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The CESL Proposal:

An Overview^{*1}

1. Introduction

The European Commission has prepared a proposal for a Common European Sales Law (CESL) for B2C and B2B contracts.^{*2} This would be an ‘optional instrument’: a set of rules that would form part of each Member State’s law and which the parties could choose to use instead of the ‘pre-existing’ or ‘domestic’ rules. For issues that fall within the scope of the CESL, it would be the rules of the CESL (most importantly, the mandatory rules of the CESL) that would apply. The CESL is not intended to replace domestic contract law in the way that, for example, the Rome I Regulation^{*3} has replaced the earlier law of each Member State (MS), but if the parties choose to use the CESL, its rules would displace the domestic rules that would otherwise apply.

How have we arrived at this proposal? What is its purpose? How would it work? Is it needed? These are the questions I hope to answer in this paper.

2. Background^{*4}

In 2001, the European Commission issued a consultation paper titled ‘Communication on European Contract Law’.^{*5} From the responses, the Commission concluded that, while differences between the laws of contract in the various Member States do not prevent trade, they represent an obstacle that increases the cost and therefore the attractiveness of cross-border contracting. Indeed, it seems self-evident that having to deal with a variety of legal systems must add to the cost, or the risk, of all but the simplest of cross-border transactions. Each business will want to know what difference it will make if the other party is a consumer who has rights under the law of his own country of residence that may not be taken away under that law, or if the other party is a business that insists on the contract being governed by its own country’s law or even

¹ An earlier version of this paper was presented at a conference at the Centro di eccellenza Altiero Spinelli per l’Europa dei Popoli e la Pace nel Mondo, Rome III, in May 2012 and has been published in L. Moccia (ed.), *The Making of European Private Law: Why, How, What, Who?*. Munich: Sellier, 2013, pp. 65–76.

² Proposal for a Regulation on a Common European Sales Law, 11 October 2011, COM(2011) 635 final. The proposal contains a draft regulation, dealing primarily with the scope of application of the CESL, and an Annex containing the substantive rules. In this paper, Articles of the proposed Regulation are referred to as ‘Regulation Article 00’ and Articles of the Annex as ‘CESL Article 00’.

³ Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations.

⁴ A more detailed account of the background to the CESL can be found in H. Beale, *European contract law: The Common Frame of Reference and beyond*. – C. Twigg-Flesner (ed.), *The Cambridge Companion to European Union Private Law*. CUP 2010, pp. 116–130.

⁵ Communication from the Commission to the Council and the European Parliament on European Contract Law, COM(2001) 398 final.

the law of a third country. Will our standard contract ‘work’ as well under that law as it does under our own law? Perhaps even more important is that, for many businesspeople, differences between legal systems create a psychological barrier. And whether we are speaking of B2B or B2C contracts, the barriers are likely to be much more significant for small and medium-sized enterprises (SMEs) than for larger businesses. First, larger businesses may actually not sell across borders: they may open a subsidiary in the buyers’ country. Secondly, larger businesses are more likely to have expertise in dealing with foreign laws. Thirdly, larger businesses are likely to enter larger transactions, involving higher values, or larger numbers of similar contracts—when the cost of obtaining legal advice about foreign law is, in relative terms, much lower than with smaller or less frequent transactions. Lastly, I strongly suspect that smaller businesses are generally more risk-averse than larger ones. In simple terms, they can’t afford to take the same risks. I suspect many are simply put off from attempting cross-border sales. So the problems are likely to be much greater for SMEs than for larger businesses. It is precisely these firms that we hope to encourage by providing the CESL.

The Commission also concluded that the existing consumer legislation needed to be improved. In 2003, the Commission produced its ‘Action Plan on a More Coherent European Contract Law’.⁶ This suggested revising the consumer *acquis* in line with a Common Frame of Reference (CFR) and reflecting on the need for some further harmonising measure such as an optional instrument. In 2004, in a document called ‘The Way Forward’⁷, the Commission indicated that the CFR should contain fundamental (guiding) principles; definitions, which could be used in interpreting the European legislation or which future legislation could adopt; and model rules, ‘best solutions’ found in the national laws or international instruments. At an earlier conference, in Tartu⁸, I also suggested that the CFR might provide comparative material, which is essential background information for any legislation. The Commission’s immediate aim seemed to be to use the CFR to revise and possibly extend the various consumer directives, with the aim of amending the laws of the various states. It was said that the CFR might form the basis for an optional instrument; but as late as 2009 that seemed a long way off.⁹

Though the signs were clear in the Commission documents, I had not appreciated that the Commission’s approach to the consumer *acquis* had undergone a very significant shift. The earlier directives were justified in terms of improving the functioning of the internal market—consumer protection was originally not an end in itself. However, the Commission’s approach was all about building the confidence of consumers to ‘shop abroad’ by ensuring that, wherever in the EU the consumer made a purchase, he would possess a set of minimum rights. But in the Action Plan documents there were clear indications that the approach was changing. It was now about encouraging cross-border sales by removing the barriers faced by businesses. Later it emerged that the Commission wants to do this for not only B2C but also B2B contracts.

