The Impact of Europeanization of Contract Law on English Contract Law

Omar Abdelaziz

Abstract

The ongoing process of Europeanization for promoting cross-border transactions and conferring better protection for consumers and small businesses has had its impact all over Europe. It represents a new step towards a harmonized set of legal rules to govern cross-border transactions in the field of contract law. So what is its exact scope? Who will benefit from it? What are its risks? What is its methodology? Does it represent a codification of common law rules? What will be its impact especially on common law countries such as the United Kingdom? The effectiveness of Europeanization depends almost entirely on the correct implementation into national law of the various directives; every member state is obliged to fully implement a harmonized measure into its domestic laws. This is accomplished by ensuring that (1) the relevant legal framework meets the requirements of the harmonized measure and (2) the application of the domestic rules giving effect to a harmonizing measure does not undermine the effectiveness of the European measure. English contract law is largely an uncodified law. Accordingly, the approach taken and the methods used by this jurisdiction to implement European directives into its national laws with the aim of harmonization are different. How did the English courts interpret legislations that implement EU legislations? Will Europeanization affect the deep-rooted principles and doctrines of English contract law (issues of commercial agency), good faith in pre-contractual obligations, unfair contract terms and specific performance? Finally, what could be the clash between European contract law, Rome I Regulations and the United Nations Convention on Contracts for the International Sale of Goods? Could this optional instrument be an exclusive law to either national or international mandatory rules for consumers in member states? What will be the qualification for a genuine consent of consumers in cross-border contracts? Will it lead to the development of the internal market as envisaged by the Commission?

Keywords: Rome I and II Regulations, Europeanization, contract law, Common European Sales Law, faulty goods.

A. Introduction

I will focus my study on the most recent piece of legislation on the Europeanization track for a substantive contract law issued on 11 October 2011 by the European Commission, namely, the proposal for a regulation on Common European

Sales Law (CESL), COM (2011) 635 final. This project (CESL) is distinguished from all previous attempts on the path of unification of contract law across Europe by embarking directly on private law in its essence as a substantive law (common sales law). It is intended to co-exist in parallel with national legislations of contract and consumer laws with an unidentified relationship. The EU legislator aims to integrate certain business contracts in this regulation to lessen the tension between the different regimes of regulation.

However, this is unlikely to happen for many reasons:[1] first, the continuing divergence and clash between definition and concepts of old national contract laws and European concepts within member states' laws; second, the proposed regulation ignores any reference to transnational instruments governing international commercial contracts and finally, the lack of a true need for a separate regime in the first place governing cross-border commercial contracts. Taking into consideration the specific characteristics of both commercial contracts and consumer contracts that call for a crucial legislative intervention from EU legislators while conforming between them, especially within the absence of a fully developed legal doctrine on the requirement of maximum harmonization approach, one might ask: What can traders and consumers expect from this piece of legislation? Can it achieve what it is addressed to do? Does it consider the existing legal framework sufficient to succeed? Does it satisfy the requirement of the subsidiarity principle? Do we need to tailor a separate coherent and consolidated package of specific mandatory rules for consumers and traders in the common market?

B. Application of CESL in the English Legal System (Procedural Implications)

I. Common European Sales Law and Rome I Regulation

It seems important to address the impact of the Rome I Regulation[2] on consumer protection in the United Kingdom and how the CESL can affect such protection and interact with this previous instrument that harmonizes the rules of conflict of laws within the context of mandatory rules. Unlike the Rome Convention, the United Kingdom has chosen to opt in Rome I Regulation. This is due to the shift in the drafting technique by which this regulation addresses the applicability of mandatory rules. The European Commission proposes the inclusion of an Article in Rome I analogous to Article 7(1) of the Rome Convention,[3] which allows for the discretionary application of the overriding mandatory rules of state that is neither the forum nor that of the governing law, but which has some of sort of connection with the matter. Because of this uncertainty that significantly out-

1 M. Heidemann, IALS Lecture on European Private Law at Cross Road: Some Thoughts on European Sales Law, IALS: 29 March 2012.

2 Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (the 'Rome I' Regulation), OJ 2008 L 177/6.

3 *See* Art. 8 (3) of the Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations of 15 December 2005, COM (2005) 650 final.

weighs any foreseeable or perceived benefit, either practical or doctrinal, which might ensue from the applicability of a third country's mandatory rules, the United Kingdom has opted out of the ambit of this provision.

After a significant revision of this provision, the Commission proposed Rome I Regulation with a new provision 9(3) by which the ambit of applicability of mandatory rules has been substantially limited and clearly determined to a significant extent. Such an approach motivated the UK ministry of justice to issue a consultation paper in which it expresses its willingness to join the Regulation.[4] Then, the UK government declared its final intention to join the Regulation and notified both the European Council and the Commission.[5] In its turn, the Commission accepted the request from the UK government[6] and formally allowed the United Kingdom to opt in the Regulation.[7]

Accordingly, the mandatory rules and public policy provisions in this regulation will find its way of application to the United Kingdom. Thus, either traders or consumers may face a sort of guarantee or protection, respectively, afforded by either a state law, non-state law or even the law that is most closely connected with the matter in question, which is likely to be not the *lex-fori*, *lex-causae* or *lex-loci solutionis*. Accordingly, a line of demarcation should be drawn to differentiate between forum's mandatory rules/public policy and foreign mandatory rules/public policy, as this will have its reflection on European instruments that intend to act as a non-state or supra-national law that may take precedence over private international law (PIL) rules.

In October 2011, the European Commission took the first step towards unification of substantive private law by publishing its proposal for a regulation on CESL.[8] It is supposed to be an optional instrument like the European contract law and its CFR, but unlike them, it will coexist as a part of substantive law of each

4 Ministry of Justice, Rome I – Should the UK Opt in? Consultation paper CP 05/08, 2 April 2008, especially paras. 79-81, the Ministry published the results of the consultation after a final decision was made to opt in the Regulation in January 2009; see Ministry of Justice, Rome I – Should the UK Opt in? Response to Consultation CP 05/08CP(R), January 2009. According to the Report 95% were advocating opting in to the Regulation, 3% were against and the remainder undecided. "78% … of the respondent were felt that the Regulation was now … as good as or better than the Rome Convention. As the United Kingdom currently applies the convention there would be a continuing advantage to British Business in applying uniform choice of law rules, ensuring a consistent approach across as wide an area of Europe as possible. Aligning the UK law to that in the rest of the European Union would achieve this and in turn should lead to a reduction in both legal and transaction costs" (para. 21). The Ministry remarked that "As a result of the negotiations, the Regulation does not include the provision in the European Commission's proposal that were of greatest concern to UK stakeholders" (para. 4); cited in J. Harris, 'Mandatory Rules and Public Policy Under Rome I Regulation', *in* F. Ferrari & S. Leible (Eds.), *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*, Sellier European Law Publisher, Munich, 2009, p. 270, n. 6.

5 2007/0282 (COD), 24 July 2008.

6 Commission Opinion on Request from UK to accept Rome I Regulation COM (2008) 730 final dated 7 November 2008.

7 Commission Decision of 22 December 2008 (2009/26/EC), OJ 2009 L 10/22.

8 Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM (2011) 635 final.

member state. Thus it will not be classified as a 28th regime in Europe and the only way of getting them into force is by applying either Article 3 or 4 of Rome I Regulation.

