# SOME MEDITATION ON THE "OPTING OUT" AND "OPTING IN": SCOPE AND APPLICATION OF THE CONVENTION ON THE INTERNATIONAL SALES OF GOODS AND THE COMMON EUROPEAN SALES LAW – PARALLELS AND DIFFERENCES

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In 2011, after a decade long debate on the approximation of civil law the European Commission published a draft Regulation on Common European Sales Law (CESL).[1] We may think that with this act the European Commission has crossed the Rubicon River. As the old Roman proverb says: *'Alea iacta est, the Die is cast!'* This is the first time that the EU has promulgated a comprehensive draft law on sales – so, creating a harmonised sales law is not any more a fascinating research subject for academic people and comparatists.

After the publication of several consultative documents, communications[2] and the efforts of the academic sphere[3] this step may signal the beginning

[1] Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM/2011/0635 final.

[2] Communication from the Commission to the Council and the European Parliament on European Contract Law. Brussels, 11. 07. 2001. COM (2001) 398 final; Communication from the Commission to the European Parliament and the Council. A more coherent contract law. An action plan. 15. 3. 2003. COM(2003) 68 final; and Communication from the Commission to the European Parliament and the Council - European Contract Law and the revision of the acquis: the way forward, Brussels, 11.10.2004, COM (2004) 651 final. In 2010 the Commission published a Green Paper on policy options for progress towards a European contract law for consumers and businesses, 1.7.2010, COM (2010) 348 final.

[3] The Commission funded a three-year research programme for the preparation of the CFR; scholars were to present their final report in 2007. The final result of the academic co-op-

of a new era, a real breakthrough, similar to that of the publication of the draft statute for a European Company in the seventies, last century. Of course the reference to the European Company Statute is not only encouraging but it can be discouraging as well. Since it took some 30 years to get the Regulation on *Societas Europaea* after the initial proposal was made by the Commission.

## I. Possible fields of comparison between CISG and CESL

We may compare the Vienna Convention on International Sales of Goods (CISG)[4] and the Proposal on the Common European Sales Law (CESL) according to different criteria, like the type of the chosen legal instrument, their territorial and personal scope or according to their content and structure. It goes without saying that a comprehensive analysis of the CISG and CESL has to deal with the substantive rules of contract law, the different concepts and definitions included into these instruments as well as with their interpretation and the guarantees of uniform interpretation.[5]

The CISG was born in the form of an international convention, while the would be CESL has the form of an EU Regulation, more precisely, the Regulation contains the introductory *'Chapeau'* rules, while the substantive rules of the CESL are included in the Annex of the Regulation.

This paper – resisting the temptation of a full scale critical analysis and comparison rather focuses on the characteristics of CISG and CESL – as

eration and network was published in 2009: Christian von Bar, Eric Clive and Hans Schulte Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*. Outline edition. Munich: Sellier, European Law Publishers, 2009. The complete results of the Study Group on European Civil Code and the Research Group on EC Private Law were published by Christian von Bar and Eric Clive (eds.): *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)*. Full edition, Volumes I–VI, Munich: Sellier, European Law Publishers, 2009.

4 United Nation Convention on Contracts for the International Sale of Goods (1980)

5 Regarding the critical analyses see Basedow, Jürgen, An Optional Instrument and the Disincentives to Opt in. *Contratto e Impresa/Europa* 1-2012, pp. 37-47 and Eidenmüller, Horst, Jansen, Nils, Kieninger Eva-Maria, Wagner, Gerhard and Zimmermann, Reinhard, The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law, *The Edingburgh Law Review*, 16.3 (2012), pp. 301-357.

*second national legal regimes* in business to business (B2B) relations. It means that only some rules of the *'Chapeau'*, Articles 1-16 of the proposed CESL Regulation – will be dealt with.

