THE COMMON EUROPEAN SALES LAW, CONSUMER PROTECTION AND OVERRIDING MANDATORY PROVISIONS IN PRIVATE INTERNATIONAL LAW

Abstract This article analyses the relationship of the proposed Common European Sales Law (CESL) and the rules on mandatory and overriding provisions in private international law. The author argues that the CESL will not achieve its stated aim of taking precedence over these provisions of national law and therefore not lead to an increase in cross-border trade. It is pointed out how slight changes in drafting can overcome the collision with mandatory provisions. The clash with overriding mandatory provisions, the author argues, should be taken as an opportunity to rethink the definition of these provisions.

Keywords: conflict of laws, Common European Sales Law, mandatory provisions, overriding mandatory provisions, consumer protection.

I. INTRODUCTION

The European Commission's Proposal for a Regulation on a Common European Sales Law[1] has met with enormous interest from both scholars[2] and legal practice.[3] The proposal seeks to establish an optional regime for sales contracts, which the parties would have to agree on in order to replace—as far as it reaches—national laws. The proposal is aimed at facilitating cross-border trade within the EU, making it easier for traders who would only have to comply with the requirements laid down by this instrument rather than the diverging requirements of the Member States' national laws.

[1] COM(2011) 635 final. The document contains the Regulation, to which the text of the Common European Sales Law is appended. In the following 'Regulation' refers to the Regulation itself, and 'CESL' refers to the Common European Sales Law.

[2] See only the latest contribution of 9 July 2012: H Eidenmüller, *What Can Be Wrong with an Option? An Optional Common European Sales Law as a Regulatory Tool* available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102827>, and more generally, H Eidenmüller et al, 'Der Vorschlag für eine Verordnung über ein gemeinsames Europäisches Kaufrecht (2012) 6 JZ 269.

[3] Law Commission, *An Optional Common European Sales Law: Advantages and Problems. Advice to the UK Government*, November 2011 available at <http://lawcommission.justice.gov.uk/docs/Common_European_Sales_Law_Advice.pdf>; and Verbraucherzentrale Bundesverband, *Ein Gemeinsames Europäisches Kaufrecht Stellungnahme des Verbraucherzentrale Bundesverbandes Zum Verordnungsvorschlag der Europäischen Kommission* (available in two parts at <http://www.vzbv.de/cps/rde/xbcr/vzbv/Stellungnahme-vzbv-Gemeinsames-Europaeisches-Kaufrecht-2012-01-13.pdf> and <http://www.vzbv.de/cps/rde/xbcr/vzbv/Gemeinsames_Europaeisches_Kaufrecht-Stellungnahme-vzbv-2012-05-13.pdf>).

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To that end, the optional instrument covers the formation of contracts, the interpretation and fairness of terms, the obligations and remedies of the parties to a sales contract and related service contracts, as well as damages, interest, restitution and prescription. It is far from being a comprehensive codification of sales law though, as important areas are not covered and recourse must be had to the law determined by the Rome I Regulation or other conflict of laws rules in order to determine the law applicable to the following questions: capacity to contract, illegality and immorality, representation, plurality and change of parties and many more.[4] For that reason alone, there is a need to take conflict of laws rules into account when applying the Common European Sales Law.

The conflict of laws is of further importance as it provides the mechanism that leads to the applicability of CESL, which under the current proposal would not apply autonomously: the parties have to choose to apply CESL to their contract and such choice is only possible if the law of a Member State applies. Where that is the case, the parties can then choose to use CESL instead of the autonomous law of that State. Which country's law governs a contract for the sale of goods is determined across the EU Member States either by the rules laid down in the Rome I Regulation[5] or, in Finland, France, Italy and Sweden, by the Hague Convention on the Law Applicable to International Sale of Goods 1955.[6] Under those rules, however, the parties do not have unlimited freedom to choose the law applicable to their contract. That freedom is limited in purely domestic situations,[7] for consumer contracts[8] and where there are conflicting overriding mandatory provisions of the forum State or a third country.[9] The proposal explains that there is no overlap between CESL and the aforementioned limitations to party choice as

> there will be no disparity between the laws of the Member States in this area, where the parties have chosen to use the Common European Sales Law. Consequently, Art 6(2) [Rome I Regulation] which is predicated on the existence of differing levels of consumer protection in the Member States, has no practical importance for the issues covered by the Common European Sales Law.[10]

This view has been doubted in the literature and cannot be maintained, as I will argue in this article. The proposal is furthermore silent as to the applicability of overriding mandatory provisions, which ought to prevail over the CESL, given their definition as:

> provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable.[11]

[4] Regulation Recital 27.

[5] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L 177/6.

[6] In the following the focus will be on the Rome I Regulation.

[7] Rome I Regulation art 3(3). This might only become an issue where a Member States decides to make CESL available for internal transactions as provided for in Regulation art 13.

[8] Rome I Regulation art 6(2). There are two further limitations, which are irrelevant in the present context: employment contracts (Art 8(1) sentence 2) and form of contracts relating to rights *in rem* or tenancy of land (Art 11(5)).

[9] Rome I Regulation art 9.

[10] Regulation Recital 12.

[11] Rome I Regulation art 9(1).

Admittedly, there are not many provisions of that nature in the area of sales law but the Unfair Contract Terms Act 1977 is generally considered to be of an overriding mandatory nature[12] and thus clashes directly with one of the key areas of CESL.[13] I will argue that CESL presents us with an opportunity to rethink the notion of overriding mandatory provisions, rather than condemning CESL's failure to address its relationship with those provisions. First, the notion of party autonomy (Part II) and the regulatory choices made in CESL (Part III) are considered, after which the interplay between the conflict of laws and CESL are more closely examined (Part IV).