That said, that CESL – within the context of conflict of law rules – cannot be selected separately as a non-state law; instead, a choice of state law is a prerequisite for its enforceability. This draws attention to the assumption of having – under Rome I Regulation provisions – a third state law as the applicable law to the contract; how can the CESL find its way of application?

1. The Issue in B2B Contracts

Owing to the non-autonomous nature stressed by the CESL, parties have to provide explicitly for application of a member state law; yet this is not always the case, as it is – practically speaking – possible, within the context of European conflict of laws, to have the governing law of the contract as the seller's national law (Rome I Regulation Art. 4, Hague Convention[9] Art. 4). Therefore, the parties should theoretically agree on choosing a member state law as the governing law to their contract.

Unfortunately and from a professional perspective, this is not the case, as it seems illogical for many small or medium business people who are among the addressee of the CESL to force them to still choose a national law (member state law) when they could merely agree to opt for a European one (CESL) directly. Otherwise, we would face a legally complex situation where a contract governed by a third country law provides for the application of a European law.

To add more sophistication to this legal paradox, let us imagine a situation where the parties fail – either intentionally or not – to specify the applicable law and limit their choice to CESL, as one of them has its habitual residence in the European Union while the seller is from a third state country. In such a case, the contract will be governed by a third country law. However, would you consider that their mere agreement on subjecting their contract to CESL would amount to an implicit choice of a member state law?[10] And if the answer were affirmative, which member state would the choice fall upon? Unfortunately, the Regulation did not contemplate such a situation and left the parties with no answer, or at least open the door for the choice of law rules to find a way to restrict the parties' will and thwarting the harmonious objective of the proposal.

As some scholars have suggested, an exit from this situation could be by an explicit stipulation from EU legislators that ECSL could be applied *autonomously*, or to provide on either "objective subsidiary choice of law rule, or as a presump-

9 Hague Convention of 15 June 1955 on the Law Applicable to the Sale of Goods, available from <www.hcch.net/upload/conventions/txt03en.pdf> (Accessed 27 March 2012).

10 This could be envisaged from Recital 25 of the proposal of CESL where the parties' choice of applying CESL includes an 'opt-out' from CISG, so the same approach could be applied regarding the issue of third state law.

tion of the will of the parties".[11] According to the latter solution, and in the above-mentioned scenario, the parties would have presumably chosen the law of the habitual residence of the buyer to be the governing law to their contract.

That said that Article 11, as truly suggested by Cuniberti, should incorporate a paragraph – to the extent where B2B contracts are concerned – to read as follows:[12]

(a) Where the parties have validly agreed to use the Common European Sales Law for a contract, but have not chosen the applicable law, they are presumed to have chosen the law of a Member state.
(b) This law shall be the law designated by Article 4 of the Rome I Regulation or any other applicable choice of law rule.
(c) If the law referred to in (b) is not the law of a Member state, this law shall be the law of the habitual residence of the buyer.

Still, the problem of identifying which state law to apply is a mysterious one, as the connecting factor to merely a European Union would not be sufficient to settle this issue. Moreover, and as Article 29 necessitates, the interpretation of this CESL by the courts should be "autonomously in accordance with the well-established principles of interpretation of Union legislation [...] without recourse to any other law". This could be the only way to clearly identify its scope and shed light on its implications. Yet, it is a timely matter whose legal costs remain unknown.

2. The Issue in B2C Contracts

According to the proposal of CESL, choice of law rules in Rome I Regulation shall not be affected. That said, within the context of B2C contracts, the applicable law for such contracts will be determined by virtue of Article (6) for those types of contracts falling within its scope or otherwise by Articles (3) and (4).

This time, the problem has two faces stemming from the broad drafting of Recital 14 of the preamble of the proposal,[13] which, from one face extends the scope of CESL not only to cross-border contracts between member states but also to consumers from third countries. In the latter case, the consumers shall not be denied the enforceability of the conflict of law rules applicable to their situation by Rome I Regulation, because in such a case, CESL represents for them a foreign law. One might think that the EU law maker was targeting the interest of foreign

11 G. Cuniberti, 'Common European Sales Law and Third State Sellers', *Conflict of Laws .Net: News and Views in Private International Law*, 14 February 2012, available from <http://by155w.bay155.mail.live.com/default.aspx#!/mail/InboxLight.aspx?n=386205945!n=866364390&fid=1&fav=1> (Accessed 27 March 2012).

12 *Ibid.*

13 The exact wording of the Recital is "The use of the Common European Sales Law should not be limited to cross-border situations involving only Member States, but should also be available to facilitate trade between Member States and third countries. Where consumers from third countries are involved, the agreement to use the Common European Sales Law, which would imply the choice of a foreign law for them, should be subject to the applicable conflict-of-law rules".

consumers before his eyes while attempting to articulate this recital. But his ambitions were not perfectly realized.

From the second face, the consumer then de-effectuated the enforceability of Article 6(2) of Rome I Regulation by claiming that the protection afforded to this foreign consumer by CESL is incomparable to any law to be designated by the aforementioned Article. It is true that in some instances we may not resort to this Article in B2C contracts where the consumer is an active one. In such a case, Article 4 is recalled to settle the situation, which resembles the one in B2B contracts. On the other hand, where Article 6 governs the B2C contract, the risk of having the law of a third state where the consumer has his or her habitual residence is likely to govern the contract despite the fact that the parties have mutually agreed on CESL to govern their transaction as long as they fail to designate or extend their mutual agreement to a law of a member state (or at least law of habitual residence of the seller or business) to govern the contract.

As a solution to this dilemma, the same presumption could be postulated here: as long as the parties have mutually agreed on CESL, this should *undoubtedly* mean that this law *per se* is the *only* governing instrument to the parties' contract regardless of the habitual residence of either party. Of course, this presumption entails that the applicability of CESL will be a part of the applicability of a member state law – yet which law? Could it be the law of the member state closely connected to the subject matter of the contract?

3. Solutions

Some presumptions were introduced by Cuniberti to redraft Article 11 of the draft Regulation:[14]

> *Single presumption.*
>
> Article 11
>
> Consequences of the use of the Common European Sales Law
>
> (1) Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules. Provided that the contract was actually concluded, the Common European Sales Law shall also govern the compliance with and remedies for failure to comply with the pre-contractual information duties.
>
> (2) Where the parties have validly agreed to use the Common European Sales Law for a contract, but have not chosen the applicable law, they are presumed to have chosen the law of a Member state.
>
> (a) This law shall be the law designated by Article 4 or Article 6 of the Rome I Regulation, or any other applicable choice of law rule.

14 G. Cuniberti, 'Common European Sales Law, Third States and Consumers', *Conflict of Laws .Net: News and Views in Private International Law*, 23 February 2012, available from <http://conflictoflaws.net/2012/common-european-sales-law-third-states-and-consumers/> (Accessed 27 March 2012).

(b) If the law referred to in (a) is not the law of a Member state, this law shall be the law of the Member state which is the most closely connected with the contract.

Several presumptions.

Article 11

Consequences of the use of the Common European Sales Law

(1) Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules. Provided that the contract was actually concluded, the Common European Sales Law shall also govern the compliance with and remedies for failure to comply with the pre-contractual information duties.

(2) Where the parties have validly agreed to use the Common European Sales Law for a contract, but have not chosen the applicable law, they are presumed to have chosen the law of a Member state.

