The cisg and the cesl

In the 21 st century, international contracts and cross-border sales are regularly used by people all around the world. Most goods we buy in our daily life are connected to at least one international contract in one way or another. A great part of the international economy and most businesses in Europe rely on international trades and cross-border transactions. But almost all international contracts share the same question: which legislation guides the contract? Is it the domestic law of the seller or the domestic law of the buyer? The answer to this question might have a big influence on, for example, the distribution of risks in the contract or the amount of damages paid in the case of a breach of contract. It is, therefore, essential for every cross-border trade transaction to know in advance which legislation will guide the contract.

This is the point where the CISG and the CESL come into play. Both, the CISG and the CESL, try to provide the buyer and the seller with a reliable and unified legislation. Between all sellers and buyers located in a country that accepted the CISG the legislation for any given trade is determined by the convention. The CESL seeks to accomplish the same goal between all European countries.

A reliable legislation is especially important in business to business transactions (B2B transactions). Businesses are usually involved in a great number of sales contracts with different business partners in different countries at the same time. The work required to evaluate risks and calculate appropriately would be just too costly. The only solution is a unified international sales law.

However, the question arises why there is the need for a second cross-border sales legislation next to the CISG. The statement was given by the ICC on the European Commission proposal for a regulation on a Common European Sales Law also raises the same question. To answer this question, this assignment will compare the CISG and the CESL to one another. Therefore, this essay will have a look at the regulations provided by the CISG and CELS – with a focus on the provisions related to e-commerce – as well as on the backgrounds of both regimes. Firstly, the essay will introduce the two regimes and give some general information about them. Secondly, the essay will identify all major differences between the two legislations and analyse the CELS' suitability to fill gaps in the CISG. The essay will also take a closer look at rules and regulations implemented by the CESL. Lastly, the essay will put the findings in relations to the needs of businesses and B2B transactions and thereby analyse whether the CESL is just an " optional instrument" or an improvement to the CISG. The essay will end by giving a conclusion.

A. CISG

The CISG was developed by the United Nations Commission on International Trade Law (UNCITRAL) and was signed in Vienna in 1980. The CISG came into force on 1 January 1988, after being ratified by 11 countries. [1]Currently, 78 states have signed the Convention[2]and the combined trade power of those 78 countries sums to about 80% of international trade. The only major country yet to sign the CISG is Great Britain.

The CISG is described in the convention as follows:

“ The CISG governs contracts for the international sales of goods between private businesses, excluding sales to consumers and sales of services, as well as sales of certain specified types of goods. It applies to contracts for the sale of goods between parties whose places of business are in different Contracting States, or when the rules of private international law lead to the application of the legislation of a Contracting State. It may also apply by virtue of the parties’ choice. Certain matters relating to the international sales of goods, for instance, the validity of the contract and the effect of the contract on the property in the goods sold, fall outside the Convention’s scope. The second part of the CISG deals with the formation of the contract, which is concluded by the exchange of offer and acceptance. The third part of the CISG deals with the obligations of the parties to the contract. Obligations of the sellers include delivering goods in conformity with the quantity and quality stipulated in the contract, as well as related documents, and transferring the property in the goods. Obligations of the buyer include payment of the price and taking delivery of the goods. In addition, this part provides common rules regarding remedies for breach of the contract. The aggrieved party may require performance, claim damages or avoid the contract in case of a fundamental breach. Additional rules regulate passing of risk, anticipatory breach of contract, damages, and exemption from performance of the contract. Finally, while the CISG allows for freedom of form of the contract, States may lodge a declaration requiring the written form.”[3]

B. CESL

The CESL was drafted by the European Commission in 2011. The CESL is based on the Draft Common Frame of Reference (DCFR)[4]. The CESL looks to unify trade law in the European Union by providing an additional legislation to the CISG. In contrast to the CISG is does not apply to contracts automatically but chose the so-called “ opt-in” solution. The CESL only comes into effect if both parties agree on using it as the guiding legislation. The draft of the CESL has been revealed to the public, but the convention is yet to be ratified by the European Parliament.

The first part of the CESL deals with the general principles and applications of the convention. The second part of the CESL deals with the definition of a legally binding contract, duties of the seller and the buyer while forming a contract, the conclusion of the contract, and the right to withdraw the contract. The third part of the CESL deals with the interpretation of a contract and the identification of unfair content. The fourth part of the CESL deals with the obligations and remedies of the performing parties in a sales contract such as delivery of the goods and payment of the agreed price. The fourth part also covers the distribution of risks in the contract. The fifth part of the CESL deals with the obligations and remedies under a service contract. The sixth part of the CELS deals with damages and interest.

A. Objectives and scope of application of the CISG and the CESL

The first point to discuss, are the objectives of the CISG and the CESL. Why were they implemented, what is their purpose, what is the goal they want to archive, and what contracts do they cover?

