exceptional

[81] In this direction Wendehorst (n 69) Art 62 CESL, para 7.

[82] Cf. Kieninger (n 2) Art 72 CESL, para 14.

[83] Similarly, Looschelders and Makowsky (n 34) Art 72 GEK-E, para 8.

circumstances, however, it seems unfair to completely exclude the possibility to introduce a merger clause which has also some effect on a consumer. In the rare cases in which contract negotiations in the B2C context take place over a certain period of time and the final subject of the sale is yet to be specified in the beginning (eg a set of paintings, where it is unclear, which painting will finally be included), it is also possible that assumptions underlying statements in the earlier phase of negotiations will be abandoned for the final contract. In such cases a merger clause should also have the effect of a rebuttable presumption against the consumer if the clause has been individually negotiated. The present draft makes it almost impossible to exclude the legal effect of early statements without expressly naming them.

12.5.2 Art 72 CESL in B2B Contracts

If the interpretation concerning the interdependence between Art 72 CESL and other Articles, in particular Art 2 and Art 62 CESL, as laid down in this Article turns out to be correct, the rules on merger clauses in the B2B context are also quite functional. They give enough room for private autonomy while protecting, in particular, SME from the misuse of a merger clause. If, however, prior individually negotiated agreements should not prevail over a merger clause contained in standard terms, a misuse of merger clauses would be possible. That effect is even increased due to the knock-out-rule for conflicting standard terms in its strong form as contained in Art 39 CESL. Hereby, it will regularly happen that in particular SME will not be aware of the merger clause in a standard term and will not have included a conflicting term in their standard terms due to the fact that they want to rely on the default solution in that context. Since the CESL is supposed to provide a strong protection of weaker parties, including SME,[84] that would not be acceptable.[85]

12.6 Concluding Remarks

Even though Art 72 CESL leaves too much room for legal uncertainty, it seems to provide a workable and balanced solution for the problem of merger clauses in almost all cases. From the point of view of the draft regulation, due to the incoherence with the general principles of contract interpretation (Art 58 *et sec.* CESL), the exclusion of prior statements as a tool of contract interpretation should not be permitted, if the CESL should ever become positive law in some way.

Regarding its effects, Art 72 CESL can be seen as a good starting point for the discussing of the development of the law on the validity and the effect of merger

[84] In this direction COM(2011) 635 final, pp. 3 et seq.

[85] In this direction Kieninger (n 2) Art 72 CESL, para 6, 13.

clauses in the future. That special rules for B2C contracts have been introduced is a step in the right direction, which could be reared as a model for future sales law in the EU and its Member States. From a structural and dogmatic point of view, however, it would be preferable if the principle of *venire contra factum proprium* and the limited effect on merger clauses contained in standard terms would be expressly entailed in a rule on merger clauses in future instruments for B2B sales contracts. It has been shown that, specifically for European or international sales law, the dogmatic choices taken in CESL cause to much legal uncertainty.

The legal uncertainty that would be caused by a rule as Art 72 CESL, at least in the short run, would also endanger one goal of a merger clause, namely the increase of certainty between the parties and thereby a gain of efficiency. In the European and international context, it would, moreover, take too much time to clarify such issues through jurisprudence. A clearer rules, as already contained in the DCFR would be, therefore, strongly recommendable. Insofar, the rules contained in the PECL and the DCFR seem to be better suited to serve as model rules for national and particularly international legislators. However, the special rule for B2C contracts, as contained in CESL should be added to the draft rules in PECL and DCFR.

In B2C contracts it is only to be criticized that an individually negotiated merger clause should have the effect of a rebuttable presumption against a consumer if a merger clause is objectively justified (ie that underlying presumptions have changed during the negotiations). That is, however, of no importance if the application of the sales law should be reduced to e- and m-commerce. Contract negotiations for contract conclude in online-shops will nether take such a long time that a merger clause would be objectively justified in consumer contracts. In that case, the rule contained in the draft regulation would be perfectly suited as a basis for a rule on merger clauses.

Annex: Rules on Merger Clauses in Modern (Drafts of) International Sales Law

CISG-AC Opinion no 3 The CISG has no provision on merger clauses. However, CISG-AC Opinion no 3, Parol Evidence Rule, Plain Meaning Rule, Contractual Merger Clause and the CISG, 23 October 2004 deals with this issue:

[…]

(3) A Merger Clause, also referred to as an Entire Agreement Clause, when in a contract governed by the CISG, derogates from norms of interpretation and evidence contained in the CISG. The effect may be to prevent a party from relying on evidence of statements or agreements not contained in the writing. Moreover, if the parties so intend, a Merger Clause may bar evidence of trade usages.

However, in determining the effect of such a Merger Clause, the parties' statements and negotiations, as well as all other relevant circumstances shall be taken into account.

[…]

Art 2.1.17 UNIDROIT Principles 2010 (Merger Clauses)

A contract in writing which contains a clause indicating that the writing completely embodies the terms on which the parties have agreed cannot be contradicted or supplemented by evidence of prior statements or agreements. However, such statements or agreements may be used to interpret the writing.

Article 2:205(1) Principes Contractuels Communs 2008 (PCC)

Les parties ont la faculte′ d'inse′rer dans le contrat une clause d'inte′gralite′ au terme de laquelle les de′clarations ou engagements ante′rieures que ne renferme pas l'e′crit n'entrent pas dans le contenu du contrat.

Art 2:105 (ex Art 5.106 A) PECL (Merger Clause)

1. If a written contract contains an individually negotiated clause stating that the writing embodies all the terms of the contract (a merger clause), any prior statements, undertakings or agreements which are not embodied in the writing do not form part of the contract.
2. If the merger clause is not individually negotiated it will only establish a presumption that the parties intended that their prior statements, undertakings or agreements were not to form part of the contract. This rule may not be excluded or restricted.
3. The parties' prior statements may be used to interpret the contract. This rule may not be excluded or restricted except by an individually negotiated clause.
4. A party may by its statements or conduct be precluded from asserting a merger clause to the extent that the other party has reasonably relied on them.

Art II.–4:104 DCFR (Merger Clause)

1. If a contract document contains an individually negotiated term stating that the document embodies all the terms of the contract (a merger clause), any prior statements, undertakings or agreements which are not embodied in the document do not form part of the contract.
2. If the merger clause is not individually negotiated it establishes only a presumption that the parties intended that their prior statements, undertakings or agreements were not to form part of the contract. This rule may not be excluded or restricted.

3. The parties' prior statements may be used to interpret the contract. This rule may not be excluded or restricted except by an individually negotiated term.
4. A party may by statements or conduct be precluded from asserting a merger clause to the extent that the other party has reasonably relied on such statements or conduct.

Art 68 FS/Art 72 CESL/Art 71 S-2-2012 (Merger Clauses)

(1) Where a contract document contains a clause stating that the document embodies all the terms of the contract (a merger clause), any prior statements, undertakings or agreements which are not embodied in the document do not form part of the contract.
(2) Unless the contract otherwise provides, a merger clause does not prevent the parties' prior statements from being used to interpret the contract.
(3) In a contract between a business and a consumer, the consumer is not bound by a merger clause.
[(4) The parties may not, to the detriment of the consumer, exclude the application of this Article or derogate from or vary its effects.] *Paragraph 4 is not included in the FS.*

Also the EP has not suggested any changes to Art 72 CESL in its affirmation of this Article.

Chapter 13
Art. 73–75: Price Determination

Viola Heutger

Abstract The CESL offers a detailed solution for the determination of the price to be paid in exchange for goods by offering an approach which sticks to the validity of the contract. Within the system of the CESL, this approach is not in line with the open concept of the CESL towards a variety of remedies, including the quite easy termination of the contract. However, this reluctant approach towards the termination of the contract in the case that the price is not determined is well in line with the general approach of good faith and fair dealing inherent to the CESL, European, and international trade.

13.1 Introduction

Parties normally determine the price for a good to be paid and fix it in the contract. Party autonomy offers a wide range of possibilities to negotiate a price which is adequate in the given circumstances. Price determination is a necessary requirement for European and international trade. Most sales contracts are concluded with the call for a specific price for a specific good in exchange. However, it could happen that both parties are willing to exchange goods for money without determining the exact price at the moment of the conclusion of the contract. Such a situation will occur more often with service contracts, for example, construction contracts, than with sales contracts. Nevertheless, one can imagine that there are goods for sale where the parties are not able to determine the exact price at the moment of the conclusion of the contract. Out of such a situation a dispute could arise and legal rules may help parties to solve their problem.

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13.2 Historical Background

Articles 73–75 of the CESL[1] foresee a solution for the rare case of a missing price in sales contracts. As the problem is timeless it could help to look into history to see what possible solutions for the scenario are available where the price has not been determined. For centuries the proverb "*pretium debet esse verum, certum et iustum*", the price must be in money, determined, and not against the law, was accepted as the best and only way to negotiate a fair price.[2] Many codes followed this example, eg the *Austrian Allgemeines Bürgerliches Gesetzbuch*.[3] The origin of this rule is not Roman, as the idea that a fair price shall be paid is not at all Roman. In Oriental bazaars, for example, the Romans were convinced that it is inherent in merchants to strive for one's own best interests.[4] It was a well-known principle of sales negotiations that the scope of each merchant was to cheat for his own advantage (*invicem se circumscribere*).[5] Since the second century, the Roman lawyer has discussed whether it is sufficient for the price determination to leave the price to the estimation of a third person.[6]

13.3 Three Solutions at Stake

The CESL offers, in Articles 73–75, a full program for the price determination. First, determination of the price by one party, followed by the rule that offers a possibility for price determination by a third party in the case that the determination by one party has not lead to a reasonable price determination. As a last resort, when the price has not been determined by a third person, then the determination of a reasonable price is left to a court, with the surprising option that first the court may appoint another third person and only finally, when also this "second" third person has failed with the price determination, the court itself may determine a reasonable price. In the given circumstances a court includes an arbitral tribunal. The scope of Articles 73–75 of the CESL are not coherently directed towards price determination. Article 73 deals with price determination only, whereas Articles 74 and 75 also refer to terms not clearly identified.

[1] Common European Sales Law, COM (2011) 635 final.

[2] See T Mayer-Maly, *Römisches Privatrecht* (Wien New York, Springer Verlag, 1991)110 ss.

[3] See § 1054 Austrian Civil Code.

[4] See Ulpian, D.4,4,16,4. Anna Radvány from Budapest Catholic Pazmany Peter University is writing her PhD thesis on this subject.

[5] See on sales law Pomponius at Ulpian D. 4,4,16,4.

[6] See Gaius, Inst. 3, 140.

13.4 The Chosen Comparative Paradigms

The German Civil Code, representing an influential continental legal system and the Dutch Civil Code, representing a quite modern Western European Codification approach, have been chosen for a comparative analysis. Because of the similarity in scope, the solutions offered by the Convention on the International Sale of Goods, CISG, and the corresponding UNIDROIT Principles for international commercial contracts have been chosen for the determination of the comparative perspective.

13.5 Comparative Analysis

Most international modern regulations offer rules for the determination of the price, such as the UNIDROIT Principles art 5.1.7 and art 55 CISG. National rules, like the German § 315 BGB ss and the Dutch Article 7:4 BW also foresee rules for price determination. The German solution is quite explicit and lengthy, whereas the Dutch solution is short, compact, and more general. The CISG offer a one-Article solution, whereas the UNIDROIT Principles offer a more elaborated and structured solution.

13.5.1 Price Determination by the Seller

The common accepted method of price determination by international and national regulations is that first the seller requests a reasonable price in the given circumstances. This approach is implicitly followed by art 73 of the CESL, where it is written "*the price normally charged…". As a price is normally charged by the seller it is also the seller who determines the price. Art 55 CISG and art 5.1.7 UNIDROIT Principles follow this approach, when speaking of "the price generally charged". §316 BGB also recognises the principle that the determination of a price is on the side of the seller. The Dutch solution is not as explicit as the German one, however even here the determination of the price is on the side of the seller, as art 7:4 BW states that the price shall be equivalent to a price normally charged at the moment of the conclusion of the contract*. The rule as laid down in art 73 of the CESL offers a solution that is in line with UNIDROIT Principles Art 5.1.7 and Art 55 CISG and it offers a similar level of protection as the rules laid down in national provisions like § 315 BGB in combination with § 316 BGB and Article 7:4 BW. The question whether the CESL offers a stronger or weaker protection level than other solutions can be answered simply: The CESL offers an equivalent solution.

13.5.2 A Manifestly Unreasonable Price

Art 74 of the CESL offers a rule on unilateral determination of a price by a party. A grossly unreasonable price determination by one party has to be substituted by a price normally charged or a reasonable price. Derogation from this rule is not possible. This rule protects not only the consumer but all parties to a contract.

In the event that the price determination by the seller has led to a price which has to be specified as grossly, in the wording of the CESL, or manifestly, in the wording of UNIDROIT, unreasonable, then the parties shall agree on a price normally charged or a reasonable price.

What is problematic is the use of the term "grossly" in the CESL. The understanding could vary from jurisdiction to jurisdiction. Countries used to the concept of "laesio enormis"[7] would determine the unreasonableness by the concept of a 100 % more to be paid or a price less than 50 %. These percentages would be the indication for the determination of a price being grossly unreasonable. Countries without the concept of "laesio enormis" will probably determine the gross unreasonableness by other means and will offer another outcome. For international trade it would have been better to determine with more specificity the missing proportionality.[8]

In Art 74, the CESL offers a step by step solution which mirrors the approach of art 73 of the CESL: First the parties may seek a price normally charged in comparable circumstances at the time of the conclusion of the contract. If no such price is available, a reasonable price is substituted. It could be quite hard to argue what is now a price normally charged and what could be the difference in comparison with a reasonable price. The CESL approach is fairly multilayered without really offering a practical solution. It would have been enough to refer to a reasonable price in the given circumstances. The German Civil Code provides the solution that a court may decide when the party has asked an unreasonable price.

The solution offered in the CESL seems to be more complex than in other legal systems and it does not offer more protection in the case that the seller has asked an unreasonable price, notwithstanding the length of the rule provided for in the CESL one can state that the protection level is less. A solution is offered, but in a way that does not determine the paradigms for a clear answer. The solution offered in the BGB in § 315 (3) is better. An unreasonable price must be replaced with a reasonable one by a judge. However, the CESL offers a more detailed solution than the Dutch Civil Code.

[7] Eg Austria.

[8] The discussion of what exactly is meant by a reasonable price and the term 'grossly unreasonable' will be left to Axel Halfmeier and Tim Dornis (in this volume).

13.5.3 Price Determination by a Third Party

Being unable to determine a price normally charged or reasonable, parties may resort to a price determination by a third person and as a last remedy in their search for a fair price they may ask a court. These solutions are offered by most sales laws, even though time restraints and actions to be taken by the parties differ from legal order to legal order.

Article 75 par. 1 of the CESL offers a solution for the case that the appointed third person has not determined the price. In such a case this person can be replaced. The rule foresees in the solution that a court appoints this person. This rule is quite pointillist and time consuming. No other legal system provides for a rule on the replacement of the third party in the event that this party fails to act. Other solutions, like the German one, resort in such a case to a court decision. Such a right to cure an appointed non-acting third person and the subsequent right to replace this person at a later time is unique and does not at all offer a fair and fast solution. In the scenario sketched by this Article the parties have a serious problem and in all likelihood will have to resolve it through a court process. Art 75 of the CESL offers a solution for the case that parties have not determined the price at the time of the conclusion the contract, subsequently one party asks a price which is grossly unreasonable, and a third party shall now determine the price and is not able to do so. The chain of misunderstanding and negotiations will now be followed by the determination of another third person and the hope that this person will be able to finally determine the price as a fourth step in the actions taken to determine the price. This solution is not acceptable as it adds to costs and it involves extra time. No other system offers this approach and the solution at stake does not add to the protection mechanism that is offered in the CESL as such. Here the German and the Dutch code and international instruments offer a better and more straightforward approach.

13.5.4 Court Decision as a Last Remedy

When a price normally charged in comparable circumstances at the time of the conclusion of the contract or no reasonable price can be determined, the CESL provides a further remedy. As explained above, the parties may ask the court to determine a third party for the determination of the price. Finally, when neither the first nor the second appointed third person may determine a reasonable price, it is up to the court to determine the price.

The small number of court decisions is proof that the absence of the determination of the price does not often lead to a resolution by a court.[9] On the determination of price, as regulated in Art 5.1.7 UNIDROIT Principles, only two cases can be

[9] On the issue: Price generally charged at time of conclusion of contract for performance of same type, two cases can be found. See Unilex www.unilex.info.

identified. One case deals with the validity of the contract and confirmed the contract's validity even in the case of a missing price determination.[10] A Spanish court also confirmed the validity of the contract and strived for a price determination in accordance with objective criteria such as the market price.[11]

The relative lack of case law could lead to a reluctant answer to whether or not there is a substantial need for such a rule. It could be understood that other comparative law analyses do not even compare the CESL rule on price determination with other rules like the Convention on the international sale of goods, CISG.[12] However, in the UNILEX database eight decisions on price determination can be retrieved.[13] One case deals with the problem of price determination after the conclusion of the contract.[14] Three cases deal with the problem of the interconnectedness of price and quality determination.[15] The other cases then deal with the problem of a price generally charged at time of conclusion of contract for performance of same type and are close to the questions raised in UNIDROIT Principles 5.1.7.

13.6 Findings

The CESL offers detailed regulation for price determination. Three Articles determine the lack of a specified price by requesting a market conformant or reasonable price, a unilateral determination, or as a last resort the determination by a third person or the court. *In the words of Ewoud Hondius* "Common European Sales Law: If it does not help, it won't harm either."[16]

However, let me conclude with an overview of my findings.

13.6.1 No Coherent Fixation of Reference to a Point in Time

Article 73 of the CESL declares as the point of time for the determination of a price the time of the conclusion of a contract. In the absence of any price indication the price must be determined by the circumstances at the moment of the conclusion of

[10] Arbitral Award from 1999, ICC International Court of Arbitration, 7819. The validity of a contract in the absence of a determined price is also in line with Dutch jurisprudence, HR 10/12/99, (2000) *NJ*, 5.

[11] Audiencia Provincial de Murcia, Section 1, Number, 348/2011 from 08.07.2011.

[12] Schelhaas and Loos do not even mention the rules on price determination in the very excellent analysis, BM Loos, and H Schelhaas,'Commercial Sales: The Common European Sales Law: Compared to the Vienna Sales Convention' (2013) 21, Issue 1, *European Review of Private Law* 105–130.

[13] See Unilex, www.unilex.info, art 55 CISG.

[14] A price to be fixed during the season, see Landgericht Neubrandenburg, 10 O 74/04 of 03.08.2005.

[15] The definiteness of price (art 55 CISG) and the definiteness of quality (art 14 CISG).

[16] This is the title of the editorial: E Hondius,'Common European Sales Law: If it does not help, it won't harm either?' (2013) 1*ERPL*1-12. Part of the editorial is a quite exhaustive list of literature on the CESL, see specifically 5–12.

the contract and not, what would have been another option, by the value of the goods at the time of delivery. The time of delivery cannot be determined as a point in time for the determination of the price according to the wording of the CESL. However, for the payment of a reasonable price no reference to a specific time limit has been made in the CESL. Here lawyers are asked to come up with an interpretation of the rule. For the determination of a reasonable price, parties may refer to a reasonable price at the time of the conclusion of the contract or to a later point in time. This interpretation seems to be possible as the wording in the CESL is not clear as regards this point.