(a) This law shall be the law designated by Article 4 or Article 6 of the Rome I Regulation, or any other applicable choice of law rule.

(b) If the law referred to in (a) is not the law of a Member state, this law shall be the law of the habitual residence of the buyer, or the law of the habitual residence of the seller for contracts falling within the scope of Article 6 of the Rome I Regulation.

This problem has led other scholars[15] to differentiate between three scenarios where the CESL can interact with PIL. The first scenario provides for the integration of CESL with rules of PIL as a '28th regime';[16,17] the second one, which is currently favoured by the Commission, provides that CESL is a '2nd regime module', which exists side by side with national contract law.[18] She argued that both modules will not achieve the overall objective of CESL as Article (6) of Rome I Regulation will still apply. Thus, she postulated another module '1st regime module'[19] in which CESL operates as a uniform law, enjoying autonomous enforceability above rules of PIL where there is no longer a need to consult it for the sake of determining CESL scope of application.

Further achievement for the latter module is that it will foster the true uniform application of CESL to all contracts of the parties submitted to it to the exclusion of the purely domestic contracts where Article 4(1) of the proposal

15 G. Ruhl, 'The Common European Sales Law: 28th Regime, 2nd Regime or 1st Regime?' electronic copy dated 19 March 2012, available from <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2025879> (Accessed 28 March 2012).

16 G. Dannemann, 'Draft for a First Chapter (Subject Matter, Application and Scope) of an Optional European Contract Law', *Oxford University Comparative Law Forum*, 2011, p. 2, available from <http://ouclf.iuscomp.org/>, text under section B (Accessed 26 February 2012); H. Heiss, 'Party Autonomy', *in* F. Ferrari & S. Leible (Eds.), *Rome I Regulation*, 2009, pp. 1, 13-16; H. Heiss & N. Downes, 'Non-Optional Elements in an Optional European Contract Law. Reflections from a Private International Law Perspective', 13 *ERPL*, p. 693; M. Jagielska, 'Issues of Private International Law Linked with the Adoption of an Optional EU Contract Law', 2010, available from <www.europarl.europa.eu/webnp/webdav/site/myjahiasite/users/emartinezdealosmoner/public/ jagielska%20EN.pdf> (Accessed 26 February 2012); E. Lein, 'Issues of Private International Law, Jurisdiction and Enforcement of Judgment Linked with the Adoption of an Option EU Contract Law', 2010, available from <www.europarl.europa.eu/webnp/webdav/site/myjahia site/users/emartinezdealosmoner/public/Lein%20EN.pdf> (Accessed 26 February 2012); Max Planck Institute for Comparative and Private International Law, 'Policy Options for Progress Towards a European Contract Law, Comments on the Issues Raised in the Green Paper from the Commission of 1 July 2010', COM (2010) 348 final, 75 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (R*abels*Z), 2011, pp. 371, 400-412; M. Hesselink, 'How to Opt into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation', *Amsterdam Law School Studies Research Paper* No. 2011-43 (*Centre for the Study of European Contract Law Working Paper* No. 2011-15), available from <http://ssrn.com/abstract=1950107> (Accessed 4 March 2012). It is worth noting that the notion of '28th Regime' looks misleading as it gives an impression that parties are bound to choose between the 27 contract laws of member states or the CESL; nevertheless and according to Art. 3 of Rome I-Regulation, parties can choose any law of any state outside EU. Moreover, in some EU member states such as England and Spain, legal systems comprise more than one contract law.

17 The European Commission has decided not to follow this regime, as per Art. 8 of the proposal the existence and validity of the CESL shall be determined by its provisions itself and not in accordance with the rules of Private International Law.

18 The Explanatory Memorandum states "The Rome l Regulation and Rome II Regulations will continue to apply and will be unaffected by the proposal. It will still be necessary to determine the applicable law for cross-border contracts ... The Common European Sales Law will be a second contract law regime within the national law of each member states" (p. 6).

19 As it takes precedence not only over private international law but also over national contract rules as well, having the parties validly agreed on its application pursuant to its rules. This indicates a clear intention from the Commission not to integrate CESL with the rules of Private International Law.

applies, unless member states agree on extending its ambit to those contracts as well under Article 13 of the proposal.

On a different note, to what extent does the choice of CESL qualify as a proper choice of law in PIL realm? Some authors[20] argued that a mere choice of a set of rules (or any optional instrument such as European contract law) is not an actual choice of law within the context of Article 3[21] of Rome I, especially after the Commission's adoption of the second regime module.[22] On the other side, others[23] resort to Article 11 of the proposal to confirm that a valid choice of CESL according to Article 3 of the proposal will lead to the effect that only rules of CESL will govern the contract to the exclusion of any other default or mandatory provisions of the applicable law that would have otherwise governed the contract, had Rome I applied. In addition, an opinion goes further to claim that adopting the CESL in the form of a regulation turns it into a substantive state law, and thus there is no need for this hassle.[24]

A hassle that was lessened because of Recital 14 of Rome I Regulation entitled the parties to *incorporate by reference* into their contracts a non-state body of law to indicate that what was intended – by tracking the legislative history of Article 3 of Rome I – is to preclude the choice to only state law.[25]

Grasping more into Rome I Regulation, Article 25 does not prejudice the parties' right to claim the application of one or more international convention that member states are party to, as far as such conventions are setting out conflict of

20 Heiss & Downes, pp. 693, 708.

21 The majority of jurisprudence is of the opinion that such article allows for the choice of only state law; A. Bonomi, 'The Rome I Regulation on the Law Applicable to Contractual Obligations – some General Remarks', *in* P. Sarcevic, A. Bonomi & P. Volken (Eds.), *Year Book of Private International Law*, Vol. X, Sellier European Law Publisher, Munich, 2008, pp. 165, 170; G.-P. Calliess, 'Article 3 Rome I', *in* G.-P. Calliess (Ed.), *Rome Regulations: Commentary on the European Rules of the Conflict of Laws*, 2011, pp. 73-74 [33]. P. Lagarde & A. Tenenbaum, 'De la Convention de Rome au reglement Rome I', 98 *Revue critique de Droit International Prive* (*Rev. Crit. DIP*), 2009, pp. 727, 736; R. Plender & M. Wilderspin, *The European Private International Law of Obligations* (3rd edn), Sweet & Maxwell 2009, para. 6-012; P. Stone, *EU Private International Law* (2nd edn), Edward Elgar Publishing Ltd, Cheltenham, 2010, pp. 301-302.

22 Unfortunately the draft of Art. 3(2) of Rome I confers on the parties the option to choose substantive contract law of any state (non-state law) as long as it is universally agreed upon or at least accepted within European law; however, it was omitted from the final draft as member states did not agree on its precise scope; *see* C. Kessedjian, 'Party Autonomy and Characteristic Performance in the Rome Convention and Rome I Proposal', *in* J. Basedow, H. Baum & Y. Nishitani (Eds.), *Japanese and European Private International Law in Comparative Perspective*, Mohr Siebeck Gmbh & Co. K, Germany, 2008, pp. 105, 116-117.

23 M. Gebauer, 'Europäisches Vertragsrecht als O'tion – der Anwendungsbereich, die Wahl und die Lücken des Optionalen Instrumentes', *Zeitschrift für Gemeinschaftsprivatrecht (GPR)* 2011, p. 227; M. Stürner, 'Kollisionsrecht und Optionales Instrument: Aspekte einer noch ungeklärten Beziehung', *Zeitschrift für Gemeinschaftsprivatrecht (GPR)* 2011, p. 236.