In particular, the Commission wanted to tackle what it perceives to be a major problem for B2C contracts arising from what is now Article 6 of the Rome I Regulation.¹⁰ Under said Regulation, the parties to a consumer contract may choose which law is to apply to the contract and the seller may use its standard terms and conditions; but the consumer cannot be deprived of the protection of the mandatory rules of the state in which he is habitually resident if the contract resulted from the trader directing its activities to consumers in that state. This means that a trader seeking to sell across borders may need to know the mandatory rules of each country toward which it directs its activities. An Internet shop running a Web site that appears to invite customers from all over the EU may, therefore, have to know no fewer than 29 or more individual sets of laws.

The answer to this found in ‘The Way Forward’ was not just that eight directives would be improved¹¹ but that there might be a move from minimal harmonisation to full harmonisation¹²—so that, within the fields covered by the directives, the substance of the law would be the same in each MS.

⁶ COM(2003) final, OJ C 63/1.

⁷ Communication from the Commission to the European Parliament and the Council, COM(2004) 651 final, 11 October 2004.

⁸ See H. Beale. The nature and purposes of the Common Frame of Reference. – *Juridica International* 2008 (XIV), p. 10.

⁹ See H. Beale. The content of the political CFR—how to prioritise. – J. Kleinman (ed.). *A Common Frame of Reference for European Contract Law* (Centrets skriftserie, 14). Stockholm: Stockholm Centre for Commercial Law 2011, pp. 27–32.

¹⁰ See Note 3, above.

¹¹ The Way Forward (see Note 7), p. 3. To be reviewed were directives 85/577 (‘the Doorstep Selling Directive’), 90/314 (‘the Package Travel Directive’), 93/13 (‘the Unfair Contract Terms Directive’), 94/47 (‘the Timeshare Directive’), 97/7 (‘the Distance Selling Directive’), 98/6 (‘the Price Indication Directive’), 98/27 (‘the Injunctions Directive’), and 99/44 (‘the Consumer Sales Directive’).

¹² The Way Forward (see Note 7), p. 4. See also paragraph 4.2.2 of the Action Plan.

This was the approach of the proposal for a Consumer Rights Directive (CRD) made in 2008.¹³ The new directive would have replaced four major directives. There would have been some increase in the degree of consumer protection, but that would have been only slight, with the important shift being toward full harmonisation. The result would have been that Member States that had given consumers stronger protection than was required by the directives (or had stronger protection already and left it in place) would have had to remove it. Not surprisingly, this approach was a failure. If there was to be any significant reduction in the variety of mandatory rules that might affect cross-border sellers, there would have to be substantial interference with MS laws. The only alternative was to narrow the scope of the CRD and its full harmonisation provisions. And that is what happened. The Commission opted for a new directive that applies only to distance and off-premises contracts and, for the most part, governs only pre-contractual information and withdrawal rights.¹⁴ In effect, the Commission decided to cut its losses on the CRD, because by then it had a new approach.

The new approach is the CESL. Rather than seek further harmonisation of Member States' laws for all B2C transactions, the CESL creates an optional law that can be used for cross-border contracts. The Regulation will insert into each Member State's law a separate set of rules, which the parties may choose to apply for cross-border contracts in place of the 'pre-existing' or 'domestic' rules. If they have chosen the CESL, for any issues that fall within the scope of the CESL, its rules shall apply, not the rules of the 'domestic' law. Most importantly, this includes mandatory rules. The CESL contains its own set of mandatory rules for consumer contracts and, within the scope of its application, it is these that would apply, not the mandatory rules of the 'pre-existing' domestic law. As we will see, these mandatory rules provide a high level of consumer protection; and for a consumer contract, Article 8 (3) of the Regulation provides that the CESL can only be adopted in its entirety. This means that the trader cannot 'cherry-pick' just those rules of the CESL that are more favourable to it than the rules that would otherwise apply.

So, though the CESL does not replace domestic contract law, if the parties choose to use it, its rules will displace the domestic rules that would otherwise apply. Therefore, for most purposes a trader who can persuade a consumer to buy goods with the CESL governing the contract need worry only about one set of rules—the rules of the CESL.

The neatness of the solution is that Article 6 of the Rome I Regulation ceases to be a problem. Suppose an English Internet seller directs its Web site toward consumers in Estonia but asks the consumers to agree to using the CESL. A consumer habitually resident in Estonia who agrees to buy goods on these terms will still be entitled to the protection of the mandatory rules of Estonian law—but, because that consumer has agreed to use the CESL, it is the mandatory rules of the CESL that will apply¹⁵—and these rules will be the same in both Estonian and English law.