Towards time limits for the determination of the price, the CESL should have chosen a more coherent or clearer approach. The CESL could have linked all price determination to the time of the conclusion of the contract in the absence of any indication in the contract. Another option would have been to choose more precise wording for the point in time for the determination of a reasonable price. It remains unclear whether in this case the price must be determined in connection with the time of the conclusion of the contract or to a later point in time.

In comparison to the German system, the CESL offers a clear solution to the point in time which is to be used for the determination of the normally charged price. Towards this point, the CESL is in line with the Dutch solution. The reference to the time of the conclusion of the contract seems to be fair and coherent in an international setting as it avoids misunderstanding and too much flexibility. Unfortunately, the drafting of the CESL is not especially clear with respect to a reasonable price. Here it is not obvious whether the drafters wanted to keep the option open for determining a reasonable price also after the conclusion of the contract or whether they expected the price to always be determined in connection with the time of the conclusion of the contract. Neither the German nor the English versions offer a clear guideline for a grammatical interpretation.

13.6.2 Overly Elaborated Program of Third Party Determination

The CESL offer a complex program for the determination of a third party and the replacement of that third party. However, the German solution of price determination by taking not only one voice but offering the possibility to let more than one person determine the price and to resort then to the average of the third parties offers are a more democratic approach than the CESL.[17] This solution is better than the appointment of a replacement third person in the case of a missing determination of the price by the first-appointed third person.

[17] *§ 317 (2) BGB.*

13.6.3 Traditional "Pacta Sunt Servanda" Approach

The CESL offers a competitive approach when dealing with remedies for defective goods. In the case of defective goods parties are not obliged to abide by the contract and may terminate it. This open approach is not followed in the rules regulating the determination of the price. The option of rescission of the contract is not mentioned in the Articles dealing with the determination of the price. The CESL offers a complex system of determining the price in various steps: first unilateral determination, second determination of the price normally charged or a reasonable price, third determination by a third party, fourth determination by a replaced third party, and lastly, determination by the court. This whole sequence is not coherent within a system where in the case of a defective product the termination of the contract is that easy. Rescission of the contract should have been one of the various options of resolving the problem of the missing determination of the price.

13.6.4 Return to National Court or Arbitration

The solution offered in the CESL on the determination of price is old-fashioned, complex and multilayered. For a modern approach dating from 2011, the CESL offer a retrospective and not at all innovative approach. The CESL is not able to provide a self-standing rule for the determination of price. A court is finally involved. National law or arbitrational knowledge is needed for the final determination of the price. To achieve this result, a shorter rule than that elaborated by the CESL would have been sufficient. The resort to a court also adds costs and time. Furthermore, court processes are organised quite differently in all the Member States. Costs can differ and the duration of receiving a court decision is different from country to country. In order to avoid resorting to court, I would have preferred a rule that makes it possible for the parties to rescind the contract.

13.6.5 Necessary Flexibility and Credibility for European and International Trade

The proposed CESL rules on the determination of price offers the necessary flexibility to meet the needs of European and international trade. Seeing the rules on price determination also in the light of other rules inherent to the CESL like rules on good faith and fair dealing (art 2 CESL), it can be said that rules on price determination offer a clear, but complex approach, and protect the parties to contracts in the same way as other international rules, like the UNIDROIT principles and the CISG. The CESL offers a step-by-step approach which is easy to understand, however it is not elegant or innovative. By providing a clear regime for the

determination of a price, the CESL offers more legal certainty than the Dutch system offers in art 7:4 BW. In comparison to the German system, one may say that the German solution is more to the point and offers protection even in circumstances not foreseen by the CESL, like the rule on delay of the appointed third party (§ 319 BGB) or on a price determination by a group of experts (§ 317 (2) BGB).

The CESL offers a detailed solution for the determination of the price to be paid in exchange for goods by offering an approach which sticks to the validity of the contract. Within the system of the CESL, this approach is not in line with the open concept of the CESL towards a variety of remedies, including the quite easy termination of the contract. However, this reluctant approach towards the rescission of the contract in the case that the price is not determined is well in line with the general approach of good faith and fair dealing inherent to the CESL and European and international trade.

Chapter 14
Art. 74: The "Grossly Unreasonable" Unilateral Determination of Price or Other Contract Terms and Its Substitution Under the Proposed Art 74 CESL

Axel Halfmeier and Tim W. Dornis

Abstract The present chapter analyses the interpretation of what is a "grossly unreasonable" unilateral determination of price or other contract terms under Art 74 of the draft CESL. This analysis is carried out in a comparative perspective, taking into account German and Dutch law, the PECL, and the DCFR. The chapter reaches two conclusions. Firstly, the term "grossly unreasonable" should be interpreted as "manifestly unreasonable" in the procedural sense. Hence, the lack of reason in the unilateral determination must be plain to see. The term "grossly" should not be read as a substantive or quantitative criterion. Secondly, and in view of possible future attempts to unify European sales law, the replacement mechanism in case of an invalid unilateral determination should be changed back to the wording "a reasonable price or term" as it is found in Art 6:105 PECL and Art II-9:105 DCFR, since the wording that was proposed for Art 74 para 1 CESL that refers to the price "normally charged" and "at the time of conclusion of the contract" is not capable of giving sufficient effect to the interests and economic considerations of the parties, particularly in long-term relationships.

14.1 Introduction

Freedom of contract is an important principle under several aspects. Traditional private law theory looks at it as a part of "private autonomy" in the – somewhat utopian – sense of self-determination and self-enacting of laws, as the famous description in Art 1134 *code civil* formulated it 200 years ago.[1] In more recent times, freedom of contract is often seen as an instrument to achieve maximum efficiency: As both parties enter into a contract to increase their individual level of

[1] "Les conventions légalement formée tiennent lieu de loi à ceux qui les ont faites."

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utility, a contract creates an increase in total social value and should therefore be enforced by the legal system of a given society.[2]

Both approaches must deal with the principal incompleteness of contracts. Even though the parties will usually – and typically have to – agree on the *essentialia negotii*, the basic elements of the contract, they will often fail to provide contractual provisions for all circumstances in their future relationship.[3] This is of particular relevance in long-term agreements where unknown future developments may create unforeseen losses or gains that must be distributed amongst the parties. One possible rule regarding such unforeseen circumstances may be to allow one contracting party – or a third party[4] – to unilaterally determine the price or any other contractual obligation.

Such a contractual rule may be seen as problematic from both of the abovementioned viewpoints towards contract law: If contract law is to protect autonomy, the question arises to which extent and under what conditions one may give up autonomy in favour of the other party's right to alter or unilaterally determine the contract's content. If we look at it from the efficiency perspective, such a rule creates a moral-hazard problem as it gives one party the possibility to alter the "deal" purely in its own interest, which is not necessarily identical with maximum efficiency.[5]

It is therefore not surprising that most contract law systems provide certain rules or restrictions that deal with the unilateral determination of contractual obligations by one party. The original draft of the EU sales law codification (CESL)[6] did so in its Art 74, which stipulated in its first paragraph:

> Where the price or any other contract term is to be determined by one party and that party's determination is grossly unreasonable then the price normally charged or term normally used in comparable circumstances at the time of the conclusion of the contract or, if no such price or term is available, a reasonable price or a reasonable term is substituted.

The second paragraph of Art 74 CESL adds that the parties cannot derogate from this provision. This means that Art 74 CESL erects a strict barrier in relation to the relevant party's determination: It must not be "grossly unreasonable" lest it be replaced – potentially by the court – by a more reasonable determination.

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[2] Cooter and Ulen, *Law and Economics* (6th ed, 2014) 275.

[3] Shavell, *Foundations of the Economic Analysis of Law* (2004) 299–301.

[4] The determination of contractual obligations by a third party (Art 75 CESL) is not covered here, as this article deals only with Art 74. However, the language of Art 75 CESL is very close to Art 74, and the issues are quite similar. This similarity is also reflected in the fact that some legal systems deal with the unilateral determination and the third-party determination in one provision, see. eg the Dutch Art 7-904 para 1 *Burgerlijk Wetboek*.

[5] See H Unberath, 'Der Dienstleistungsvertrag im Entwurf des Gemeinsamen Referenzrahmens' in G Wagner (ed), *The Common Frame of Reference: A View from Law and Economics* (2009) 87, 139.

[6] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM(2011) 635 final, 2011/0284 (COD) (11.10.2011).

The question therefore arises how "grossly unreasonable" shall be interpreted and used. This chapter will approach this question by looking at the provision's context and an example (in Sect. 14.2), at the wording of the provision (in Sect. 14.3), at its historic roots and under a comparative angle (in Sect. 14.4), as well as at the provision's economic function (Sect. 14.5). On this basis, we will also extend the analysis to the provision's second part on court-backed default rules (in Sect. 14.6). Finally, we shall arrive at our proposals regarding the interpretation of Art 74(1) CESL (Sect. 14.7), which could also serve as a useful guideline for possible future attempts in unification of sales law.

14.2 Art 74(1) in Its Context and an Example

14.2.1 The Limited Scope of Art 74

The rule in Art 74 CESL must be seen in the context of other restrictions regarding freedom of contract that can be found in the CESL as well as in national contract laws.

First of all, there are special rules regarding standard form contracts that are based on the assumption that in many – if not most – cases of contracting, there is no actual bargaining but instead one party is in a situation in which it can introduce its own terms into the contract. In a way, the use of standard form contracts also alleviates the incompleteness problem, as those forms typically try to cover many possible issues and situations that may arise in relation the contract. Nevertheless, the moral hazard problem is particularly virulent with regard to standard forms, as they can be used to give an advantage to their user that would not have been possible if the issues had been actually bargained for.

In the draft CESL, we find rules on standard from contracts in Arts 79–86. Between a trader and a consumer, a standard form clause is regarded as unfair and thus invalid if the clause causes a significant imbalance to the consumer's detriment and does so "contrary to good faith and fair dealing" (Art 83 para 1 CESL). In addition, certain clauses are *per se* unfair (Art 84 CESL) or at least presumably so (Art 85 CESL).

These rules mean that a clause in a standard form contract which allows the unilateral determination of the contractual content by one party could – depending on the circumstances and the language of the clause – already be seen as invalid due to their unfairness as standard form clauses.

For contracts "between traders", the standard scrutiny is less strict: a clause is unfair and thus invalid when it "*grossly* deviates from good commercial practice, contrary to good faith and fair dealing" (Art 86(1) CESL, emphasis added).

If we are looking at individually negotiated contracts instead, Art 79 *et seq*. CESL do not apply. Since the focus of this chapter is Art 74 CESL, the other rules mentioned above shall not be dealt with in more detail. At this point, it suffices to

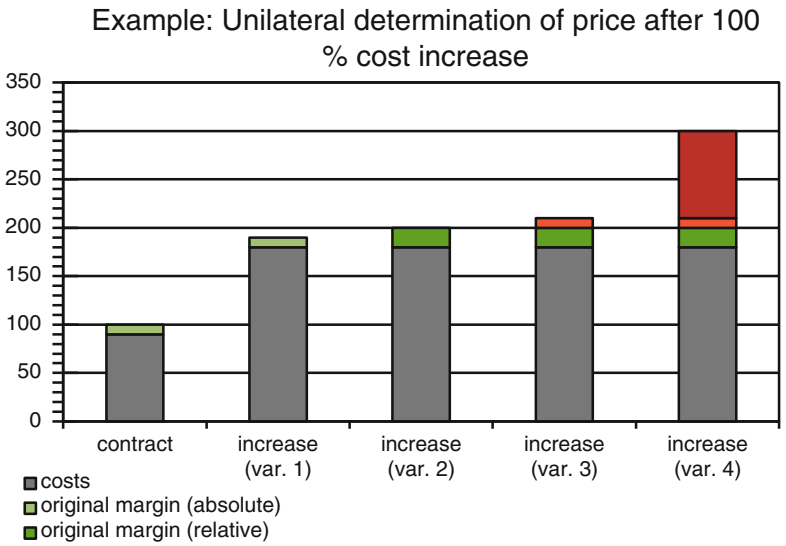

Fig. 14.1 Example: unilateral determination of price after 100 % cost increase

emphasise that Art 74 must be read in the context of other restrictions on freedom of contract under the CESL. Both a systematic interpretation and – as we will see[7] – an economic perspective explain the provision as a norm covering arm's-length transactions only.

14.2.2 An Example: Unilateral Determination of Price After Cost Increase

Let us look at a simplified example of a unilateral determination of the price of a sold good, maybe in a long-term relationship under uncertainty regarding the development of market prices. We assume that the parties have stipulated in their contract that if a significant increase in the acquisition price of the raw materials required to produce the goods should arise – which would make the contract less attractive or even disadvantageous for the seller – it should be up to the seller to determine the new price. In the original situation, when the contract was concluded, the costs for the seller were 90 and the sales price to the buyer was 100, resulting in a profit of 10 per unit sold.

Assuming that the costs now double to 180, what is a "reasonable" determination of the new price? Variation 1 (see Fig. 14.1) would be to keep the profit of 10 per

[7] See *infra*, at 14.5.

sold unit, thus fixing the new price at 190. This would be reasonable at least from the perspective of the seller.[8]

In variation 2 of the illustration the seller fixes the new price at 200, thereby keeping the cost-profit ratio of 9:1 from the original situation so that he now has costs of 180 and a profit of 20 per unit sold. However, his profit rate on invested capital remains at the original level; therefore one could also call this a "reasonable" determination from the seller's perspective as the relative profit margin is unchanged. Variations 1 and 2 together confirm the intuitive idea that there may be more than one "reasonable" solution to a given problem of this sort.

The two remaining variations 3 and 4 in the figure show two pricing options that might be regarded as "unreasonable" under the assumed circumstances: In variation 3, the seller decides on a price of 210, thereby using the cost increase to raise his relative margin from about 11 % to now 17 %. Although this is only a slight increase in the margin and it results only in a price 5 % higher than in variation 2, one could doubt whether this is a reasonable price anymore (under the given assumptions). Prima facie, at least, the new price departs from the initial bargain both in absolute and in relative terms. Unless there is justification for the seller's additional profit, it could be unreasonable.

Here, a first problem surfaces: a change of the price or of other contract terms may appear unreasonable on its face. Yet, it may still be an economically rational determination for at least one party of the contract, often even for both parties. The seemingly inadequate or disproportional alteration of the price may, for instance, be justified with regard to circumstances that are not evident. One example for such a constellation underlying the facts of variation 3 could be the change of market conditions, for instance, a market exit of competitor sellers that lead to a rise of market prices for the sold good. Another example is the case where the seller has undertaken significant investment in order to accommodate the buyer's special needs. In both cases, the apparently "disproportional" raise of the price may be justified and can thus hardly be qualified as "unreasonable". It is in such cases where a court may lack sufficient information to determine the issue of "unreasonability". Often, the judge may also lack the expertise for an assessment of the determination of this kind.[9] Most generally, therefore, the issue of "reasonability" is problematic already.

But this is not the only problem. The invalidation of a unilateral party determination not only requires unreasonability; it is "gross unreasonability" that must be found to exist. With this qualifying factor, problems multiply.

Back to our example: Let us assume that we can explain the raise of the price in variation 3 to be unreasonable. Is it then also "grossly unreasonable"? This is hard to say. Maybe not, because a price that is only 5 % above the accepted reasonable level is not "grossly" above the reasonable level according to ordinary language. Another example clarifies this point: if the normal price of gasoline in our town is

[8] We will disregard here the question of whether the buyer would still be interested in the goods at this price, and just assume that he is, possibly because the goods are very important to him.

[9] See extensively Unberath (n 5).

1.30 €, we would maybe speak of a gas station that sells for 1.365 € (that is, 5 % above the normal level) as being a bit too expensive, but not "grossly" so.

The foregoing illustration therefore raises the issue of whether Art 74 CESL is designed to allow the determining contract party a small "unreasonable" extra profit (variation 3 in the illustration), but not one that is so large that it could be called "grossly unreasonable" (variation 4 in the illustration). To put it more bluntly: Is a little bit of unreasonability acceptable? And: Where does a "little bit" change into "too much"?

As our overview has shown, the most pressing problem in interpreting and applying the CESL's provision on unilateral party determination is finding the exact demarcations for "gross unreasonability". The issue of "unreasonability" is problematic already, but it is the qualifying element of "gross" that ultimately determines the outcome of a court-backed review of unilateral party determinations. Our inquiry will therefore focus on the specific issue of when a certain deviation from reasonability in the unilateral determination is a case of "gross" unreasonability.

14.3 Semantics: Two Possible Meanings

To solve this question, one should first look at the language used in Art 74 CESL, in particular at the qualifying term, which in the English version is the word "grossly". This word may have different meanings in the English language. One is a substantive or quantitative meaning in the sense of "gross" as "fat" or "big-bodied".[10] In that sense, "grossly unreasonable" would equal "very unreasonable". On the other hand, "grossly" is also explained in English dictionaries as "roughly, generally, without regard to detail, or even – although in older usage – "plainly, obviously".[11] This other meaning relates less to quantity but rather to the fact that something is easy to see. These two categories may, but do not necessarily overlap: On the one hand, a large difference in quantity may be easy to see in the physical realm. But there may be strong aberrations from a standard that are not easy to see; think of a defect in an automobile engine that is very severe, but not easy to see at all, as one needs special tools to open up the engine and identify the defective part inside. On the other hand, there are also small defects that are easy to see, for example a big stain of dirt on the car that can be seen instantly, but may be rather insignificant, as it will wash off with the next rain.

Therefore, "grossly" may be read as a substantive term, indicating a qualitatively and/or quantitatively significant deviation from the standard, or as a procedural term, indicating a deviation that is easy to see, irrespective of its actual size.

These two possible meanings are also reflected in other language versions of Art 74 CESL: The German text speaks of "grob", which tends more to the substantive side both in ordinary language – eg "grober Kies" are large pieces of gravel – and

[10] Entry "gross", in *The New Shorter Oxford English Dictionary* (1993) 1149.

[11] Ibid, entry "grossly".

in the legal world: "Grobe Fahrlässigkeit" is a higher degree of negligence, and "grober Unfug" is translated as "serious mischief".[12] Notwithstanding this use in everyday German, a German commentary on Art 74 CESL reads "grob" as meaning a "raised or evident degree of unreasonableness", thereby using both a quantitative (raised) and a procedural (evident) interpretation.[13] The Dutch text – "uiterst onredelijk" – also leans more in a quantitative direction. However, other language versions of Art 74 CESL sound clearly more on the procedural side: In French, one reads "manifestement", in Spanish "manifiestamente" and in Danish "åbenbart" – something that is open to see.

In favour of a substantive reading of "gross" in Art 74 CESL, finally, one may point to at least one more provision in the CESL that uses it in a rather substantive sense: Art 84 (b) CESL speaks of "gross negligence" which is typically thought of as a substantively very strong form of negligence. However, there are also other provisions in the CESL where "gross" is used as a qualifying element in a different manner: One example is Art 86 CESL where the deviation from "good commercial practice" is required and supposed to be "gross". The issue here is not whether the outcome differs, but whether the practice deviates. Hence, looking at the deviation implies a process-oriented understanding of "gross".

Against this backdrop, it is clear that a strictly language-oriented interpretation cannot resolve the question what metric to apply when determining "gross unreasonability" under the CESL. Neither can the national laws provide a reliable basis for the interpretation of Art 74.

14.4 History and Comparison: From Roman Law Through National Codifications to the PECL, the DCFR, and the CESL

As a closer look unveils, the historical and comparative perspective is ultimately also unhelpful. The two potential meanings of "grossly unreasonable" – as a substantive or a procedural standard – can be found throughout the history of lawmaking in European contract regimes, both of nation-state origin and in scholarly suggestions. Nowhere, however, can one find a reliable basis in favour of one interpretation of the other.

