CHOOSING BETWEEN CISG AND CESL

A COMPARISON BETWEEN THE COMMON EUROPEAN SALES LAW AND THE VIENNA SALES CONVENTION FROM THE PERSPECTIVE OF COMMERCIAL PARTIES

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Abstract
If the Common European Sales Law (CESL) is adopted, commercial parties will have the opportunity to choose between this instrument and the Vienna Sales Convention (CISG) to regulate their cross-border commercial sales contracts. In this paper, a comparison is made between the two international legal instruments in order to answer the question: why and when commercial parties should want to opt-in to the CESL (and opt-out of CISG)? In this paper it is argued that as CESL remedies major flaws in CISG, in fact CESL is the better choice for commercial parties, in particular because it introduces coherent rules on defects of consent, clearer and more balanced rules regarding the incorporation of standard terms, and a scheme for the testing of the unfairness of standard terms.

Keywords
Common European Sales Law; Vienna Sales Convention; Cross-border sales contracts; Commercial sales

1. INTRODUCTION

On 11 October 2011 the European Commission submitted a proposal for a Regulation on a Common European Sales Law (COM (2011) 635 final), in short: CESL. The CESL is intended to allow the parties to a sales contract to opt for a pan-European regulation of sales law instead

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of being subject to the national sales law of a Member State. In particular in the case of a cross-border contract this may be attractive to the parties as the parties need not invest time and money in order to determine the applicable national contract law and to try to understand the content of that applicable contract law. However, in the case of commercial sales contracts, an alternative international instrument is already in place: the Vienna Sales Convention on the international sale of goods (hereinafter also referred to as: CISG, or: the Convention). Moreover, whereas CESL is an opt-in instrument, CISG is an opt-out instrument, implying that if the parties to a cross-border commercial sales contract do not agree otherwise, CISG is applicable to the sales contract, whereas CESL would not be applicable. This begs the question why and when commercial parties should want to opt-in to the CESL (and opt-out of CISG)?

In theory, several reasons could be given. First, a choice in favor of CESL over CISG could be interpreted as a vote of confidence towards *European* legislation. It seems rather unlikely that in the present atmosphere of euroscepticism this would convince any commercial party.

A second reason could be the fact that CESL creates the possibility to apply the same set of rules to cross-border consumer sales contracts and to cross-border commercial sales contracts, whereas CISG is limited to cross-border commercial sales contracts.[1] On the other hand, the fact that CESL is also available for consumer sales contracts could suggest that CESL is actually less suitable for commercial sales contracts as commercial parties typically have different interests compared to consumers – often, hard and fast rules are preferred over rules that may be more nuanced and fair in individual cases, but which may also may lead to lengthy and expensive legal proceedings. Moreover, different from consumer contracts, typically the bargaining powers of parties to a commercial sales contracts are thought to be

[1] Cf. Article 2(a) CISG, which excludes consumer sales contracts from the scope of CISG.

more or less equal,[2] and as repeat players commercial parties are more experienced in concluding contracts. The advantage for some commercial parties that they can apply the same set of rules to both types of cross-border contracts may therefore be a disadvantage for other commercial parties, in particular for such parties that do not or only infrequently have to deal with consumer contracts.

And finally, a third reason could simply be that with regard to its content, CESL is superior to CISG. One situation would be where the matter is not dealt with under CISG and as a result a recourse to national contract law is needed, whereas the matter is dealt with adequately under CESL – in which case a return to national contract law may be avoided. Another situation would be that a matter as such is dealt with under CISG, but in an unconvincing or in a unsatisfactory manner. If CESL adequately deals with the matter, again this would be a case where the choice in favor of CESL would prove to be an advantage over the choice in favor of CISG.

In this paper, I will look into this third possible reason for commercial parties to opt-in to CESL and opt-out of CISG. To that extent, I will take a look at matters that notoriously are ill-regulated in CISG and see whether and to what extent they have been better regulated in CESL. First, I will discuss the way CISG and CESL deal with defects of consent (section 2) and then I will go into the matter of standard terms (section 3). In section 4, I will discuss the approach of both instruments to the moment when ownership passes from the seller to the buyer. In section 5, I will then make some observations as to the duty to examine the goods and the corresponding duty to notify a non-conformity to the seller. Section 6, on the remedies for non-conformity, will be brief for reasons explained there. Finally, in section 7 I will draw some conclusions.