24 Dannemann 2011, text under section B.1.

25 P. Lagarde, 'Cadre Commun de Reference et Droit international prive', *in* R. Schulze (Ed.), *Common Frame of Reference and Existing EC Contract Law*, Sellier European Law Publisher, Munich, 2008, pp. 263, 270-272.

law rules relating to contractual obligations. This means that the overall objective of application and interpretation of CESL by member states will lack uniformity.[26]

Furthermore, the application of CESL under the '28th regime' would not deprive the consumers of the protection of the mandatory rules of their habitual residence under Article 6(2) if the professional shared his/her habitual residence or directed his/her activity to this country. Again, this leads to a law mix between CESL and mandatory rules of the consumer's habitual residence, so the problem is not solved.[27] The same holds true for both Articles 3(3) and 4, which provide for the application of mandatory rules of either domestic law or EU law, respectively. That is why the Commission favoured the 2nd regime module. It explicitly states:

> The Rome I Regulation and Rome II Regulation will continue to apply and will be unaffected by the proposal. It will still be necessary to determine the applicable law for cross-border contracts … The Common European Sales Law will be a second contract law regime within the national law of each Member State.[28]

Nevertheless, such an approach is not free from problems. First, the parties have to consult the rules of PIL before they resort to CESL. This, in turn, does not raise any issue for B2B or C2C where the seller is resident in the European Union (Article 4(1) lit. a), or even in B2C or C2B contracts so far as the requirements of the targeted activity criterion of Article 6(1) of Rome I are not met.

But the problem appears in B2B and C2C contracts where the seller is not habitually resident in the European Union. In that case, Article 4 refers to the law of a third state and the only exit for this situation is by the incorporation of two choice of law clauses into their contract: one for a choice of a member state law and the other for a choice of CESL to the exclusion of the national contract law of that state unless, we consider that the choice of a CESL is an implicit choice for a member state law. Yet, the determination of the validity of such clauses will still be subjected to the rules of PIL or the rules of the Hague Convention of the Law Applicable to Sales Contracts where applicable.

On the other hand, in B2C or C2B contracts, we have to differentiate between two situations where the consumers are habitually resident in the European Union; here Article 6 calls for the application of an EU member state law. That

26 Finland, Denmark, France, Italy and Sweden choose not to apply Rome I and prefer to apply Hague when it comes to sales contracts.

27 A part of jurisprudence advocated the idea that CESL should be restricted in such a way as to avoid what they call 'social dumping'; *see* H. Muir Watt & R. Sefton-Green, 'Fitting the Frame: An Optional Instrument, Party Choice and Mandatory/Default Rules', *in* H.-W. Micklitz & F. Cafaggi (Eds.), *European Private Law After the Common Frame of Reference*, Edward Elgar, Cheltenham, 2010, pp. 201, 210; B. Lurger, 'The Common Frame of Reference/Optional Code and the Various Understanding of Social Justice in Europe', *in* T. Wilhelmsson, P. Elina & A. Pohjolainen (Eds.), *Private Law and the Many Cultures of Europe*, Kluwer Law International, The Hague, 2007, pp. 177, 181-184; J.W. Rutgers, 'An Optional Instrument and Social Dumping Revisted', 7 *ERCL* 2011, pp. 350-359.

28 Explanatory Memorandum, p. 6.

said, a choice of CESL could amount to a choice of law on the level of PIL as it replaces both the default and the mandatory rules of the otherwise applicable law, and will be enforced if the standard of consumer protection it offered goes beyond those stipulated in the law of the habitual residence of the consumer. Otherwise, we would be faced with a special law mix of both CESL and mandatory rules of the national law. This entails that the parties' choice of CESL will be hindered by restrictions of Article 6(2) of Rome I Regulation.

The Commission decides to deviate from this general rule of Article (1 & 2) Rome I Regulation by providing that in case the parties agree on the application of another member state's law other than the consumer's habitual residence law to their contract *and* explicitly choose the CESL as the applicable law within that national law. The Commission claims that the level of consumer protection would still be the same under that law and that there is no compelling need to apply the mandatory rules of consumer protection under the Consumer's habitual residence law had Article 6(2) been applied. The CESL's Explanatory Memorandum of the proposal reads:

> ... [T]he reason is that the provisions of the [CESL] of the country's law chosen are identical with the provisions of the [CESL] of the Consumer's country. Therefore, the level of the mandatory consumer protection laws of the consumer's country is not higher and the consumer is not deprived of the protection of the law of his habitual residence.[29]

Although the wording of the Commission is clear in its intention to make the application of CESL across the European Union uniform in case both the consumer and business are habitually resident in European Union. Theoretically, this drafting does not achieve this aim as Article 6(2) in its true interpretation does not deprive the consumer of the protection of the rules that cannot be derogated from by agreement of the law that would have been otherwise applicable in case of the absence of choice pursuant to Article 6(1) Rome I Regulation. That law is the national contract law of the consumer's country, not its CESL. A practical change might not be sensed in this argument as the CESL provides more protection, but this is not in every single case.[30] This foreseeable possibility could be tackled by inserting an explicit provision in Rome I Regulation or CESL itself excluding the full application of Article 6 of Rome I Regulation if the parties have validly agreed to apply CESL according to its provision.[31]

The worst case scenario is where the consumer is resident outside the European Union. Article 6 will lead to both the application of a non-member state's law with its mandatory rules of its consumer protection. Therefore, a choice of CESL would be effective only if it exceeds the protection standard offered in the consumer's country. Again the parties' choice of CESL as a supra-national law like CISG is frustrated when Article 6 comes into action according to the so-called

29 *Ibid.*
30 Ruhl, 2012, p. 10.
31 *Ibid.*, p. 11.

'preferential law approach' regardless of the overall uniformity object of CESL or the satisfaction of the consumers or business expectation of their choice. Especially in the course of occasional or multi-transactions between parties who desire to submit all their contracts to the same legal rules (CESL), they would face the interference of Article 6 of Rome I Regulation in some situations to produce this 'law mix' to ensure consumers protection. Accordingly, legal certainty and transparency are not guaranteed under this module as well. Thus, the '1st regime module' suits better the objective of the Commission from this proposal.

4. Legal Basis of CESL

The Commission invokes Article 114 (Approximation of Laws) of TFEU[32] to justify the issuance of this proposal. This calls into question the appropriateness of this Article. Measures that could not effectively keep intact the national laws of member states could not be claimed to have an 'approximation effect'.[33] In this case, the CESL does not actually intend to keep intact the national contract laws of member states – which we do criticize – but to coexist with them under the second regime module.[34]

Till the CESL becomes popular over a wide scale to the extent that it provides an incentive to national legislators to adapt their national laws to its provision, the process of regulatory completion might act as a practical base for spreading the harmonization effect and bestowing legitimacy back to Article 114.[35] However, businesses within a commercial context – and unlike consumers – might prefer to use standardized contracts stemming from the highly valued freedom of contract and not to circumvent fragmented well-known *Acquis* to them rather than to opt into a newly optional soft law instrument (CESL). Alternatively, the costs of 'unfamiliarity, high learning costs, routines, substantive concerns can cause businesses to stick with tried and tested national contract laws'. Consequently, the converging effect of CESL on national legislations could not be materialized without a brave choice from small and medium enterprises (SME) and consumers of opting into CESL.[36]

5. Subsidiarity Concerns

It is worth noting that the CESL lacks subsidiarity as well because during the consultation period upon this proposal, comments were sought from the people blindly where the proposal had not yet been published. The expert group working

32 Consolidated version of the Treaty on the European Union and the Treaty on the Functioning of the European Union, OJ 2010 C 83/1, 94.