Many modern provisions have their roots in the ancient Roman *manifesta iniquitas*, which originally dealt with a type of arbitration through a third party's decision, as Roman law did not allow at all a unilateral price determination by one of the

[12] *Langenscheidts Enzyklopädisches Wörterbuch der englischen und deutschen Sprache* (9th ed, 2002), part II, vol 1, 717. In favor of a substantive reading of "grob": J Kleinschmidt, *RabelsZ* 76 (2012) 785, 800.

[13] Looschelders and Makowsky, in Schmidt-Kessel (ed), *Der Entwurf für ein Gemeinsames Europäisches Kaufrecht* (2014) Art 74 margin no 3 (translation ours).

contracting parties.[14] The Roman fragment had a clear procedural character, as it allowed the correction of an arbitral decision if its injustice was open to see for everybody.[15]

The Roman approach is conserved, for example in the Italian codice civile, which strikes out a third party's determination if it is manifestly unjust or erroneous ("manifestamente iniqua o erronea").[16] But this status has by far not been conserved throughout the continent. Illustrative examples for the meandering evolution in the national laws can inter alia be found in the Dutch *Burgerlijk Wetboek* and the German civil code.

The modern Dutch *Burgerlijk Wetboek* does not distinguish between the determination by one contracting party and the determination by a third party, but instead uses the same standard for both of these cases in Art 7-904 par. 1 BW. This provision declares such a determination as voidable if under the specific circumstances the determination violates the "maatstaven van redelijkheid en billijkheid". This is translated to English as "standards of reasonableness and fairness".[17]

Although the provision talks only about *redelijkheid en billijkheid* without any qualification such as "gross" or "strong" inequity, the rule is regarded in Dutch literature as having "een marginaal karakter" in the sense that it shall only be used to correct a contracting party's (or third party's) determination if a certain threshold is passed.[18] This is backed by a decision of the Dutch *Hoge Raad* from 1998, in which the court said that a contracting party or – in that case – third party's determination should only be voidable under Art 7-904 par. 1 BW if the court can find a serious flaw in the determination.[19] Although we cannot exhaustively survey Dutch literature on this issue, both the wording of the provision and its interpretation seem to lean towards a substantive interpretation in the sense that there must be a certain gravity of the violation in order to trigger the control.

The German *Bürgerliches Gesetzbuch* distinguishes between a contracting party's determination (§ 315 BGB) and a third party's determination (§§ 317–319 BGB). The more procedural standard in the tradition of *manifesta iniquitas* is codified only with regard to the latter in § 319 BGB ("offenbar unbillig"). The determination by one contracting party is put under apparently stricter scrutiny in § 315 BGB by binding it to "billiges Ermessen" (equitable discretion) and using "Billigkeit" (equity) as the standard for review. However, these concepts are far

[14] Kleinschmidt, 'Contractual Terms, Subsequent Determination', in Basedow, Hopt & Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law*, Vol 1 (2012) 396, 397.

[15] "[…] manifesta iniquitas eius appareat […] "*Paulus* Digests 17.2.79; see Hofer, in: Schmoeckel, Rückert and Zimmermann (eds), *Historisch-kritischer Kommentar zum BGB* (2007) §§ 15–319 margin no 5.

[16] Art 1349 par. 1 codice civile.

[17] Warendorf, Thomas and Curry-Sumner, *The Civil Code of the Netherlands* (2013) 938.

[18] "[…] als de grensen zijn overschreden." MacLean and Van den Hevel, in Castermans (ed) *Bijzondere Overeenkomsten* (2006) Vol 2, Art 904 note 2.

[19] "[…] alleen ernstige gebreken in de beslissing" make it voidable, *Hoge Raad*, 12/09/97, (1998) Nederlands Jurisprudentie, nr 382, 2175.

from clear. With regard to § 315 BGB, it is said by a commentator that "offenbar unbillig" does not mean "evident" and thus in more complex cases may be found after intensive research by a specialist[20]; with regard to smaller inequities the case law says that they must be tolerated[21] – but even if they are open to see?

With regard to § 315 BGB – the unilateral determination by one contracting party, as in Art 74 CESL – there is an "equitable discretion" that does not command one single result. A judicial correction is only mandated if the "boundaries" of this discretion are violated.[22] With this language of "boundaries" one steps close to the Dutch provision and its "marginal" character, as only a clear violation of equitable principles can be corrected. It may be inherent in the soft concept of "equity" that a violation requires some form of overstepping of boundaries.

In sum, the vagueness of Art 74 CESL somewhat reflects the existing diversity and ambiguities in European national laws and the character of the provision as a flexible instrument of judicial control.

And modern scholarly attempts to promulgate universal and acknowledged principles of contract law are not more sophisticated or decided either. In fact, many hints are hidden in the textual history of Art 74 CESL, although this cannot be seen from comparing it with earlier scholarly "restatements" of European contract law, as these essentially sound the same: Art 6:105 of the "Principles of European Contract Law" (PECL) also invalidates a unilateral determination that is "grossly unreasonable",[23] and the same is stated in Art II-9-105 of the "Draft Common Frame of Reference" (DCFR).[24]

In the *travaux préparatoires* that led to the current CESL draft, there was apparently "some discussion" with regard to the standard of "grossly unreasonable", but the content of the discussion is not specified.[25] In the comments to the earlier PECL provision, "grossly unreasonable" is explained to prohibit "abuse" of the determination right by the determining party.[26] A clarification of the distinction between "grossly unreasonable" and "unreasonable" is provided only in relation to the third party's determination, which is controlled by the same standard of prohibiting a "grossly unreasonable" determination. Here, the commentators lean towards a procedural reading of "grossly", as they explain it with an "error" that is "manifestly unreasonable, such as a clear mistake of arithmetic or a grossly wrong valuation."[27] The commentary to the relevant DCFR provisions supports this rather procedural view.

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[20] Würdinger, in *Münchener Kommentar BGB* (6th ed, 2012) § 319 margin no 7.

[21] BGH, 3/11/95, (1996) *Neue Juristische Wochenschrift*, 452, 454.

[22] Würdinger (n 22) § 315 margin no 29 and 30; for historic references see also Kronke, *AcP* 183 (1983) 113, 139.

[23] Lando and Beale (eds), *Principles of European Contract Law, Parts I and II* (2000).

[24] Von Bar and Clive, *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference*, Full Edition, Vol I (2009) 602.

[25] See the reference by Kleinschmidt (n 12) 800 fn 72.

[26] Lando and Beale (n 23) at 310.

[27] Ibid, at 312.

In essence, therefore, a solution cannot be found in the CESL's language, its systematics, and its history. The European national laws do not provide for a clear solution either. The only thing remaining, thus, is a functional analysis looking for the correct policy to be implemented in a rule on the unilateral determination of the price or other contract term.

14.5 Functional Analysis

14.5.1 Why Allow for a Unilateral Determination?

In order to arrive at more specific guidelines regarding the operation of Art 74 CESL, we shall look more closely into its function. As stated in the introduction, a determination right for one party as regards the contents of a contractual obligation is one way of dealing with an incomplete contract. It actually is the most efficient way to provide for the ubiquitous problem of contract incompleteness.

Of course, one alternative for the parties would be to devise a truly "complete" contract ahead of time. Yet this would lead to potentially indefinite transaction costs, notably if the possible developments are complex. In addition, freedom of contract allows the parties to opt for renegotiating the contract in case of unexpected post-contractual developments. Hence, they are free to not provide for any fall-back mechanism. But renegotiating creates the risk of a non-agreement which could ultimately end the performance of the contract. Again, transaction costs for all sides would rise significantly.

Therefore, it seems only sensible to allow the parties to create long-term relationships that leave open a possible re-allocation of unforeseen losses or gains. This re-allocation is done by some form of contract modification, which could be done by public officials – notably the courts – to remedy the original contract's deficiency and supplement the parties' agreement *ex post*. Alternatively, the contract modification or amendment may be delegated to one of the parties or to a third party. In most private law regimes – as discussed above – both elements are combined: The parties are allowed to use party or third-party determination, but there is a court-backed review to control such determination to a certain extent.

14.5.2 Why Control and Review a Unilateral Determination?

What is the function of this secondary control through the legal system? One could argue that if we presume the parties' initial agreement to be efficient,[28] the presumption of efficiency should also extend to the contractual provision that gives one party

[28] See *supra*.

a unilateral right do determine the content of the contract under certain circumstances. More concretely: that the presumption of efficiency should also cover the ultimate determination of one party. After all, since the right to unilateral determination is part of the parties' overall bargain, one might presume, it is "justified" by utility considerations. For example, a right to determine the price if circumstances change could be "paid for" with a lower original price or other advantages for the other side.

But this perspective would be oversimplified. The right to unilateral determination actually does create a significant moral hazard problem.[29] It gives the determining party a possibility to extract an extra rent from the contract that it would not have been able to achieve under the original terms. The determination right may have been "paid for" in advance by the granting of certain advantages for the other side. Yet, a risk of over-extraction – and, hence, inefficiency – notably springs from the usually unlimited scope of discretion for the determining party.

It is therefore in the interest of preserving the efficiency in long-term agreements that the legal system allows such a one-sided determination but at the same time sets a certain standard for a court-backed review.

14.5.3 What Is the Optimal Standard of Review?

What is the optimal level of control, one may now ask, and thus approach towards an interpretation of "grossly unreasonable" in Art 74 CESL. Here, we must revert to the distinction alluded to already – must "grossly" be understood as a qualifying factor of procedure or of substance?

The answer to this question depends on the trust in the courts' qualification as decision maker and purveyor of default rules for the parties' agreement.

From the camp of law and economics, it is usually brought forward that the courts are typically not very well suited to intervene in the parties' contract and thus in their enterprises that underlie the contract.[30] Therefore, as proponents of a less intrusive approach of court review contend, a court-induced contract modification runs the risk of missing the optimal result from the viewpoint of the parties. And – at least from a law and economics perspective on contract functions – it is their increase in utility that matters as it defines the value created by the contract. And even though usually not backed by reference to economic arguments, legal commentary also suggest a rather loose standard of review. Accordingly, the courts should not be too exact or apply too tight a metric when determining whether a determination is "grossly unreasonable".[31]

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[29] Unberath (n 5) 87, 139.

[30] Unberath (n 5) 105 et seq.

[31] Looschelders and Makowsky (n 13) Art 74 margin no 5: "High requirements" for an invalidation.

In sum, therefore, we can conclude that a review of unilateral determinations envisaged in Art 74 CESL is required in order to limit moral hazard problems, but that it must nonetheless be kept in narrow confines due to a limited court capacities.

In this light, the requirement that the "unreasonability" to be found must be "gross" is of course helpful to avoid inefficient court interference into the parties' agreement most principally. After all, the court is not asked to analyse the unilateral party determination in its details. The test is simplified.

Yet, it is still necessary to determine which of the two possible meanings of "grossly" that were outlined above – substantive or procedural – should be chosen. In principle, both interpretations serve the function of allowing for judicial control of a unilateral determination, but at the same time limiting it to marginal cases so as to disturb the parties' allocation of risks as little as possible. A closer look at the economic background of the court-backed review of private-party agreements helps to find the right standard.

In favour of a substantive interpretation, it is argued that it is necessary to provide for a solution that best caters to the parties' interests. According to this opinion, a procedural understanding of "gross" would thus not be adequate.[32]

This is not ultimately convincing: The parties interest surely lies in an optimal – that is, most perfectly individualised and personally tailored – promulgation of a hypothetical agreement. Insofar, a closer look at the details seems sensible. At the same time, however, the parties are also interested in keeping the risk of a court-infused mistake small. The parties may not be aware of the problem. They may even actually "trust" in the capacities of the judiciary. Yet, economic theory counsels that judges are non-experts most of the time. Hence, they should principally be prevented from ultimately rewriting the parties' agreement and thereby – very likely – acting to the detriment of the parties.

Against this backdrop, a rather formal or procedural understanding of "grossly" seems more convincing: the more simplified the test, the less is the risk of an overly rash invalidation of the unilateral determination. Seen in this light, "grossly" should much more be understood as "manifestly".

More concretely, this means that the efficiency consequences of the unilateral determination may be smaller or larger depending on the content of the parties' agreement. This concerns the efficiency of the contract as such. It is the presumption that free and unhindered contracting will maximise welfare that requires that, as we have just seen, modifications or invalidation of a contractual consensus must be handled with care.[33] In addition, however, there is another aspect that must be given regard to when evaluating the benefits and detriments of a court-backed review. This aspect concerns administrative costs. In the context of tort liability, these costs are usually explained as costs of "administering" an accident.[34] With respect to the handling of party disagreement on a unilateral post-contractual deter-

[32] Kleinschmidt (n 12) 800–801.

[33] See *supra*.

[34] Also described as "tertiary costs", see Calabresi, *The Costs of Accidents* (New Haven, 1970) 28.

	deviation from reasonable: **small**	deviation from reasonable: **large**
deviation: **easy** to detect	probably efficient/inefficient	Efficient
deviation: **hard** to detect	inefficient	possibly efficient/inefficient

Fig. 14.2 Efficiency of judicial control under Art 74 CESL

mination, these cost must also be considered as a relevant factor in the overall computation of social costs. These administrative costs may vary depending on the administrative and judicial handling of private-party agreements, notably in cases where they disagree on the reasonability of a unilateral determination. Again, a look at our example helps to clarify the issue.

If we return to the apparently "unreasonable" determinations provided in Fig. 14.1, the question is which of these should be struck out by the judge through the application of the "grossly unreasonable standard" in Art 74 CESL.

The deviation from "reason" may in substance (for example in monetary value) be small or large, as shown in Fig. 14.1. But this does not imply that it is possible to find out the cause for such unreasonability with either more or less effort. On the contrary: it may be that a large deviation from reason in the determination is hard to find and assess and, vice versa, that even a small deviation can be evident.[35] We must thus add a procedural dimension by differentiating between deviations from "reason" that are easy to detect (by everybody, notably by an inexpert judge) and deviations that are hard to detect (only through expert testimony and/or sophisticated analysis of the case). The correlation between deviation scope and detection efforts is shown in the following matrix (Fig. 14.2).

In this matrix, there are two solutions that are rather clear: It is not efficient to search with high costs for a deviation from reasonability that is only small, because in such cases, the tertiary costs (eg expert testimony) will typically be higher than the efficiency gained from correcting the small deviation. In sum, a court-backed review will be welfare reducing.

On the other extreme (upper right-hand corner of the matrix), it is efficient to correct a substantively large deviation if the procedural costs are low in comparison to the deviation. Here, the cost-benefit perspective suggests that a search is overall welfare enhancing.

A more intricate analysis is required with respect to the fields "easy to detect & small deviation" and "hard to detect & large deviation"(upper-left and lower-right):

[35] For the inherent problems of inexpert court evaluation see *supra*.

Both fields are characterised by a structural equality of costs and benefits. In the upper-left hand field, the small costs of detection may or may not be lower than the revealed deviation, so that it is uncertain whether the control is efficient in total. The same holds true – albeit on a different quantitative level – for the lower-right hand corner: High detection costs may or may not be "justified" in efficiency terms by the detection of a large deviation.

For both fields, one aspect is fundamental. Considering that the parties both have agreed to this unilateral determination, it seems hard to justify why the court should spend comparatively "high" detection costs in order to search for an error in the determination:

For the upper-left field, one could argue that, even if an error can be found, it is likely so small that spending potentially higher detection costs are not an efficient use of resources.

Prima facie, this seems to differ for the lower-right field. Of course, the social cost of an unreasonable unilateral determination may justify a court-backed review in some constellations. Yet, in all cases, the risk of inexpert judge failure looms.[36] In addition, a look at the administrative costs at stake reveals that the parties are not only the best decision makers with respect to the welfare provided by the contract. In many cases, they are also the cheapest cost avoiders with respect to the providing of safeguards against deviations from unreasonability. This means that it may be cheaper for the parties to provide for contractual terms to confine the discretion of the party entitled to unilaterally determine the price or other terms than it is for the courts to review the determination post-contractually.

This is particularly the case when the deviation is large. For such constellations, providing safeguards at the time of contracting is not overly expensive. If the deviation is small, however, the cost-benefit ratio may change. Hence, in the case of low detection costs, even if only a small error is found, it may still be worth correcting this error if the detection costs are low enough. Again, take the original example in Fig. 14.1: assumed that all the figures are easy to calculate without any experts' assistance, why should one party be allowed to keep the unreasonable gain of 10 units in variation 3? If this can be corrected without much procedural costs, then it should be corrected in the interest of a reasonable solution that preserves the parties' original intentions.

On this basis, the conclusion is evident: in cases of low detection costs, society risks useless spending if it does not provide for an option of court-backed review.[37] It is only in cases where either no deviation from reasonability is found or where such a deviation is so small that the social gain[38] from correcting it is lower than the incurred procedural costs, that the review will ultimately not be efficient.

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[36] See *supra*.

[37] Note that we are not concerned here with the question of who carries which costs at the end of a lawsuit. Distribution of costs is irrelevant if we look at total social welfare.

[38] Note also that the social gain of correcting an unreasonable unilateral determination is not identical with the private losses and gains by the parties, as the issue from a social point of view is not

We therefore propose to read "grossly unreasonable" in Art 74 CESL as setting a procedural standard in the sense of a "manifestly" or "clearly visible" violation of reason. We acknowledge that this may lead to a lack of judicial protection in cases where there might be a large deviation from reasonability in the unilateral determination, but where it is not evident and could be seen only after extensive review (eg, expert testimony). From an incentive perspective, this lack of protection should lead the parties – if they have equal bargaining power – to either not accept a unilateral determination clause in complex circumstances or to frame it in a way that confines the determining party's discretion or makes the ultimate determination and its potential deviation from reasonability more easily controllable by a non-expert judge.

In this light, as already alluded to,[39] our solution also illustrates that Art 74 has not been conceived with an eye on parties who do not have the bargaining power to influence the existence or the wording of the unilateral determination clause in the contract. This problem, is thus addressed by other provisions, notably Art 79 et seq. CESL: Where an imbalance of bargaining power is assumed, the affected parties need protection under other provisions, notably in the area of the law on unfair contract terms. Such protection is envisaged with regard to consumer contracts, for example in Art 84 (f) and 85 (i), (j) and (k) CESL. In particular, with regard to the unilateral determination of a price, Art 85 (k) CESL requires for a valid clause that the increase must not be "too high in relation to the price agreed at the conclusion of the contract". With such a clause in the contract that defines certain rules for increases, a dispute over a price increase then becomes an "ordinary" dispute about the interpretation of certain contractual terms, and Art 74 CESL with its high threshold of "grossly unreasonable" does not apply. Instead, the question is whether the clause enabling the price increase is valid at all, and if so, whether the specific increase is within the confines stipulated by the contract.[40]

14.6 Lest to Forget: What Is the "Reasonable Price" to Be Substituted?

If a unilateral determination is invalidated by the court under Art 74 para 1 CESL, the next step is that it must be replaced with a reasonable determination. In our example concerning a price determination, the court must then find a reasonable price. This is explained in Art 74 par. 1 CESL as the price "normally charged". Commentators are confident in this respect that a "market price" or a "standard price" can be found.[41]

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which party gets the amount in controversy, but whether the allocation reflects the optimal use of resources.

[39] See *supra*.

[40] Among traders, of course, Art 85 (k) CESL is not applicable, but Art 86 CESL may help.

[41] EM Kieninger, in Schulze (ed), *Common European Sales Law* (2012) Art 74 para 9.