[2] Obviously, inequality in bargaining power exists in commercial transactions also – between, for instance, SMEs and multinationals. However, where this inequality exists *a priori* in consumer contracts, this is not the case in commercial transactions.

2. DEFECTS OF CONSENT

Although the Vienna Sales Convention contains rules on the formation of international commercial sales contracts, Article 4 CISG expressly provides that the Convention 'is not concerned' with the validity of the contract or with the effect which the contract may have on the property in the goods sold. Traditionally, defects of consent have been associated with matters of validity of the contract and would therefore not be seen as covered by the Convention. Nevertheless, where a mistake or misrepresentation relates to the characteristics of the goods, to the creditworthiness of the buyer or the extent to which the buyer is capable of performing his obligations under the contract, these matters are considered to fall within the scope of the provisions on the conformity of the goods (Articles 35 ff CISG) and the provision regarding anticipatory breach (Article 71 CISG), which implies that resorting to the applicable national law on these matters is not necessary.[3] This implies that in most cases where a buyer could rely on a remedy based on mistake or misrepresentation in relation to the sale of goods under national contract law, he cannot rely on that remedy if CISG applies to the contract – although CISG does not explicitly deal with these issues, they impliedly fall within the scope of CISG. From the perspective of the commercial buyer, this effectively means that he has fewer possibilities to escape from a bad contract, as the national remedies for mistake and misrepresentation are excluded without them having been replaced by an international equivalent thereof in CISG.

Other types of defects of consent recognized under national law, such as fraud and deceit, threat, abuse of circumstances, and *laesio enormis*, as well as cases of mistake and representation not falling under the provisions of conformity or anticipatory breach, are not considered to have been covered by CISG. This implies that where the buyer under

[3] See M. Djordjevic, Comment 21 to Article 4 CISG, in: S. Kröll, L. Mistelis, P. Perales Viscasillas, *UN Convention for the International Sale of Goods (CISG)*, München: C.H. Beck, 2011, p. 71; U. Magnus, 'CISG vs. CESL', in: U. Magnus, *CISG vs. Regional Sales Law Unification. With a focus on the new Common European Sales Law*, Munich: Sellier, 2012, p. 111. It should be noted that this is the majority view held in most legal systems, but different views are held in particular with regard to the relation between mistake and non-conformity.

national contract law could invoke such defects, he may do so even though the contract as such is regulated by CISG.[4]

Defects of consent therefore lead to both types of problems under CISG: under certain conditions, mistake and representation are excluded as remedies when CISG applies to a contract, whereas other defects of consent are left to national law with the ensuing uncertainty as to the question which national law is actually applicable and whether under that, possibly unknown, national contract law the contract may be voided for a defect of consent.

The situation under the Common European Sales Law is rather different: CESL contains a comprehensive set of provisions on fundamental mistake, fraud, threat and unfair exploitation (Articles 48-51 CESL). In the subsequent articles the exercising of the power to avoid or confirm the contract and the consequences thereof are regulated (Articles 52-55 CESL). This entails that in so far as CESL applies to the contract, defects of consent are exclusively dealt with under the umbrella of CESL and no recourse is needed or possible to the national contract law on this subject. This means that the parties to the contract will not be taken by surprise by the availability of a remedy for a defect of consent or the absence of such a remedy under the national contract law on this subject. In this respect, opting for CESL rather than CISG is certainly more attractive for both parties, as the former lays down a more comprehensive legal regime.