33 C-436/03 *Parliament v. Council (European Cooperative Society)*, [2006] ECR I-3733 and C-217/04 *United Kingdom v. Parliament and Council (ENISA)*, [2006] ECR I-3771.

34 G. Low, 'A Number Game – The Legal Basis for an Optional Instrument in European Contract Law', *Maastricht European Private Law Institute Working Paper No. 2012/2*, Faculty of Law – Maastricht University, 2012, available from <http://ssrn.com/abstract=1991070>.

35 G.W.L. Low, *European Contract Law Between the Single Market and the Law Market. A Behavioural Perspective*, Wolf Publisher, Nijmegen, 2011.

36 For these reasons, the Governments of the United Kingdom, Austria, Belgium and Germany refused this proposal.

on it considered it confidential, but it was published later, in October 2011. It is a very broad, comprehensive instrument, and it ought to be more precise. The interpretation of its rules is governed solely by Article 29 of the CESL (Mandatory Autonomous Interpretation), by the various principles and freedoms set out in the Treaty of the European Union, and the European Case Law. It is not a national contract law. It is a transnational European, not an international, law instrument, as is the case in the UNIDROIT, CISG and Vienna Convention on the International Sale of Goods, which is not drafted primarily for consumers.

Subsidiarity in its strictly legal terms does not monitor the existence of competence of the European Union to regulate for member states, but rather its exercise. It cannot act as a basis for the development of CESL or CFR to a European Civil Code as "the substantive content would extend far beyond those areas necessary for functioning of the internal market".[37]

Accordingly, Article 352 TFEU can be regarded as the rescuer for the Commission's regulation which "operates under the principle of unanimity and provide a residual power to act where there is no other legal basis in the Treaty".[38]

6. CESL, UNIDROIT and CISG Compared

The introduction of the CESL as a cross-border sales instrument beside the CISG raises concerns about its necessity.[39] Thus, we should now embark on the short-

37 L. Miller, *The Emergence of EU Contract Law: Exploring Europeanization*, OUP, Oxford, 2011, p. 147.

38 *Ibid.*, p. 148, n. 214.

39 Orgalime comments on the Commission Green paper on policy options for progressing towards a European Contract Law – Comm (2010) 348 final, Brussels, 31 January 2011, available from http://ec.europa.eu/justice/news/consulting_public/0052/contributions/270_en.pdf (Accessed 10 March 2012) '[d]ifferences between national systems of Contract law generally do not cause problems for cross border trade in the B-2-B area …'; American Chamber of Commerce to the European Union, AmCham EU's position on the Green Paper on policy options for progress towards a European contract law for consumers and businesses, 28 February 2011, available from <http://ec.europa.eu/justice/news/consulting_public/0052/contributions/8_en.pdf> (Accessed 10 March 2012); Eurobarometer survey on European contract law in business-to-business transactions, Flash EB#320, 2011. According to some factors such as (i) difficulty in agreeing on the applicable foreign contract law, (ii) difficulty in finding out about the provisions of a foreign contract law, (iii) problems in resolving cross-border conflicts, including costs of litigation abroad, and (iv) obtaining legal advice on foreign contract law. Approximately 3% of businesses claimed they were completely deterred from cross-border trade by these obstacles, 12% indicated they were often deterred, 49% occasionally discouraged and 33% reported they were never deterred; report of SME Panel Survey on the Impact of European Contract Law, available from <http://ec.europa.eu/justice/contract/files/report_sme_panel_survey_en.pdf> (Accessed 10 March 2012) it claimed that divergent contract laws were not the true barrier to trade; instead culture differences, administrative and tax regulations and language differences are the true obstacles in pursuing cross-border trade.

coming of CISG[40] that calls for the Commission to extend the scope of the European contract law harmonization from consumer to commercial sales contracts. The problem may be the possibility of having too many choices rather than having no alternatives, especially within the scale of commercial contracts where the problem of fragmented *Acquis* and divergent mandatory rules is not paramount.[41] What is the added value of the CESL?

The source of conflict between the CESL and CISG is Recital 25 of the proposed regulation by which the parties' agreement to subject their contract to CESL constitutes an implied agreement to exclude the application of CISG where that convention is applicable.[42] In addition, Article 6 of CISG allows the parties to contract out of the convention. An explicit derogation from CISG is needed where the choice of law of a member state (to apply CESL in second regime module) should be explicit, especially if that state is a contracting state to CISG as well. It might even get more complex when parties decide to have their contract subjected partially to CESL and leave the other part subjected to the default national law rules including CISG (Decepage).[43]

Many factors trigger this decision of opting into CESL or opting out of CISG such as familiarity, bargaining power, substantive concerns,[44] absence of an international tribunal to reconcile the interpretation and enforceability of provisions of CISG and a 'behavioural barrier' where "CISG constitutes a default regime requires contracting parties to make an explicit choice to opt out. In contrast, the CESL requires contracting parties to make an explicit choice to opt in".[45] Accord-

40 The law governing international sales is uniform in 23 out of 27 Member States with notable exceptions of UK, Portugal, Ireland and Malta. For the current status of the CISG see <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html> (Accessed 10 March 2012); S. Moss, 'Why the United Kingdom Has Not Ratified the CISG', 25 *Journal of Law and Commerce* 2005-2006, pp. 483-485; N. Hoffman, 'Interpretation Rules and Good Faith as Obstacles to the UK's Ratification of the CISG and to the Harmonization of Contract Law in Europe', 22 *Pace International Law Review* 2010, pp. 145-181.

41 *See* the UK Law Commission, An Optional Common European Sales Law: Advantages and Problems. Advice to the UK Government, November 2011, available from <www.justice.gov.uk/lawcommission/docs/Common_European_Sales_Law_Advice.pdf> (Accessed on 10 March 2012) 6.19.

42 Nevertheless, the decision on the effectiveness of this implied exclusion agreement is to be governed by the rules of CISG itself, *see* M.W. Hesselink, 'How to Opt into the Common European Sales Law? Brief Comments on the Commission Proposal for a Regulation', *ERPL*, Vol. 19, No. 1, 2010, pp. 195-212, 201-202.

43 *Ibid*.

44 CISG does not address the validity of limitation or exclusion clauses, which are common in sales contracts. It is excluded as well in market commodities for concerns about good faith, strict test for termination in case of fundamental breach, seller's cure, price reduction and method of damage calculation. *See* L. Spagnolo, 'Green Eggs and Ham: The CISG, Path Dependence, and the Behavioural Economics of Lawyer's Choices of Law in International Sales Contract', *JPIL*, Vol. 6, No. 2, 2010, pp. 417, 429.