1. The CISG

The objective of the CISG is to unify the substantive law of professional international sales of goods. The CISG, however, principally excludes consumer sales unless the consumer is not recognized as a consumer by the other party or where the consumer sells to a professional buyer.[5]Other than that, the CISG covers all forms of professional sales. The reason the CISG was drafted was the insight that different sales laws of different states hinder international trade. To remove those differences and to thereby simplify international trade. Since most merchants do not really care about the law applicable to their specific contract, the CISG only replaces the otherwise applicable national law as far as the CISG reaches.[6]The CISG applies automatically to all trade contracts matching the requirements of the CISG.

2. The CESL

“ The purpose of the Regulation is to improve the conditions for the establishment and the functioning of the internal market by making available a uniform set of contract law rules.”[7]The objectives of the CISG and the CESL are therefore essentially the same. Both conventions look to remove the national law from international trade, as the differences between laws represent a hindrance to cross-border trade transactions and should, therefore, be removed. However, the CESL, as its name already indicates (Common European Sales Law), only seeks to archive this aim within the European Union.

The CESL does not apply automatically to all trade contracts within the European Union. It is intended to be an additional instrument parties of a

sales contract can choose, in order to avoid differences between domestic sales laws. The authors of the CISG want a choice in favor of the CESL to be understood as a conclusive deselection of the rules of the CISG.[8]

Additionally, the CESL is intended to apply mainly to consumer contracts and to small businesses. The CESL only covers contracts between consumers and professional sellers and contracts between professional traders if one of them is a small or medium sized business.[9]The CESL aims to protect the naturally disadvantaged party in an international sales contract. However, even though the CELS expressively excludes contracts between large businesses, the proposal includes the option to make the CESL available in large scale international sales contracts between large companies, if the member states chose to do so.[10]

3. Comparison

The scope of application and the objectives of the CISG and the CESL only match to a very limited extent. Where the CISG aims to act as a tool to facilitate international trade on a global level between companies, the aim of the CESL is to protect consumers and small businesses primarily in the European Union. However, the scope of application of the CISG and the CESL overlap on small and medium sized businesses. In contracts between small and medium sized businesses the CESL therefore truly represents an " optional instrument," as the statement of the ICC on the proposal states (Unless the member states decide to open the CESL to large businesses). This fact is, however, surprising, since the CESL´s primary goal is consumer protection, whereas the CISG´s aims to facilitate international trade between businesses.

Another important aspect to notice are the different solutions on how the conventions are implemented into trade law. While the CESL is intended to be an alternative solution to existing domestic trade laws the involved parties can choose as an alternative, the CISG aims to replace the different national sales laws by default.

B. Opt-in and Opt-out

As mentioned before, the CISG and the CESL require different circumstances under which they apply. The CISG, on the one hand, applies automatically the moment its conditions of applications are met. However, this is only true in case the parties of the contract did not choose to " opt-out," meaning the parties did not explicitly agree on excluding the CISG.[11]The CESL, on the other hand, chose a so-called " opt-in" solution. Only if the parties explicitly agreed on the application of the convention, is the contract guided by the CESL.[12]It is, however, doubtful whether the opt-in solution selected in the CESL provides an incentive big enough for businesses to opt into the convention. Since the CESL includes a high level of consumer protection, it seems unlikely that small businesses have any interest in the application of the CESL in their contract.[13]Consumer protection is usually not necessary in B2B contracts and sometimes even aggravates trade. It is therefore highly unlikely that businesses to whom the CESL applies choose the CESL over the CISG.

C. Partial exclusion

Article 6 of the CISG states that parties can exclude each part of the CISG or the convention as a whole from their contract.[14]The only exceptions to this are: (1) form requirements established by the member states according to

Article 12 CISG[15], (2) the unwritten exceptions in the final provisions[16], and (3) the principle of good faith in international trade.[17]

The CESL, on the other hand, can only be adopted as a whole, since its rules and regulations are mandatory.[18]This principle is revisited in recital 24 of the proposal for a Common European Sales Law as it states: “ In order to avoid a selective application of certain elements of the Common European Sales Law, which could disturb the balance between the rights and obligations of the parties and adversely affect the level of consumer protection, the choice should cover the Common European Sales Law as a whole and not only certain parts of it.”[19]Contrary to the idea of an “ all or nothing” solution in the CESL, recital 30 of the CISG reads as follows: “ Freedom of contract should be the guiding principle underlying the Common European Sales Law. Party autonomy should be restricted only where and to the extent that this is indispensable, in particular for reasons of consumer protection. Where such a necessity exists, the mandatory nature of the rules in question should be clearly indicated;”[20]indicating that only parts of the CESL are mandatory and can therefore not be excluded in case the convention is chosen as the guiding law. The compatibility of those contrary statements in the CESL is up for discussion and will probably only be resolved in case the CESL is issued.