3. STANDARD TERMS

3.1. Incorporation of standard terms

An important question in legal practice is whether and to what extent a party may invoke its standard terms. The Vienna Sales Convention does not contain any clear rules on the incorporation of standard contract terms. It is nevertheless assumed that the provisions of CISG on the

[4] See M. Djordjevic, Comment 21 to Article 4 CISG, in: Kröll/Mistelis/Perales Viscasillas 2011, p. 71-72.

conclusion and interpretation of contracts apply to this issue.[5] In legal practice, however, there is much debate as to whether the standard terms must be made available to the other party so that the party introducing them to the contract may rely on them. In practice, two conflicting approach exist. The highest Austrian court, the *Oberster Gerichtshof (OGH)* ruled that since CISG does not contain any specific rules on this point, general rules of contract formation apply, which means that the party making use of such standard terms may rely on them without having to meet further requirements if the other party has accepted their applicability. Moreover, acceptance may be tacit and can also be concluded from the behaviour of the parties or from an established commercial practice between these parties.[6] By contrast, the highest German civil court, the *Bundesgerichtshof (BGH)* considered that CISG requires that the party wishing to rely on its standard terms has provided its counterpart with the opportunity to take note of these terms in an appropriate way and that this is only guaranteed where the first party provides the other with the standard terms.[7] However, it might be doubted whether CISG actually makes it obligatory to provide the other party with the standard terms. In any case, the Convention does not explicitly say so.

The clearly opposing views of the OGH and the BGH compromise the aim of CISG of making available a uniform and coherent set of rules regulating international commercial contracts. In this respect, CESL

[5] See M. Djordjevic, Comment 24 to Article 4 CISG, in: Kröll/Mistelis/Perales Viscasillas 2011, p. 73; P. Hachem, in: P. Schlechtriem & I. Schwenzer, *Commentary on the UN Convention on the International Sale of Goods*, Munich: C.H. Beck, 3rd. ed. 2010, Comment 12 to Article 4 CISG, p. 79. See also H.N. Schelhaas, *Algemene voorwaarden in handelstransacties*, Deventer: Kluwer, 2011, p. 27. In this sense also, cf. HR (Netherlands Supreme Court) 28 January 2005, *Nederlandse Jurisprudentie* 2006, 517 (B.V.B.A. Vergo Kwekerijen/Plantenkwekerij G.N.M. Grootscholten B.V), available at http://www.unilex.info/case.cfm?pid=1&id=1012&do=case (last visited on 5 February 2013).

[6] OGH (Austrian Supreme Court) 6 February 1996, 10 Ob 518/95, *Recht der Wirtschaft* 1996, p. 203-205, available at http://www.unilex.info/case.cfm?id=202 (last visited on 5 February 2013).

[7] BGH (German Supreme Court in civil cases) 31 October 2001, VIII ZR 60/01, *Neue Juristische Wochenschrift* 2002, p. 370, available on http://www.unilex.info/case.cfm?pid=1&id=736&do=case (last visited on 5 February 2013).

may provide a clearer legal environment. Under the Common European Sales Law, as under CISG, the normal rules on offer and acceptance also apply to the incorporation of standard terms. However, Article 70(1) CESL provides that standard terms may only be invoked against the other party if the other party was aware of the terms or where the party supplying them has taken reasonable steps to draw the other party's attention to them before or at the time when the contract was concluded. This provision applies both to commercial and consumer contracts and, pursuant to Article 70 paragraph (3) CESL, is mandatory where the parties have opted for the applicability of the Common European Sales Law. Under Article 70 paragraph (2), the requirement set in paragraph (1) has not been met in a consumer sales contract by a mere reference to the standard terms in a contract document, even if the consumer signs the document. *A contrario* one may infer from this that such a reference suffices in a *commercial* sales contract.[8] This suggests that the approach by CESL is much closer to the opinion of the OGH than that of the BGH in relation to CISG.

In my view, the regime laid down by CESL is preferable to that of CISG for commercial sales. Commercial parties know in advance that standard terms will apply to their transactions. It should therefore suffice that the first party makes the other party aware of the general conditions and indicates where the other party may access the standard terms. When commercial parties are genuinely interested in the content of the standard terms introduced in the contract by the other party, they can reasonably be expected to make the small effort to retrieve the standard terms. Given that the standard terms will only exceptionally be studied in advance, and that it is usually not possible to negotiate the standard terms further even in commercial transactions, it should suffice to have them easily accessible. Against this background, it is too much of a burden, and serves no reasonable interest of a party, to stipulate a rule requiring commercial parties to communicate the standard terms to the other party.