3. Scope of application

The scope of application of the CESL is limited in a number of ways.

3.1. Types of contract

First, the CESL applies only to contracts for the sale of goods or for the supply of digital content that is not supplied via a tangible medium (such as a DVD) but, for example, is downloaded directly from the Internet. The provisions on digital content, which were drafted by the Commission after the Expert Group's Feasibility Study¹⁶ had been published, are a major innovation for many countries. In the UK, for example, digital

¹³ Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM(2008) 614.

¹⁴ Directive 2011/83/EU of 25 October 2011 on consumer rights.

¹⁵ It is true that some commentators question whether the consumer's agreement to use the CESL provisions of the applicable law (in the example given, the seller is likely to have stipulated English law) means that the consumer has also agreed to accept the CESL provisions of the law of the consumer's habitual residence (in the example, Estonian law); see, for example, the Law Society of England and Wales, *European Brief*, November 2012, p. 3. If there is any real doubt on this point, it seems simple enough to amend the proposed Regulation to make this effect clear.

¹⁶ See May 2011's 'A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback'.

content supplied via a tangible medium falls within the scope of the Sale of Goods Act but we have no legislation applying to digital downloads.

The CESL applies also to 'related services' that the seller or supplier agrees to supply in the contract of sale/supply or in a separate contract made at the same time. However, 'related services' are limited to matters such as installation, maintenance, and repair.^{*17} If the seller agrees to provide other services, this will not fall within the scope of the CESL, and if the provision is under the main contract, it will bring the whole contract outside the scope of the CESL through being a 'mixed purpose' contract, which Article 6 (1) of the proposed Regulation states is not covered.

Contracts involving consumer credit (such as for sales wherein the consumer pays by instalment) are also outside the scope of the CESL, see Regulation's Article 6 (2).

3.2. Territorial scope

Secondly, the CESL applies only to cross-border contracts. For a B2B contract, the definition of a cross-border contract in Regulation's Article 4 (2) appears to be simple: it is one wherein the parties have their habitual residence in different countries, at least one of which is a Member State. I pause only to note that this means that the CESL is not wholly internal to the EU. The CESL may be used when a business that is 'resident' in an MS is selling to or buying from a business that is resident outside the EU. For B2C contracts, the same is true under Regulation's Article 4 (1). So a seller in Russia, which will not be subject to the Regulation, may nonetheless sell to an Estonian consumer on CESL terms; and it seems that Article 4 (1) envisages also the converse case, wherein an Estonian seller supplies a consumer resident in Russia. But whether the private international law of Russia would permit the mandatory rules of Russian law to be displaced by those of the CESL, I have no idea.

In B2C contracts, the scope of application is broader than for B2B contracts. The parties do not have to be habitually resident in different countries. It is enough if

either the address indicated by the consumer, the delivery address for goods or the billing address are located in a country other than the country of the trader's habitual residence.^{*18}

So it seems that the CESL can be applied even if the consumer would not benefit from Article 6 of Rome I when, for example, the consumer buys on a Web site that is not targeted at his country or the consumer is in the trader's country and buying in the trader's shop, provided that the consumer gives an address in another country.

3.3. The issues covered

Thirdly, the scope of the CESL is limited to the issues that are most likely to arise under a contract for sale or supply of digital content. This is explained in Recital 27 of the proposed Regulation. Matters that are beyond its scope are left to be governed 'by the pre-existing rules of the national law outside the Common European Sales Law'. They include 'legal personality, the invalidity of a contract arising from lack of capacity, illegality or immorality, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law and the law of torts'.

¹⁷ See the proposed Regulation's Article 2 (m).

¹⁸ See the proposed Regulation's Article 4 (3) (a).

4. Benefits for the trader in B2C relations

One advantage of the CESL for the trader in a B2C contract is that for most disputes that are likely to arise, the CESL would provide a ‘neutral’, non-national system of rules. The text of the rules would be available in all the EU languages. One hopes that it would be applied uniformly in all of the individual Member States. However, with B2C contracts the principal advantage would be to overcome the problem posed by Article 6 of the Rome I Regulation. There is, in effect, a trade-off. A business that uses the CESL would find that it has to give consumers in some Member States—states that do not have a particularly high level of consumer protection—more extensive rights than if the trader were to sell on the basis of the pre-existing law qualified, as it would be, by the consumer’s rights under Article 6 of Rome I. But, in exchange, the business would be able to sell across borders on the basis of a single law applying equally to all and with which, hopefully, all would become equally familiar. It would allow firms to use a ‘single operating platform’ for all cross-border sales. Being able to use a single system may indeed be so much more convenient that traders will put pressure on the Member State in which they are resident to exercise the option given by Article 13 of the proposed CESL Regulation to permit the use of the CESL when the parties are resident in the same MS.^{*19}

5. Benefits of the CESL for the consumer

Some consumers will benefit directly from using the CESL. If the level of consumer protection in both the country where they live and the country whose law governs the consumer sale is relatively low, by using the CESL they can increase their protection. Other consumers, those who live in a country with very high levels of protection, may get slightly less protection under the CESL. But again there is a trade-off. If the CESL has the effect the Commission hopes for—namely, increasing the number of traders willing to sell across borders—all consumers should benefit from increased choice and more competition, leading to lower prices.