For B2B transactions it is essential to have the flexibility granted by the possibility of a partial exclusion of certain rules. Businesses will most likely only consider the CESL as an alternative to the CISG if it does not limit them in their freedom of contract.

D. Conflict of laws

The CISG and the CESL both are international conventions on sales law. They naturally compete with the international law established by the contractual states. Therefore, an important aspect of the CISG and the CESL is their relation with international private law.

The regulation in the CISG is very straightforward: as far as the CISG reaches does it supersede private international law.[21]The supersession does not limit the parties in the exclusion of parts of the CISG and thereby also limiting its supersession.

The CESL takes basically the same approach. The relationship between the CESL and the private international law is covered in recital 27 and Article 11 CESL. Article 11 states: " Where the parties have validly agreed to use the Common European Sales Law for a contract, only the Common European Sales Law shall govern the matters addressed in its rules. Provided that the contract was actually concluded, the Common European Sales Law shall also govern the compliance with and remedies for failure to comply with the pre-contractual information duties."[22]Additionally, in recital 27 the CESL states: " All the matters of a contractual or non-contractual nature that are not addressed in the Common European Sales Law are governed by the pre-existing rules of the national law outside the Common European Sales Law …"[23].

The CISG and the CESL do not replace private international law as a whole. Both conventions only provide a uniformed international trade law inside their scope of application.[24]

E. Comparison of specific regulations in the CISG and the CESL

1. Contractual conformity of goods

The most important part of any law concerning the sale of goods are the rules regarding the contractual conformity of the goods. In the CISG this topic is covered in Article 35 and mainly focuses on the agreements of the parties made concrete in the contract.[25]Whether a good is delivered in the condition and quantity necessary to avoid liability does first and foremost depend on the way the parties described the good in the contract. Only if such an agreement was not included in the contract is the contractual conformity determined by assumptions made in the CISG.[26]

The CESL takes a different approach. Whether a good delivered is in conformity with the contract depends on two different aspects: The goods must match the agreement of the parties in the contract, but at the same time the good must be compliant with certain requirements laid down in the Articles 99 and 100 of the CESL.[27]This, so called, " objective and subjective approach" may be the standard in most modern consumer protection laws[28]. It most certainly does not comply with the needs and concerns of modern B2B international transactions. In trades between businesses goods can serve the intended purpose even in cases I which they " are (not) fit for purpose for which goods … of the same description would ordinarily be used."[29]A case like this would lead to the preposterous situation, where the seller is liable for damages even though a good serving the purpose was delivered. This again demonstrates one of the main issues of the CESL regarding the usage in B2B transaction. Unifying consumer protection and

the interests of businesses in one convention never serves both interests equally well.

Both, the CISG and the CESL, regulate the requirement of notification of lack of conformity and the examination of the goods in sales contracts between traders.[30]

2. Formation of contract

The formation of a contract is an essential part of a trade law convention. It is therefore not surprising that the CESL is very similar to the CISG in many aspects and even copied some parts.

a) Open price

A difference is that Article 31 (1) (b) CESL requires only " sufficient content and certainty for there to be a contract", while according to Article 14 (1) sent. 2 CISG an offer " is sufficiently definite if it…expressly or implicitly fixes or makes provision for determining the quantity and the price." There is no doubt that under the CESL an offer with an open price can be a valid offer.[31]Under the CISG this question was disputed. But since the parties can derogate from Article 14 CISG they can validly conclude a contract even if the offer leaves the price open. Then, according to Article 55 CISG, the market-price fills the gap.[32]Thus, despite differences in formulation both regulations here accord in substance.[33]

b) Incorporation of standard contract terms

Standard contract terms are without a doubt an important part of international sale contracts. However, the standard contract terms are not regulated in the CISG. In the past 25 years' courts and scientists developed

basic rules in regard to standard contract terms considering the fundamental principles of the CISG.[34]

The CESL does include rules regarding standard contract terms.[35]The CESL copied the solution the German supreme court established.[36]Article 70 of the CESL states: “ Contract terms supplied by one party and not individually negotiated within the meaning of Article 7 may be invoked against the other party only if the other party was aware of them, or if the party supplying them took reasonable steps to draw the other party’s attention to them, before or when the contract was concluded.”[37]

The CESL does however not include regulations regarding the meaning of “ reasonable steps” in a B2B relation. Neither does the CESL include rules about the language in standard contract terms between businesses, since Article 82 CESL does only apply to B2C contracts.

A further uncertainty in the CESL is Article 86:

“ 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 (b) it is of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing.”[38]

The terms “ good commercial practice,” “ good faith” and “ fair dealing” are not defined in the CESL. Providing a well-established meaning towards those terms would take years of court ruling and scientific research.