[8] Cf. extensively M.B.M. Loos, 'Standard contract terms regulation in the proposal for a Common European Sales Law', *Zeitschrift für Europäisches Privatrecht* 2012/4, p. 780.

3.2. Battle of forms

Another important aspect of standard terms concerns the battle of forms, i.e. both parties refer to their own standard terms. The Vienna Sales Convention does not explicitly regulate the battle of forms. The prevailing opinion seems to be that under Article 19 paragraph (2) CISG the *last shot theory* is the applicable rule under CISG.[9] However, different opinions are voiced, [10] and sometimes also followed by national supreme courts – who then appear to interpret CISG in accordance with national contract law.[11] As such, it is difficult to predict which rule is applied to solve the battle of forms under CISG.

In so far as the last shot theory would indeed be the applicable rule under CISG, it should be noted that this theory, as well as the opposing *first shot theory*,[12] has the drawback that which offer is ultimately accepted frequently owes more to coincidence than to anything else. Both these theories even become problematic where the parties have negotiated

[9] In this sense F. Ferrari, Comments 15 and 16 to Article 19 CISG, in: Kröll/Mistelis/Perales Viscasillas 2011, p. 290; U.S. District Court, Minnesota 31 January 2007, *The Travelers Property Casualty Company of America and Hellmuth Obata & Kassabaum, Inc. v. Saint-Gobain Technical Fabrics Canada Ltd*, available on http://www.unilex.info/case.cfm?id=1166 (last visited on 5 February 2013; see also the references in P. Schlechtriem, P. Butler, *UN Law on International Sales. The UN Convention on the International Sale of Goods*, Berlin/Heidelberg: Springer, 2009, p. 81-82; U.G. Schroeter, Comments 35 and 38 to Article 19, in: Schlechtriem/Schwenzer 2010, p. 348 and 350.

[10] Some maintain that CISG does not regulate the battle of forms at all, implying that this is left to national law. See for references F. Ferrari, Comment 14 to Article 19 CISG, in: Kröll/Mistelis/Perales Viscasillas 2011, p. 288-289. Others argue that the contract is concluded with the exclusion of the contradictory standard terms, thus applying the knock out theory (Restgültigkeitstheorie). See also P. Schlechtriem, *Internationales UN-Kaufrecht*, Tübingen: Mohr Siebeck, 4th edition, 2007, p. 78; Schlechtriem/Butler 2009, p. 78, 81-82; U.G. Schroeter, Comment 38 to Article 19, in: Schlechtriem/Schwenzer 2010, p. 350.

[11] A good example of this homeward trend is Germany, where the BGH has ruled that where parties refer to different sets of standard terms, the contract is concluded with the exclusion of the contradictory standard terms. Cf. BGH 9 January 2002, *Neue Juristische Wochenschrift* 2002, p. 1651, available on http://www.unilex.info/case.cfm?id=766 (last visited on 5 February 2013).

[12] Which in essence is accepted in Dutch law, cf. Article 6:225(3) of the Dutch Civil Code.

the content of the contract and as a result it is difficult to ascertain who has made the final offer and who has accepted it, or when the negotiations have resulted in partial agreements, some of which were the result of acceptance of the first party's offer and others that were the result of the second party's offer. In such cases, qualifying a statement as constituting the final offer will be heavy with legal consequences. This ensures a lawyer's paradise.

In this respect, the approach taken by the Common European Sales Law is to be preferred. Under Article 39 paragraph (1) CESL, where both parties make use of standard terms, both sets of terms apply in so far as they are 'common in substance' – and neither set of terms applies where they conflict with each other. It is beyond doubt that this rule would provide more legal certainty, since at least there is clarity as to which *theory* applies.