II. PARTY AUTONOMY

The Rome I Regulation is governed primarily by the principle of party autonomy and its Article 3(1) laconically states, 'A contract shall be governed by the law chosen by the parties'. The same holds true for the 1955 Hague Convention, whose Article 2 declares 'the domestic law of the country designated by the Contracting Parties' applicable. Both sets of rules allow choice of any law and do not require there to be a connection to the law chosen by the parties.[14] This, however, is by no means universally accepted. The US Restatement Second of Conflict of Laws only allows a choice of such systems that have a substantial relationship to the parties or the transaction[15] and some Latin-American and Middle-Eastern jurisdictions do not allow choice of law for contracts in general.[16] The freedom of choice is also, as has been shown, not without limitations under the Rome I Regulation, and the parties are limited to choosing the law of a State.[17] Earlier drafts of the Rome I Regulation had provided for a choice of non-State law but that has not been enacted and Article 3(3) explicitly refers to 'the *country* whose law has been chosen'.[18] Recital 13 gives the parties the option of 'incorporating by reference into their contract a non-State body of law or an international convention'.[19] Such incorporation can only ever go as far as the applicable law allows, ie, it is subject to the internally mandatory provisions of that law. In England, for example, it cannot do away with the requirement for consideration. The UNIDROIT Principles of International Commercial Contracts,[20] the *lex mercatoria*[21] or Shariah law[22] could thus not be chosen as the law governing a contract, but they can be incorporated into a contract. The limitation to State law is important in the present context as a supranational instrument, such as CESL, is not without anything further available to be chosen under the Rome I Regulation.

[12] See Part IV.E below.

[13] Chapters 7 and 8 CESL (arts 66–86).

[14] J Basedow, 'Theorie der Rechtswahl oder Parteiautonome Grundlagen des Internationalen Privatrechts' (2011) 75 Rabels Zeitschrift für ausländisches und internationales Privatrecht 33.

[15] Restatement 2nd Conflicts section 187(2)(a). See also UCC section 1-105: 'reasonable relation'.

[16] eg. Introductory Act to the Civil Code of 1942 art 9 (Brazil); Civil Code of 1948 art 19 (Egypt). For further references see Basedow (n 14).

[17] Equally Hague Convention art 2.

[18] Italics not in the original.

[19] The same is possible under Restatement 2nd Conflicts section 187(1).

[20] E Brödermann, 'The Impact of the UNIDROIT Principles on International Contract and Arbitration Practice – the Experience of a German Lawyer' (2011) UnifLRev 589, 595.

[21] NW Vernooij, 'Rome I: An Update on the Law Applicable to Contractual Obligations in Europe' (2009) 15 ColumJEurL 71, 73.

[22] *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd* [2004] EWCA Civ 19 [2004] 1 WLR 1784.

The parties' freedom to subject their contract to a law of their choice is further limited by mandatory provisions and public policy. Rome I Regulation Article 3(3) renders a choice of law ineffective in a purely domestic situation to the extent that the domestic law does not allow deviation by contract. Two Englishmen could thus not enter into a contract for which there is no consideration given by either of them simply by choosing a foreign law, unless there is a truly international connection to the situation.[23] Article 3(4) extends this notion to provisions of EU law for contracts which are connected to the EU only and not to any other State. Articles 6(2) and 8(1), sentence 2 do not allow a choice that would deprive a consumer or employee 'of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable'.[24] A uniform feature of Articles 6 and 8 is that they require a comparison between the level of protection granted to the consumer under the chosen law and under his home law. Where the former is more protective, it will govern the contract as the consumer is not deprived of protection;[25] where the latter it is more protective, it will render the choice obsolete. All these situations concern the same type of mandatory provisions: those that cannot be derogated from by agreement. If another State's law applies without the parties having chosen it, then those mandatory provisions do not need to be taken into account; they give way to the objectively determined applicable law.[26] The common feature of all these situations is that certain situational requirements must be met before these mandatory provisions supersede a choice made by the parties: in Articles 3(3) and (4) there is a lack of internationality, or, to put it the other way round, there is a connection to one country only. In Article 6 the consumer is only protected if the professional has targeted the consumer in his home market (eg via advertising, website, etc), not if the consumer has ventured out on his own. This means that not every consumer contract is subject to the specific protection afforded by the Rome I Regulation. Article 8 only grants the employee the protection of the country where he habitually carries out his work, or, where his employer is a subsidiary, where the branch that employed him is situated.

Another type of mandatory provision is provided for in Article 9. These so-called overriding mandatory provisions override even the objectively determined applicable law because

> respect for [them] is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable'.

These provisions are applicable in any situation and mainly concern provisions of public law, such as exchange control or the prohibition to export certain items of

[23] See Part IV.D below; and n 75.

[24] Art 8(1) sentence 2; the wording of art 6(2) is marginally different but with no change as to the substance.

[25] CGJ Morse, 'The EEC Convention on the Law Applicable to Contractual Obligations' (1982) 2 Yearbook of European Law 107, 136–7; A Philip, 'Mandatory Rules, Public Law and Choice of Law' in PM North (ed), *Contract Conflicts* (North-Holland 1982) 81, 99–100 (who advocates simultaneous application of both laws if they grant different favourable rights to the consumer, but application of the chosen law where this is more favourable); R Plender and M Wilderspin, *European Private International Law of Obligations* (3rd edn, Sweet & Maxwell 2009) 9–063.

[26] Rome I Regulation art 4, or, for consumer contracts, art 6(1).

cultural importance. There is debate whether consumer protection and employment law provisions can be given effect via the Article 9 mechanism, for example, where the situational requirements laid down in Articles 6 and 8 are not met.[27] The predominant view is that this is possible despite the apparent contradiction to the principle *lex specialis derogat legi generali*. I have shown elsewhere that the better view is that Article 9 is inapplicable where a provision falls within the scope of Articles 6 and 8 *ratione materiae*.[28] Article 9(2) grants the court freedom to apply the overriding mandatory provisions of the forum and Article 9(3) entitles the court to give effect to overriding mandatory provisions of the State where the contract is to be performed, if they render performance unlawful. In the area of commercial contracts, the number of overriding mandatory provisions is limited, an example, according to the predominant view, being the Unfair Contract Terms 1977, to the extent that it is applicable in international situations.[29]