45 N. Kornet, 'The Common European Sales Law and the CISG: Complicating or Simplifying the Legal Environment', *Maastricht European Private Law Institute Working Paper No. 2012/4*, 2012, p. 9, available from <http://ssrn.com/abstract=2012310>.

ingly, there is no sufficient empirical evidence that there would be a shift in the trend of businesses to vastly apply another optional soft law of uniform rules.[46]

Furthermore, CISG suffers from significant shortcomings that paved the way for CESL to replace it gradually. First, as highlighted by the commission, not all the EU member states are contracting states to the CISG. This could be criticized as marginalizing the global acceptance of 77 contracting states to CISG comparable to 23 EU member states. In addition, and from a logical perspective, it might be wiser to call the rest of the member states to join CISG rather than issuing a new regional instrument to reinforce the position of businesses in the global trade.[47] Secondly, the incompleteness of CISG by excluding the validity of the contract or any of its provisions or any usage, and the effect of the contract on the property of sold goods. It ignores issues like defects in consent, information duties and the fairness and validity of standard terms. This can be complemented by the UNIDROIT Principles of International Commercial Contracts, which covers the life cycle of the contract and is closely related to CISG.[48] Likely, the CESL ignores many aspects of the contract, and mainly any reference to property aspects of sold goods.[49] Thus, both encounter the same criticism.

Finally, the lack of legal uniformity, unlike the CISG,[50] the CESL as a European instrument will be subjected to the CJEU, which will reconcile different final judgments submitted to it from national courts of member states applying CESL to create a data base for ensuring uniformity and certainty in application.[51] This overburdens the task of this court and adds more delay to judicial activism.[52] Yet this entails an interaction from scholars in each member state to keep a track of the developments of legal judgments regarding application and enforceability of

46 S. Vogenauer, 'Common Frame of Reference and Unidroit Principles of International Commercial Contracts: Coexistence, Competition, or Overkill of Soft Law?', *ERCL*, Vol. 6, No. 2, 2010, pp. 143-183.

47 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, 'Small Business, Big World – a new partnership to help SMEs seize global opportunities', Brussels, 9 November 2011, COM (2011) 702 final.

48 Businesses do not favour this combination of non-state law to be incorporated into their contracts. *See* S. Vogenauer, Civil Justice System in Europe: A Business Survey conducted by the Oxford Institute of European and Comparative Law and the Oxford Centre of Socio-Legal Studies, 2008, <http://pl11.deedi.net/upload/docs/application/pdf/2010-08/oxford_civil_justice_survey__summary_of_results_final.pdf> (Accessed 12 March 2012).

49 For a full list of unregulated areas *see* Recital 27 of the Explanatory Memorandum, p. 6. Also European Contract law totally leaves property law aside from its regulation, see J.H.M. van Erp, 'DCFR and Property Law: The Need for Consistency and Coherence', *in* R. Schulze (Ed.), *Common Frame of Reference and Existing EC Contract Law*, 2nd and revised edn, Sellier European Law Publisher, Munich, 2009, pp. 263-268.

50 Art. 7 of CISH requires from different courts and tribunals of contracting states to maintain a uniform interpretation of its provisions, taking into consideration its international character.

51 Art. 14 of proposed regulation.

52 Court of Justice Annual Report 2010, available from <http://curia.europa.eu/jcms/jcms/Jo2_7000/annual-reports> (Accessed 3 March 2012), it takes CJEU 16 months to settle a dispute and 23 months before General Court to render a judgment.

each provision of CESL to develop the legal doctrine. Business would undoubtedly prefer to keep with already tested law (CISG) rather than opting into a new one.

Eventually, CESL does add value to CISGL by regulating some areas of contract law not referred to in the latter. In addition, CESL with its deeply rooted consumer background, which represents the endeavour of European contract law, broadens its scope to encompass commercial settings as well.[53] Its primary concern is the protection of weaker parties, be they consumers or SME.[54] It might be argued that completion law fits more appropriately than contract law within this context. The widespread application of CESL will relate to its validity, interpretation and enforceability, which represent the primary concern for business. The fairness test provided by CESL extends beyond standardized contract terms to all not individually negotiated terms. The principle of *Contra Proferentem* in non-individually negotiated terms is a mandatory interpretation rule. Article 86 CESL states, "a term is unfair if it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealings".

C. Substantive Impact of CESL on English Contract Law

I. First Issue: The Scope of CESL Is an Arguable Issue[55]

Internet traders wish to apply it to all their contracts domestically and transnationally. Consumers, on the other hand, are worried about the level of protection in different member states had the law been applied only domestically. A distinction should be drawn between Articles 4 and 13 of CESL. While the former Article provides that CESL applies to cross-border contracts, the latter allows member states to apply it to domestic sales.[56] For instance, would you consider a trade between Edinburgh and London a cross-border transaction passing through border between Scotland and England or as a domestic one because both states lie within the same country of the United Kingdom?

This problem arises especially for the case of multi-national Internet traders. Where is its habitual residence? Is it the place where the goods are dispatched? Or the operation centre where the consumers' requests are received? If a retailer is allowed to use CESL abroad while his counterpart in the United Kingdom is not

53 G. Cordero Moss, 'Commercial Contracts and European Private Law', *in* C. Twigg-Flesner (Eds.), *Cambridge Companion to European Union Private Law*, CUP, Cambridge, 2009, pp. 147-159. Commission Staff Working Paper Impact Assessment Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, Brussels, 11 October 2011, SEC (2011) 1165 final.

54 Commissioner Viviane Reding's speech, The Next Step Towards a European Contract Law for Businesses and Consumers, Leuven, 3 June 2011, available from <http://europa.eu/rapid/press ReleasesAction.do?reference=SPEECH/11/411> (Accessed 4 March 2012).

55 Law Commission and Scottish Law Commission, 'An Optional Common European Sales Law: Advantages and Problems: Advice to the UK Government', November 2011, paras 3.19-3.47.

56 According to Art. 4 CESL cross-border sales are sales where the consumer provides an address in one country (billing address or delivery address) while the trader is habitually resident in another country. Still at least one of these countries should be an EU member state and not even an EU country.

enjoying the same privilege, this might inhibit foreign retailers from confining their Internet operations to the UK consumers or SME.

In case the proposal was accepted and formulated into a regulation, the UK government should consider its extension domestically. However, this entails its applicability to not only distance sales contracts but also to all consumer sales contracts as stipulated by Article 13 of the current proposal. This, in turn, subjects the United Kingdom to vexing issues arising from doorstep and off-premises selling.

II. Second Issue: Language[57]

The CESL, like the Consumer Rights Directive (CRD), leaves the issue of translating the language of the contract to the will of a member state. It may necessitate that a particular contract, or at least some considerable contractual information like the case in French law, is drafted in its language. So how far are traders who transact across the European Union obliged to translate their contracts into the language of each member state or perhaps non-EU member states?

Linguistic requirements are a practical barrier to small businesses, especially for Internet traders who must comply with such requirements within the 27 member states or at least not direct their activities to these countries in case they prefer non-compliance. The policy is to protect consumers by the smooth flow of correct information, but this does not take into consideration the costs for small businesses that would be required to translate their sites into 27 community languages.

III. Third Issue: The Right to Terminate for Faulty Goods[58]

1. UK Position

The protection afforded to the consumer by the EU consumer sales directive is of a fairly low level; consumers have to ask first for a repair or a replacement for faulty goods. If such repair or replacement cannot be provided without unreasonable delay or significant inconvenience, a consumer can ask for rescinding of the contract. In this case, traders may retain an allowance for use (proportional percentage from the price) in exchange for the use the consumer has had for the returned product.