3.3. Unfairness of standard terms

The Vienna Sales Convention does not contain any provisions on the unfairness of standard terms. This means that the applicable national law determines whether standard terms are subject to an unfairness test, and what the consequences of unfairness are.

Unlike CISG, CESL does contain provisions on the unfairness of standard terms (Articles 79-86 CESL). This implies that the question whether or not a term may be considered unfair in a cross-border commercial sales contract, and what the consequences thereof would be, is not left to the applicable national law, but may be dealt with in a uniform way to all standard terms. Moreover, CESL also offers a uniform regime for the consequences of the verdict that a term is unfair: such term is then 'not binding' on the other party (Article 79 CESL).
This does, however, not mean that the solution opted for under CESL is unproblematic. Under CESL, a different standard is used to determine the unfairness of standard terms in commercial contracts from that which applies in consumer contracts: whereas in a consumer sales contract a clause which has not been individually negotiated is considered to be unfair where 'it causes a significant imbalance between

the parties' rights and obligations arising from the contract, to the detriment of the consumer, contrary to the principles of *bona fide* and fair trading',[13] this merely applies to commercial sales contracts where 'it is of such a nature that its use seriously departs from good commercial practice and is contrary to the principles of *bona fide* and fair trading.[14]
This more restricted approach is justified by pointing to the fact that for commercial contracts the mere introduction of an unfairness test is politically controversial[15] and that its introduction is not justified by the general assumption of an unequal bargaining position,[16] but only by the assumption that the use of the terms that have been drafted in advance by one party enables that party to restrict the contractual freedom of the other party through these terms.[17] Yet, it is precisely that argument that has led to the development of the first forms of protection against unfair terms in the Member States – not in the area of consumer contracts, but in the area of commercial contracts.[18] This argument

[13] See Article 83 paragraph (1) CESL.
[14] Cf. Article 86 paragraph (1) sub (b) CESL.
[15] See Th. Pfeiffer, 'Hintergrund und Entstehung der Regeln über nicht ausgehandelte Klauseln in den Acquis Principles und im Entwurf eines gemeinsamen Referenzrahmens', in: Th. Pfeiffer, W. Grunsky and J. Dammann (ed.), *Gedächtnisschrift für Manfred Wolf*, 2011, p. 114. One of the arguments used against the introduction of an unfairness test for terms in commercial contracts is that it leads to legal uncertainty and as such will lead to an increase in costs. See Pfeiffer 2011, p. 117, who opposes this argument.
[16] The Court of Justice has in a systematic manner indicated that 'the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge' (as expressed by the Court in case C-243/08, *Pannon*, [ECR] 2009, p. I-4713, no. 22). Cf. also recital (9) of the preamble to the Directive, where the unfairness test is thought to be necessary to protect consumers 'against the abuse of power by the seller or supplier, in particular against one-sided standard contracts and the unfair exclusion of essential rights in contracts'.
[17] See C. von Bar, E. Clive (eds.), *Principles, definitions and model rules of European private law. Draft Common Frame of Reference (DCFR), Full edition*, Munich: Sellier, *Comment A to Article II.–9:405 DCFR*, 2009, p. 641; compare also Pfeiffer 2011, p. 113 and 120.
[18] In this respect it is worth noting that in commercial practice it may very well be the party that objectively is in a weaker bargaining position that succeeds in introducing its standard contract terms in the contract by including a reference to them in documents preceding the conclusion of the contract, often by winning the battle of forms under the applicable national rules. See also M.W. Hesselink, 'Unfair terms in contracts

therefore does not explain why the unfairness test should be worded differently for commercial contracts than for consumer contracts, as in both cases the other party has more or less been forced to agree to the applicability of the standard contract terms.[19] The unfairness test rather serves to restore the autonomy of the party who is faced with an unfair term included in the contract than to protect against unequal bargaining power.[20] The fact that in one case that party is a consumer and in another case a professional party can and should be taken into account whether a term *in this contract* is unfair, just as the actual bargaining position of the parties and the way in which the term is included in the contract are relevant factors.[21] However, the mere fact that a party is not classified as a consumer but as a business does not mean that that party is in a better bargaining position than a consumer. As *Hesselink* argues, businesses come in all sorts and sizes, from a sole trader to a multinational company.[22] Does a sole trader really have a better bargaining position vis-à-vis a multinational than a consumer has? And what about the buyer in the case of a dual purpose contract, where the fact that the goods (e.g. a suitcase) are used both in a private capacity (for a holiday) and for business purposes (for business travel) leads to the classification of the contract as a *commercial* contract? Given that, it seems to make more sense to use the same wording for the unfairness test for both consumer and commercial contracts.[23] When applying that