6. Safeguards for the consumer

There are some built-in safeguards for the consumer. First, the Regulation provides that in a B2C contract the CESL can be adopted only through

an explicit statement which is separate from the statement indicating the agreement to conclude a contract. The trader shall provide the consumer with a confirmation of that agreement on a durable medium.^{*20}

Accordingly, the choice of the CESL cannot be simply made one of the trader’s standard terms; the consumer will have to sign a separate document or, on a Web site, click on a special ‘Blue Button’^{*21}.

In addition, the trader will have to send a Standard Information Notice.^{*22} As currently drafted, this is merely a bit of advertising of the advantages of the CESL. As does the European Law Institute^{*23}, I have serious doubts about the usefulness of this: it would be better to require a link to a Web site giving the consumer information about the differences between the CESL and each national body of ‘domestic’ law.

But the chief protection for consumers is simply the content of the CESL, the high level of consumer protection that it affords.^{*24} If, in fact, the consumer will be well protected, warnings and the like are not needed. So is it true that the level of consumer protection is high?

¹⁹ Proposed Regulation’s Article 13 (a).

²⁰ Proposed Regulation’s Article 8 (2).

²¹ See H. Schulte-Nölke, <http://www.eesc.europa.eu/resources/docs/schulte-nolke-budapest-march-2011.pdf>.

²² Proposed Regulation’s Article 9.

²³ Statement of the European Law Institute on the Proposal for a Regulation on a Common European Sales Law, COM(2011) 635 final, para. 23.

²⁴ A high level of protection is an explicit aim of the CESL; see Recital 11.

The CESL does not provide the highest level of protection found within the EU in every respect. I think that, in comparison to the law of most Member States, the level of consumer protection is very good, however. I will give just three examples.

6.1. Pre-contractual information duties

The CRD requires the trader to give the consumer specified information before the contract is concluded, and it provides that the information ‘shall form an integral part of the contract’—i.e., the trader undertakes to ensure that the information is correct.^{*25} But the CRD does not provide the individual consumer with a remedy if the information is **not** given and the consumer suffers a loss as a result. The CESL gives the consumer a right to damages for breach of the duty.^{*26}

6.2. Unfair terms

In some respects, the CESL follows the minimum requirements of Directive 93/13. Thus, the controls apply only to terms that are not individually negotiated, and ‘core terms’ (the main definition of the subject matter and, more importantly, the amount of the price) cannot be challenged under these provisions.^{*27} But certain types of term are ‘blacklisted’ as always unfair^{*28} while other terms are not merely ones that ‘may be unfair’, as under ‘Indicative list’ in the directive, and are actually ‘grey-listed’—i.e., presumed to be unfair unless the trader shows otherwise.^{*29}

6.3. Remedies for non-conformity

The Consumer Sales Directive^{*30} gives a consumer who has been supplied with non-conforming goods the right to repair or replacement. However, the choice between repair and replacement is the seller’s; and the consumer cannot rescind the contract and ask for its money back, or demand a price reduction, without first giving the seller the chance to repair or replace (unless neither is possible or each would be disproportionate)—the so-called hierarchy of remedies. The CESL allows the consumer to choose between repair and replacement, where appropriate^{*31}, but also allows the consumer to demand termination or price reduction immediately.^{*32} This may be much more convenient for the consumer, who may be able to get a substitute more quickly than the seller can repair or replace the non-conforming goods. Nor is there any time limit on termination, provided that it can be shown that the goods did not conform to the contract at the outset, and the consumer has to pay for use he had from the goods before termination only if it would be inequitable to allow the recipient the free use of the goods for that period.^{*33} This strengthens the consumer’s hand in negotiating with the seller. These provisions may even go too far; I would prefer to give the consumer the right to terminate or have the price reduced, without first asking for repair or replacement, for only a short period after delivery.

So even if the CESL does not match the level of consumer protection in every MS point for point, the overall level of consumer protection in the CESL is very high. My own view is that, insofar as it is possible to ‘average’ these things, the ‘average’ level of protection across all of the issues that may affect consumers is about as high under the CESL as it is under any national system of law. Therefore, very few consumers would suffer any real loss of protection, while all should gain a good deal from the increased choice and competition.

²⁵ Consumer Rights Directive’s Article 6 (5).

²⁶ CESL, Article 29.

²⁷ CESL, Article 80.

²⁸ CESL, Article 84.

²⁹ CESL, Article 85.

³⁰ Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, Article 3.