## II. Scope of application

Regarding the sphere of application, the CISG regulates the contracts on international sale of goods. According to its Article 1 it may become applicable via two ways: autonomous application and as a result of the application of private international law.[6] The Convention opens the possibility of *opting out* in its Article 6, according to which *'The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.*' In fact it happens quite often.[7]

The sphere of application of CESL is quite similar at first sight: According to Article 4 of the CESL Regulation, it applies to *cross-border contracts*, to contracts which have an international element, plus have an anchor to the EU, namely at least one of the parties has to have its habitual residence in a Member State of the EU.[8] On one hand this legal regime which is limited to *cross-border* transactions was criticised by several authors worrying about the actual applicability of the CESL[9], on the other hand

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6 Art. 1(1) *'This Convention applies to contracts of sale of goods between parties whose places of business are in different States:*
*(a) when the States are Contracting States; or*
*(b) when the rules of private international law lead to the application of the law of a Contracting State.'*

7 Unfortunately in certain trade sectors it has become a standard practice of some major law firms, although there is a growing tendency of acceptance. Bonell, Michael, Joachim, The CISG, European Contract Law and the Development of a World Contract Law, *The American Journal of Comparative Law*, Vol. 56, 2008, pp. 1-28.

8 Art. 4 1. *'The Common European Sales Law may be used for cross-border contracts.*
*2 For the purposes of this Regulation, a contract between traders is a cross-border contract if the parties have their habitual residence in different countries of which at least one is a Member State.'*

9 Basedow, Jürgen op. cit p. 39 and Loos, M.B.M., Scope and Application of the Optional Instrument pp. 119-121., in Voinot, Denis and Sénéchal, Juliette (eds.) *Vers un Droit Européen des Contrats Spéciaux/ Towards a European Contract Law of Specific Contracts*, Éditions Larcier, Bruxelles, 2012, pp 177-151.

this might be a precondition for the support of the Member States carefully defending the role of their national civil codes.[10] We may add that for a multinational enterprise the cross-border requirement for application, included in both instruments, does not mean a real hurdle: it is easy to tailor-made a transaction as international, choosing the proper subsidiaries belonging to the same corporation – if the enterprise wants to get under the umbrella of international or European sales laws.

Despite the similarities, the CESL - unlike the CISG -, has a marked optional character: the parties of the covered cross-border transactions have to *opt-in*, if they want to trigger the application of the European Sales Law. So, while in case of the CISG, a statement of the parties is needed for the avoidance of the application of the Convention, in case of the CESL the parties have to make their decision to achieve the legal regime of the Common European Sales Law.[11] The requirement of the choice of the parties excludes not only the autonomous application of the CESL but the application via private international law, too. The opting in requirement is a striking difference between the preconditions of application of the CISG and that of the CESL. However, as M.B.M. Loos emphasizes, even an opting out CESL regime would not be unproblematic, since in such a case both CISG and CESL could be applicable to the very same contract, unless the parties exclude one of them.[12]

## III. CISG and CESL as second legal regimes

Both CISG and CESL have the ambition to function as second legal regimes for cross-border sales, parallels to national laws, but in a different way. The CISG has become a contract law regime for international sales of goods in the contracting countries by virtue of the ratification of the Vienna Convention.

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[10] For example the Governments of Austria and Germany seem to be quite reluctant to support the draft CESL Regulation. source: www.EurActiv.de, 26.09.2012.

[11] According to Article 3 of the Proposed Regulation. *'The parties may agree that the Common European Sales Law governs their cross-border contracts… for the sale of goods, for the supply of digital content and for the provision of related services within the territorial, material and personal scope as set out in Articles 4 to 7.'*

[12] M.B.M Loos op.cit p. 135.

The CESL has the same goal, to work as a *'second contract law regime within the national laws of each Member State'*[13] But in case of CESL to reach the actual status of a second contract law regime, something more is needed besides the promulgation of the EU Regulation: the will and decision of the parties. So, although an EU Regulation is directly applicable in the EU, without any implementing measure, in the case of this special EU Regulation, the contract law rules of its Annex I will be applicable only as a result of the choice of the parties. In other words, the strongest type of secondary source of EU law, the Regulation, in this case contains a very weak instrument inside – at least from the point of view of its normative power.

This innovative approach[14] is worth for further analyses. The choice of the CESL, as a secondary contract law regime presupposes that a national law has been already selected according to the rules of private international law, most often according to Regulation Rome I.[15] This prior selection of the governing law can be the result of the choice of the parties[16] or is determined as the applicable law in the absence of choice.[17] Although the selection of the CESL can be reached practically by one decision, logically it includes two steps: first indicating a national law of a Member State and then within this national law choosing the CESL.[18] This regime is characterised as *'Vorschaltlösung'*, (prior connection solution) by Mankowski.[19]

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13 COM(2011) 635 final p. 5.