Finally, the parties' freedom to choose the applicable law and the objectively determined applicable law are limited by virtue of the forum's public policy.[30] Where the application of foreign law would manifestly contravene the forum's public policy, the foreign law will not be applied. The difference between any kind of mandatory provisions and public policy is that the latter is negative while the former are positive.[31] Mandatory provisions contain a positive order which must be applied and to that extent, replace the otherwise applicable law. Public policy contains a negative order, in that the foreign law must not be applied to the extent that it produces an outcome that is manifestly incompatible with the public policy of the forum. There is no positive order to apply a forum law instead, although this will often be done in practice. It is universally accepted that public policy must not be invoked lightly, in particular as the Rome I Regulation has added the requirement of a *manifest* incompatibility. There is, on the other hand, no corresponding restriction regarding mandatory provisions: these are to be applied in any case. Party autonomy is thus the guiding principle behind our conflict of laws rules for contracts. As with any principle, however, it is subject to several limitations.

III. THE COMMON EUROPEAN SALES LAW

While this is not the place to discuss the content of the proposed CESL in detail, a few of its main features must be recalled to place it in its proper context.

CESL does not autonomously define its applicability, unlike, for example, the Vienna Convention on Contracts for the International Sale of Goods (hereinafter 'CISG'). Article 8 of the draft Regulation requires instead a choice by the parties in any case, expressed in rather awkward language as requiring an agreement for 'the use of' CESL.[32] The consumer's agreement to the use of CESL must moreover be separate

[27] See C Bisping, 'Consumer Protection and Overriding Mandatory Rules in the New Rome I Regulation' in J Devenney and M Kenny, *European Consumer Protection – Theory and Practice* (CUP 2012) 239.

[28] ibid.

[29] JJ Fawcett, JM Harris and M Bridge, *International Sale of Goods in the Conflict of Laws* (OUP 2005) 13.302 ff; see further Part IV.E below.

[30] Rome I Regulation art 21; 1955 Hague Convention art 6.

[31] G Kegel and K Schurig, *Internationales Privatrecht* (9th edn, CH Beck 2004) 516 ff.

[32] MW Hesselink, 'How to Opt into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation' Amsterdam Law School Legal Studies Research

from the agreement to enter into the contract and it must be explicit.[33] A choice of CESL by agreeing to the trader's standard terms is thus not possible. In the literature the proposed mechanism for choice has been called the blue button technique as it is envisaged that in future there might be a separate button displaying the EU flag, the ticking of which would indicate agreement to subject the contract to CESL.[34] Entering into a contract governed by CESL thus requires a two-step approach, agreeing to the contract and then agreeing to subject the contract to CESL. The trader is further obliged to draw the consumer's attention to the main features of CESL by providing a standard information notice prior to the agreement to use CESL.[35] The overall process is thus a rather cumbersome one and it could well be that the consumer might be led to think that the choice of CESL is disadvantageous and dangerous since the required information looks rather like a warning and the multiple steps required to enter into a contract seem like a mechanism to protect the consumer from hastily entering into the contract. In the face of all this, many consumers might be deterred from agreeing to use CESL.

The main objective of CESL is not consumer protection but the facilitation of cross-border trade within the EU. Having the option of a uniform regime for sales across the EU is expected to increase (especially small) traders' willingness to contract outside their home State. Term control is therefore at the heart of the proposal. A trader is only required to make his terms compliant with CESL and does not have to adapt his contract terms to the various legal systems found within the EU. That is the theory. A trader would have to make sure that his agreement to the main contract is made dependent on the consumer accepting the use of CESL, as otherwise he runs the risk of entering into a contract which is subject to the law of another State according to which his terms and conditions might not be effective. The two-step approach might thus not be free from risk for the trader. This is a consequence of the optionality of CESL. In practice, it is expected that traders will only be prepared to deal on the basis of CESL, thereby excluding any risk of exposing themselves to foreign legal systems unknown to them. Since CESL is not normally available for domestic transactions, traders will need to have two standard contracts prepared—one for domestic situations and one for intra-EU situations. Member States are, however, free to expand CESL to domestic situations.[36]

The foregoing discussion presupposed that the parties can choose to use CESL. Such a choice is not possible under the Rome I Regulation which only allows the choice of State law. CESL will become national law once brought into force. Within each legal system of the EU, there will be available in the future two sets of rules for consumer sales, the autonomous national law and CESL. CESL is an option within each national system; the legislative method used has been described as the 'second regime'[37] and has

Paper No 2011-43; Centre for the Study of European Contract Law Working Paper No 2011-15 available at <http://ssrn.com/abstract=1950107> 7.

[33] Regulation art 8(2).

[34] The idea of a blue button was first promoted by H Schulte-Nölke, 'Europäisches Vertragsrecht als blauer Button im Internet' (2007) Zeitschrift für das gesamte Schuldrecht 81. See further H Beale, 'The Future of the Common Frame of Reference' (2007) 3 ERCL 247.

[35] Regulation art 9 and Annex II.

[36] Regulation art 13.

[37] The terminology is not universally accepted, for an overview of the different approaches see G Rühl, 'The Common European Sales Law: 28th Regime, 2nd Regime or 1st Regime?' (2012) 19 Maastricht Journal of European and Comparative Law 149 (Maastricht European Private Law Institute Working Paper No 2012/5, available at <http://ssrn.com/abstract=2025879>).

been contrasted to the so-called '28th regime'[38] solution, which would have rendered CESL open to direct choice by the parties without first having to determine a Member State system.[39] Without a change of the Rome I Regulation or an explicit provision within CESL a direct choice would not have been feasible. Alternatives would have been an opt-out solution, comparable to CISG, or compulsory autonomous application of CESL. The Commission seems to have chosen the 'second regime' opt-in solution to find a simple and uncontested legislative basis, Article 114 TFEU, the harmonization of Member State law with a view to facilitate cross-border trade.[40]