However, two aspects are problematic here. First, the "normal" price – even if it is the market price – need not necessarily reflect what the parties would have agreed upon. It may also not reflect the outcome most beneficial and efficient for both sides of the agreement. Many other factors may be determinative from the viewpoint of the parties. Even if the seller agrees to a price below the market price, this may be efficient and reasonable in the context of a long-term relationship. Notably if market prices tend to fluctuate, a long-term contract may be more important than exact reproduction of market prices. Reference to the market price can thus – at best – be justified on the basis of procedural efficiency in that it provides a handy bright-line rule for the inexpert judge.

One solution would be to resort to the general definition of "reasonableness" in Art 5 CESL. This provision states that reasonableness is to be objectively ascertained, having regard to the nature and purpose of the contract, the circumstances of the case and to the usages and practices of the trades or professions involved. This party-oriented approach is explained in scholarly commentary with the idea that it leads to the question of "what price or term honest and reasonable parties would have chosen in the given situation."[42]

This specific and individualised interpretation of Art 5 CESL somewhat contradicts its wording that states that in general, reasonableness should be determined objectively. However, it has been correctly said that the core standard in assessing reasonableness should be rationality.[43] This rather suggests an approach that looks for an outcome that is in most optimal accordance with the economic rationale of the contract and with the rules of market efficiency. Here again, the issue of administrative costs becomes relevant.[44]

And there is a second problem with the provision of Art 74 par. 1 CESL: it is its reference to the normal price charged "at the time of conclusion of the contract". This may conflict with a reasonable solution in cases of market price changes. It may even openly contravene the parties' intentions: Had they been interested in fixing the price at the market level on the conclusion date, they would not have opted for a later unilateral determination in the first place. Therefore, the criteria fixed in Art 74 CESL to determine the "reasonable" price rather complicate things instead of simplifying the task of the court.

A second example illustrates these problems: Suppose that the parties agree on the sale of a machine, to be delivered within the next 6 months. The price is to be determined by the seller at the time of delivery. The market price at the time of contracting is 110, with costs for the seller of 100. If the costs for the seller now go up to 120, and the seller determines the price to be 220, a court may come to the conclusion that this determination is grossly unreasonable. After all, the seller has doubled the price although her costs have increased only by 20 %.

Applying Art 74 para 1 CESL, the court is required to use the price "normally charged […] at the time of the conclusion of the contract". This would be the "old"

[42] Kieninger (n 42) Art 74 para 10.

[43] Schulte-Nölke, in Schulze (ed), *Common European Sales Law* (2012) Art 5 para 6–7.

[44] See *supra*.

market price of 110. This would lead to a loss on the seller's side that would make the contract clearly unattractive. No rational seller would have agreed to this price that does not even cover the costs of producing the machine. In order to arrive at a rational decision, the court would have to determine the market price at the time of delivery as this would guarantee a more adequate correlation of costs and benefits and fit better with the original intent of the parties.

The example shows that the reference to the price charged "at the time of conclusion" does not help and is in fact counter-productive in contracts that deal with longer periods of time and under circumstances of changing costs and prices. It should thus be omitted from the draft CESL.

Furthermore, reference to a "normally charged" price may also not be helpful in many constellations as it does not sufficiently take into account the intentions and economic considerations of the parties. Especially in long-term relationships and against the backdrop of fluctuating prices, one party may be willing to pay a premium in exchange for security of supply within a certain price range or make other considerations that cannot be explained only with reference to the price "normally charged". It would be preferable to delete this wording in Art 74 CESL and replace it with a general reference to rationality or reasonableness as defined in Art 5 CESL. This was the solution that was already used in Art 6:105 PECL ("a reasonable price or term shall be substituted") and in Art II-9:105 DCFR.

One may speculate that the authors of Art 74 CESL wanted to be more specific by referring to prices "normally charged" and thus reduce the uncertainty that is involved with a general term like "reasonable price". This attempt must fail, however, because the possible intentions or calculations by the parties involved may be too complex to reduce them to a reference to prices "normally charged". Therefore, the legal system must live with the uncertainty inherent in the term "reasonable" and the discretion it gives to judges.

However, this uncertainty seems tolerable since the replacement mechanism of Art 74 CESL is only activated in cases of a "grossly unreasonable" unilateral determination which – as argued above – will only be given if the lack of reasonableness is manifest and open to see; if there is *manifesta iniquitas*.

14.7 Results

We conclude with two results. Of course, these findings may still cautiously be explained as preliminary in the sense that they could be challenged by a deeper analysis of the economic foundations underlying the draft provision of Art 74 CESL. Yet, the principal findings should be valid for the further debate on this provision or similar provisions in future unification efforts.

From our current perspective, the term "grossly unreasonable" should be interpreted as "manifestly unreasonable" in the procedural sense. Hence, the lack of reason in the unilateral determination must be open to see. The term "grossly" should not be read as a substantive or quantitative criterion.

In addition, we propose to change the replacement mechanism in case of an invalid unilateral determination back to the wording "a reasonable price or term" as it is found in Art 6:105 PECL and Art II-9:105 DCFR, since the wording that was used in Art 74 para 1 CESL that refers to the price "normally charged" and "at the time of conclusion of the contract" is not capable of giving sufficient effect to the interests and economic considerations of the parties, particularly in long-term relationships.

Chapter 15
Art. 76: The 'Stick to the Language' Rule

Peter Rott

Abstract Article 76 on 'Language' wanted to establish the 'stick to the language' rule for post-contractual communication. The scope of the rule would have been modest as it only applied if no legal provisions on language apply and if the parties have not entered into a language agreement. Nevertheless, the provision would have posed serious threats to consumers. The 'stick to the language' rule would have applied to any type of post-contractual communication including the termination of the contract and disputes about remedies. Moreover, it did not clarify the consequences of the use of the 'wrong' language. Therefore, it might have been interpreted so as to make declarations invalid even if the addressee understands that 'wrong' language. This would not only deteriorate the position of the consumer as compared to current national rules; legal uncertainty also works against the consumer generally. Thus, the 'stick to the language' rule needs clarification and limitation, and actual understanding of declarations must prevail over it.

15.1 Introduction

Although language issues have arisen in manifold fashion in EU law,[1] the language of the contract is an issue that the EU has carefully avoided until now. The proposed Common European Sales Law (CESL) contained a novel provision headed 'Language' in Article 76, forming part of Chap. 7 on 'Contents and effects'. According to Article 76,

[1] See only B de Witte, 'Language Law of the European Union: Protecting or Eroding Linguistic Diversity?', in R Craufurd Smith (ed), Culture and European Law (Oxford: OUP, 2004) 205 ff.; AL Kjaer and S Adamo (eds), Linguistic Diversity and European Democracy (Farnham: Ashgate, 2011) 167 ff.; G Howells, B Marten and W Wurmnest, 'Language of Information, Contract, and Communication', in: G. Dannemann and S. Vogenauer, The Common European Sales Law in Context (Oxford: OUP, 2013), 190 ff.

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> (w)here the language to be used for communications relating to the contract or the rights or obligations arising from it cannot be otherwise determined, the language to be used is that used for the conclusion of the contract.

This chapter provides an analysis of what this provision meant to regulate, and what it did not mean to regulate. To this end, it first summarises the starting point of current EU law and of the current German doctrine and court practice related to the language of the contract, in particular in cross-border situations. It then analyses Article 76 CESL and the effect it might have had on a variety of situations in which language difficulties may arise. In a final step, that effect is compared to the previous situation under German law, with particular focus on the positive or negative effects on the comprehensibility of information and of the contract itself to consumers. The chapter finishes with recommendations on limitations to a potential future 'stick to the language' rule in EU law.

15.2 Current Situation Under EU Law

In principle, the EU Commission has always recognised that language requirements can be an important consumer protection instrument.[2] In fact, we find language requirements widely in early European food law, such as Article 14 of Directive 79/112/EEC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer,[3] according to which Member States were to ensure that the sale of foodstuffs in their territory was prohibited if the necessary information did not appear in a language easily understood by purchasers, unless other measures have been taken to ensure that the purchaser is informed. Art 16(1) of Directive 2000/13/EC,[4] which has replaced Directive 79/112/EEC, is worded similarly.

In consumer contract law, in contrast, language requirements are strongest in the area of life insurance where Art 185(6) of Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)[5] determines that consumer information shall be provided in an official language of the Member State of the commitment, although such information may be provided in another language if the policy holder so requests and the law of the Member State so permits or the policy holder is free to choose the law applicable. Other Directives addressed the issue but left it to the Member States to decide whether or not they want to adopt language provisions. For example, under recital (8) of the Distance Selling Directive 97/7/EC,[6] '(…) the languages used for distance contracts are a matter for the

[2] See only the Communication concerning language use in the information of consumers in the Community, COM(93) 456 final.

[3] OJ 1979, L 33/1.

[4] OJ 2000, L 109/29.

[5] OJ 2009, L 335/1.

[6] OJ 1997, L 144/19.

Member States'.[7] Even the latest harmonisation instrument, the Consumer Rights Directive 2011/83/EU,[8] follows that approach: Article 6(7) explicitly allows Member States to maintain or introduce language requirements so as to ensure that information is easily understood by consumers.

Indirectly, language issues come into play through provisions such as Article 8(1) of the Consumer Rights Directive, according to which information shall be made available 'in plain and intelligible language'. Similarly, under Article 5(1) of the Unfair Contract Terms Directive 93/13/EEC, the terms within the scope of application of the directive 'must always be drafted in plain, intelligible language'. Arguably, information is not intelligible if it is provided in a language that the consumer does not understand; and the same applies to contract terms.[9] The European Court of Justice argued in the case of *Colim*:

> (…) information which traders are obliged to communicate to the purchasers or, as the case may be, to the end-user is of no practical use unless it is given in a language which can be understood by the persons for whom it is intended.[10]

The question remains whether the consumer, in this context, is the individual contracting partner or a kind of 'average consumer' that the Court has referred to in its case law in the area of unfair commercial practices. As a starting point, the contractual relationship certainly allows for the consideration of individual abilities, and particularly language mastery. That consideration may, however, be difficult in cross-border situations, and especially so where offer and acceptance are made predominantly non-verbally, by ticking boxes, entering numbers and only inserting information such as name and address into a form on internet; in which case the orientation on normal or average language mastery may be justified.

15.3 Private International Law

Since some Member States have enacted language requirements, the search for the applicable law matters. Private international law has been Europeanised with the Rome I Regulation (EC) 593/2008 and the Rome II Regulation (EC) 864/2007. Legal issues relating to the language in which contractual declarations have to be made would seem to come under the Rome I Regulation, although that regulation does not explicitly mention language rules. In contrast, recital (10) of the CESL proposal classified pre-contractual information as a non-contractual matter that is

[7] See also Art 6(4) of the Consumer Sales Directive 1999/44/EC on optional language requirements related to guarantees.

[8] OJ 2011, L 364/64.

[9] For detailed analysis see P Rott, 'Informationspflichten in Fernabsatzverträgen als Paradigma für die Sprachenproblematik im Vertragsrecht' (1999) *Zeitschrift für vergleichende Rechtswissenschaft (ZvglRWiss)* 382, at 403 ff.

[10] ECJ, judgment of 3/6/1999, case C-33/97 *Colim NV v Bigg's Continent Noord NV* ECLI:EU:C:1999:274 at para 29.

dealt with by the Rome II Regulation, and thus the language in which pre-contractual information has to be provided is governed by the Member State whose law is applicable according to the rules of the Rome II Regulation.

15.3.1 The Language of the Contract

The language of the contract has not been explicitly regulated by the Rome I Regulation (EC) 593/2008. Generally speaking, a variety of classifications have been offered in the past by academic authors. Some have proposed a separate classification rule for language issues,[11] whilst others have suggested seeing language requirements as formal requirements, which would call for the application of Article 11.[12] The vast majority of authors, instead, regard the contractual language as an ancillary issue that is governed by the law that is applicable to the contract.[13]

For consumer contracts this means that, according to Article 6(2) Rome I Regulation, traders who direct their activities to the country where the consumer has his habitual residence[14] cannot avoid language requirements if the law of that country regards those language requirements as 'provisions that cannot be derogated from by agreement'. In fact, some Member States have enacted general language requirements in order to protect consumers. In Portugal, the general Consumer Protection Act requires information to be provided in Portuguese. France has also enacted fairly strict language requirements,[15] although it is less clear that those are meant to protect the consumer. In fact, their main purpose lies in the defence of the French language against Anglicism.[16] The same mixed approach can be attributed to the Polish language regime.[17] Greek and Italian consumer law require the contract to be concluded in the language of the contractual negotiations.

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[11] See KF Beckmann, 'Die Bedeutung der Vertragssprache im Internationalen Wirtschaftsverkehr' (1981) *Recht der Internationalen Wirtschaft (RIW)* 79 f.

[12] See G Reinhart, 'Verwendung fremder Sprachen als Hindernis beim Zustandekommen von Kaufverträgen?' (1977) *RIW* 16, at 19; R Schütze, 'Allgemeine Geschäftsbedingungen bei Auslandsgeschäften' (1978) *Der Betrieb (DB)* 2301, at 2304.

[13] See, for example, H Linke, 'Sonderanknüpfung der Willenserklärung?' (1980) *ZVglRWiss* 1, at 47; U Spellenberg, 'Fremdsprache und Rechtsgeschäft' in Heldrich et al. (eds) *Festschrift für Murad Ferid zum 80. Geburtstag am 11. April 1988* (1988) 463, at 465; Rott (n 9) 392 ff.

[14] On that prerequisite, see CJEU, judgment of 7/12/2010, Case C-585/08 *Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG* and Case C-144/09 *Hotel Alpenhof GesmbH v Oliver Heller* ECLI:EU:C:2010:740.

[15] See the Loi no. 94–665 du 4 août relative à la langue française; on which see C Jamin, 'Langue française – Loi no. 94–665 du 4 août 1994 relative à l'emploi de la langue française (JO 5 août 1994)' (1994) *Revue trimestrielle du droit civil* 953 f.; H.-W. Micklitz, 'Zum Recht des Verbrauchers auf die eigene Sprache' (2003) *Zeitschrift für Europäisches Privatrecht (ZEuP)* 635 ff.

[16] See A Somma, 'Sprachgesetzgebung in Frankreich und Italien: Rechtsnationalismus oder Schutz der Schwächeren?' (1998) *ZEuP* 701, at 712 f.

[17] Law of 7/10/1999 on the Polish language; on which see M Perdeus, 'Gesetz über die polnische Sprache' (2004) *Wirtschaft und Recht in Osteuropa (WiRO)* 72 ff.; Howells, Marten and Wurmnest (n. 1), at 200 f.

Where language requirements do not have a consumer protection background, they may still come into play as overriding mandatory provisions in the terms of Article 9 Rome I Regulation.

15.3.2 Pre-contractual Information Obligations

As mentioned above, pre-contractual information obligations come under the Rome II Regulation (EC) 864/2007. Article 12(1) of that Regulation, however, ensures the parallel treatment of the pre-contractual and the contractual regime by rendering applicable the law that applies to the contract or that would have been applicable to it had it been entered into. This makes perfect sense as the failure to fulfil pre-contractual language requirements may take effect on the contract, for example, by triggering the extension of a withdrawal period.[18] Under Article 6(5) of the Consumer Rights Directive, the information provided by the trader shall form an integral part of the distance or off-premises contract.

15.4 German Law

The official language in Germany is obviously German, and German is also the language of judicial proceedings,[19] although there are claims that courts should become more open to handling cases in English when it comes to international commercial contracts.[20] In contrast, in consumer law no language requirements exist beyond the principle of intelligibility.[21] Generally speaking, each party needs to make sure that the other party understands the message.[22]

That principle has to some extent been fleshed out by the courts; although it should be noted that the vast variety of court cases involving language issues have been domestic cases. One main area was employment contracts between German companies and migrant workers[23] but we also find occasional cases in the broader

[18] Art 4 § 9 of the Greek Consumer Protection Act 1994; Art 47 of the Spanish Ley 7/1996, de 15 de enero, de Ordenación del Comercio Minorista; on which see T Rauscher, 'Neue verbraucherfreundliche "Spielregeln" im spanischen Markt' (1998) *RIW* 26, at 31.

[19] § 184 Courts Constitution Act (*Gerichtsverfassungsgesetz*, GVG).

[20] See G Maier-Reimer, 'Vertragssprache und anwendbares Recht' (2010) *Neue Juristische Wochenschrift (NJW)* 2545, at 2550.

[21] With the exception of § 484 BGB that implements Art 4(3) of the Timeshare Directive 2008/122/EC, OJ 2009, L 33/10.

[22] See U Spellenberg, 'VO (EG) 593/2008. Art 10' in *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (2015) margin note 69.

[23] For overviews see H Hohn, 'Ausländische Industriearbeiter und deutsches Recht' (1965) *Betriebs-Berater (BB)* supp 10, 1 ff, in particular at 9 ff.; W Brill, 'Der ausländische Arbeitnehmer in der arbeitsgerichtlichen Rechtsprechung' (1976) *BB* 1276 ff; P Gola and K Hümmerich, 'Das

realm of consumer law.[24] For example, the Federal Supreme Court (*Bundesgerichtshof*; BGH) had to decide on the validity of a suretyship contract between a German bank and an Iranian woman who could not read German.[25] In both areas, no clear rules have been developed. In labour law, cases where courts have emphasised the (recognisable) incapability of the addressee of a contractual declaration to understand that declaration and have therefore held the declaration void[26] or voidable[27] can be contrasted with cases where the courts took the generalising view that one may assume that a person that works or lives in Germany is capable of understanding German, or otherwise is responsible for obtaining a translation of the contractual declaration.[28]

In consumer law, case law and doctrine are only consistent where the parties have explicitly agreed on the language of the contract. In such a case, no party can raise objections against contractual declarations in that language.[29] It should, however, be noted, and has been criticised,[30] that German courts fairly easily 'find' a language agreement, for example, by deriving such an agreement from the fact that the parties negotiated[31] or that the contract was drafted in a certain language.[32] In the absence of such an agreement, declarations are valid if the addressee can actually understand them, which obviously may well be the case if the declaration is not made in the addressee's mother tongue. Courts have, however, quite readily, in domestic contexts, concluded from some basic language comprehension to the

"Sprachrisiko" des ausländischen Arbeitnehmers' (1976) *Blätter für Steuerrecht, Sozialversicherung und Arbeitsrecht (BlStSozArbR)* 273 ff; Rott, (n 9) 382, at 387 f.

[24] See M Kallenborn, *Das Sprachenproblem bei Vertragsabschlüssen mit ausländischen Verbrauchern*, *Diss. Rostock* (1997) 19 ff, 43 ff, 72 ff.

[25] BGH, 15/4/1997, (1997) *NJW* 3230.

[26] See LAG Hamm, 2/1/1976, (1976) *BB* 553; LAG Stuttgart, 30/12/1970, (1971) *DB* 245; ArbG Bochum, 4/6/1980, (1980) *BB* 1323; ArbG Heilbronn, 26/11/1968, (1969) *BB* 535.

[27] See LAG Mannheim, 8/7/1966, (1968) *BB* 860; LAG Stuttgart, 16/3/1967, (1967) *DB* 867; ArbG Ulm, 30/1/1968, (1968) *BB* 547.

[28] See ArbG Celle, 16/11/1972, (1973) *Arbeitsrecht in Stichworten (ARST)* 64; ArbG Gelsenkirchen, 4/1/1967, (1967) *BB* 999; ArbG Neumünster, 25/4/1979, (1979) *BB* 784; ArbG Oberhausen, 23/8/1972, (1973) *ARST* 64; ArbG Stuttgart, 30/4/1964, (1965) *BB* 788.