14 Hesselink, Martijn, How to opt into the Common European Sales Law. Brief Comments on the Commission's Proposal for a Regulation. 2012 (20) ERPL 1, pp. 195-211, p. 198.

15 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) Official Journal L 177, 04/07/2008 pp. 0006 – 0016.

16 Art. 3 of Rome I.

17 Art. 4 of Rome I.

18 Hesselink op.cit. p. 199. As the recital (10) of the Preamble of the Draft CESL Regulation describes the choice of CESL: *'The agreement to use the Common European Sales Law should be a choice exercised within the scope of the respective national law which is applicable pursuant to Regulation (EC) No 593/2008 or, in relation to pre-contractual information duties, pursuant to Regulation (EC) No 864/2007.... on the law applicable to non-contractual obligations, or any other relevant conflict of law rule.'*

19 *Zum CESL komme Man im Prinzip nur, wenn Art 3 oder 4 Rome I-VO zum Recht eines Mitgliedstaates führe. Die Kommission will also das IPR in Gestalt der Rom I-VO Vorschalten. Sie wird eine Vorschaltlösung. '* Mankowski, Peter, Der Vorschlag für ein Gemeinsames Euro-

## IV. CESL and private international law

First of all we must not forget about the fact that in certain matters of contractual or non-contractual nature which are not addressed by CESL, private international law will preserve its importance. For example in the issues of legal personality, invalidity of a contract arising from lack of capacity, illegality or immorality or matters of non-discrimination the applicable national law will be chosen by PIL rules.[20]

The CESL was originally modelled as a 28th legal regime of the EU, a *sui generis* set of European rules for contracts. The Commission Decision setting up the Expert Group on the Common Frame of Reference cited the Europe 2020 strategy on the need to make progress towards an optional *European* Contract Law.[21] In such a setting, the choice of CESL inevitably would belong to the domain of private international law, raising the interesting but sensitive relationship between the harmonisation of substantive law (contract law) and the unification of private international law within the European Union. However, in the meantime the character of the CESL was changed or at least a new robe was given to it: According to the published version of the proposal *'This agreement to use the Common European Sales Law is a choice between two different sets of sales law within the same national law and does therefore not amount to, and must not be confused with, the previous choice of the applicable law within the meaning of private international law rules'*[22] This statement represents a significant policy shift on the side of the European Commission.

Based on this approach one can consider CESL as a dormant or latent secondary contract law within national laws.[23] The Regulation on CESL builds in the optional rules into national legal systems – in an abstract sense. Only the choice of the parties triggers or activates the application of CESL – their decision can make the CESL a real secondary contract law

päisches Kaufrecht (CESL) und das Internationale Privatrecht , *RIW*, 2012, Heft 3, pp 97-103, p. 100.

20 COM (2011) 635, pp. 18-19, Preamble, Recital 27.

21 Commission Decision of 26 April 2010 setting up the Expert Group on a Common Frame of Reference in the area of European contract law, (6) recital.

22 COM(2011) 635, p. 6.

23 Unlike CISG rules backed by a ratified Convention.

operative in their transactions. But what is the legal basis for the choice of CESL by the parties? According to the above described position – „*a choice between two different sets of sales law within the same national law",* the application of Art. 3 EC Reg. 593/2008, (Rome I), which facilitates a choice[24], is excluded.

Although Preamble 14 of Rome I has already foreseen: *'Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.'* However, according to its present status, the CESL is not a *sui generis* European legal instrument, a 28th legal regime[25], but a carefully implanted second contract law in the legal system of each Member States.

Such a situation is acceptable from the point of view of the uniform private international law of the EU, the preamble 40 of Rome I contains a reference to its subsidiary role: *'This Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation.'* The reference to the applicability of other internal market provisions is very broad indeed, although most probably it was not tailor-made to provide an 'immune' status, namely a position untouched by Rome I Regulation for a future European sales law. The authorisation for the choice of CESL by the parties does not stem from Regulation Rome I but rather from the (proposed) Regulation of the CESL.[26] In other words: The power for the parties to opt in a second national contract law is given in the (draft) CESL Regulation.