Choosing CESL therefore first requires that the law of a Member State is applicable, and, second, that the parties choose CESL in preference to the autonomous rules of that system. As Recital 10 makes clear, CESL operates within the conflict of laws framework: 'the agreement to use [CESL] should be a choice exercised within the scope which is applicable pursuant to [the Rome I Regulation] or, . . . any other relevant conflict of law [sic] rule.' The agreement to use CESL is therefore not itself a choice of law 'and should be without prejudice to [conflict of laws rules]. This Regulation will therefore not affect any of the existing conflict of law [sic] rules'.[41] CESL is, therefore, only available as an option where the law of a Member State governs the contract. This can be either because of the consumer's residence in a Member State[42] or because the parties have chosen a Member State law to apply.[43] The applicable law will be determined in the majority of cases in accordance with the rules laid down in the Rome I Regulation. Choice of law for sale of goods in Finland, France, Italy and Sweden is governed by the Hague Convention on the Law Applicable to International Sale of Goods 1955 so that in these countries different rules apply.[44] As far as pre-contractual duties are concerned, the choice-of-law rules in question are those contained in the Rome II Regulation.[45]

The questions triggered by this method of application will be addressed in the following section. For now, it should be remembered that CESL cannot only be chosen for consumer contracts but also for contracts where one party is a small or medium sized enterprise (SME). An SME is defined as a trader whose annual turnover is below €50,000,000 or has an annual balance sheet not exceeding €43,000,000.[46] That would include rather large companies. It is doubtful, however, whether organizations of that

[38] It has been pointed out that this name is misleading as there are more legal systems within the EU than Member States (the UK eg encompasses three legal systems), G Dannemann, 'Draft for a First Chapter (Subject Matter, Application and Scope) of an Optional European Contract Law' (2011) OUCLF available at <http://ouclf.iuscomp.org/articles/acquis_group2.shtml>; the name is further misleading as the parties are free to choose a non-EU law to govern their contract; M Fornasier, '28. versus 2. Regime – Kollisionsrechtliche Aspekte eines optionalen europäischen Vertragsrechts' (2012) 76 Rabels Z 401; Rühl (n 37) in fn. 8; M Stürner, 'Kollisionsrecht und Optionales Instrument: Aspekte einer noch ungeklärten Beziehung' (2011) GPR 236, 239.

[39] J Basedow, 'Fakultatives Unionsprivatrecht oder: Grundlagen des 28. Modells' in D Joost, H Oetker and M Paschke, *Festschrift für Franz Jürgen Säcker* (CH Beck 2011) 29, 31.

[40] Explanatory Memorandum to the draft Regulation (n 1) 8.

[41] Recital 14 Regulation.

[42] Rome I Regulation art 6(1).

[43] Rome I Regulation art 3.

[44] Rome I Regulation art. 25 declares that earlier conventions remain applicable.

[45] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, OJ L 199/40.

[46] Regulation art 7(2).

size need the protection afforded by, or indeed would choose, CESL to govern their contracts. In many situations, CESL constitutes the third regime available to those parties, next to national law and CISG, let alone the various other legal systems that they might consider choosing. Member States also have the option of making CESL available to contracts where all parties are traders and none of them qualifies as a SME.[47]

IV. THE INTERPLAY BETWEEN CESL AND THE ROME I REGULATION

As explained above,[48] CESL operates within a conflict of laws setting. Only after the traditional conflict of laws rules have determined the applicability of a Member State law can a choice of CESL take effect. While the European conflict of laws rules for contracts allow for rather far-reaching party autonomy, this autonomy is not without limitations.[49] The drafters of CESL assume that the limitations of the applicable law will not become an issue as far as CESL is concerned. Recital 12 explains that Article 6(2) Rome I Regulation 'has no practical importance for the issues covered by [CESL]' as there is no 'differing level of consumer protection' in the Member States because CESL 'contains a complete set of fully harmonised mandatory consumer protection rules'. The reasoning of the drafters is thus as follows; as CESL is national law (the second system in each Member State) it is not necessary to compare whether consumers would be better protected under their home law. The level of protection across the EU is the same as CESL is applicable in all Member States. Whether this reasoning is correct must now be analysed. At the outset it must be noted that the drafters refrain from referring to overriding mandatory provisions or public policy, which might also come into play. It is submitted that the drafters' argument is misconceived for several reasons.

A. Cross-Border Contract and Consumer Domiciled in Member State

The standard case for the application of CESL is a situation involving a trader operating from one Member State of the EU and a consumer domiciled in a different Member State. As long as the situational requirements of Article 6 Rome I Regulation are met, ie, the trader has acted in the consumer's home market,[50] the consumer is protected twofold: in the absence of a choice by the parties the contract will be governed by the consumer's home law.[51] And where the parties have chosen a law in their contract, such choice is subject to the mandatory provisions of the consumer's home law,[52] unless the protection afforded to the consumer by the chosen law is greater than under his home law.[53] The drafters' argument is that such comparison is not necessary where the parties

[47] Regulation art 13(2). [48] Part III. [49] See Part II, above.

[50] The requirements are defined more precisely in art 6(1) Rome I Regulation. The essence of the test is whether the professional (= trader) entered the consumer's home market. If the consumer ventured out and approached the trader on the latter's home market, then art 6 Rome I Regulation is not applicable. See Plender and Wilderspin (n 25) 9–047 ff.

[51] This is in deviation from art 4 Rome I Regulation which makes the characteristic performer's law applicable; in a sale situation the characteristic performer is the seller.

[52] Rome I Regulation art 6(2).

[53] Morse (n 25); Philip (n 25) 81; Plender and Wilderspin (n 25) 9–063.

have agreed to use CESL; as CESL applies in both, the consumer's home State and at the trader's residence, the law is necessarily the same. But this neglects the level of protection offered under autonomous law.