The implementation of rules regarding standard contract terms in the CESL is a step in the right direction. The usage of standard contract terms is common throughout international sales. Easy and well-established rules are essential for a healthy trade environment and the acceptance of the rules. There are however too many weaknesses and uncertainties in the rules of the CESL to identify them as an improvement compared to the practice established in the CISG. Especially in B2B transactions, there are too many undefined words and phrases to make it a reliable set of rules for businesses to use.

c) Defects of consent

As indicated above, the Vienna Sales Convention contains rules on the formation of international commercial sales contracts. However, 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. These matters have therefore been left to the applicable national law to regulate. However, Article 4 CISG adds that this is different in so far as is ‘ otherwise expressly provided in this Convention’. The question of whether a topic has or has not been included explicitly or impliedly within the scope of CISG is, however, difficult to answer in practice and has been the subject of much litigation – the prevailing view is that this must be assessed on the basis of CISG itself, and it is assumed that a topic that is not expressly regulated in CISG may nevertheless be governed by the Convention on the basis of the general principles of the Convention. [39]Defects of consent concern the validity of the contract and will therefore not be governed by CISG, unless specified otherwise. Is this indeed the case?

It is generally assumed that in so far as 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 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.[40]In that case, the uniformity that CISG is to bring about obstructs the application of a national approach towards mistake or misrepresentation in cases which concern conformity.[41]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.

Cases where the buyer concluded the contract under the influence of fraud or deceit is thought not to be governed by CISG,[42]even though in these cases also there is often a close connection with conformity issues. Therefore, national rules on fraud apply where a mistake has been deliberately caused by the seller so that in such cases the contract may be void or avoided. Similarly, CISG does not deal with issues such as threat, abuse of circumstances, which means that the buyer may rely on the remedies available under the applicable national contract law for these defects of consent, even where CISG applies.[43]The Common European Sales Law contains a comprehensive set of provisions on a 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). These provisions by and large overlap with national approaches in these areas, even if the requirements under CESL to invoke a remedy for, for instance, unfair exploitation may be stricter than national doctrines on abuse of circumstances. 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

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[1]http://www. uncitral. org/uncitral/en/uncitral_texts/sale_goods/1980CISG. htm; The signing Nations were Argentina, China, Egypt, France, Hungary, Italy, Lesotho, Syria, the United States, Yugoslavia, and Zambia.

[2]http://www. uncitral. org/uncitral/en/uncitral_texts/sale_goods/1980CISG. htmfor a complete list of all member states.

[3]http://www. uncitral. org/uncitral/en/uncitral_texts/sale_goods/1980CISG. html

[4]Von Bar: Priciples, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR)

[5]Art. 2 lit a CISG.

[6]U Magnus, CISG and CESL, p. 226.

[7]Art. 1 Proposal; see also Explanatory Memorandum to the CESL, COM (2011) 635 final, p. 4.

[8]Recital 25, Proposal for a Common European Sales Law.

[9]Art. 7, Proposal for a Common European Sales Law.

[10]Art. 13 lit. b, Proposal for a Common European Sales Law.

[11]Art. 6 CISG.

[12]Art. 3 Proposal for a Common European Sales Law.

[13]U Magnus, CISG and CESL, p. 229.

[14]Art. 6 CISG.

[15]Art. 12 CISG

[16]Art. 89-101 CISG, with the re-exception of Art. 100 CISG.

[17]Art. 7 (1) CISG

[18]Art. 8 (3) Proposal for a Common European Sales Law, this is at least true for B2C transactions.

[19]Recital 24 Proposal for a Common European Sales Law.

[20]Recital 30 Proposal for a Common European Sales Law.

[21]U Magnus, CISG and CESL, p. 238.

[22]Art. 11 Proposal for a Common European Sales Law.

[23]Recital 27 Proposal for a Common European Sales Law.

[24]Grundmann S, Common Market Law Review, Session 50 (2013), pp 237-240.

[25]Art. 35 (1) CISG

[26]Art. 35 (2) CISG

[27]Art. 99, 100 Proposal for a Common European Sales Law.

[28]Feltkamp/Vanbossele, European Review of Private Law, Volume 19 (2011), p. 886.

[29]Art. 100 (b) Proposal for a Common European Sales Law.

[30]Art. 38, 39, 43 CISG; Art. 121, 122 Proposal for a Common European Sales Law.

[31]Art. 18 (1) sent. 2 CISG and Art. 34 (2) CESL or Art. 19 (3) CISG and Art. 38 (2) CESL

[32]LG Neubrandenburg 3 August 2005, CISG-online Nr. 1190

[33]U Magnus, CISG and CESL, p. 243.

[34]Schwenzer, Inrto to Arts 14-24 CISG; Art 14 CISG

[35]Art. 70 Proposal for a Common European Sales Law.

[36]Mazeaud, Unfiar Terms in Contr