between businesses', in: R. Schulze, J. Stuyck (eds.), *Towards a European Contract Law*, 2011, p. 133.

[19] Cf N. Jansen, 'Revision des Verbraucher-acquis?', *Zeitschrift für Europäisches Privatrecht*, 2012, p. 770.

[20] Hesselink 2011, p. 133-134; Pfeiffer 2011, p. 113; Th. Pfeiffer, 'Unfaire Vertragsbestimmungen', *European Review of Private Law* 2011, p. 838-839.

[21] Jansen 2012, p. 770.

[22] Cf. M.W. Hesselink, 'Towards a sharp distinction between B2B and B2C? On consumer, commercial and general contract law after the Consumer Rights Directive', *European Review of Private Law* 2010, p. 93.

[23] See H. Eidenmüller, N. Jansen, E.-M. Kieninger, G. Wagner and R. Zimmermann, *Der Vorschlag für eine Verordnung über ein Gemeinsames Europäisches Kaufrecht. Defizite der neuesten Textstufe des europäischen Vertragsrechts*, 2012, available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1991705 (last visited on 5 February 2013), p. 9-10; Jansen 2012, p. 770-771; Hesselink 2011, p. 133-134.

standard, the fact that the term is incorporated in a commercial contract may (and should) of course be taken into account.[24]
Therefore, the mere fact that under CESL also in commercial contracts some form of unfairness control will be exercised and that a uniform standard will have to be applied throughout Europe, under supervision of the ECJ, instead of leaving the matter to national law altogether, is good news in particular in so far as standard terms are invoked against small or medium-sized enterprises that have a similar bargaining position towards their seller as a consumer has. In my opinion, however, there is no convincing reason to use a different standard for commercial and consumer contracts.

4. TRANSFER OF OWNERSHIP

A third issue that is not adequately regulated in the Vienna Sales Convention, concerns the question as to when the ownership of the purchased goods is transferred to the buyer. With regard to the transfer of ownership, Article 30 CISG merely provides *that* the seller is required to transfer ownership of the goods. The time at which the ownership is transferred is not regulated. This entails that the drafters of CISG failed to make a choice between, on the other hand, the system applied in countries such as France,[25] where, in principle, the transfer of ownership of movable goods is, result results automatically from the conclusion of the contract, and therefore normally takes place at the moment when the contract was concluded, and, on the other hand the system which prevails in countries such as Germany, where the transfer of ownership of movable goods typically takes place at the time of delivery.[26]

The Common European Sales Law also fails to settle the dispute between the consensual systems and those that make the transfer of ownership conditional upon delivery: like CISG, CESL requires the seller to transfer ownership,[27] but the time at which ownership is transferred has expressly been left unregulated. From recital (27) in the

[24] See extensively Loos 2012 with further references.

[25] Cf. Article 1603 of the French Code civil.

[26] Cf. Article 929 of the German Bürgerliches Gesetzbuch.

[27] Cf. Article 91 sub (b) CESL.

preamble it follows that this question is to be decided in accordance with the applicable national law. Accordingly, opting for CESL or CISG on this issue does not produce a different result. The same, unfortunately, applies to security rights, which have not been regulated in either instrument either.