³¹ CESL, Article 111.

³² See CESL’s Article 106.

³³ CESL, Article 174 (1) (c).

I would add that it is essential to the scheme that this overall high level of consumer protection in the CESL not be watered down in any significant way. Article 8 (3) of the proposed Regulation is also essential, to prevent traders from omitting articles of the CESL that would give the consumer more protection than the law of the consumer's habitual residence. Consumers are unlikely to know the details of the law—neither the law of their habitual residence nor that of the CESL—but they should know that by pressing the Blue Button they will get the full, high-level protection of the CESL.

7. Advantages for B2B contracts

In contrast, the case for the CESL for B2B contracts rests more on the substance of the rules. In particular, the CESL contains many provisions aimed at providing the kind of legal protection needed by SMEs—protection that is found in some laws but that in others is noteworthy by its absence.

8. The disincentives to cross-border trade for SMEs

I have already explained why I think that differences between legal systems create much larger obstacles—even if they are psychological rather than real obstacles—to cross-border selling by SMEs than for bigger businesses. First, larger businesses may actually not sell across borders: they may open a subsidiary in the buyers' country. Secondly, larger businesses are more likely to have the expertise to deal with foreign laws. Thirdly, larger businesses are likely to enter larger transactions, with higher values, or conclude similar contracts in large numbers—such that the cost of obtaining legal advice about foreign law should be relatively low in comparison to that with smaller or less frequent transactions. Often SMEs are not so sophisticated and will not consider the cost of taking expert advice justified. So if they were to make cross-border contracts, they would have to take the legal risk. However, SMEs are likely to be risk-averse.

9. Model contracts and adoption of principles by contract

Obviously, there are fewer mandatory rules for B2B contracts than there are for B2C contracts in the CESL, just as in most national laws. With a B2B contract, the parties are free to agree on their own terms to a much greater extent. This suggests another way in which to solve the problem of different laws: provision of model standard contracts prepared for cross-border transactions. Bodies such as the International Chamber of Commerce have done a great deal in this respect. But there are two serious limitations with this approach. The first is that very few model forms are anything like complete—they frequently leave out important matters that are covered only by the otherwise applicable law. True, this problem can be solved via incorporation of sets of principles such as the Principles of European Contract Law³⁴ (PECL) or the UNIDROIT Principles of International Commercial Contracts (UPICC) into the contract,³⁵ but that will not address a second problem: often, one party will try to modify the model contract or the set of principles that the parties have agreed to incorporate. The modification may be hidden in the small print and be unknown to the other party. This is particularly likely when one party is a large, sophisticated business using its standard form in a contract with a much smaller and less sophisticated business. In such a situation, the SME may assume that, because the contract looks like the model form or appears to incorporate the PECL or the UPICC, the SME will get the protection it wants, when, in fact, the exclusions or alterations take away that protection. This problem can be dealt with only by having mandatory rules such as controls over unfair terms. The risks to an SME cannot necessarily be resolved by the parties using a model form or a set of internationally accepted principles as part of their contract.

³⁴ O. Lando, H. Beale (eds). *Principles of European Contract Law, Parts I and II*. The Hague: Kluwer 2000.

³⁵ Third edition (Rome, 2010).

10. The need for protective rules for SMEs

In other words, the problems faced by SMEs are not just ones of understanding foreign laws. They are also about the terms of the contract or, indeed, the way in which the contract is made or the way in which the other party might behave during the validity of the contract. When a party is relatively inexperienced or unsophisticated in negotiating contracts and cannot afford legal advice, there are serious dangers. An SME, for example, may not know what is in the standard contract terms supplied by the other party, or it may not understand the implications of those terms. In the course of negotiations, it may not think to ask for information that might affect its decision on whether or not to enter the contract—it may assume the other party will disclose such information. And it may not anticipate the other party behaving opportunistically during the course of performance, and so not seek to insert safeguards into the contract.

11. Different approaches to inexperienced parties

There are marked differences in the way in which our various national laws deal with such issues. Some national laws of contract offer protection to businesses that get themselves into trouble of the kinds I have just described. German law, for example, allows a business to challenge the other party's standard terms^{*36}, and it imposes a duty of disclosure if non-disclosure would be contrary to good faith.^{*37} Some laws, such as Dutch law^{*38}, give the court very wide powers to refuse enforcement to a party whose behaviour has been contrary to good faith. Other systems, such as English law, take a very different attitude.^{*39} English law for B2B contracts can be described as highly 'individualistic'—the parties are expected to stand on their own two feet and not look to the court for assistance. There are very few controls over unfair terms—in essence, controls exist only over clauses that limit or exclude liability.^{*40} There is generally no duty to disclose facts, however crucial^{*41}, and, in effect, there is no doctrine of mistake that can be used to escape the contract.^{*42} Finally, there is no general doctrine of good faith.^{*43} English law's attitude is this, broadly speaking: read the contract; ask questions before you agree; and if you don't want the other party to behave in a certain way, insert a term in the contract to prevent it. And if you didn't, well, tough luck. You'll know better for next time.