Suppose a German consumer buyer wishes to exercise a cancellation right under a distance contract.[54] Under autonomous German law the buyer does not have to pay the cost for sending back the item to the seller.[55] Article 45(2) CESL imposes those costs on the consumer; the level of protection in this respect is therefore lower under CESL than under German law. Suppose further that an English consumer enters into a contract which contains a penalty clause in the case of the consumer's breach, ie, a clause requiring the consumer to pay a sum of money which is not a genuine pre-estimate of the loss likely to follow from the breach.[56] Such a clause would be ineffective under English law[57] but would only be presumed to be unfair under CESL Article 85(e), if it had not been individually negotiated. Both the German and English consumer would be worse off under CESL than they would be under their home laws in these situations.

Can consumers, then, be deprived of these protective mechanisms? It is certainly correct to say that overall the level of protection under CESL is similar to the protection under national laws since CESL does, after all, seek to uphold a high level of consumer protection.[58] It would appear rather cynical to deny a consumer a right that he would otherwise enjoy under his home law by reference to a potential right that he might enjoy in different circumstances under CESL. For the trader the opposite is true. The trader will want to be able to rely on only the rights and duties laid down in CESL being applicable. CESL is designed to be a 'complete set of fully harmonised mandatory consumer protection rules'[59] and is considered to strike a fair balance between the interests of consumers and traders and in order to preserve that balance, it can only be chosen in full and not in part.[60] This is different from the basis on which Article 6 Rome I Regulation operates, as this requires a de facto analysis of the protection afforded in a particular situation. The concrete level of protection, rather than the abstract level of protection, is decisive under Article 6 Rome I Regulation.[61] While in any case the particular factual situation needs to be taken into account, there is discussion of whether protective elements of the chosen law and the consumer's home law are to be applied cumulatively, thus cherry-picking the most favourable elements from both systems, or whether only that system of law is to be applied, to the exclusion of the other system of law, that in this situation is on the whole more

[54] BGB section 312d.

[55] ibid section 357(2); only where the value of the goods is below €40 can the cost by agreement be imposed on the consumer.

[56] *Commissioner of Public Works v Hills* [1906] AC 368; *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79.

[57] See the references in the previous footnote. For the proposition that the law on penalty clauses operates as a consumer protection device see *Campbell Discount Co Ltd v Bridge* [1962] AC 600, *Philips v The Attorney General of Hong Kong* [1993] 61 BLR 41, and M Chen-Wishart, *Contract Law* (4th edn, OUP 2012) 557.

[58] According to Recital 11, CESL should 'maintain or *improve* the level of protection that consumers enjoy under [EU] consumer law'.

[59] Recital 11 and passim.

[60] Recital 24.

[61] F Ragno, 'The Law Applicable to Consumer Contracts' in F Ferrari and S Leible (eds), *Rome I Regulation. The Law Applicable to Contractual Obligations in Europe* (Sellier European Law Publishers 2009) 129, 152.

protective.[62] Under the first view, CESL and national law could be applied at the same time, in breach of the principle that CESL can only be chosen in its entirety; under the second, either CESL or the national law would be applied. For the present discussion nothing turns on deciding this contested question: under both views mandatory consumer protection provisions of national law should apply.

The drafters of CESL consider this comparison to be inappropriate since the object of the comparison is not the autonomous law but CESL as part of the consumer's home law.[63] That position cannot be supported for the following reason: CESL cannot be chosen directly under the Rome I Regulation.[64] Before CESL can be chosen, there has to be a determination of the applicable national law, either by agreement of the parties or by objective determination under the Rome I Regulation. Only then can CESL be chosen, in a second step and as a part of that national law. This is expressly stated in Recital 14 of the draft Regulation. For the purpose of Article 6 Rome I Regulation the chosen law would thus have to be compared to the national law of the consumer's domicile. According to some, CESL is not to be taken into account at this stage.[65] The logic behind this argument appears unimpeachable: if CESL is only chosen subsequently in a second step, then the first step only involves comparison of national laws. This is the consequence of the regulatory approach chosen by the drafters of CESL.

However, this criticism is itself not free from doubt: where the parties have chosen CESL without indicating which national law shall govern their contract, Article 6(1) Rome I Regulation subjects the contract to the consumer's home law. There is no comparison of which law is more favourable to the consumer. In situations where the parties decide that their contract will be governed by a body of law other than the consumer's home law and within that body of law then chose CESL, the question that arises is whether it is the other body of national law or CESL which is to be compared to the consumer's home law. If the aforementioned view is correct, then it is the other national law which is to be compared to the consumer's home law. The level of protection under that law is, however, irrelevant since it is the consumer protection rules of CESL which will in fact apply. If the chosen law is less favourable than the consumer's home law, that does not mean that CESL would also be less favourable. A similar question arises regarding the comparator on the side of the consumer's home law. Is the foreign law to be compared to the autonomous law of the consumer's domicile, or with CESL? The drafters tell us it should be CESL, whilst the critics, might say it should be the autonomous law. But that is not obvious; the main argument of the critics is that the *choice* of CESL can only happen at the second stage. But this does not alter the fact that CESL is national law in each Member State. CESL might therefore be a possible comparator at the first step of the exercise.

There does not seem to be a logical answer to that question. Therefore, we should look at the purpose underlying the provisions in order to establish whether an answer can be found through purposive (or teleological) interpretation. The purpose of Article 6

[62] Discussed with further references in Dicey Morris and Collins (eds.), *The Conflict of Laws* (14th edn, Sweet & Maxwell 2006) 13–033; and Ragno ibid 153.

[63] Recital 12.

[64] The Rome I Regulation only allows choice of State law, no other instruments, which can only be incorporated qua terms into a contract (Recital 13). Fornasier (n 38).

[65] Eidenmüller et al. (n 2) 273.