[29] See BGH, 10/3/1983, 87 *Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ)* 112, at 114; LG Cologne, 16/4/1986, *Wertpapier-Mitteilungen (WM)* 822; Beckmann (n 11) 82; U Jancke, *Das Sprachrisiko des ausländischen Arbeitnehmers im Arbeitsrecht* (1987) 85; Spellenberg (n 13) 483.

[30] Spellenberg (n 13) 484; Jancke (n 29) 90 f.

[31] See BGH, 10/3/1983, 87 *BGHZ* 112, at 114; OLG Frankfurt a. M., 28/4/1981, (1982) *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 242. See also Beckmann (n 11) 80 f.; id., *Das Sprachenstatut bei internationalen Geschäftsverträgen. Diss. Bochum* (1980) 36; M Wolf, N Horn and W Lindacher, *AGB-Gesetz*, 3rd ed. (1994) § 2 margin note 28.

[32] See OLG Bremen, 22/6/1973, (1973) *WM* 1228, at 1229; OLG Dusseldorf, 2/11/1973, (1974) *Außenwirtschaftsdienst des Betriebsberaters (AWD)* 103; OLG Karlsruhe, 30/3/1979, (1979) *RIW* 642 f.; LG Cologne, 16/4/1986, (1986) *WM* 822.

capability to understand complicated text such as standard terms and conditions,[33] in particular where the consumer has signed the standard terms.[34] However, we can also find decisions according to which a foreign language needs to be used in Germany where the negotiations were performed in that foreign language.[35]

In cross-border contracts, German courts tend to assume that one cannot expect anybody to understand any other language than his or her mother tongue,[36] not even English.[37] In a recent air passenger case, the US American airline had provided the standard terms in English, whilst the contract was in German language otherwise; which the AG Cologne rejected as unintelligible.[38] The LG Berlin decided that WhatsApp is not allowed to use English language standard terms in the contractual relations with German consumers.[39] Foreigners may however be bound to their signature under text in foreign language, even if the contract is mainly drafted in a different language.[40]

Overall, the tendency is that he or she who enters the German market to work or to trade shall adjust to German law and use the German language. A signature is treated as waiving the right to understand what was signed. Courts barely distinguish between basic understanding of a language and the capability to understand complicated text. In case of doubt, the risk of communication failures is often imposed on the foreign contracting partner.[41]

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[33] See, for example, OLG Bremen, 22/6/1973, (1973) *WM* 1228, at 1229; OLG Munich, 20/3/1975, (1976) *RIW* 447. See also J Schmidt-Salzer, *Allgemeine Geschäftsbedingungen* (1977) 115; W Niedenführ, *Informationsgebote des AGB-Gesetzes* (1986) 41. For an expressly deviating view, see OLG Munich. 29/1/1974, (1974) *NJW* 1659. For critical comments, see also Spellenberg (n 22) margin note 83.

[34] See LG Frankfurt a. M., 5/10/1976, (1977) *WM* 298. See also W Weimar 'Die vom Verwender von AGB anzuwendende Sprache bei Ausländern als Vertragspartnern' (1978) *DB* 243.

[35] See, for example, LG Cologne, 8/3/2002, (2002) *Neue Juristische Wochenschrift – Rechtsprechungsreport (NJW-RR)* 1491.

[36] Germans do not need to understand Italian or Dutch, see OLG Karlsruhe, 9/5/1972, (1972) *AWD* 580; OLG Düsseldorf, 25/4/1963, (1963) *DB 929*; OLG Koblenz, 16/1/1991, (1994) *IPRax* 46, at 48. Vice versa, English, Portuguese, Italians or Turks do not need to understand German, see OLG Cologne, 1/7/2005, (2005) *Die Deutsche Rechtsprechung auf dem Gebiete des IPR (IPRspr)* no. 1; OLG Stuttgart, 19/7/1962, (1964) *Monatsschrift für Deutsches Recht (MDR)* 412; OLG Stuttgart, 16/6/1987, (1988) *IPRax* 293, at 294; LG Memmingen, 31/1/1966, (1966/67) *IPRspr* no. 219.

[37] OLG Frankfurt a.M., 31/1/1984, (1984) *IPRspr* 94, at 96; LG Berlin, 10/6/1981, (1982) *NJW* 343, at 344.

[38] AG Cologne, 24/9/2012, 114 C 22/12, *juris*.

[39] LG Berlin, 9/5/2014, (2014) *Kommunikation und Recht (K&R)* 2014, 544.

[40] See OLG Munich, 4/4/1974, (1975) *MDR* 141, on an Italian trader that signed standard terms in German language.

[41] See E Jayme, 'Allgemeine Geschäftsbedingungen und internationales Privatrecht' (1978) 142 *Zeitschrift für das gesamte Handelsrecht (ZHR)* 105, at 110; Kallenborn (n 24) 50.

15.5 Language Under the CESL Proposal

15.5.1 The Language of the Contract or of Pre-contractual Information

At first glance, the CESL proposal would not seem to have changed much; which is remarkable as language requirements have been identified to constitute impediments to intra-Union trade.[42] Indeed, recital (27) mentioned the determination of the language of the contract amongst those issues that are not addressed in the CESL:

> All the matters of a contractual or non-contractual nature that are *not* addressed in the Common European Sales Law are governed by the pre-existing rules of the national law outside the Common European Sales Law that is applicable under Regulations (EC) No 93/2008 and (EC) No 864/2007 or any other relevant conflict of law rule. These issues include legal personality, the invalidity of a contract arising from lack of capacity, illegality or immorality, *the determination of the language of the contract*, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law and the law of torts.[43]

Thus, the CESL proposal neither provided for mandatory rules nor even default rules for the determination of the language of the contract.[44] Instead, the national rules remain in place; and since the Rome I and Rome II Regulations remain untouched, in consumer contracts these are the rules of the law of the Member State in which the consumer is domiciled, provided the trader had directed his activities towards that Member State.

At the same time, the CESL proposal included the existing rules on information to be provided[45] and not individually negotiated contract terms to be communicated[46] in plain and intelligible language; with no solution to the relationship between that intelligibility and the language to be used, as set out above.[47]

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[42] See only English and Scottish Law Commission. 2011, An Optional Common European Sales Law: Advantages and Problems. Advice to the UK Government, www.lawcommission.justice.gov.uk/publications/1698.htm at 4.21.; EM Kieninger, 'Art 76' in R Schulze (ed) *Common European Sales Law (CESL)* (2012) 367.

[43] Emphasis by the author.

[44] See also Kieninger (n 42) 365.

[45] See Art 13(3)(b) on distance contracts and Art 13(4)(b) on off-premises contracts.

[46] See Art 82 draft CESL.

[47] For detailed proposals, see D Schmidt, 'Vorvertragliche Informationspflichten bei Verbraucherverträgen im Gemeinsamen Europäischen Kaufrecht' in T Pinkel, C Schmid and J Falke (eds), *Funktionalität und Legitimität des Gemeinsamen Europäischen Kaufrechts* (Bremen: Nomos, 2014) 369.

15.6 Article 76

To what then did Article 76 CESL refer? The provision stated the so-called 'stick to the language' rule.[48] Three questions appear to be crucial: its scope of application, the legal consequences when a contracting party does stick to the language in which the contract was concluded, and finally the legal fate of communications in a different language. These issues are dealt with in turn hereinafter.

15.6.1 Scope of Application

To start with, Article 76 should only apply in cases where the language to be used for communications under the contract cannot be determined otherwise. 'Otherwise' would appear to mean: either determined by law, or by contractual agreement.[49] This would mean that, first of all, national language laws would have taken priority over the interpretation rules of Article 76, and in this regard the law of the consumer's domicile is relevant, under Article 6(2) Rome I Regulation. Secondly, an express language agreement would have prevailed over Article 76 too.[50]

Moreover, Article 76 seemed to presuppose an existing contract, as the interpretation rule only makes sense where the language 'used for the conclusion of the contract' can be determined. Thus, its scope of application was limited to post-contractual communication. Examples for consumers' post-contractual communications are the withdrawal from the contract[51] or claims related to remedies for non-conformity of goods or digital content with the contract. Examples for a trader's post-contractual declaration are a reminder to pay the agreed price, or the termination of the contract due to the consumer's breach of the law. Communication 'related to the contract' can, however, be also interpreted in a much broader sense to cover all disputes related to the contract up to the preparation of litigation[52];

[48] See D Looschelders and M Makowsky, 'Inhalt und Wirkungen von Verträgen – Kapitel 7 des Entwurfs der Expertengruppe für einen Gemeinsamen Referenzrahmen auf dem Gebiet des Europäischen Vertragsrechts' (2011) *Zeitschrift für Gemeinschaftsprivatrecht (GPR)* 106, at 110.

[49] See also the specifications made by Art II.-9:109 of the Draft Common Frame of Reference, which stood model for Art 76 draft CESL: 'Where the language to be used for communications relating to the contract or the rights or obligations arising from it cannot be determined *from the terms agreed by the parties, from any other applicable rule of law or from usages or practices*, the language to be used is that used for the conclusion of the contract.' (emphasis by the author).

[50] According to Looschelders and Makowsky (n 47) and id., 'Art. 76 GEK-E, in: Schmidt-Kessel (ed.), Der Entwurf für ein Gemeinsames Europäisches Kaufrecht (Munich, Sellier, 2014) 425 f., an implied language agreement prevails over Art 76 as well. It is, however, hard to see, what scope of application would remain for Art 76 if one concluded from the use of a particular language to an implied language agreement.

[51] See also English and Scottish Law Commission (n 42) 4.28.

[52] See also Kieninger (n 42) 366.

whereas it may be assumed that when it comes to litigation itself, the laws of the Member States will determine the language of judicial proceedings.

In contrast, Article 76 would not seem to have applied to the pre-contractual information obligations or to the language of the contract itself, as it required the contract to be concluded in a certain language already. In that regard, the only applicable rule remains that of the intelligibility or comprehensibility of that information, or of the contractual agreement as such.

15.6.2 Communication in the Language of the Contract

What, however, does it mean if a provision like Article 76 determines the language in which the contract was concluded to be the language of communications related to the contract? Article 76 did not elaborate on this. Nor does Article II.-9:109 of the Draft Common Frame of Reference which stood model for Article 76. The only 'stick to the language' rule in EU law can be found in the Unfair Commercial Practice Directive 2005/29/EC. Under no. 8 of the Annex to that Directive, it is a blacklisted misleading practice to undertake to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is not an official language of the Member State where the trader is located and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction. This provision is, however, limited to the trader's use of language and to after-sales service and has thus a much narrower scope of application than Article 76 of the CESL proposal. It does not touch on communications by the consumer at all. Under Article 4(2) of the CESL proposal, the gaps of Article 76 related to the implementation of the 'stick to the language' rule would be closed through autonomous supplementing of the rules of Article 76, thereby taking account of the principles underlying the CESL.

Article 76 seems to imply that no party of the contract can object to communication that is made in the language that was used for the conclusion of the contract. This is without any doubt reasonable when it comes to the consumer's communications to the trader. If, for example, the trader had set up a website where the consumer could order goods in Italian language, there seems to be no reason to protect him from the consumer's withdrawal being sent in Italian, in particular since he would have provided a withdrawal form in Italian language anyway. Here, one should take into consideration that a trader who directs his activities towards the Member State of the consumer takes the risk, under the jurisdiction rules of Art 17 ff. of the Brussels I Regulation (EU) No. 12015/2012 to have to litigate in the courts of the Member State where the consumer is domiciled; and those courts may require relevant communication to be translated into their language.

Vice versa, this does not apply to the trader's communication towards the consumer. One can, of course, argue that a consumer who orders goods in the language

of the trader or in a third language, in particular English, deliberately takes the risk of not understanding all the details of the contract. Does that necessarily mean, however, that this consumer must take care to obtain (costly) translations of all communications that the trader sends after the conclusion of the contract, and possibly in legal or technical language, in order to avoid negative consequences? Would that even apply if the consumer, on receipt of such communication, indicates to the trader that he or she is unable to understand the communication and asks for a translation? Surely, most consumers would not foresee this kind of consequence.[53]

A default rule like Article 76 could also have repercussions on the assessment of standard terms related to the language of contractual communication used by traders. Obviously, under the concept of Article 76 a valid language agreement prevails over the default rule provided by Article 76. At the same time, default rules are an important parameter for the assessment of the unfairness of standard terms.[54] Article 76 expresses that the contracting parties should, as a default rule, be able to rely on the validity of post-contractual communication in the language of the contract. To force a consumer to use a different language in order to make a complaint would therefore seem to be a measure that creates a significant impediment to his or her access to that complaint mechanism. The situation would be similar to, or even worse than, forcing the consumer to use a complicated complaint form; which has been regarded unfair in the terms of Art 3(1) of the Unfair Contract Terms Directive 93/13/EEC (as implemented in German law).[55]

15.6.3 Communication in a Different Language

And what are the legal consequences if the consumer or trader does not use the language of the contract for a contractual communication? Does Article 76 mean that such communication is invalid? Thus, would the consumer miss the end of the relevant withdrawal period if he or she communicated the withdrawal in the wrong language? Arguably, the right of withdrawal can be exercised on a withdrawal form, and the consumer does not need to explain his or her motivation for the withdrawal so that it would not be difficult to withdraw from the contract in the language of the contract. The situation may be more difficult when it comes to a defect that arises on the last day of the prescription period. Even in the case of the withdrawal, however, the consumer may simply be unaware of the need to use the contractual language. Notably, Article 76 CESL would have only applied if the contractual agreement did *not* deal with the language of contractual communication. Surely, the

[53] See also English and Scottish Law Commission (n 42) 4.27 ff.

[54] See, for example, CJEU, judgment of 14/3/2013, Case C-415/11 *Mohamed Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, ECLI:EU:C:2013:164, at para 74.

[55] See LG Cologne, 28/10/2010, 31 O 76/10, *juris*.

consumer would not be expected to be aware of such a provision, and it is also highly unlikely to form part of the one-page information on the content of CESL that was envisaged by the European Commission to be provided by the trader to the consumer.

Furthermore, would the 'stick to the language' rule even apply if the trader actually understands the language that the consumer used but that is not the language of the contract? Agreements to that effect are possible[56] but it would be hard to infer such a consequence from the mere use of a particular language for the conclusion of the contract.[57] Again, Article 76 would have only applied where *no* contractual agreement on the language of post-contractual communication has been concluded.

Moreover, the consumer may use a language for postcontractual communication that the trader has offered for the conclusion of the contract under the pre-contractual information obligations in E-commerce (Article 24 of the CESL proposal) but that has not been used then for the conclusion of the contract. Surely, regarding such communication as invalid would be hard to bring in line with general rules on good faith and fair dealing as mentioned in Article 2(1) of the CESL proposal, which should apply in all stages of the contractual relationship.[58] Recital (31) of the proposal indicated that the concrete requirements resulting from the principle of good faith and fair dealing may depend on the level of expertise of the party concerned. Thus, under the principle of good faith and fair dealing, the trader may be precluded from relying on the 'stick to the language' rule if he actually understood the communication sent by the consumer.

All this, however, is far from obvious and may give rise to legal uncertainty; which usually works against the consumer, as the trader will be able to point, in his post-contractual communication, to the interpretation rule expressed in Article 76. Article 76 may then have acted as a disincentive for the consumer to take the risk of litigation.

15.7 Comparison with German Law

As Article 76 of the CESL proposal was not entirely clear in itself, it is not easy to compare with German law, which likewise does not offer clear solutions to the issue of language. It seems, however, that German law does not know a strict 'stick to the language' rule. The rules on the language of contractual communication are subrules to the general principle of contract law, according to which declarations of will only become effective when the recipient understands them. Thus, actual

[56] On the possibility of this kind of agreement, see Spellenberg (n 22) margin note 94.

[57] See also Spellenberg (n 22) margin note 84, on German law.

[58] See H Schulte-Nölke, 'Art 2' in R Schulze (ed) *Common European Sales Law (CESL)* (2012) 90.

understanding will always prevail, in the absence of an explicit agreement to the contrary. Consequently, traders cannot claim the invalidity of a consumer's communication solely by pointing at the different language of the contract, and bad faith does not need to be invoked as an exception to the rule. Thus, although both German law and the rule that was envisaged in Article 76 of the CESL proposal might ultimately have come to the same result, it seems preferable, from a consumer's perspective, not to be confronted with a default rule like Article 76 CESL that works against the consumer and to have to hope for the court to find bad faith in the trader's conduct.

15.8 Conclusion

Despite the importance of language issues in EU contract law, the contribution of the CESL to resolving them would have been very modest.[59] The proposed Article 76 only touched on a small aspect of it, whilst leaving most questions, including the mandatory use of a certain national language, to the competence of the Member States. With that approach, the aim of legal certainty cannot possibly be reached. Within its modest scope of application, Article 76 had a tendency to work against the interests of the consumer who orders goods or digital content in a foreign language. The risks that the 'stick to the language rule' creates could be mitigated by applying the principle of good faith and fair dealing against the trader. It would, however, be preferable not to create these risks in the first place. To this end, if the European legislator takes the issue of the language of contractual communication up again, the 'stick to the language' rule should be qualified in two ways: First, the broad formula of 'communications related to the contract' should be narrowed by limiting it to contractual notifications. Secondly, it should be clarified that where the recipient of communication actually understands the communication or gave rise to the expectation that he or she would understand the language in which the communication was made, the rule should not apply.

[59] See also Kieninger (n 42) 365.

Chapter 16
Art. 77: Contracts of Indeterminate Duration: Article 77 CESL – A Comment from a German Perspective

Franziska Weber

Abstract Unlike the Common Principles of European Contract Law or the Draft Common Frame of Reference in their respective provisions concerning contracts of indeterminate duration, Article 77 CESL read that such a contract could be terminated by default by either party upon giving a reasonable period of notice *not exceeding 2 months*. Article 77 (2) CESL furthermore made this provision mandatory for b2c contracts. Deviations to the detriment of the consumer were prohibited. When the CESL-proposal was withdrawn, the Commission announced a new instrument limited to online purchases of digital content and tangible goods that is currently being drafted. In this context, contracts of indeterminate duration remain of relevance and a provision is, hence, likely to be included again.

This chapter assesses the CESL regime concerning contracts of indeterminate duration in the light of German law. Like German law, the CESL followed a system of special substantive control for the non-individually negotiated contract terms. Therefore, on the whole four different scenarios will be assessed: an individually negotiated clause in a b2c contract and likewise a non-individually negotiated one; and in the same way, an individually negotiated clause in a b2sme contract and likewise a non-individually negotiated one. The critical analysis leads to suggestions for improvement regarding the contracts of indeterminate duration under the new instrument.

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16.1 Introduction[1]

When the CESL-proposal was withdrawn, the Commission announced a new instrument limited to online purchases of digital content and tangible goods that is currently being drafted.[2] Contracts of indeterminate duration remain of relevance. Within the new scope they may, for instance, concern any type of continuous downloads/updates (music, movies, software or smart-phone applications) or subscriptions for magazines and the like.[3] The new instrument is, therefore, likely to include a provision on contracts of indeterminate duration again. A critical analysis of the original (withdrawn) Article 77 CESL provides an opportunity to make a more informed drafting choice within the context of the new instrument. This chapter seeks to assess the level of protection of consumers and traders, particularly small-and-medium-sized entities (SMEs) in the context of contracts of indeterminate duration under the CESL-proposal. The CESL was to apply in the cross-border context, while Member States were allowed to extend its application to domestic contracts as well. In terms of scope it applied to business-to-consumer (b2c) contracts and business-to-business (b2b) contracts only in so far as one party was a SME – thus basically to b2sme contracts.