Many English lawyers believe that English law is, by and large, appropriate for the kinds of cases that are normally heard by the English courts, especially the Commercial Court. I agree. The 'typical litigant' in an English contract case is a large company that is either sophisticated (many of them are 'repeat players' in the relevant market) or represented by highly trained lawyers; a party that knows what is in the standard-form document, if there is one; a party that knows what facts it should ask for before entering into a contract; and a party that can anticipate at least most of the tricks that the other party might get up to. Moreover, such parties do not mind risk; what they dislike is uncertainty about the legal effect of their

³⁶ See §§305–307 of the BGB. The 'grey' and 'black' lists (see §§308 and 309, respectively) do not apply to B2C contracts, but §310 (1) means that the courts can and do reach similar results under the general provision of §307; see B. Markesinis, H. Unberath, A. Johnston. *The German Law of Contract: A Comparative Treatise*. Second edition. Oxford: Hart 2006, p. 177.

³⁷ *Ibid.*, 306–310.

³⁸ Article 6:2 of the BW.

³⁹ Some of these characteristics of English law are explored in more depth in H. Beale. *Mistake and Non-Disclosure of Facts*. Oxford: Oxford University Press 2012, Chapter 3. Some possible reasons for them are surveyed in H. Beale. Characteristics of contract laws and the European optional instrument. – H. Eidenmüller (ed.). *Regulatory Competition in Contract Law and Dispute Resolution*. Munich: Beck 2013, p. 315.

⁴⁰ Under the Unfair Contract Terms Act, 1977.

⁴¹ *Smith v. Hughes* (1871) LR 6 QB 597 and, more recently, *Statoil ASA v. Louis Dreyfus Energy Services LP (The Harriette N)* [2008] EWHC 2257 (Comm), [2008] 2 Lloyd's Rep. 685.

⁴² When the mistake is as to the substance or the surrounding facts (as opposed to being a mistake as to the terms, which may give rise to relief, as in *Hartog v. Colin and Shields* [1939] 3 All E.R. 566), it is legally relevant only if it is shared by both parties and renders the contract or the 'contractual venture' impossible: *Great Peace Shipping Ltd v. Tsavlis Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679, at paragraph 76.

⁴³ In the recent case *Yam Seng Pte Ltd v. International Trade Corporation Ltd* [2013] EWHC 111 (QB), the Court stated that, on the particular facts (involving a long-term distribution contract that had been drafted without legal advice and comprised, in all, eight clauses), there was an implied term under which the parties should behave toward each other with good faith, but the actual decision seems to have rested on much narrower implied terms.

agreement—uncertainty that is inevitable if the court has power to assess the validity of the contract terms or to assess, after the event, whether the parties' behaviour was or was not in accordance with good faith and fair dealing. This is particularly true when the contract is in a fluctuating market, where one or the other party may have very strong incentive to find legal grounds for avoidance of the contract if the market has moved against it.^{*44} But this kind of law is not suitable for many SMEs, which do not have the same characteristics and which do not, in general, sign large contracts or contracts in fluctuating markets.

12. Why the CISG is not the answer

This explains my answer to a question that is frequently asked: why do we need a CESL when we already have the Convention on Contracts for the International Sale of Goods (CISG)? It so a good question. The CISG offers many of the same advantages as the CESL. It provides a neutral, internationally accepted law that is translated into many languages. Moreover, it is already part of the law of many countries and we have developed case law and wide experience of the CISG. But my answer is simple. There are crucial elements—validity and the control of unfair terms—that are not covered by the CISG. They are left to be determined by the otherwise applicable law of contract. And that brings us back to the problem of knowledge. Unless it is familiar with the otherwise applicable law affecting the contract, an SME that is offered a contract to which the CISG will apply but which is on standard terms will not know whether it would be able to challenge one of those terms if it is unfair; it will not know whether the other party has a duty of disclosure; it will not know whether it might have a remedy if it finds that it has made a fundamental mistake; and it may have enormous difficulty in knowing to what extent it will have protection if the other party behaves badly. All of that will depend on what the law that governs these issues provides. And the position is made even more complex by the fact that in some systems of law, the protections that apply to domestic contracts do not apply to 'international' (i.e., cross-border) contracts.^{*45}

13. Protection within the CESL

If I am right in saying that many SMEs are risk-averse, then I would expect many SMEs to want to have the kind of protection that the mandatory rules of the CESL provide even for business-to-business contracts. They will want to have protection in case terms that were not negotiated are unfair. They will find this in the CESL. CESL's Article 86 provides the following:

Meaning of 'unfair' in contracts between traders

1. In a contract between traders, a contract term is unfair for the purposes of this Section only if:
 - (a) it forms part of not individually negotiated terms within the meaning of Article 7; and
 - (a) it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.
2. When assessing the unfairness of a contract term for the purposes of this Section, regard is to be had to:
 - (b) the nature of what is to be provided under the contract;
 - (c) the circumstances prevailing during the conclusion of the contract;
 - (d) the other contract terms; and
 - (e) the terms of any other contract on which the contract depends.