5. EXAMINATION OF THE GOODS AND NOTIFICATION FOR NON-CONFORMITY

Article 38 paragraph (1) CISG requires the commercial buyer to examine the goods that were delivered by the seller within a short period following delivery, or to have them examined on his behalf. CISG opts for a flexible period, the length of which is dependent upon the circumstances of each individual case and the reasonable opportunities available to the parties.[28] The wording of the article ('a period as short as is practicable in the circumstances') indicates that the examination period is rather short.[29] Article 38 paragraph (2) adds that, where the parties have agreed that the seller should also be responsible for the carriage of the goods, the buyer may postpone the examination of the goods until such time as they have arrived at their destination.

A similar obligation also exists under Article 121 CESL. This provision is much more explicit as to the duration of the examination period: examination must take place within as short a period as possible, which shall not exceed 14 days following delivery. Neither CISG nor CESL penalizes the breaching of the duty to examine the goods. However, in most cases the buyer who breaches the duty to examine the goods will not have met the related duty to notify the seller for non-conformity, which is to be performed within a reasonable period following the time at which he became, or should have become, aware of the non-conformity of the goods.[30] Breaching this duty causes the buyer to lose

[28] I. Schwenzer, Comment 15 to Article 38 CISG, in: Schlechtriem/Schwenzer 2010, p. 614-615.
[29] I. Schwenzer, Comment 15-18 to Article 38 CISG, in: Schlechtriem/Schwenzer 2010, p. 614-617.
[30] Cf. Article 39 paragraph (1) CISG and Article 122 paragraph (1), first sentence, CESL.

the opportunity to use a remedy for non-conformity.[31] Under Article 44 CISG, the buyer does retain the right to reduce the price or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice. Unfortunately, a corresponding provision is missing in CESL. It should, however, be noted that under both instruments, the seller may not invoke a breach of the duty to notify or argue that the period for notification had already elapsed if the lack of conformity relates to facts of which the seller knew or could be expected to have known, and which the seller failed to disclose to the buyer.[32]

CISG does not expressly indicate when the notification period starts to run. CESL does contain such an explicit provision: Article 122 paragraph (1), second sentence, CESL indicates that the notification period starts either at the time of delivery of the goods or, if this comes later, at the time when the buyer discovered, or should have discovered, the lack of conformity – e.g. on the basis of the examination required under Article 121 CESL. Obviously, for defects which could not reasonably have been discovered during the period for examination, the latter time applies as regards the start of the notification term. In this respect, as the defect could not have been discovered at the time of delivery, it is immaterial whether the buyer had in fact examined the goods or not. However, both under CISG and CESL, with regard to hidden defects, the buyer loses the right to rely on the lack of conformity if he has not informed the seller of any lack of conformity within a period of two years following delivery.[33] Defects that only manifest themselves after this period has elapsed are therefore for the buyer to bear. However, if the parties have agreed that the goods

[31] Article 39 paragraph (1) CISG and Article 122 paragraph (1), first sentence, CESL. In both instruments, the duties to examine and notify for non-conformity are limited to commercial sales contracts. For CISG this follows from the scope of application of the Convention itself; for CESL it follows from the headings of the section in which this issue is regulated and the respective provisions containing the duty to examine the goods and the duty to notify for non-conformity.
[32] Cf. Article 40 CISG and Article 122 paragraph (6) CESL.
[33] Cf. Article 39 paragraph (2) CISG and Article 122 paragraph (2) CESL. It should be noted that Article 122 paragraph (2) CESL points to the moment when the goods are handed over to the buyer as the moment when the cut-off period starts to run.

should remain fit for a specific or for normal use during a longer period, it is the longer period that will apply.[34]

The provisions on examination of the goods and notification of any defects in CISG and CESL are very similar, and as such any preference for CESL over CISG does not change the position of commercial parties in substantive terms. In relation to concealed defects, however, there is a difference. Both instruments stipulate that, where the seller has concealed defects, he will forfeit not only his right to claim that the duty to notify had been breached, but also the opportunity to argue that the buyer may not claim a remedy because the two-year period had elapsed. Under both instruments, this entails that the buyer may invoke a remedy as long as the two-year cut-off period has not already elapsed. In terms of legal certainty, short and clear-cut time limits are usually considered to be in the best interest of smooth business transactions.[35] It may be observed that the rules in CESL are more concrete than those in CISG: CESL makes clear that the examination period shall not exceed 14 days from delivery, and provides for an explicit starting time of the duty to examine. These clear rules are usually beneficial for commercial parties, since they enhance legal certainty.