The CESL had been building upon the Draft Common Frame of Reference (DCFR), which, in turn, drew heavily on the Principles of European Contract Law (PECL).[4] The (withdrawn) proposal for a regulation on the CESL was furthermore strongly inspired by the feasibility study (FS) of the Expert Group on European contract law.[5] Consequently, Article 77 of the CESL will be analysed in the context of its predecessors. In the next step, a German perspective on the matter will be added.

Given that the modus of contract termination can be set out in both a general contract clause and a standard contract term, the analysis comprises both 'individually negotiated and non-individually negotiated contract terms'. Like German law

[1] I wish to thank the participants of the workshop 'Content and effects of contracts: the CESL in the European multi-level system of governance', 31 May – 1 June 2013, Groningen Center for Law and Governance for their helpful comments and I thank Peter Rott for very valuable comments on an earlier version of this chapter.

[2] An online consultation on the matter has recently been opened: http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm

[3] CESL applied for 'contracts on the sales of goods and supply of digital content (music, movies, software or smart-phone applications), as well as directly related services' such as installation, maintenance, repair or any other processing, see Art 1 RegCESL. For the definition of digital content see already Art 2(j) Regulation.

[4] See I Schwenzer, 'The Proposed Common European Sales Law and the Convention on the International Sale of Goods' (2012) 44 *Uniform Commercial Code Law Journal* 457–481, 458.

[5] See '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', http://ec.europa.eu/justice/contract/files/feasibility_study_final.pdf. Accessed 10 December 2013.

and the Directive on Unfair Contract Terms,[6] the CESL followed a system of special substantive control for non-individually negotiated contract terms.[7] On the whole four different scenarios will be assessed: an individually negotiated clause in a b2c contract and likewise a non-individually negotiated one; an individually negotiated clause in a b2sme contract, and in the same vein a non-individually negotiated one.

16.2 Evolution and Interpretation of Article 77 CESL

16.2.1 The Historical Context

The provision in the CESL read as follows:

> Contract of indeterminate duration: Article 77 CESL
>
> 1. Where, in a case involving continuous or repeated performance of a contractual obligation, the contract terms do not stipulate when the contractual relationship is to end or provide for it to be terminated upon giving notice to that effect, it may be terminated by either party giving a reasonable period of notice not exceeding 2 months.
> 2. In relationship between a trader and a consumer, the parties may not to the detriment of the consumer exclude the application of this Article or derogate from or vary its effects.

The Article applied to contracts of indeterminate duration where parties had not stipulated the modus of its termination: either party had the right to terminate the contract by giving notice.[8] Article 77 applied to two alternatives: The contract was silent about the modus of termination – no end was specified – or set out generally that the contract could be terminated upon giving notice to that effect. Note that the fact that the contract could be 'terminated upon giving notice to that effect' was consequently implied when a contract was silent about matters of how to terminate it. An imaginable case is that in which parties have involuntarily failed to stipulate a contract term for duration.

The parties' will took precedence for the termination if the parties had made a contractual provision for the requirement of termination.[9] However, as will be set out, certain restrictions applied in the b2c context.

For the situation of silence concerning the mode of termination as the default rule either party had the right to terminate the contract by giving notice as provided for in the first paragraph of the Article.[10] The scope of this notice period was not fixed in absolute terms, the indication of 'reasonable' was, however, enhanced by a maximum, a long stop, of 2 months. This allowed for some adaptation to the circumstances.

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[6] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

[7] §§ 305 BGB and artts. 7, 83–86 CESL.

[8] See EM Kieninger, 'Article 77 – Contracts of Indeterminate Duration' in R Schulze (ed), *Common European Sales Law (CESL) – Commentary* (Baden-Baden: Nomos, C.H. Beck and Hart Publishing, 2012) 367–370 368.

[9] See Kieninger (n 10) 368.

[10] See Kieninger (n 10) 369.

At the same time, setting a maximum allowed for some planning dependability. Not every period shorter than 2 months would consequently be reasonable. For factors that determined reasonableness, reference can be made to the PECL commentary.[11]

Importantly, the second paragraph of the Article set out that the provision was mandatory in the context of b2c contracts when it came to a deviation that was to the detriment of the consumer.[12] The right of the consumer to terminate such a contract could not be abridged. A notice period thus could not be extended to more than 2 months if this was detrimental to the consumer, which was always the case when the consumer wished to terminate. It would have to be determined for each given case whether an extension of the notice period for the trader had negative consequences for the consumer. Consequently, granting the consumer more far-reaching, eg immediate rights to terminate was always possible. On the other hand, it did not seem to be exactly clear from the wording that the only logical interpretation was that the consumers' right to terminate a contract of indeterminate duration could never be excluded. The rule given in Article 77 (1) of the CESL was to be followed under all circumstances.

The definition provided for 'indeterminate' left it open whether a contract for a definite period that was subsequently prolonged for an indefinite period was within the scope of the Article.[13]

Looking back to the history of the Article, the PECL and the DCFR are crucial. One has to keep in mind that the scope of application of the instruments differs.[14] Unlike the CESL, the PECL and the DCFR apply to contracts in general.

The CESL's first 'predecessor' is Article 6:109 of the PECL concerning contracts for an indefinite period, which reads:

> A contract for an indefinite period may be ended by either party giving notice of reasonable length.

Article 1:302 furthermore provides a definition of 'reasonableness' which is applicable when determining the interpretation of a reasonable length.[15] There is therefore no 2 months long stop, nor special protection for consumers. Furthermore, the terminology/definition of the type of contract is different. The PECL applies to contracts of indefinite duration and by this refers to contracts that purport to be

[11] See Kieninger (n 10) 370 who refers to O Lando and H Beale, *Principles of European Contract Law Parts I and II Combined and Revised* (The Hague, London, New York: Kluwer Law International, 2003) 316. See below.

[12] See Kieninger (n 10) 368.

[13] See Kieninger (n 10) 369. They are included in the scope of the PECL but not the UNIDROIT PICC.

[14] See Kieninger (n 10) 368.

[15] "Under these Principles reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable. In particular, in assessing what is reasonable the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trades or professions involved should be taken into account."

everlasting and those which run for an indefinite period,[16] whereas the CESL talked about contracts of indeterminate duration only. Article 6:109 of the PECL does not cover contracts for which statutory provisions of notice apply.[17] Article 5.1.8. UNIDROIT PICC, by the way, offers an almost identical rule to the PECL.[18]

Next, in the DCFR the respective principle reads[19]:

> III. – 1:109 DCFR: Variation or termination by notice
>
> 1. A right, obligation or contractual relationship may be varied or terminated by notice by either party where this is provided for by the terms regulating it.
> 2. Where, in a case involving continuous or periodic performance of a contractual obligation, the terms of the contract do not say when the contractual relationship is to end or say that it will never end, it may be terminated by either party by giving a reasonable period of notice. In assessing whether a period of notice is reasonable, regard may be had to the interval between performances or counter-performances […]

Again, like in the PECL, the provision applies to contracts concluded for an indefinite period (see also principle 20 of the DCFR). A definition of reasonableness can also be found in the DCFR, which can be pulled up for the interpretation.[20] Again there is no mention of the 2 months period, so this was a new specification in the CESL indeed. There is, however, a specification of the fact that 'regard may be had to the interval between performances or counter-performances'. This part of the stipulation did not feature in the CESL. The provision applies to contractual relationships which 'purport to be everlasting and to such relationships which are for a period of duration of which cannot be determined from the contract'.[21] The time when the contractual relationship is to end cannot be determined from the terms of the contract, thus it is not applicable to contracts of a fixed duration or those that provide for a fixed time of termination. Nor are cases covered where the contract provides a method of termination – for example, a period of 6 months' notice, as in this case the contract says when the contractual relationship will end. On the other hand, contractual relationships which were originally for a definite period, but which the parties have tacitly continued after the end of that period although they have not expressly agreed to renew them are covered.[22] As mentioned, the scope of the CESL was unclear in this regard. The rules on change of circumstances and termination for serious grounds were always available as a means of escape.

Reasonableness is furthermore said to depend, among other things, on the period the contract has lasted, the efforts and investments which the other party has made in performance of the contract, and the time it may take the other party to obtain

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[16] See Lando and Beale, *Principles of European Contract Law* (2003) (n 13) 316.

[17] See Lando and Beale (n 13) 316.

[18] See Kieninger (n 10) 368.

[19] Additional information comes back in the principles 20 and 22.

[20] See 1. – 1:104 DCFR.

[21] See Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group) *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR*) (online pre-version) 732.

[22] The same is true for PECL, see Lando and Beale (n 13) 316.

another contract with somebody else. The length of notice will be governed by usages. Where a performance or counter-performance is due at regular intervals, regard may be had to these intervals in assessing what is a reasonable period of notice. It is suggested that this interval (between performances or counter-performances, if longer) could be regarded as a reasonable period.

Lastly, in the feasibility study that was published only a few months before the CESL, Article 77 of the CESL cannot be found. The respective provision in the feasibility study, which was consequently abolished, is Article 74 of the CESL (FS). It reads:

> Contracts of indefinite or perpetual duration
>
> Where, in a case involving continuous or periodic performance of a contractual obligation, the terms of the contract do not say when the contractual relationship is to end or say that it will never end, it may be terminated by either party by giving a reasonable period of notice.

It is apparent that Article 74 of the CESL (FS) resembles the predecessors much more than Article 77 did. In fact, Article 74 is part of principle III. – 1:109 of the DCFR, but shorter.

On the whole the definition of 'indeterminate' provided in Article 77 of the CESL was new, referring to a contract in which an obligation was carried out repeatedly and the contract did not fix its own running time.[23] One has to distinguish between contracts of infinite and indefinite duration.[24] The notion of 'infinite' – a perpetual right – was dropped for the CESL for the first time compared to all precursors, including Article 74 of the CESL (FS). Hence, 'indeterminate duration' had to be interpreted as excluding contracts of infinite duration and as purely referring to contracts of indefinite duration. Prior to the CESL, instruments applied to both contracts of infinite and indefinite duration. A clear addition with the CESL was the precision in the notice period for default purposes and, of course, the second paragraph which rendered the provision mandatory for b2c contracts. Article 74 of the CESL (FS) is regarded as less precise compared to Article 77 of the CESL.[25]

The new addition to the definition 'or provide for it to be terminated upon giving notice to that effect' was rather complicated. In the end it seemed to come down to meaning simply that a contract of indeterminate duration could be terminated upon giving notice to that effect (which can be stated in the contract). It extended the scope of the Article not only to contracts for indeterminate duration but also any other type of long-term contract.

The possibilities to deviate from the default notice period varied in the b2sme and the b2c context and will be set out in the following. The parties' will therefore did not always prevail. In the b2c context mandatory law disallowed deviating from the notice periods stipulated in Article 77 (1) of the CESL to the detriment of the consumer.

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[23] See Kieninger (n 10) 368.

[24] See H Beale, 'The sources of contract terms under the CESL' in this series.

[25] See Kieninger (n 10) 368.

On the whole the principle that nobody can be eternally bound by contract is well enshrined in European civil codes.[26]

16.2.2 Article 77 CESL Within CESL

In a next step the four different situations that could occur in relation to Article 77 of the CESL will be assessed: an individually negotiated clause in a b2c contract and likewise a non-individually negotiated one; an individually negotiated clause in a b2sme contract and likewise a non-individually negotiated one. Specifications concerning the termination of a contract of indeterminate duration could be stipulated in any of these forms.

16.2.2.1 b2c: Individually Negotiated Contract Term

To start with Article 77 (1) of the CESL sets out a default rule for any contract to which it applied – ie in the event of silence about the mode of contract termination. This ranged from a reasonable period (minimum) up to 2 months as a long stop. Where a contract of indeterminate duration was silent regarding when the contract was to end or provided for it to be terminated upon giving notice to that effect, both parties were allowed to terminate it by giving notice. According to Article 77 (2) of the CESL, in a b2c situation Article 77 (1) of the CESL became mandatory: 'In relationship between a trader and a consumer, the parties may not to the detriment of the consumer exclude the application of this Article or derogate from or vary its effects'. Whereas a deviation was not possible to the detriment of the consumer, it might be possible to the detriment of the trader. In practical terms, and as set out above, this meant that a notice period could not be extended to more than 2 months if this was detrimental to the consumer. Thus, this was always the case when the consumer wished to terminate. Whether an extension of the notice period for the trader had negative consequences for the consumer would have had to be determined for each given case. Consequently granting the consumer more far-reaching, eg immediate, rights to terminate was possible.[27] It did not matter if it was to the detriment of the trader. Following the *a contrario* reasoning the application of the Article could be excluded to the detriment of the trader or be derogated from or its effects be varied. In the context of the assessment of reasonableness the aforementioned factors applied. Furthermore Article 5 (1) of the CESL was applicable, which in its definition of reasonableness in particular referred to 'the nature and purpose of the contract, to the circumstances of the case and to the usages and practices of the

[26] See Lando and Beale (n 13) 317.

[27] See Kieninger (n 10) 368.

trades or professions involved'.[28] Again, as said, not every period of less than 2 months was consequently reasonable. The consumer's right to terminate the contract could also under no circumstance be excluded. If the contract stipulated that the period for giving notice was reasonable, this would have had to be interpreted in line with Article 77 of the CESL, therefore meaning no longer than 2 months to the detriment of the consumer. Longer periods of notice for the trader were consequently not an issue.

An additional but less specific principle in the light of Article 77 (2) of the CESL was stipulated in Article 64 of the CESL: 'Interpretation in favour of consumers'. This mandatory provision – mandatory in the b2c context according to Article 64 (2) of the CESL – set out that in cases of doubt about the meaning of a contract term in a contract between a trader and a consumer, the interpretation most favourable to the consumer should prevail unless the term was supplied by the consumer.[29]

Note that it was regarded as doubtful that many b2c contracts would contain an individually negotiated term on the termination period for a contract of indeterminate duration.[30] Furthermore, the main problem in b2c transactions was said to be contracts with automatic renewal clauses or those regulating a too long duration which were not covered by Article 77 of the CESL.[31]

16.2.2.2 b2c: Non-individually Negotiated Contract Term

The CESL provided for a special regime for non-individually negotiated contract terms. These terms, to begin with, were defined in Article 7 of the CESL and could show various contingencies. A distinction could be made between b2c and b2sme situations. The first relevant context was the b2c situation. The general definition of 'unfairness' in a b2c context was set out in Article 83 of the CESL according to which a term fulfilling the definition set out in Article 7 is unfair if it causes a ´significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer, contrary to good faith and fair dealing'. It was further specified which factors account was to be taken of when assessing unfairness. Article 83 of the CESL was followed by two Articles stipulating a black and a grey list of standard contract clauses that were always considered unfair (Article 84 CESL) and presumably unfair (Article 85 CESL) in a b2c context.

Regarding the existence of a mandatory b2c provision and the special protection of non-individually negotiated contract terms in a b2c context the question could be raised whether the concepts could be aligned at all. It seemed that the European

[28] See H Schulte-Nölke, 'Article 5 – Reasonableness' in R Schulze (ed) *Common European Sales Law (CESL) – Commentary* (Baden-Baden: Nomos, C.H. Beck and Hart Publishing, 2012) 97–102, 98.

[29] As part of the amendments approved in the 1st reading in the European Parliament on 26 February 2014, Article 64 CESL was deleted and became Art 61 b CESL. The content remained unchanged.

[30] See Kieninger (n 10) 370. The same author therefore suggests that Article 77 (2) is superfluous.

[31] See Kieninger (n 10) 368.

legislator did not consider the relationship with the control of unfair contract terms when adding the second paragraph to Article 77 of the CESL.[32] This being so, it stands out that there were two provisions in which contracts of indeterminate duration were explicitly mentioned in Article 85 of the CESL, which consequently needed to be interpreted in view of Article 77 of the CESL.[33] Firstly, it was presumably unfair if a clause enabled 'the trader to terminate a contact of indeterminate duration without reasonable notice, unless there were serious grounds for doing so' (Article 85 (g) CESL). Secondly, Article 85 (v) of the CESL stipulated that a clause was presumably unfair if it imposed an excessive burden on the consumer in order to terminate a contract of indeterminate duration. Interpreting them in the light of Article 77 of the CESL, Article 85 (v) of the CESL needed to be interpreted among other possible reasons of unfairness as meaning that the excessive burden must mean longer than 2 months.[34] In the reverse situation when the trader wanted to free himself, an unreasonably short period was unfair according to Article 85 (g) of the CESL. On the whole the practical relevance of Article 77 (2) of the CESL was said to be reduced to individually negotiated terms.[35]

Certainly there was a flaw in the drafting of the CESL in this regard. A mandatory provision for consumer protection would have rendered the control of standard contract terms concerning the same matter obsolete.

It furthermore stands out that Article 85 (g) of the CESL made reference to the 'serious grounds' for terminating a contract of indeterminate duration which could not explicitly be found back in the general provisions concerning contents and effects of contracts.

16.2.2.3 b2sme: Individually Negotiated Contract Term

For the b2sme situation the default rule stipulated in Article 77 (1) of the CESL likewise applied. The provision was, however, not mandatory in this context and deviation from it or excluding it was possible. Where parties specified a notice period, the mandatory nature of Article 77 (1) of the CESL did not apply to determine if there had been an illegitimate deviation. This consequently leads to the question what the limits within the CESL were for b2b contracting:

The first limit that comes to mind is that of good faith and fair dealing as set out in Article 2 (1) of the CESL. Apparently we have not come as far as seeing any

[32] See Kieninger (n 10) 370; see eg Articles 170 and 171 and the criticism by Kieninger (herself) 'Allgemeines Leistungsstörungsrecht im Vorschlag für ein Gemeinsames Europäisches Kaufrecht' in H Schulte-Nölke et al. (eds) *Der Entwurf für ein optionales europäisches Kaufrecht* (Munich: Sellier, 2012) 205–228, 219. See Beale (n 26).

[33] See Kieninger (n 10) 370.

[34] As part of the amendments approved in the 1st reading in the European Parliament, Article 85 (v) CESL was deleted and instead became Article 84 (ha) CESL. It was, thus, shifted from the grey to the black list.

[35] See Kieninger (n 10) 370.

practical applications of the CESL. The laws of the Member States differ significantly regarding whether they acknowledge a general duty to act in accordance with good faith and fair dealing.[36] It is suggested that a rather low weight, or a narrow interpretation would have to be given to the named concepts within the CESL.[37] It is, however, expressed in relation to the concepts of good faith and fair dealing in the context of the PECL that in relationships which last over a period of time, the concept of good faith 'has particular significance as a guideline for the parties' behaviour.'[38] This could have been similarly interpreted in the context of the CESL and therefore the cases at hand. In the b2sme context, furthermore, Article 3 of the CESL on cooperation could have played a role. According to Article 63 of the CELS an 'interpretation which renders the contract terms effective prevails over one which does not'.[39] In the b2sme situation more specifically Article 67 of the CESL on usages and practices in contracts between traders could have mattered. Lastly for the purpose of determining reasonableness in the context of the default rule Article 5 of the CESL came into play once more. Trader protection overall was suggested to be low, few practices only would have seemed to qualify as unfair.[40] Article 77 (1) of the CESL may have worked as a guiding value.

These general principles, in so far as applicable, could also have mattered in a b2c relationship. Given that Article 77 (2) of the CESL was much more specific, they would not seem to have been of any practical relevance.