Rome I Regulation is to grant the consumer a high level of protection, being either that provided for in his home law, with which he is familiar, or that provided for in the chosen law, but only where the latter's protection exceeds that granted under his home law. CESL serves a twofold purpose: to facilitate cross-border trade and to provide a high level of consumer protection. The latter purpose overlaps with the purpose of Article 6 Rome I Regulation. Where a higher level of consumer protection is available under the autonomous law of the consumer's domicile, that should be applied. But doing so might contradict the first purpose of CESL, to the extent that it might create obstacles to cross-border trade. As the legal basis for CESL is Article 114 TFEU, the facilitation of cross-border trade is the predominant purpose and would proportionately weigh more than the protection of consumers. The Rome I Regulation is based on the Union's competence for judicial cooperation in civil matters[66] and thus seems to pursue a different aim. Judicial cooperation, however, is itself based on the pursuit of facilitating cross-border trade, as made clear from Rome I Regulation Recital 6:

> The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

Both instruments thus serve to facilitate cross-border trade and so consumer protection might be regarded as an ancillary purpose only and not decisive for the purposes of teleological interpretation. Nevertheless, facilitating cross-border trade requires a 'high level of [consumer] protection'[67] and that must be borne in mind when interpreting the instruments. But ultimately it still leaves us in a situation where the conflicting purposes cannot be squared, meaning that a purposive interpretation is equally ambivalent.

As neither the regulatory path followed by the drafters nor the purpose of CESL give a clear indication as to the relationship between Article 6 Rome I Regulation and CESL, it is helpful to consider whether there would have been a clearer answer to this question had the drafters decided to follow other regulatory alternatives. There are, in theory, two alternatives to the second regime model. According to the 28th regime model, CESL would have taken the form of an additional legal system that the parties could have chosen to be the governing law applicable to their contract.[68] Under this model CESL would be subject to the normal mechanisms provided for in the choice of law process, including Article 6 Rome I Regulation.[69] The second regime model is thus more likely to exclude Article 6 Rome I Regulation than the 28th Regime model. The other alternative to the second regime model would be the direct application of CESL as uniform law, comparable, for example, to CISG.[70] The proponents of such an approach

[66] Now TFEU art 81(2)(b); see Rome I Regulation Recital 2.
[67] TFEU art 114(3).
[68] Basedow (n 39); Fornasier (n 38).
[69] Rühl (n 37); Fornasier (n 38).
[70] There are various names suggested for such an approach. Rühl (n 37) refers to it as the '1st regime' on basis of the fact that CESL would take precedence not only over the rules of private international law but also of the autonomous national laws. Other authors use terms such as *einheitsrechtliche Lösung/Ansatz* (uniform law solution/approach) (C Busch, 'Kollisionsrechtliche Weichenstellungen für ein Optionales Instrument im Europäischen Vertragsrecht' (2011) 22 EuZW 655; H Schulte-Nölke, 'Der Blue Button kommt – Konturen einer neuen rechtlichen Infrastruktur für den Binnenmarkt' (2011) 19 ZEuP 749); second regime model (M Stürner (n 38) 236) and model of direct or immediate application (Fornasier (n 38)); H Heiss and N Downes,

claim that it would avoid any clash with mandatory norms of any type because CESL would apply without any reference to conflict of laws at all.[71] According to this view, the direct application model would effectively exclude mandatory provisions and thus lead to a greater predictability of outcome and reliability for traders who were using CESL. While this view might be correct in theory, direct applicability of CESL would trigger severe concerns regarding the competence of the EU and would probably infringe the principle of subsidiarity.[72] Therefore, it is not a viable alternative. As this brief overview shows, it is difficult to achieve the effective exclusion of mandatory provisions. The better view appears to be that Article 6 Rome I Regulation continues to apply in cases where the parties have opted to use CESL. The contrary conclusion would require there to be a clear statement in CESL explicity excluding the applicability of Article 6.[73]

B. Cross-Border Contract and Consumer Domiciled in a Third State

There is no ambiguity where the consumer is domiciled in a third State outside the EU. In such a case Article 6 Rome I Regulation must apply as CESL is not part of the law of the third State. In the absence of a choice of a national law, the contract would be governed by the law of the consumer's country of domicile. Where the parties have chosen another law to govern their contract, which would most likely be the law of the trader's residence, that choice would be limited by the mandatory provisions provided for in the law of the consumer's place of domicile, at least to the extent that they provided a higher standard of protection. The question is, once again, whether the law of that third State is to be compared with the provisions of the national law chosen by the parties or to CESL. Once again, logic would suggest that the chosen national law must be the comparator, as CESL is only made applicable at the second step after the assessment under Article 6(2) Rome I Regulation. But this might yield perverse results. Suppose that the level of protection under the chosen national law is lower than the level of protection under the consumer's home law. Article 6(2) Rome I Regulation would then give effect to the mandatory provisions of the consumer's home law. But what if the level of protection under CESL is in fact higher than under the consumer's home law? If only the national law would be taken into account for the purpose of the comparison under Article 6(2)

'Non-Optional Elements in an Optional European Contract Law' (2005) 13 ERPL 693; E Lein, 'Issues of private international law, jurisdiction and enforcement of judgments linked with the adoption of an optional EU contract law regime' available at <http://www.europarl.europa.eu/webnp/webdav/site/myjahiasite/users/emartinezdealosmoner/public/Lein%20EN.pdf>.

[71] eg Rühl (n 37) 12/13.

[72] TEU art 5.

[73] The same view is taken, in principle, by U Magnus, 'CISG and CESL' in MJ Bonell, M-L Holle and PA Nielsen, *Liber Amicorum Ole Lando* (Djoef Publishing 2012) 225, 239–41. He suggests, however, to resolve the problem by understanding 'Article 11 Proposal as an exception to Article 6 (2) Rome I Regulation'. This seems difficult to square with the express reference to 'matters addressed' in Regulation art 11, which shows that it is to do with substantive law not choice of law issues. Therefore Magnus too concludes that a 'clear formulation in Article 6 (2) Rome I Regulation that this provision does not apply . . . would however be certainly preferable'. The *liber amicorum Ole Lando* contains several further articles on CESL, some of which even contrast it to CISG: MM Fogt, 'Private International Law Issues by Opt-out and Opt-in Instruments of Harmonization: A Comparison between CISG and CESL' 119; J Basedow, 'An EU Law for Cross-Border Sales Only – Its Meaning and Implications in Open Markets' 27. None of these articles deal with the question addressed here.