SMEs will want the right to avoid the contract on grounds of mistake, at least when the other party knew or ought to have known of the mistake and should have said something. They will find this in CESL's Article 48:

⁴⁴ See the analysis by G. Priest. Breach and remedy for the tender of non-conforming goods. – *Harvard Law Review* 1978 (91), p. 960.

⁴⁵ For example, the UK's Unfair Contract Terms Act (1977) does not apply to international supply contracts (S. 26); neither does it apply to contracts to which English law applies only because the parties have chosen English law to govern the contract and which otherwise would be governed by some other law (S. 27).

Mistake

1. A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:
 - (a) the party, but for the mistake, would not have concluded the contract or would have done so only on fundamentally different contract terms and the other party knew or could be expected to have known this; and
 - (b) the other party:
 - (i) caused the mistake;
 - (ii) caused the contract to be concluded in mistake by failing to comply with any pre-contractual information duty under Chapter 2, Sections 1 to 4;
 - (iii) knew or could be expected to have known of the mistake and caused the contract to be concluded in mistake by not pointing out the relevant information, provided that good faith and fair dealing would have required a party aware of the mistake to point it out; or
 - (iv) made the same mistake.

SMEs will welcome the duty of disclosure in CESL's Article 23:

Duty to disclose information about goods and related services

1. Before the conclusion of a contract for the sale of goods, supply of digital content or provision of related services by a trader to another trader, the supplier has a duty to disclose by any appropriate means to the other trader any information concerning the main characteristics of the goods, digital content or related services to be supplied which the supplier has or can be expected to have and which it would be contrary to good faith and fair dealing not to disclose to the other party.
2. In determining whether paragraph 1 requires the supplier to disclose any information, regard is to be had to all the circumstances, including:
 - (a) whether the supplier had special expertise;
 - (b) the cost to the supplier of acquiring the relevant information;
 - (c) the ease with which the other trader could have acquired the information by other means;
 - (d) the nature of the information;
 - (e) the likely importance of the information to the other trader; and
 - (f) good commercial practice in the situation concerned.

SMEs may even welcome the general duty of good faith and fair dealing contained in Article 2 of the CESL:

Good faith and fair dealing

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

Article 2 is not supposed to assume the major role that is played by good faith in some legal systems: it is intended to be subsidiary. Recital 31 states that

[t]he principle of good faith and fair dealing should provide guidance on the way parties have to cooperate. As some rules constitute specific manifestations of the general principle of good faith and fair dealing, they should take precedent [*sic*] over the general principle. The general principle should therefore not be used as a tool to amend the specific rights and obligations of parties as set out in the specific rules.

Nonetheless, good faith and fair dealing is an important principle under which SMEs can expect significant protection.

14. Will SMEs pay for protection?

However, there is a very real question. Will the other party—a large business, say—ever agree to a contract on the terms of the CESL? The CESL provides, as I have shown, ‘consumer-like’ protection to the other party. That will mean that the larger business may face increased costs if it agrees to contracting under the CESL. For example, a business that usually concludes contracts on its own standard terms and insists on the contract being governed by English law will find that suddenly the other party may be able to challenge those terms on grounds of unfairness—with the result, for example, that the large business may be unable to increase its prices suddenly or, if it breaks the contract, it may have to pay additional compensation. It might have to disclose information that it had no duty to disclose under English law. Its behaviour may be challenged. The challenge may or may not succeed, but the business will in any event face additional uncertainty. Even if it can show that its terms are fair and its behaviour was impeccable, there may be delay while the issue is argued before a judge—most of these are not issues that can be dealt with upon application for summary judgement. The large business may decide, therefore, that it will agree to use the CESL for a contract only if it is paid enough extra or obtains the goods or services that it wants at a sufficiently low price, to compensate for this. In other words, the SME may have to pay a ‘premium’ to the larger business in order to use the CESL for the contract and therefore obtain the legal protection that the SME wants.