Member states could also add to these privileges. In the case of the United Kingdom, consumers enjoyed a long-established right to reject the goods and be paid the price fully without passing through the above-mentioned steps, provided that the rejection is made within a reasonable time. According to a joint report published by the two law commissions concerning the remedies for faulty goods, the reasonable period is 30 days following the sale. If such a period lapsed, and the goods proved to be faulty, the consumer should go through the above hierar-

57 Law Commission 2011, paras 4.14-4.29.
58 *Ibid.*, paras 4.112-4.139.

chy, starting with the request for repair or replacement.[59] The allowance for use was empirically unpopular, especially in the case of reputable traders.

2. CESL Position

Consumers have the right to terminate the contract for faulty goods and receive the full price without the need to have recourse first to either repair or replacement. This is similar to the UK's right of rejection. In contrast to the limitation of the usage of this right, the CESL's right of termination is unlimited. Accordingly, this right is subjected to the general rule of prescription where such right is prescribed after the lapse of two years from the date the consumer discovered the fault or should have known about it or the lapse of ten years from the date of sale.

This prolonged delay in exercising the right of termination could constitute a breach of the duty of 'good faith and fair dealings' set out in Article 2 of the CESL, which deprives the consumer of enjoying the remedy that would otherwise have been applicable. The allowance for use is still available if the consumer were 'aware of the ground for avoidance or termination' but delayed taking action or if 'it would be inequitable to allow the recipient the free use' of the goods. Businesses are concerned about abusing the long period of rejection and the uncertainty of proving bad faith, and the entitlement and amount of the allowance for use which will raise an debate against the general policy of the proposal.

IV. Fourth Issue: Damages for Distress and Inconvenience[60]

These types of damages are available under English and Scottish laws in two exceptional cases: first, where the main purpose of the contract is to provide happiness or to avoid distress and, second, where the distress and inconvenience is associated with physical inconvenience and discomfort. This is not the case in CESL, where damages for 'non-economic' loss are totally prohibited.

V. Fifth Issue: Telephone Selling[61]

Such type of sales requires promptness, and thus lies outside the scope of CESL. Internet traders who wish to use online service besides telephone sales will be subjected to cumbersome by requiring them to send information notice to consumers to conclude a contract by this method. In addition, such contracts would not be valid unless the consumer sent his or her written consent or explicitly signed the offer. This issue needs to be revised and revisited in the final proposal.

VI. Sixth Issue: Doorstep Selling[62]

Owing to the fact that this type of selling is not highly welcomed by many consumers where they feel vulnerable to it, CESL should be restricted to cross-border sales and, perhaps if permitted, with off-premises, and member states should

59 2009 Law Commission and the Scottish Law Commission, Consumer Remedies for Faulty Goods, Law Com No. 317, Scot Law Com No. 216.

60 Law Commission 2011, paras 4.140-4.147.

61 *Ibid.*, paras 5.2-5.27.

62 *Ibid.*, paras 5.28-5.44.

search for quick and simple remedies to deal with this type of selling. On the other hand, if CESL is to be stretched to cover this type, necessary modifications should be carried to Article 50 of the proposal, where aggressive practices should be included within the meaning of the Unfair Commercial Practices Directive. A clear remedy is needed as well had this Article is breached, and finally the inclusion of negotiated terms within unfair terms protection.

VII. Seventh Issue: Content of the CESL[63]

Certainty and fairness represent the bounds of scale of balance for any commercial contracts. It simply refers to the extent to which parties stick to the wording and content of their agreement and the discretionary power of the judge to interpret such agreement to do justice. Although the laws of United Kingdom and Scotland tend towards certainty and lack a general duty of good faith (except in cases of B2C contracts), CESL is leaning towards fairness by setting high standards of good faith and fair dealings and by providing a variety of remedies for a party who is liable with bad faith.

CESL is addressed primarily to consumers, SME, and it is arguable whether it would find a suitable large market to develop the mass it needs. Practically speaking, the stronger party will dictate and impose the choice of law on the weaker parties to the contracts. That said, those who are the main concern of the proposal are unlikely to benefit from it. Professional businesses will not risk using an unfamiliar and untried legal system to both lawyers and judges.

VIII. Eighth Issue: Restrictions on the Use of CESL[64]

Two restrictions are imposed on CESL. First, it cannot be applied by large businesses contracting with other large businesses; at least one of the parties should be a small or medium enterprise. Yet, member states can remove this restriction as provided in the proposal. The UK government should consider exercising this option for the following reasons:

(a) It is not possible to restrict the choice of law without amending Rome I Regulation.
(b) It goes against the deeply rooted principle of freedom of contract enjoyed specifically in commercial contexts among businesses where a choice of law is of paramount importance and crucial to satisfy their needs.
(c) There is no strict definition of what is meant by small and medium size enterprises in this proposal, and this adds more complexity and uncertainty.

Secondly, CESL cannot be used for what is called 'mix-contracts', which involve an object other than sale of goods, digital content or related services. If a contract contains hire or purchase of equipment, training or provision of loans, this could cause complexity to the governing law where possibly more than one legal system will govern the contract in that case and chances of conflict appear.

63 *Ibid.*, part 7.
64 *Ibid.*, paras 6.37-6.65.

The English Law Commission has advised that efforts should be exerted on the idea of issuing a 'European Code for Consumer Sales over the Internet' instead of giving unnecessary priority to developing CESL for commercial parties.

Eventually, four European parliaments (UK, Germany, Belgium and Austria) have refused this proposal. The UK Ministry of Justice has asked for a call of evidence and consultation papers from stakeholders to ascertain their opinions in this proposal to finally draft the final response of the UK government to the commission.

IX. Ninth Issue: The Duty of Good Faith and Fair Dealings[65]

This duty is mandatory owing to Article 2 of the proposal in case the CESL is the governing law of the contract and this obligation remains the same for B2B or B2C contracts. The significant feature of this duty is that it is actionable in itself and a party may be deprived, in case of breach and upon the discretion of the court, of any entitlements (right, defence or remedy) it would have had. The evaluation of its implementation, as per Recital 23 of the proposal, will vary from case to case, taking into account the nature of the parties (business or consumer), their relative expertise and context of contracting (commercial perspective). On the contrary, the United Kingdom's position does not provide for a general obligation of good faith, yet it applies in cases of abuse or where it becomes inevitable to ensure contractual equilibrium.

Pursuant to Article 86 of CESL, a differentiation was drawn between the unfair terms in contracts between traders and those between traders and consumers. In the first case, the court is allowed to strike down unfair terms that 'grossly deviate from good commercial practice', and it is not limited to 'exclusion clauses' as in the United Kingdom. For the second set of contracts, this article does not apply and the UK courts will apply the notion of 'unfair terms' as stated in the Unfair Terms in Consumer Contracts Regulation 1999 will render such terms unbinding to the party against consumers.

Under Article 89 of the proposal, parties are required to negotiate in good faith when 'performance becomes onerous because of exceptional circumstances'. Moreover, the court could redraft the contract to ensure fairness upon a request of either party and may further award damages in case of non-compliance with the ruling of this provision. This may seem impracticable in commercial contexts, which require prompt solutions to unforeseen instances.