Rome I Regulation then the consumer would only receive the second-best protection. Therefore CESL must be taken into account at the stage of determining the applicable law, despite the fact that logically it only enters the picture at a subsequent stage. This means that European traders cannot rely on CESL being applicable in third-country situations. In particular, CESL will not be available where the third State does not allow choice in consumer contracts, such as, for example, Switzerland.[74]

C. Cross-Border Contract and Trader Domiciled in a Third State

A trader from outside the EU might only chose CESL as a part of the consumer's home law. A simple choice of CESL unaccompanied by a choice of a Member State's law might be interpreted as a choice of the consumer's national law. Such an interpretation is in fact not necessary since in the absence of a choice of law the consumer's home law applies anyway by virtue of Article 6(1) Rome I Regulation. This presupposes, however, that a dispute is being brought in the courts of a Member State. Should litigation take place in the country of the trader's residence or in another third State, this outcome cannot be guaranteed. A further condition for the automatic applicability of the consumer's home State law is that the situational requirements of Article 6(1) Rome I Regulation are met. Where, for example, the consumer has actively contacted the trader abroad, without the trader directing his activities to the consumer's domicile, the operation of Article 6 Rome I Regulation is not triggered and CESL can only apply if the court is prepared to see in the choice of CESL an implied choice of the consumer's home law.

D. Internal Contracts

If no other country is involved and the contact is internal then the choice of CESL might cause problems under Article 3(3) Rome I Regulation. The parties cannot exclude those provisions of their joint home State law which cannot be derogated from by agreement. These include the provisions under Article 6 Rome I Regulation and other simple mandatory provisions, which are not aimed at consumer protection. In England, for example, the requirement of consideration might be such a mandatory provision.[75] Another example might be implied terms under the Sale of Goods Act 1979, which according to Unfair Contract Terms Act 1977 section 6 cannot be excluded by a contract term as against a consumer and as against a business can only be excluded if doing so is reasonable. Any attempt to escape the operation of this provision by choosing a foreign law is rendered ineffective by UCTA section 27(2)(a), if that foreign law was chosen 'wholly or mainly for the purpose of enabling the party imposing it to evade the operation of this Act'. A court is particularly likely to consider such a choice to be an evasion if there are no elements connecting the contract to any country other than the UK. Finally, the prohibition of penalty clauses also falls within this category of mandatory provisions.[76] There is here a direct collision between English law, which

[74] Swiss Act on Private International Law art 120(2).

[75] A Briggs, *The Conflict of Laws* (2nd edn, OUP 2008), 173; Dicey, Morris and Collins (n 62) 32–105; Fawcett, Harris and Bridge (n 29) 13.99, questioning, however, whether the policy requiring consideration was strong enough for a court to insist on it; see *Re Bonacina* [1912] 2 Ch 394.

[76] Fawcett, Harris and Bridge (n 29) 13.99.

invalidates any type of penalty clauses and CESL, which only deals with penalty clauses that have not been individually negotiated.[77]

CESL is not automatically applicable to purely internal contracts. It is only where the national legislator has decided to make it available to internal cases that CESL can become applicable.[78] The decision to make CESL available for internal contracts might be regarded as a sign that a State is prepared to allow for departures from its own mandatory provisions. A possible justification for this might be that, taken overall, CESL guarantees a high level of protection and that the mandatory provisions of the forum are, therefore, no longer necessary. The autonomous mandatory provision would still continue to apply where the parties purported to deviate from them by the terms of their contract. Only where the parties choose to opt into another system which has a high level of protection might the mandatory provisions be regarded as superfluous.

This outcome is by no means inevitable though, as is shown by a comparison with CISG. CISG takes precedence over national mandatory provisions[79] because 'the commitment that Contracting States make to each other [is]: we will apply these uniform rules in place of our own domestic law on the assumption that you will do the same'.[80] This is true, however, only to the extent that CISG applies autonomously. Where, on the other hand, CISG applies by virtue of its being chosen by the parties, the mandatory provisions of the otherwise applicable law remain in force.[81] A choice of CISG thus cannot trigger the subordination of national law under CISG, as this can only be achieved where a State has made CISG applicable by incorporation into its legal system. Applying these principles to a situation where CESL is chosen by the parties in a purely internal situation,[82] it might be argued that CESL is subject to national mandatory provisions since it only applies by virtue of the parties' choice. The same reasoning can then be applied to all situations where CESL is being used: since CESL can only ever become applicable because the parties have chosen to apply it, CESL would always be subject to the mandatory provisions of national law.

That result stems from the fact that the drafters of CESL chose an opt-in model, meaning that CESL is never applicable by virtue of State action alone.[83] The optionality of CESL would thus be its greatest weakness. A possible counter-argument might be

[77] CESL art 85(e).

[78] Regulation art 13(1).

[79] F Enderlein and D Maskow, *International Sales Law* (Oceana 1992) art 6 No 3.1 available at < http://cisgw3.law.pace.edu/cisg/biblio/enderlein.html >; R Herber, *Article 6*, in Commentary on the UN Convention on the International Sale of Goods (P Schlechtriem ed, 1998) No 24; M Lorenz, *Artikel 6*, in International Einheitliches Kaufrecht: Praktiker-Kommentar und Vertragsgestaltung zum CISG, No 20 (W Witz, H-C Salger and M Lorenz eds, 2000); U Magnus, *Artikel 6*, in J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Wiener UN-Kaufrecht (CISG) (1999) No 55; G Reinhart, UN-Kaufrecht (1991) art 6 No 8; H Rudolph, Kaufrecht der Export- und Importverträge (1996) art 6 No 1, No 6.

[80] JO Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (3rd edn, Kluwer 1999) 103.2.

[81] I Schwenzer (ed), *Schlechtriem and Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (3rd edn, OUP 2010), art 6 No 31 citing as an example, in fn 92, mandatory formal provisions that in this case override art 11 CISG.

[82] CISG is not available for choice where the contract is purely internal as it requires a 'sale of goods between parties whose places of business are in different States' (art 1(1)). This does not have any effect on the general relation between CISG and mandatory provisions though. Signatory States could expand its scope to include domestic transactions.