16.2.2.4 b2sme: Non-individually Negotiated Contract Term

A contract term stipulating the period of notice to terminate a contract of indeterminate duration or excluding the right to terminate such a contract could be found again within the standard contract terms that were drafted by only one of the parties and with which the other party consequently agreed. Therefore, as a means of protection the special regime for a substantive control of non-individually negotiated b2sme contract terms applied.

The relevant provisions were Articles 83 and 86 of the CESL. The applicable definition of unfairness was set out in Article 86 of the CESL, which unlike Article 83 for the b2c case referred to any term within the meaning of Article 7 of the CESL – the definition of non-individually negotiated term – that was 'of such a

[36] See Schulte-Nölke (n 29) 89 who refers to R Zimmermann and S Whittaker (eds) *Good Faith in European Contract Law* (Cambridge University Press, Cambridge, 2000). The principle of good faith has recently been recognised for the first time in an English case: *Yam Seng PTE Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB).

[37] Beale (n 25) (it is a duty and not an obligation).

[38] See Lando and Beale (n 12) 114.

[39] As part of the amendments approved in the 1st reading in the European Parliament, Article 63 CESL became Article 61a CESL.

[40] See Schwenzer (n 5) 476, who expresses this in the context of non-individually negotiated contract terms which must consequently be even more the case with individually negotiated ones. See similar: Beale (n 26).

nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing'.[41] It continued to say that when assessing unfairness, regard was to be had to the nature of what was to be provided under the contract; the circumstances prevailing during the conclusion of the contract; the other contract terms; and the terms of any other contract on which the contract depended. This would thus have been the test that a clause would have had to pass in order not to be considered unfair. It stands out that in order to assess unfairness in a b2sme contract it was necessary to consider the same elements as in b2c contracts, only the duty of transparency was lacking for traders (b2sme).[42] The formulation 'to grossly deviate', however, suggested that a very high standard had to be met in order for a trade practice to constitute unfairness. It would only be logical that the regime for non-individually negotiated contract terms was stricter than the regime for individually negotiated ones. It seems that the concept of unfairness was very vague and did not provide orientation.[43] It furthermore, insinuated that an individually negotiated term could practically never be unfair.

16.2.3 Interim Conclusion

Compared to the precursors of the CESL the scope of the respective Articles and principles differed in the sense that with Article 77 of the CESL for the first time contracts of perpetual duration would have been excluded from the scope.

As an interim conclusion from the point of view of consumer protection one can start by saying that the mandatory nature of Article 77 (1) of the CESL in the b2c context was a new feature. The notion of the reasonable period had furthermore been enhanced by a more precise formulation. This suggested enhanced consumer protection. The right of the consumer to terminate a contract of indeterminate duration could never be abridged (to the detriment of the consumer). It is argued that the practical relevance of Article 77 (2) of the CESL was reduced to individually negotiated contract terms due to the specific regime of substantive control applicable for non-individually negotiated ones. The relation between both types of contract clauses is certainly slightly dubious. One would have expected that a mandatory provision makes additional control of non-individually negotiated contract clauses on the same matter obsolete. There seem to have been inconsistencies in the drafting stage of the CESL. The drafting process of the new instrument is a chance to improve these. Certainly, the grey list – the list of 'presumably unfair clauses'– was

[41] As part of the amendments approved in the 1st reading in the European Parliament, "good" was exchanged for "customary".

[42] See D Mazeaud and N Sauphanor-Brouillaud, 'Article 86 – Meaning of 'unfair' in contracts between traders' in R Schulze (ed) *Common European Sales Law (CESL) – Commentary* (Baden-Baden, Nomos, CH Beck and Hart Publishing, 2012) 393–395.

[43] See Schwenzer (n 6) 476.

to be interpreted in the light of Article 77 of the CESL.[44] Furthermore, the main problems in b2c transactions are said to be rather contracts with automatic renewal clauses or those regulating a too long duration than those of indeterminate duration. In this sense the new instrument may put new emphasis.

Regarding trader protection the same default rule was in place but deviations were possible. It is unclear in how far the rule in Article 77 (1) of the CESL would have served as a guiding value. To start with in the b2c context traders did not enjoy the same protection as consumers. It was explicitly stated that deviations were not possible to the detriment of the consumer and they were, in turn, possible to the detriment of the trader. In this situation and likewise when it came to individually negotiated contract terms in a b2sme contractual relationship, traders could only profit from the general protection as set out in the CESL. Standards for trader protection seemed to be low. Naturally the regime for non-individually negotiated contract terms had to be more far-reaching and provide a stronger protection. Article 86 of the CESL's definition of unfairness was clearly narrower than that of Article 83 of the CESL. Even under this regime trader protection seemed to be rather low. No explicit differentiation was made between an ordinary trader and a SME. If one regards SMEs as a by definition weaker group like consumers, this may, however, be desirable.[45] Another matter to consider with a view to the new instrument. It was also unclear whether the factors that determined reasonableness in the notice period for the b2c context like 'the time that the contract had already lasted for' were applicable in the b2sme context. Consequently, excluding the right to terminate a contract of indeterminate duration for a certain period or even completely seemed to be possible unlike in the b2c context. A particular difficulty when establishing typical usages of traders that could be used to restrict certain behaviour, would have been the fact that cross-border usages may be difficult to establish. This could have played against the traders.[46] Yet, another aspect to pay close attention to in the drafting process of the new instrument.

16.3 The German Perspective

In the next step a German law perspective on the matter will be added and it will be reflected upon CESL in this light. In German law there are various special rules for notice periods for different types of contracts. It is not enshrined in the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) that a general principle of reasonable notice applies for contracts of indeterminate duration. In other countries this is, as a

[44] In light of the amended version of the proposal, the same would have been true for the newly introduced – but, of course, also abandoned – provision (Article 84 (ha) CESL) to the black list.

[45] M Loos, 'Incorporation and making available of standard contract terms under the proposal for a Common European Sales Law (Articles 70–71 CESL)' in this series.

[46] V Mak, 'Contract Interpretation and the Role of 'Trade Usage' in the Proposed Common European Sales Law (CESL)' in this series.

matter of fact, different.[47] Furthermore, the concept is further developed by the courts for situations where the mode of contract termination is not specified, as is set out below.

16.3.1 Terminology

The crucial term in German law is the 'Dauerschuldverhältnis' – which is made explicit in §§ 308 No 3, 309 No 9 and 314 BGB.[48] It covers a variety of contracts under which also those to which the CESL was supposed to be applicable to seem to fall. Generally speaking it concerns a long-term contract in which continuous or repeated performance of a contractual obligation is owed to the other party. The definition can cover Articles of association,[49] collective labour agreements, employment agreements, lease contracts, deposit contracts, franchise contracts,[50] but also sales contracts if parties have agreed on the continuous delivery and acceptance of goods (in German *Sukzessivlieferungsverträge)*, subscriber agreements (in German *Bezugsverträge)* for the needed amount of gas, water, electricity or the like.

Such a contract can run for a determinate[51] or indeterminate period. The latter – in fact only the latter – can be terminated by a so-called 'ordentliche Kündigung' – a statutory notice of termination. It only has an effect for the future. Mention of reasons is in general not required; it may be required according to more specific provisions. Notice periods apply that can be stipulated by contract, by law or by analogy (as will be set out in more detail). Damage payments dot not apply. By way of example a loan contract can be terminated with a notice period of 3 months (§ 488 (3) II BGB). There are special provisions for consumer loans.

[47] See Lando and Beale (n 13) 317 who refer to leases (§ 565 BGB), services (§§ 620(2), 622 and 624 BGB), mandate (§ 671 BGB) and associations (§ 723 BGB). Other countries that like Germany do not set out one general principle are the Netherlands, Finland and Greece.

[48] See W Wurmnest, 'BGB Rücktrittsvorbehalt (§ 308 Nr. 3)' in *Münchener Kommentar zum BGB. Rn 13/14. (München*, Beck, 2012), *M* Gehrlein and H Sutschet 'BeckOK BGB § 311' in HG Bamberger and H Roth (eds) *Beck'scher Online-Kommentar BGB* (*München*, Beck, 2013) Rn 11.

[49] See BGH NJW 2005, 3641, 3644.

[50] See BGH DB 2003, 2334.

[51] Here the contract ends upon expiry of its duration §§ 488 (3) I, 542 (2), 604 (1), 608 (1), 620 (1), 723(1) II BGB.

16.3.2 Termination for Serious Grounds

A special provision in German law concerning contracts of indeterminate duration that cannot be found in the same form in the CESL is the termination of a contract of indeterminate duration for serious grounds. § 314 BGB regulates this termination of a contract for 'serious grounds/compelling reasons'.[52] This applies in German law generally and cannot be excluded either via an individually or via a non-individually negotiated contract clause.[53] Outside of this general provision there are some special stipulations, for instance for rental contracts (§ 543 BGB), employment contracts (§ 626 BGB) or within credit law (§ 490 BGB). This is a so-called 'außerordentliche Kündigung' – an extraordinary notice of cancellation – as opposed to the above-mentioned statutory version: 'ordentliche Kündigung'. The former requires mention of reasons. It furthermore entails the following requirements:

The provision is founded in the 'Unzumutbarkeit'; the fact that a given situation is not acceptable and a person cannot reasonably be expected to continue the relationship until it ends or may be ended under the contract.[54] Under this circumstance a contract may be terminated without a notice period, although only within a reasonable period after obtaining knowledge of the reason for termination. In determining the notion of reasonableness a case-by-case assessment applies. As an indication it is held that § 626 (2) BGB and the 2 week notice period stipulated is not generally applicable. In case of a breach of a duty under a contract, a warning notice is furthermore required.

The 'compelling reason' is defined as follows in § 314 (1) 2 BGB: 'There is a compelling reason if the terminating party, taking into account all the circumstances of the specific case and weighing the interests of both parties, cannot reasonably be expected to continue the contractual relationship until the agreed end or until the expiry of a notice period'. Both types of contracts, those of a fixed and those of indeterminate duration, can be terminated by making use of this provision.

16.3.3 A Statutory Right to Terminate

16.3.3.1 In the Context of Individually Negotiated Contract Terms

As expressed, aside from the special provision § 314 BGB, the right to terminate a contract while adhering to certain notice periods can be stipulated in the contract, by law, or be derived by analogy. Examples for a stipulation by law concerning a lease

[52] In the official translation of the BGB § 314 reads 'termination, for a compelling reason, of contracts for the performance of a continuing obligation'.

[53] See BGH NJW 1951, 836; RGZ 160, 270; C Grüneberg, '§ 309 No 9' in *Palandt Bürgerliches Gesetzbuch: BGB* 72nd Ed (*München*, Beck, 2013) Rn 93.

[54] See Lando and Beale (n 13) 317.

contract or service contracts are § 594 b (2) BGB, § 622 BGB for employment contracts, § 624 BGB, same as § 620 (2), § 723 (1) I BGB on associations. There is no one general provision that is applicable in all contexts.

As a main consideration, the statutory right to terminate protects parties from being eternally bound by an agreement. Importantly, when there is no mention of a cancellation period in the contract or in the law, the period of notice is derived by making a legal analogy for all other types of contracts of indeterminate duration.[55] More specifically §§ 624 and 723 (1) I BGB are applicable by way of an analogy, unless parties have excluded the right to terminate a contract. The German Federal Court of Justice (*Bundesgerichtshof*, BGH) in the relevant case law makes frequent reference to the term 'reasonable period', to which the party wishing to terminate the contract has to adhere.[56] § 624 BGB (concerning service contracts) sets out that for contracts for the duration of longer than 5 years a notice period of at least 6 months applies once those 5 years have passed. It is furthermore expressed that the notice period has to be in line with 'good faith': the principles of the *guten Sitten* (§ 138 BGB) and *Treu und Glauben* (§ 242 BGB). This consequently seems to be the rule applicable for the type of contracts that the CESL would have covered. It is furthermore crucial that the right to terminate was not excluded by contract.[57] This provision applies generally: in b2c and b2b contexts. In the context of b2b contract negotiations in German law no special reference is made to SMEs. For any case where the modus of termination is not stipulated by contract, it can be derived by law or by analogy. As a related point in terms of possibilities of excluding the right to terminate a b2b contract a series of judgments concerning beer delivery contracts are illustrative.[58] The right to terminate can, according to this case law, be excluded for roughly 15 years.

16.3.3.2 In the Context of Non-individually Negotiated Contract Terms

In Germany the special regime for the substantive control of non-individually negotiated contract terms is set out in §§ 305 et seq BGB. According to § 305b BGB individually negotiated contract terms prevail over non-individually negotiated ones and are not subject to the special control on the content. The substantive control – 'Inhaltskontrolle' – according to § 307 BGB is applicable for the b2c and b2b

[55] See V Kitz, *Die Dauerschuld im Kauf* (Baden-Baden, Nomos, 2005) chapter 7 and the references mentioned there: eg RGZ 1978, 421, 424; BGHLM § 242 No 8; BGH VersR 1960, 653, 654; NJW 1985, 2585, 2586; H Oetker *Das Dauerschuldverhältnis und seine Beendigung* (Tübingen, Mohr Siebeck, 1994) § 15a.

[56] For instance GH, NJW 1972, 1128.

[57] See NJW-RR 1993, 1460: The case concerned a b2b situation, 'Wäschereivertrag mit Kurzentrum' but it seems to be generally applicable; BGH, NJW 1972, 1129; NJW-RR 2006, 1427, 1428; NJW 2008, 1064; NJW-RR 2006, 117, 120, NJW-RR 1993, 1460. The right to terminate was excluded by an individually or non-individually negotiated contract clause.

[58] BGH 74, 293; NJW 92, 2145. Regarding an invalid exclusion of 'ordentliches Kündigungsrecht' in the context of a 'Dauerschuldverhältnis', see OLGZ 1990, 249.

situation.[59] The section makes reference to 'Treu und Glauben': 'Provisions in standard contract terms are invalid if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible'. § 307 BGB prevails over § 138 BGB.[60] The protection for a non-individually negotiated contract term has to be stricter by nature. The general provision § 307 BGB is followed by a grey and a black list for unfair clauses in b2c contract terms (§§ 308, 309 BGB). For non-individually negotiated contract terms in a b2b situation § 307 BGB likewise applies. The two lists stipulated for the b2c situation are furthermore indicative of unfair practices also in the context of b2b contracting.[61] According to § 310 I 2 BGB 'reasonable account must be taken of the practices and customs that apply in business dealing'. This notion has, however, not received any practical relevance.

As said, § 307 BGB is held to be stricter than § 138 BGB.[62] By way of example a termination period of 6 days was not considered to be unfair in a fixed phone lane contract.[63] More specifically, in the black list for the purpose of terminating contracts of indeterminate duration § 309 No 9 (c) BGB seems to set out specific requirements for clauses that will always be unfair in a b2c relationship. In the context of a contract of a continuing obligation 'a notice period longer than 3 months prior to the expiry of the duration of the contract as originally agreed or tacitly extended at the expense of the other party to the contract' is always unfair. As can be seen from this definition, however, the scope of contracts covered does not extend to the type of contract that the CESL would have covered. Furthermore, § 309 No 9 (c) BGB would not have been directly applicable in the b2b situation anyway.[64] The relevant provision for the type of contracts at hand is consequently § 307 BGB. On top of the example given for the b2c telephone contract, in a b2b situation in the context of § 307 BGB it was, for instance, established that a right to terminate a contract while a period of 3 months applied, is not necessarily to be regarded as fair. This was the case in a franchise contract as the investments of the franchisee might not have been amortised in the meantime.[65] This gives an indication as to the type of reasoning and notice periods that are applied. A related question concerns the possibilities to exclude the right to terminate within a contract of indeterminate duration. It is stipulated in § 309 No 9 (a) BGB that regarding a long-term contract the

[59] See C. Grüneberg in *Palandt Bürgerliches Gesetzbuch: BGB* 72nd Ed (*München*, Beck, 2013) § 307 BGB, Rn 38.

[60] See J Ellenberger, '§ 138' in *Palandt Bürgerliches Gesetzbuch: BGB*, 72nd ed (*München*, Beck, 2013) Rn 16 et seq. § 138 BGB can apply if there are concerns about a standard contract clause that does not fall under the scope of protection of §§ 307 BGB.

[61] See Grüneberg (n 49) § 307, Rn 40.

[62] See J Dammann, '§ 309 BGB' in M Wolf, W Lindacher and T Pfeiffer (eds) *AGB-Recht Kommentar* 5th ed (München, Beck, 2009).

[63] BGH NJW 2009, 1334, 1335.

[64] See Grüneberg (n 55) § 309, Rn 96.

[65] BGH DB 2003, 2434.

right to terminate it cannot be excluded for longer than 2 years.[66] However, exclusions for 2 years or less are not necessary legitimate; this would depend upon § 307 BGB.[67] Even if a provision is cleared by § 309 No 9 (a) BGB it might still be considered unfair by failing to fulfil the requirements of § 307 BGB.

16.4 Comparison

In terms of comparing the two regimes – German law and the proposal for a CESL – it stands out that there was no equivalent to the German § 314 BGB in the CESL. Only in relation to non-individually negotiated standard contract terms mention was made of a 'termination for serious grounds'. It can be presumed that most of the cases involving a termination for compelling reasons are essentially cases of substantial non-performance by the person to whom notice is given. Therefore it is suggested that they could have been dealt with by the rules on non-performance in the CESL (see Articles 114 et seq and 134 et seq CESL).[68] Hence, this was not expected to lead to any disturbances. The situation may be more problematic if trust between the parties was destroyed. In this case, Article 2 of the CESL could have been used or the fact that the trust between the parties was destroyed could have been considered when establishing what was a reasonable period of notice within the ambit of Article 77.

In the following the fact that there is not a perfect match between the scope of contracts that are covered by the CESL and what is regarded as a 'Dauerschuldverhältnis' in German law will pragmatically be given minor importance. In terms of consumer protection, it was illustrated, how Article 77 (2) of the CESL made the established range for a period of notice mandatory for all interactions with consumers. Consequently, deviations or excluding the right to terminate the contracts under investigation was not possible. When comparing this provision with the legal provision, or alternatively analogy, made under German law, it is striking that the period of notice in the CESL was shorter than the one usually applied in German law (a maximum of 2 months vs a minimum of 6 months). In German law also in the b2c context it is possible to exclude the right to terminate largely. Here, the CESL provision was much stricter owing to its mandatory nature. Excluding the right to terminate a contract in a b2c context was contrary to Article 77 of the CESL. In German law consumer protection is increased for cases of non-individually negotiated contract terms. § 307 BGB is particularly crucial here. § 309 (a) BGB may play a role when it comes to the question of excluding the right to terminate a

[66] See Wurmnest (n 50) § 309 No 9, *Rn 14 et seq.*

[67] BGH NJW 93, 326; 87, 2012.

[68] See D Looschelders and M Makowsky, 'Inhalt und Wirkung von Verträgen' in M. Schmidt-Kessel (ed) *Ein einheitliches Europäisches Kaufrecht? Eine Analyse des Vorschlags der Kommission* (München, Sellier European Law Publishers, 2012) 227–254, 246 for CESL; and see Lando and Beale (n 13) 317 for PECL.

contract of indeterminate duration. It limits these possibilities to a maximum of 2 years. § 307 may even restrict this further. In the CESL there was no such difference really between the regimes for individually and non-individually negotiated contract terms, given the mandatory nature of Article 77 (2) of the CESL and consequently the necessity to interpret Article 85 of the CESL in the light of this.[69] On the whole Article 77 of the CESL could still have granted as much consumer protection as the German regime of substantive control of non-individually negotiated contract terms does. On a side note, Article 85 of the CESL constituted the grey list, whereas the applicable provision in German law, § 309 BGB, constitutes the black list.[70] The former leaves some discretion, whereas the latter does not.