X. Tenth Issue: Duty of Disclosure[66]

We have to differentiate between B2B and B2C contracts in light of Article 23 of the proposal. For the first set of contracts, CESL imposed a general duty of active disclosure upon the traders to disclose any relevant characteristics in the goods or

65 A Joint Consultation produced by the Ministry of Justice, the Department for Business, Innovation & Skills, Scottish Government and Northern Ireland Executive 'A Common European Sales Law for the European Union – A proposal for a Regulation from the European Commission: A Call for Evidence' (This Consultation begins on 28 February 2012 and ends on 21 May 2012) available on the Ministry of Justice Website at <www.justice.gov.uk>, 21.

66 *Ibid.*

services that might affect the decision of consumers; on the contrary, the United Kingdom limits its scope of prohibition to misleading pre-contractual information. As for the second set, the United Kingdom implemented the Consumer Protection from Unfair Trading Regulation 2008, where the duty of fair trading and prohibition of misleading omissions are incorporated. This reflects proximity in the situation of the United Kingdom to European practices at least in the last set of contract categories. CESL still stipulates this duty in its Articles 13-22.

The requirements of this discourse under CESL (B2C, distance or off-premises contracts) follow the same standards set out in the protection of the consumer in respect of distance selling Directive 97/7/EC, which is implemented in the United Kingdom by Consumer Protection (Distance Selling Regulation 2000). However, Article 20 provides for specific types of disclosures to certain types of B2C contracts. The United Kingdom does not have these specificities, yet any breach of the duty of disclosure could amount to unfair commercial practice which offends the Consumer Protection from Unfair Trading Regulation 2008 transposed by the United Kingdom.

XI. Eleventh Issue: Remedy for Mistake[67]

As an on-mandatory rule, Article 55 allows that a mistaken party can plead against the other party who knew or ought to have known of the mistake but fails to raise it. United Kingdom law suffices to prohibit misrepresentation of a contractual position as a ground for invalidating contracts. Thus, CESL goes further than the situation in the United Kingdom.

XII. Twelfth Issue: Avoidance of Contract[68]

The United Kingdom is narrower than CESL regarding the reasons for avoiding a contract, especially in a commercial context. While the United Kingdom considers the concept of 'undue influence', CELS broadens the basis of avoidance to include economic distress, urgent needs, inexperience, improvidence, ignorance or inexperience.

XIII. Thirteenth Issue: Duty to Raise Awareness of Not Individually Negotiated Terms[69]

Under Article 70 of CESL, any term that has not been individually negotiated (Art. 7) will be unenforceable if the other party is not aware of it. It imposes a mandatory obligation on each party to take 'reasonable steps' to draw the attention of the other party to such terms, and a party cannot plead that such terms are substantially fair *per se*. It is a positive obligation, especially in consumer contracts, and having the provision merely written or explicitly stated in the contract is not sufficient to undertake such an obligation. This goes further than what is provided in UK laws.

67 *Ibid.*, p. 22.
68 *Ibid.*
69 *Ibid.*

XIV. Fourteenth Issue: Conflicting Standard Contract Terms[70]

Where businesses exchange standard contracts between each other without considering the 'small print' exchanged between them, UK law considers the last form the binding contract. By contrast, in CESL, only common terms in substance between both standard contracts will form the binding new contract for both parties. This leads to an awkward situation where the parties find themselves probably in front of a totally new contract that they do not intend to have, the contract may lack the necessary terms for its operation, parties will face uncertainty upon judging which terms are common or not in substance, and the contract will end up being governed by another governing law.

XV. Fifteenth Issue: Interpreting the Contract[71]

According to UK laws, the main test in interpreting contracts is an objective test. It means what a reasonable person could think the words of a contract would mean. This matches what is provided in CESL in Articles 58-59. Any subjective elements are not applicable. In other words, what was the actual intention of the parties? It goes without saying that this method of interpretation will eventually lead to an ambiguity regarding the interpretation task conducted by the courts and to burden the parties for such legal costs. Article 59 of the CESL sets the factors to guide the interpretation process. Among these factors are parties' preliminary negotiations, circumstances surrounding the conclusion of contract and parties' subsequent performance.

Moreover, in Article 64 of CESL, and in B2C contracts where a term is tainted with ambiguity, it is construed in a way that most favourably serves the consumer. This is the same approach adopted in the UK judicial system, where it is applied under regulation 7(2) of the Unfair Terms in Consumer Contracts Regulation 1999. Thus, the CESL does not introduce a new concept in that regard.

XVI. Sixteenth Issue: Exclusion or Modification of Non-mandatory Provisions of the Common European Sales Law[72]

While in B2C contracts, CESL must be applied entirely to guarantee the high standard of contemplated protection afforded to consumers by this law (Art. 8), this is not the case in B2B contracts, where traders enjoy the possibility of modifying or excluding by mutual agreement if that better suits their bargaining position. Yet, such provisions are limited as they represent small percentages comparable to the mostly mandatory provisions of the CESL. If the parties opted for this facility, it may result in a contract governed by more than one single law. Consequently, the resolving of disputes will entail involvement of Rome I Regulation, for example, to determine the applicable law on significant aspects that were denied enforcement of CESL by the parties' agreement.

70 *Ibid.*, p. 23.
71 *Ibid.*
72 *Ibid.*

D. Conclusion

We have seen that CESL as an example of Europeanization of contract law on a regional substantive level raises some concerns on its interaction with PIL instrument (Rome I) where we prove that the 1st regime module is the most convenient module to ensure the full enforcement of CESL. European contract law focuses primarily on consumer context; however, by issuing CESL a noticeable invasion to the commercial sales contract is initiated. Businesses would undoubtedly prefer a legal environment with less complexity. Thus, the commission aims to combat the impediment of legal diversity between the 27 member states to fulfil full harmonization by issuing CESL. Accordingly, it opts for Article 114 of TFEU, but we showed that it could not academically and empirically achieve this aim. CESL is not the first instrument to make sales law uniform as the CISG played this role before on an international level. We have shown the shortcomings of the latter and the preferential stand for the former, which might provide an incentive to non-contracting states (such as the United Kingdom) to join CESL. Although the government of the United Kingdom refused the proposal, it is likely that if the commission takes into consideration the comprehensive scope of this instrument and resolves its overlap with Rome I Regulation, the United Kingdom might reconsider its position. And the situation in the Rome Convention and Rome I Regulation is a good example in that regard.

It was also shown that the commission's intention of providing a high level of consumer protection by issuing CELS as an incentive to businesses and consumers to apply it to their contract is not fully true, as we have seen that in some aspects national UK is better than the CESL for consumers such as in the areas of damages for distress and inconvenience, which may result in a reduction of consumer protection; moreover, the CESL's extended right of termination raises concerns on the lack of good faith of the consumer's exploitation of this point by his/her prolonged delay in notifying the trader of the discovered fault. This, in fact, may deter traders from using the CESL as they believe that the protection level is set at too high a level. Finally, the issue of whether the trader should keep an allowance for use when refunding the price to the consumer in case the latter was 'aware of the ground for avoidance or termination' but delayed taking action or whether 'it would be inequitable to allow the recipient the free use' of the goods. Consequently, the allegation that the advantages consumers will enjoy from greater choice and price completion will outweigh any disadvantages the CESL will have comparable with domestic national laws is not above doubt. It is true that on average CELS is better than consumer protection in the United Kingdom; nonetheless, the latter on some crucial points of law for both traders and consumers enjoy a privilege. Accordingly, the United Kingdom should raise its concerns on both procedural and substantial sides of this proposal to the European Commission to guarantee that the policy underlying it making substantive rules on sales law uniform across European Union is justified and warranted.