CESL is also clear with regard to prescription periods: a claim prescribes two year after discovery of the defect, and ten years following the time at which delivery became due, whichever is the earlier.[36] CISG does not contain any rules on prescription periods, but such rules do follow from the New York Convention on Limitation in international sales contracts (hereinafter referred to as: the Uncitral Convention). Under the Uncitral Convention, a claim for non-conformity arising from an international sales contract prescribes in four years after delivery. However, the Uncitral Convention has been ratified by substantially fewer countries, and only 6 of them are EU

[34] Cf. Article 39 paragraph (2) CISG and Article 122 paragraph (3) CESL.
[35] This is one of the reasons why it is standard to include short expiry dates in standard terms.
[36] Cf. Articles 179 and 180 CESL.

Member States.[37] This implies that in the vast majority of cases, prescription of claims under CISG is left to national law. This implies that from the perspective of legal certainty as to time limits, CESL is both more comprehensive and clear. Moreover, in so far as one agrees to the adage that short time limits are in the best interest of smooth business transactions, then this would suggest that CESL better suits the needs of commercial practice.

6. REMEDIES FOR NON-CONFORMITY

From the perspective of commercial parties an important parameter for the assessment of the two instruments is any remedy the parties may invoke in the event of non-performance. I will not go into the deals of this, as Dr. Markéta Selucká will address the remedies for non-performance in the CESL later this afternoon. Here, it suffices to say that the remedial scheme of the CESL and the CISG show large similarities and only minor differences. These differences are not of such importance that commercial parties can be said to be substantively better or worse off under CESL than is the position under CISG.

7. CONCLUDING REMARKS AND EVALUATION: THE ADDED VALUE OF CESL AND THE POSITION OF THE COMMERCIAL BUYER

In the introduction I put the question before you why and when commercial parties should want to opt-in to the CESL (and opt-out of CISG)? On the basis of what was discussed, the answer to this question seems clear: in some areas CESL is clearly superior to CISG, if only because CESL contains an extensive regulation of matters which have largely been left uncovered under CISG or are regulated in such a manner that it has led to controversies as to the proper interpretation of CISG. CISG does not provide for rules on defects of consent, substantive control regarding unfair terms, and transfer of ownership. Under CESL, both defects of consent and unfair terms are regulated, which implies that no recourse to national contract law is needed. And even though I believe that using different standards for the unfairness

[37] See the depositary at the United Nations, http://treaties.un.org (last visited on 5 February 2013).

test in B2B contracts and B2C contracts is substantively the wrong choice, the mere fact *that* under CESL also in commercial contracts some form of unfairness control will be exercised is good news, in particular for small and medium-sized enterprises lacking bargaining power that are confronted with unfair terms. A third matter left unregulated under CISG, the moment when ownership passes, unfortunately is also not regulated under CESL – as is basically the case with all property law matters. In other areas where CISG does contain relevant provisions – incorporation of standard terms and the battle of forms – the literature and case law on these provisions is so diverse that CISG has not brought much uniformity. In these areas, CESL not only contains clear, but also sensible provisions.

With regard to matters of non-conformity, we saw that the duties to examine the goods and to notify for non-conformity by and large have been regulated in the same manner, and more or less the same is true with regard to the buyer's remedies. In one area, however, again CESL appears better suited to serve the needs of commercial parties: CISG leaves the matter of prescription of a claim for non-conformity to the Uncitral Convention, which however has hardly been ratified by EU Member States. This implies that in the vast majority of cases, prescription of claims under CISG is left to national law. In this respect, the fact that CESL contains clear and comprehensive rules on prescription seems preferable for commercial practice.

This leaves but one conclusion possible: although improvements to CESL certainly are possible – and clear rules on the transfer of property and on security rights would fill an important gap –, if adopted the Common European Sales Law would most certainly lead to better and clearer results than currently follow from CISG.

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