But, is it really only a choice within a national legal system? Yes and no: One can argue that the opting in CESL is a choice within a national system. The arguments for this position can be anchored to Art. 288

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24 *'A contract shall be governed by the law chosen by the parties'*

25 Actually, from 1 July 2013, which is the date of accession of Croatia, the CESL could be considered as a 29th legal regime in the EU.

26 CESL Regulation Art. 3 *'The parties may agree that the Common European Sales Law governs their cross-border contracts for the sale of goods….'*

TFEU[27] according to which a Regulation shall have general application and it shall be binding in its entirety and directly applicable in all Member States. It means that the CESL Regulation will be directly applicable and its Annex I on Common European Sales Law will be a dormant secondary contract law in each Member State – waiting for the decision of the parties to wake it up and apply it.

However, it is not a completely futile exercise to develop an argument against the doctrine which considers CESL only as a choice within the national system. Such a reverse reasoning can be based on the same Article 288 TFEU. Being an Annex of an EU Regulation, the CESL cannot be qualified as a result of the will and law-making of national legislators – originally it is a legal act of the EU. The European Court of Justice will always have the right to interpret it in preliminary rulings according to Art. 267 TFEU. The ECJ may give such a European character to the concepts and institutions covered by CESL which does not correspond to the jurisprudence of national courts. So, one can describe CESL as European law in context of national law. These rules are far from being ordinary national laws, they are European norms implanted into the fabric of national legal systems. From the point of view of such a position, the carefully drawn demarcation line between the application of Rome I and the opting in CESL seems to be less persuasive.

## V. Advantages of the concept of a second contract law regime

The concept describing the CESL as a second national legal regime has some practical advantages: In such an interpretation the aim of CESL is to harmonise the contract law of the Member States, although in a special way, it will not amend and modify the national contract laws but it adds a new set of rules to them. As a result of this approach the European Commission may refer to Art.114 TFEU as a legal basis which gives authorisation for adopting the CESL as a measure supporting the establishment and functioning of the internal market, with a *qualified*

[27] Treaty on the Functioning of the European Union. Official Journal of the European Union, 26.10.2012, C 326.

*majority* in the Council of Ministers. Without this carefully elaborated theory on CESL as approximation of laws most probably the 'flexibility' provision of Art. 352 TFEU should be the proper legal basis, with requirement of unanimity voting in the Council.

The second contract law regime may have other advantages, beyond the world of B2B transactions. It effectively 'neutralizes' the effects' of Art. 6 (2) of Rome I on consumer contracts which prescribes that *'a choice (of law) may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.'* But if the CESL is uniform, then it is possible to argue that there is no existing higher protection. In the wording of the CESL proposal: *'The latter provision however can have no practical importance if the parties have chosen within the applicable national law the Common European Sales Law. The reason is that the provisions of the Common European Sales Law of the country's law chosen are identical with the provisions of the Common European Sales Law of the consumer's country.'*[28] Although, we may add, that the CESL provisions are really identical in the different Member States, however, there is no guarantee, that they will be the same as the 'first' (real) national sales law of the consumer's country. The otherwise applicable law may contain or may develop later stronger rules for the protection of the consumers. Since the CESL will be an optional instrument, it will not 'block' the enactment of future national sales laws in its field, unlike a classical European Regulation. This is the consequence of the cohabitation of CESL and national contract laws.

## VI. European Company v. European Sales Law

However, a somewhat disturbing counterexample may emerge at this point, the Regulation on the European Company or *Societas Europaea* (SE) which was passed in 2001. [29]

[28] COM(2011) 635, p 6.

[29] Council Regulation (EC) No 2157/2001 on the Statute for a European Company (SE).

To a certain extent the SE Regulation is a similar optional instrument to the CESL, a statute for a *sui generis* European corporation. According to the Preamble of the SE Regulation: the EC Treaty did not provide, for the adoption of that Regulation, powers of action other than those of Article 308[30] thereof.'[31] After ten years could we qualify the SE regulation as a secondary corporate law which is founded on Art.114 TFEU? What has been changed regarding the interpretation of this core Treaty provision on harmonisation? Staudenmayer defends Art.114 as a proper legal basis for CESL, emphasizing the difference between an SE (or a European Cooperative Society)[32] and the CESL. He points out that the Regulations on the European corporate forms have created new legal entities with an effect *erga omnes*, unlike the CESL: The *'CESL provides simply a second set of rules for parties to choose to apply to their contract.'*[33] Although this explanation rightly grabs the distinction between corporate law and contract law, perhaps this is not entirely convincing regarding the legal basis issue.