In terms of trader protection for cases of individually negotiated contract terms the principles of party autonomy and freedom of contract are prevailing. Certain provisions in both German law and the CESL are/were capable of putting limits to traders' behaviour. The principle of good faith can be said to be more enshrined in German law than it would have been in the CESL. From the outset the CESL seemed to make a special reference to SMEs. However, on a closer examination, no explicit differentiation was made between traders and SMEs. This may still happen when formulating a new instrument as it is currently happening.

Regarding non-individually negotiated contract terms both have/had a special substantive control also when traders are contracting with one another. German law is generally more specific in this regard by making the black and grey list also indicative for the b2b context. This did not happen with the CESL. The definition of unfairness in Articles 83 and 86 of the CESL differed substantially. The threshold for traders was much higher than for consumers. Naturally in both cases, German law and the CESL, protection is/was stronger regarding non-individually negotiated contract terms compared to individually negotiated ones. Regarding the possibilities of excluding the right to terminate a b2b contract of indeterminate duration, in both situations there is/was a large amount of leeway. The conclusion seems to be valid that under German law in the context of non-individually negotiated contract terms § 307 BGB will put stricter limits compared to a situation of an individually negotiated contract term.

In terms of practical relevance authors doubt that the construction of a contract of indeterminate duration was at the core of the CESL.[71] It is much rather regarded as an instrument that applies for single transactions. However, as illustrated, situations of long-term duration can be imagined. This will remain true with a view to a new instrument with a more limited scope. A more systematic comparison of German law and the new instrument may be warranted once its provisions are known.

[69] And Article 84 CESL.

[70] After the approval in Parliament one of the provisions became part of the grey list (Article 85 (g)) and one became part of the black list (Article 84 (ha) CESL).

[71] See Kieninger (n 10) 368.

Chapter 17
Art. 78: Third Party Stipulation and Consumer Protection

Alain Ancery

Abstract This chapter analyses the rule on third party stipulation contained in Article 78 of the abandoned CESL proposal, by comparing it with the correspondent rules of the PECL, the DCFR, and Dutch and German contract law. Third party stipulation is a method often used in (commercial) contracts, such as insurance contracts. Generally speaking there are two regimes of third party stipulation. In the first regime the third party is awarded rights under the contract but does not become a party to the contract, while in the second regime the third party becomes a party to the contract which then transforms into a tripartite contract. The withdrawn CESL opted for the first regime. This means that the contract is governed by all the rules that are applicable to these types of contracts between those types of contracting parties. If a third party consumer is awarded rights under a B2B contract this means that he is deprived of its consumer protection which he would have been entitled to had he become party to the contract. Whether this actually influences the consumer's position in a negative manner remains to be seen.

17.1 Introduction: The Post-CESL Era

The Common European Sales Law (CESL) has met quite some resistance. In particular Member States such as France, Germany, the Netherlands and the United Kingdom have advocated the complete withdrawal of the CESL proposal as far as it concerned anything else than a toolbox.[1] Although the CESL proposal has indeed been withdrawn at the end of 2014[2] a unification of a part of the law governing B2B contracts seems very likely when taking into account the speech given by the

[1] H. Beale, 'Hopes for the CESL: A Brief Response to DiMatteo, Loos, Schulte-Nölke, Storme and Twigg-Flesner', *ERPL* 2015 (2), p. 254.

[2] Cf. Commission Work Programme 2015: A New Start, 16 December 2014, COM(2014) 910 fin., Annex II, item 60.

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European Commissioner on Justice, Consumers and Gender Equality, Věra Jourová, before the European Parliament's Legal Affairs Committee on 13 July 2015. In her words the European Union has a role to play on contract law. "Especially [Small and Medium-sized Enterprises (SMEs)] should not bear additional transaction cost and suffer from legal uncertainty caused by differences between national contract laws."[3] The ones that are still not convinced that CESL will resuscitate probably will be after having read one of the following statements of the Commissioner: "The Commission is working on a legislative proposal covering harmonised rules for online purchases of digital content and key contractual rights for domestic and cross-border online sales of tangible goods. We see a good window of opportunity for these proposals, but let me be clear that our long term aim is to ensure coherence between the regime for online and offline."

Although the coming new proposal on a CESL will most likely be limited to distance contracts and/or contracts made by digital means, the intentions of the European Commission are clear. The new CESL should somewhere in the future be applicable in offline cases as well. As Beale stresses it seems rational to adopt a CESL that could serve as an optional instrument in offline situations as well.[4]

Given the fact that the new proposal will probably be designed along the lines of the withdrawn proposal (although with a more restricted scope) a study into the abandoned proposal will still prove useful. One of the aspects governed by the abandoned proposal is third party stipulation.

17.2 CESL: The Withdrawn Proposal

The CESL introduced an optional regime for cross-border contracts between traders as long as one of them can be regarded as a so-called SME (the B2B contracts) and for cross border contracts between a trader and a consumer (the B2C contracts).[5] In the latter, the CESL would only be applicable if the consumer has agreed on the application of the CESL via a separate explicit statement. A referral to the applicability of CESL in the B2C contract itself does not suffice.[6] In addition, certain information duties are imposed upon the trader to ensure that the consumer is fully aware of the implications of the applicability of the CESL.[7] It is left to the Member States to effectively enforce the Articles 8 and 9 of the CESL.

A valid agreement to the use of the CESL would have as its result that the matter between the parties would only be governed by the CESL in so far as the matters are

[3] Cf. https://ec.europa.eu/commission/2014-2019/jourova/announcements/commissioner-vera-jourovas-remarks-european-parliaments-legal-affairs-juri-committee_en

[4] H. Beale, 'Hopes for the CESL: A Brief Response to DiMatteo, Loos, Schulte-Nölke, Storme, and Twigg-Flesner', ERPL 2015 (2), p. 254–255.

[5] Article 7 CESL.

[6] Article 8, para 2 CESL.

[7] Article 9 CESL.

addressed in its rules as laid down in the annex to the CESL.[8] One of the matters that is addressed in the CESL is the so-called third party stipulation (Article 78 CESL). An employer could for example stipulate a right for its employees to make use of the facilities of a health club for a discount price and under the conditions as agreed upon between the employer and the health club in their B2B contract. Suppose one of the conditions of the B2B contract is a condition that would constitute an unfair contract term in a B2C contract. Is the employee as the third party consumer entitled to the consumer protection he would be entitled to would it have been a B2C contract?[9]

17.3 Third Party Stipulation in CESL, and the PECL and DCFR Perspective

The third party stipulation is dealt with in Article 78 of the abandoned CESL proposal. Contracting parties may confer rights upon a (not necessarily identifiable) third party. Both the nature and content of the third party's right are determined by the contract. If the right includes a performance of one of the contracting parties, the third party has the same rights to performance and remedies for non-performance as if the contracting party was bound to render the performance under a contract with the third party. To the contrary, the contracting party bound against the third party may invoke against this third party the same defences as he could assert against the other party to the contract.[10]

The third party for whom the right is stipulated can of course reject the right by notice to either one of the contracting parties provided this is done before the right has been accepted (either expressly or impliedly) by the third party. The contracting parties are allowed to remove or modify the contract term conferring the right on the third party provided this is done before either of them has give the third party notice of its right under the contract.[11] After all, once the conferred right is communicated to the third party the latter should be able to rely on the existence of the right.[12]

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[8] Article 11 CESL.

[9] Article 78 CESL does after all not change the character of the third party, cf. S Whittaker, 'Identifying Legal Costs of the Common European Sales Law: Legal Framework, Scope of the Uniform Law and National Judicial Evaluations', http://www.law.uchicago.edu/files/files/Whittaker%20paper.pdf, 27, fn 81.

[10] Article 78, para 1 to 3 CESL.

[11] Article 78, para 4 and 5 CESL.

[12] The stipulation could be accompanied by a clause stating that the contracting parties are not allowed to moderate or revoke the third party's right, in which case a new relationship is created between the contracting parties and the third party (cf. Comments on Article II – 9:303 DCFR, 626).

Both the Principles of European Contract Law (PECL) and the abandoned CESL proposalcontain one Article on third party stipulation.[13] The Draft Common Frame of Reference, however, deals with third party stipulation in book II, chapter 9, section 3 in a much more extensive form. Article II – 9:301 DCFR contains more or less similar provisions as Articles 6:110 PECL and 78 CESL. Due to the fact that the authors of the DCFR provided an extensive explanation on the concept of third party stipulation one could consult the DCFR to grasp the meaning of the provisions of Article 78 CESL.

A third party is not considered to be one of the contracting parties but is merely entitled to rights under the contract of other contracting parties.[14] Should third party stipulation not be possible, an additional transaction between one of the contracting parties and the third party would be required to achieve the result that is achieved by conducting a third party stipulation.[15] The extent to which and the means with which a third party could enforce the right conferred upon him depends on the contract that contains the third party stipulation. In order to determine the solidity of the third party's right one has to interpret the contract, taking into account the fact that parties can decide themselves which rights to confer upon third parties (party autonomy), the nature and purpose of the contract, and the contractual background (information on the negotiation process, documented interactions between parties etc.).[16] Such an interpretation could very well differ whether a contract is presented to a Common Law court or a Civil Law court, the latter probably being more willing to interpret a contractual term beyond its linguistic meaning rather than its Common Law counterpart that intervenes whenever there is a blank spot not dealt with by the contract at all.[17]

The remedies that a third party is entitled to do not always have to be the same as the remedies that one of the contracting parties is entitled to. After all, third parties only have rights and no corresponding obligations. Remedies that can only effectively be applied when the right is paired with an obligation are therefore not available to third parties. Examples of such rights are refusal of the counter-performance and reduction of the price. A third party could however obtain a court order to force one of the contracting parties to perform.

A third party's legal position is thus derived from the contract in which rights are conferred upon him, while the legal position of the contracting parties is not solely constituted by contractual terms, but is dependent on general contract law as well.[18]

[13] Cf. Article 6:110 PECL.

[14] Cf. Whittaker, 'Identifying Legal Costs' (n 5) 26–27.

[15] Comments to Article II 9 – 301 DCFR, 616.

[16] AG Guest, 'Implied Terms', in HG Beale et al. (eds), *Chitty on Contracts* (Sweet & Maxwell, Vol I) 985; Comments on Article II – 9:301, 618.

[17] Guest, 'Implied Terms' (n 12) 986 ff.

[18] Comments on II – 9:302 DCFR, 622.

17.4 Third Party Stipulation in England and the Netherlands

17.4.1 England

Article 78 of the abandoned CESL proposal appears rather uncontroversial, but the concept of third party stipulation has lead to some debate in Member States over the years, especially in England.[19] Third party stipulation does occur more often than one would expect at first sight. It is an everyday-life issue and as such is common in, for example, insurance law where the benefitting party is often a third party.[20] There are currently two regimes in Member States that accept a third party stipulation. Either the third party is considered as a party to the contract, or the third party is not regarded as such but merely derives rights out of the contract between the two (other) contracting parties.

Third party stipulation was rather controversial in England for a long time due to the Common Law doctrine of privity of contract. Contracts are only enforceable between the parties to the contract.[21] In order to benefit a third party would have to execute a deed or make a declaration in trust in the favour of the third party.[22] As mentioned above, third party stipulation is inevitable in everyday life and statutory exceptions were already made for insurance purposes. Following the report of the Law Commission of Privity of Contracts, the Contracts Act 1999 introduced a general provision on third party stipulation.[23] Contracting parties can confer rights on the third party but cannot impose liabilities on the third party.[24] The third party does not become a party to the contract due to the stipulation but needs to be identifiable at the time the contract is concluded.[25] The third party cannot enforce its right unless the contract explicitly states that he may.[26]

A right for the third party to enforce the stipulation is accompanied by those remedies that would have been available to him if he were party to the contract even though the fact that it concerns a third party cannot be fully excluded. Every remedy therefore has to be regarded from the perspective of the third party: for example in a claim for damages, what could he have done to mitigate its damages?[27]

Contracts that do not fall within the scope of the Contracts Act 1999 are to be examined under the doctrine of privity of contract. In such cases the contracting parties need a collateral contract between either one of them and the third party,

[19] Whittaker (n 5) 13, footnote 41. DCFR Comments to Article II – 9:301, 615.

[20] DCFR Comments to Article II – 9:301, 616.

[21] *Beswick v Beswick* [1968] AC 58.

[22] Cf. GH Treitel, 'Third Parties', in HG Beale et al. (eds), *Chitty on Contracts* (Sweet & Maxwell, vol. I) 1431ff.

[23] Treitel, 'Third Parties' (n 18) 1371–1372.

[24] Treitel (n 18) 1373.

[25] Article 1, para 1 and 2 Contracts Act 1999.

[26] Article 1, para 1, sub b Contracts Act 1999.

[27] Treitel (n 18)1444.

which can only exist if there is consideration supporting the promise and contractual intention on the side of the promisor.[28]

17.4.2 Netherlands

The Dutch Civil Code contains provisions on third party stipulation as well. Articles 6:253–256 CC deal with the position of the third party. A right conferred on the third party can be enforced by this third party directly against one of the parties to the original agreement.[29] The third party becomes a party to the agreement by agreeing to the right conferred upon him. In Dutch civil law a third party stipulation accepted by the third party thus leads to a tripartite agreement.[30] Due to this regime a third party is, for example, able to undo the agreement[31] or could refer to the (potential) unfairness of a term in the contract between the other two original contracting parties.[32]

The third party does not yet have to be identifiable or in existence at the time of the conclusion of the contract. It is not until the actual enforcement of the stipulation that a third party needs to be identified.[33]

Until the third party has accepted the rights conferred upon him the parties to the contract can revoke the third party stipulation.[34] If this occurs the stipulation is deprived of its functionality against the third party, but the stipulator may still appoint another third party or himself who is entitled to the performance.[35] Even though none of the provisions on third party stipulation explicitly states so, I believe Article 6:253, para 2 CC should be read so that the parties can modify the third party stipulation as well, as long as the third party has not yet accepted the rights.

In order to determine whether parties intended to confer rights on a third party the agreement has to be interpreted not solely on the words of the agreement. Justified expectations of one of the parties could give rise to the conclusion that the agreement contains a third party stipulation.[36] If this interpretation act leads to the end result of the contract not containing a third party stipulation that does not mean the third party is deprived of all its rights. As the Supreme Court of the Netherlands

[28] Treitel (n 18) 1374 and 1377.

[29] Article 6:253, para 1 CC.

[30] Article 6:254, para 1 CC; GRB van Peursem, *Enige juridische aspecten van de overeenkomst met derdenbeding naar huidig en nieuw BW* (Gouda Quint, 1990) 44ff.

[31] Cf. Article 6:279 CC.

[32] Explanatory memorandum Civil Code 1990, 1574, 1651 and 1663.

[33] Asser/Hartkamp & Sieburgh 6-III2014/568.

[34] Article 6:253, para 2 CC.

[35] Article 6:255 CC.

[36] Supreme Court of the Netherlands, 19/04/13, (2013) *NJ* 2013/239; Supreme Court of the Netherlands 1/10/04, (2005) *NJ* 2005/499. Cf. as well: Asser/Hartkamp & Sieburgh 6-III2014/565.

ruled on 24 September 2004, a third party may start an action on negligence. Interests of third parties can after all not be neglected under all circumstances. If the interests of the third party are directly connected to the performance of the contract, a breach of contract by one of the parties could entitle the third party to damages.[37]

17.4.3 Conclusion

There is a dogmatic difference between the third party stipulation in the DCFR, PECL, CESL, and the English legal system on the one hand, and the third party stipulation in the Dutch civil code on the other hand. Where the third party is not considered as party to the contract in England – he merely derives rights from the contract and has limited possibilities to enforce the rights himself – a third party becomes a party to the contract in the Netherlands. This has consequences for the conditions and terms that can be applied vis-à-vis a third party consumer.

17.5 Applicability of Consumer-Protective Provisions

As mentioned the English system of third party stipulation is comparable to the system chosen in the DCFR, PECL, and CESL. The question as to whether consumer-protective provisions should be applicable when the third party is in fact a consumer has been raised in England. The third party is not regarded or treated as a party to the contract for the purpose of consumer-protective legislation. The contract is therefore to be regarded as a B2B contract rather than the third party consumer's involvement turning it into a B2C contract. This means that a term in the original B2B contract that is regarded as unfair in a B2C contract can be upheld if the none of the contracting parties is a consumer, but the third party is. There is only one exception: if the term in the B2B contract concerns an exemption clause by way of which one of the contracting parties has excluded or restricted liability for negligence and this leads to the death or personal injury of the third party the Unfair Contract Terms Act does prevail over the Contracts Act 1999.[38]

A system like the Dutch one would probably enable a consumer to raise a plea to consumer-protective provisions since he is a party to the agreement, even though the terms were originally adopted in a B2B agreement. The legislator seems to have explicitly chosen this result.[39] The rationale behind consumer protection is that a consumer enters into a contract without being able to negotiate a fair-balanced

[37] Supreme Court of the Netherlands, 24/09/04, (2008) *NJ* 2008/587.

[38] Treitel (n 18)1454–1455.

[39] Explanatory memorandum Civil Code 1990, 1574, 1651 and 1663.

agreement due to information and economic disparities. The consumer finds himself in a weaker position vis-à-vis the seller/professional party.[40] This rationale is indeed an argument pro consumer protection for the third party. An argument con would be that the third party is granted rights and thus there is limited reason to be protected.

The CESL system is comparable to the English system. The third party derives rights from the contract but is not considered as a party to the contract. The contract thus is and remains to be regarded as a B2B contract with some B2C elements, but the fact that the contract has consequences for a third party consumer is not enough to trigger the consumer-protective provisions. After all, the consumer has explicitly accepted the rights conferred upon him. This could of course not be a decisive argument because a consumer might not be fully aware of the implications of the rights he has accepted. A so-called middle ground between the English and the Dutch system could be found if one would accept that the stipulator has an information duty vis-à-vis the third party consumer. If this information duty is breached the stipulator would be liable for the damages of the consumer. This seems not yet the *communis opinio* as far as it concerns B2B contracts in which rights are conferred upon consumers.

A more realistic option is to impose a duty of care on the stipulator for the third party consumer. The fact that the consumer is deprived of the consumer protection which he would have been entitled to if he was actually party to the contract entails that the stipulator should take reasonable care of the interests of the consumer. Again I have to stipulate that *rights* are conferred upon the consumer, no *obligations.* The absence of far reaching consumer-protective mechanisms as can be found in the Consumer Rights Directive is therefore easier to accept.

17.6 Concluding Remarks

Third party stipulation is a method often used in (commercial) contracts, such as insurance contracts. Generally speaking there are two regimes of third party stipulation. In the first regime the third party is awarded rights under the contract but does not become a party to the contract, while in the second regime the third party becomes a party to the contract which then transforms into a tripartite contract. The abandoned CESL proposal opted for the first regime. This means that the contract is governed by all the rules that are applicable to these types of contracts between those types of contracting parties. If a third party consumer is awarded rights under a B2B contract this means that he is deprived of its consumer protection which he would have been entitled to had he become party to the contract. Even though the

[40] Cf. AGF Ancery and CMDS Pavillon, 'Processuele aspecten van reflexwerking van consumentenrecht' (2014) *WPNR* 7026, 647.

abandonment of the CESL proposal enables the European Commission to rethink this regime for third party stipulation, I would not be surprised if the provisions on third party stipulation of the new proposal would resemble Article 78 of the abandoned CESL proposal. Whether this would actually influences the consumer's position in a negative manner remains to be seen. After all the contracting parties conferred rights upon the consumer, not obligations.