Will the SME be prepared to pay? I think the answer is ‘yes’—at least some SMEs will think that it is worth paying the premium. The increase in cost is likely to be relatively small, and I think the SMEs will view it as a kind of insurance: pay a small premium and get protection against a range of ‘contractual accidents’. And basic law and economics tells us that if the SME is prepared to pay the premium (or, as the case may be, accept slightly lower prices for its products), the larger firm will find it worthwhile to offer the CESL option as a way of attracting those SMEs that otherwise would not accept such a contract. There is room, in other words, for an efficiency gain that leaves both parties better off. Of course, not all SMEs will want to pay the premium. They may prefer better prices over increased protection. Let them opt then for a law that does not offer them protection, such as English law. That is their choice. The great advantage of the CESL, and its advantage especially over the alternative of further harmonisation of general contract law, is precisely that it is optional. No business needs to use it if it does not wish to do so. In addition, it may well be that a company’s willingness to adopt the CESL may be taken as a sign that ‘we are a good company; our terms are fair, so challenges to them will not bother us; and our behaviour is impeccable’. In other words, willingness to apply the CESL may become a signal of trustworthiness and reliability.

15. The CESL as a signal of reliability

I hope this is the case, not only because it would mean that the CESL will be used. I do not think we can expect companies, particularly SMEs, ever to become familiar with the details of the law. But if the CESL is adopted, I think, the trade associations and federations of small businesses will be able to get a simple message across to their members, that message being to look for the CESL: ‘If you contract on terms of the CESL, you will have a good degree of protection against nasty surprises in the other party’s terms or behaviour.’ That is an indicator of quality that is worth paying for.

That leads me to a crucial point. If we are to encourage SMEs to look for and use the CESL as a sign of quality and protection, it must be a reliable sign. A party having opted for the CESL must have confidence in getting what said party expects. Unfortunately, the current draft seems to have a mistake that could undermine this completely. I referred earlier to Article 8 (3) of the Regulation, which provides the following:

- (3) In relations between a trader and a consumer the Common European Sales Law may not be chosen partially, [...] only in its entirety.

This prevents the business in the B2C contract from ‘cherry-picking’ just parts of the CESL and ignoring the rest. But the obvious implication is that in a B2B contract the parties—or, more realistically, the party whose standard terms are used—**can** cherry-pick. That is, the contract might purport to be on CESL terms while the ‘small print’ might go on to exclude vital provisions such as the chapter on unfair terms or the chapter on validity. That would deprive the other party—typically the SME—from the protection that it was seeking to receive by asking to contract on the basis of the CESL. I believe this to be a mistake. Commission officials

have told me that they think Article 8 (3) does not allow a business, even in a B2B contract, to exclude the rules that the CESL states are mandatory. Their interpretation is almost certainly incorrect. They rely on Regulation's Article 1 (2), which provides that

[p]arties may exclude the application of any of the provisions of the Common European Sales Law, or derogate from or vary their effects, unless otherwise stated in those provisions.

Article 1 bites only where there is a provision elsewhere in the CESL making a particular article mandatory. The language of Article 81, which specifies that the rules on unfair terms are mandatory, is contained in the chapter on unfair terms. So if the CESL were adopted without that chapter, there would be nothing to make the rules mandatory and they would be excluded. This is a drafting mistake that must be put right.

16. Risks and remaining problems

It is true that there are some risks in using the CESL. It may be some years before we have an established body of jurisprudence. The Commission's proposal for a database⁴⁶, such as the ones available for the CISG, will be useful here. The CESL will also have the advantage over the CISG that there is a court—the Court of Justice of the EU—with ultimate authority to rule on the correct interpretation of the instrument. Perhaps we can avoid some of the cost and delay in obtaining rulings from the Court of Justice by creating a special lower tribunal to deal with CESL cases.

We also need clarification on some points. In particular, it is hard to know whether some issues are within the scope of the CESL though there is no provision dealing directly with them or whether, instead, they lie outside its scope, such that the mandatory rules of the 'domestic' applicable law shall apply. For example, what about national rules on penalty clauses, on terms that were 'individually negotiated' but are nonetheless unfair, or on granting an individual remedy to a consumer who has been the victim of an unfair commercial practice such as aggressive selling? We should also clarify the scope of illegality and immorality and of 'public policy', to prevent judges who are faced with the displacement of a local consumer protection provision by the CESL from 'reinventing' the local provision as a rule of legality or morality (and thus beyond the scope of the CESL), or as a rule of public policy of the forum or of the place of performance that can be applied regardless of the choice of the CESL under Rome I's Article 9.⁴⁷

The CESL cannot, by any stretch of the imagination, solve all of the problems associated with cross-border trading. There will still be major language problems—sales literature will have to be translated, and staff who handle complaints and warranty claims will need to be fluent in more than their mother tongue. In some countries, there may remain problems with ensuring delivery and in obtaining payment. And if there is a dispute, problems of dispute resolution and of enforcement are far more important than those of substantive law, which is all that the CESL tackles. Nonetheless, the CESL is a step in the right direction. I hope that readers will support it.

⁴⁶ Proposal for a Regulation on a Common European Sales Law, 11 October 2011, COM(2011) 635 final, p. 10.

⁴⁷ The Draft Report of the European Parliament's Legal Affairs Committee (2011/0284(COD)) of 18 February 2013, amendment 70, is aimed at addressing precisely this point.