## VII. CISG / CESL / PIL – interplay in B2B transactions

On one hand the CISG has 78 contracting states at present.[34] Amongst others almost all the 27 Member States of the EU – except Ireland, Portugal and United Kingdom.[35] On the other hand the CESL contains rules for 27 EU Member States, but it will be applicable in transactions between 27+'X' states, since only one party's habitual residence has to be in a Member State.[36] So, regarding B2B transactions, there is no Chinese

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30 Now Article 352 TFEU.

31 Council Regulation (EC) No 2157/2001 on the Statute for a European Company (SE) , Preamble Recital (28).

32 Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE)

33 Staudenmayer, Dirk (ed.) Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law. Verlag C.H. Beck, 2012 München, Introduction p. XX.

34 source: http://www.cisg.law.pace.edu

35 In 2013 Croatia will become the 28th Member State of the EU. Croatia is a contracting state of the CISG.

36 *'For the purposes of this Regulation, a contract between traders is a cross-border contract if the parties have their habitual residence in different countries of which at least one is a Member State.'*

wall between the potential scope of application of CISG and CESL from the point of view of their territorial scope, actually there is a large overlap regarding the potentially covered transactions and even the rules of private international law may gain certain importance.

This can be illustrated by a fictitious example, supposing a cross-border contract between traders (an SME[37] and a Plc) having their seat in France and Germany.

a) If there was no choice of law, the rules of the CISG will be applicable for such cross-border contract, since both France and Germany joined to the CISG and Art 1 (1) a prescribes the autonomous application of the Convention.[38]

b) If the parties choose the law of a third, a CISG contracting state (e.g. Switzerland), the CISG most probably will be applicable, since this decision of the parties can be considered as an implied choice of the CISG – according to Art. 1 (1) b CISG and the relevant case law.[39]

c) The parties may choose a third – non CISG member state law – e.g. UK law, than it will be the governing law. One might claim that in such a case the CESL would be applicable (presupposing that the Regulation will be promulgated in the EU), however, this should not be the case, since the application of the CESL will be based on an opting in regime. So an implied choice of the CESL is less acceptable than in the case of the CISG having an opting out nature. However, express opting in the CESL may occur, following the logic of the *'Vorschaltlösung',* since according to its

[37] According to the proposed CESL Regulation it will be applicable in B2B transactions only if one of the traders is a small or medium sized enterprise (SME). See Art. 7(1).

[38] Art 1 (1) *'This Convention applies to contracts of sale of goods between parties whose places of business are in different States:*
*when the States are Contracting States;'*

[39] According to its Article 1 (1) (b), the CISG applies when the rules of private international law lead to the application of the law of a contracting state. However, reservations are possible, since according Art. 95 of the Convention *'Any state may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph* (1) (b) of Article 1 of this Convention.'

drafters the CESL will become a secondary contract law regime of the Member States, so it will be part of UK law too.

d) It is possible to imagine a scenario when the parties expressly opt out CISG – but without choosing a third national law or CESL – than the rules of Rome I: Art. 4 1(a) shall gain relevance according to which *'a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence'*. In this fictitious example the above cited PIL rule will lead to French or German law. But again, after the French or German law was selected as the governing law, the parties may choose the CESL on this soil.

e) Naturally it is possible that the parties of a B2B transaction choose German or French law, and on this basis directly opt in the CESL (second national contract law regime) right at the beginning. But, as we have seen above, the application of the CESL may emerge in other scenarios, adding to the existing variety of possibilities.

It is necessary to clarify some other things as well. For instance : According to the Proposal, Recital (25) *'Where the CISG would otherwise apply to the contract in question, the choice of the Common European Sales Law should imply an agreement of the contractual parties to exclude that Convention.'*[40]

But should an implied opting in CESL (if it is possible at all) mean the implied opting out (exclusion) CISG? This indirect contracting out of the CISG is an intriguing question since in general the CISG has a stronger claim for application due to its opting out character than the CESL with its modest opting in features. It is difficult to predict the solution, the proper forum will decide upon the issue taking into account all the elements of the case emerging in the future.[41]

[40] COM (2011) 635, p.19, Preamble, Recital 25.

[41] On the implied exclusion of CISG see Goode, Roy, Kronke, Herbert, McKendrick, Ewan, Transnational Commercial Law, Oxford University Press, Oxford, 2007, 770 p., pp. 271-273.

Is implied or partial choice of the CESL possible in B2B contracts? The decision on the acceptance of an implied choice of the CESL in B2B transactions obviously call for the interpretation of Art.8 (2) CESL Regulation. This norm requires the express consent of the consumer[42] for the application of CESL, but there is no similar rule in respect to B2B transactions. Does it mean - *argumentum e contrario* - that an implied agreement will suffice in B2B transactions? This dilemma can be settled only by future case law.

And finally, is the partial choice of CESL possible in B2B transactions? If yes, theoretically a cross-border contract can be governed partly by the CISG and partly by the CESL. Article 11 of the CESL Regulation excludes this possibility[43]; however, such a rigid approach will not be necessarily followed by the parties in B2B transactions and by the judicial forums, influenced by the more flexible solutions accepted by private international law. Even the Preamble of the draft regulation emphasizes freedom of contract and party autonomy which should be restricted when it is indispensable, in particular for reasons of consumer protection[44] and the requirement of choosing the CESL as a whole is supported only in the interests of consumer protection.[45] However, this argument is obviously irrelevant in B2B transactions.

These scenarios lead us to a new phenomenon, to the proliferation and competition of the different harmonised contract laws in the domain of international commerce. As a result of this, we might have to face with an even more sophisticated regime: a multilayer system of uniform contract laws will be added to the interplay of national contract laws and to the existing function of private international law. In certain cases the approximation of substantive contract law and its application – e.g. express choice of CESL – may lead to a clearer picture regarding the governing contract law for a transaction. However, in more comprehensive cases,

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42 *In relations between a trader and a consumer the agreement on the use of the Common European Sales Law shall be valid only if the consumer's consent is given by an explicit statement which is separate from the statement indicating the agreement to conclude a contract…'*

43 *'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'*

44 COM (2011) 635, p.20, Preamble, Recital 30.

45 COM (2011) 635, p.20, Preamble, Recital 24.

where the contracting parties are silent on the applicable law, or in issues outside the scope of the CESL or the CISG, there will be a remaining role for classical private international law rules and national contract laws.

In sum, the CESL adds to the variable international landscape which is already characterised by competing international conventions, European instruments and national laws.

## SUMMARY

## Some Meditations on the 'Opting out' and 'Opting in': Scope and Application of the Convention on the International Sales of Goods and the Common European Sales Law – Parallels and Differences

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The paper analyses the interplay between the different instruments of harmonised contract law, i.e. the Vienna Convention on International Sales of Goods (CISG), the Proposal on the Common European Sales Law (CESL) and the classical private international law rules, especially Regulation Rome I. It devotes a special attention to the optional character of the CESL and evaluates the innovative concept according to which the CESL should be considered as a second contract law regime within the national laws of EU Member States. The author calls our attention to the proliferation and competition of international and European sources of law in the domain of international commerce.

## RESÜMEE

# Einige Gedanken über die Möglichkeit des 'Opting out' und des 'Opting in': Über die Wirkung und Anwendbarkeit des Wiener Kaufrechts und des Vorschlags für ein Gemeinsames Europäisches Kaufrecht – Ähnlichkeiten und Unterschiede

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Die Studie analysiert die Wechselwirkung der harmonisierten Rechtsmaterialien, die das Vertragsrecht regeln, so insbesondere die Beziehung zwischen dem Wiener Kaufrecht (CISG), dem Vorschlag für ein Gemeinsames Europäisches Kaufrecht (CESL) und dem traditionellen internationalen privatrechtlichen Instrumentarium – vor allem der Verordnung Rom I. Sie widmet dem optionalen Charakter des CESL und derjenigen Reformbestrebung besondere Aufmerksamkeit, die den CESL innerhalb der nationalen Rechtsordnung der Mitgliedstaaten als ein zweites Vertragsregime ansieht. Der Verfasser kommt auch darauf zu sprechen, wie die internationalen Rechtsquellen und die Rechtsquellen der Europäischen Union im Bereich des internationalen Handels – deren Zahl immer mehr zunimmt – miteinander konkurrieren.