[83] The expression 'action of Contracting States' is Honnold's (n 80), art 6 No 84.

that the parties' ability to choose CESL is always dependent on prior State action. In other words, the parties have the power to choose it only because a State has permitted the use of CESL in the domestic context. In the international context, the same reasoning would apply: since CESL is a part of national law, it was the State itself which provided the parties with the opportunity to choose it.[84] But this argument is unconvincing: CISG also requires State action before it becomes available *qua* choice. The main situation in which CISG is applicable by choice of the parties is Article 1(b) CISG, which renders CISG applicable 'when the rules of private international law lead to the application of the law of a Contracting State'. The rules of private international law allow the parties to choose the applicable law, so that, for example, a choice of German law would be a choice of CISG supplemented by autonomous German law, unless German law is chosen with the exclusion of the CISG. If the parties are domiciled in the same State, then the choice of German law would not include CISG as the parties' 'places of business are [not] in different States'.[85] Where the parties are located in different States their choice would then render CISG applicable. Such choice however would be subject to the mandatory provisions applicable under the conflict of laws rules. German law, in the above example, can only displace the otherwise applicable law to the extent that choice of law rules allow it, and the same is then true for CISG as part of German law. In this situation CISG is applicable as a consequence of both State action and party choice. Germany ratified CISG and incorporated it into its domestic law and then the parties chose to apply German law and, with it, CISG. This is not structurally different to the situation where a State makes CESL available for internal contracts and the parties then choose to use it, or even to the standard situation where CESL is available for cross-border contracts as directly applicable EU legislation if the parties so choose.

In purely domestic situations it thus follows that the use of CESL cannot render mandatory provisions of domestic law inapplicable if those provisions could not be derogated from by agreement in accordance with Article 3(3) Rome I Regulation. The comparison with CISG underlines the correctness of the earlier assumption that in cross-border contracts Article 6 Rome I Regulation continues to give effect to the mandatory provisions of the consumer's home law. The same result would follow in any of the alternative regulatory models (direct application, 28th regime) unless CESL were to be reformulated as an opt-out model, in which case CESL would apply solely as a result of State action and so could supersede mandatory provisions of existing national law.

E. Relationship with Overriding Mandatory Provisions

So far the discussion has focused on those provisions that cannot be derogated from by agreement. The opt-in character of CESL was therefore crucial for the outcome. We now have to turn our attention to overriding mandatory provisions, which differ from the mandatory provisions so far considered in that they do not only supersede the choice of law made by the parties but they also supersede the objectively determined applicable law. Under Article 9 Rome I Regulation a court can apply the overriding mandatory provisions of the forum[86] and may give effect to the overriding mandatory provisions of other States if those provisions render performance of the contract illegal.[87] It is

[84] Even if rather indirect via accession to the EU and subjection thereby to EU directives.
[85] CISG art 1. [86] Rome I Regulation art 9(2). [87] Rome I Regulation art 9(3).

submitted that CESL cannot take precedence over such overriding mandatory provisions. This follows from the definition of those provisions in the Rome I Regulation. The question which needs to be considered is whether that definition is useful or whether it should be changed. Overriding mandatory provisions are defined in Article 9(1) Rome I Regulation as

> 'provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.'

Without looking at this definition in great detail, the principal dilemma is obvious: how can a State regard a rule as crucial for its interests and then not insist on its application? Either the provision is crucial, in which case it must be applied, or it is not crucial, in which case there is no reason to disregard the applicable law. The absolute character of overriding mandatory provisions is also reflected in a further important difference between them and the otherwise similarly structured simple mandatory provisions: overriding mandatory provisions are not subject to any form of comparison in order to determine which set of rules are more favourable to a particular party.

CESL does not refer to overriding mandatory provisions and neither do any of the preparatory materials. The Max Planck Institute, in its comments on the Commission's Green Paper in 2010,[88] said that the draft Regulation should determine the relationship between overriding mandatory provisions and CESL.[89] They proposed a rule similar to Article 9 Rome I Regulation or, preferably, that there be an autonomous determination of questions of validity in the substantive provisions of CESL. They argued that it should be provided that a contract would be rendered void if it violated overriding mandatory provisions of EU law, or fundamental principles of Member States' laws. Examples for the former might include the right of commercial agents under Articles 17 and 18 of the Commercial Agents Directive,[90] and trade embargoes, eg against Iran.[91] Examples of the latter might include 'moral issues', such as 'abortion, stem cell research, or the legalization of certain drugs'. As the EU lacks the 'legal basis for determining whether a particular activity or transaction should be legal or not', Member States should be able to use their own criteria, but within narrow limits, and under the control of the ECJ as to what qualifies as 'fundamental principles'.[92]

Neither of these proposals has been taken up in the draft Regulation. Recital 27 contains a blanket exclusion of all questions regarding 'illegality or immorality' from CESL and makes these questions subject to the law determined pursuant to the Rome I and II Regulations. This creates a danger for the uniform operation of CESL, since national systems take different positions regarding illegality and immorality of contract. This, some say, has to be accepted as illegality or immorality is based on public policy considerations which therefore are to be accepted as a higher ranking goal.[93] Ultimately, therefore, no clash between CESL and overriding mandatory provisions of

[88] Max Planck Institute for Comparative and International Private Law, 'Policy Options for Progress towards a European Contract Law', (2011) 75 Rabels Z 371.
[89] ibid 407 [88].
[90] Directive 86/653/EEC, OJ 1986 L 382/17.
[91] Regulation 961/2010/EC, OJ 2010 L 281/1.
[92] Max Planck Institute (n 88) 407 [89].
[93] Dannemann (n 39) in Part E; Stürner (n 38) 238.

national law can arise. The areas where this might have happened are excluded from CESL and as far as the matters covered are concerned, there are unlikely to be overriding mandatory provisions in the laws of the Member States. The difficulty thus resolves itself and the debate has no substance.

This argument, however, fails to appreciate the extent to which Article 9 Rome I Regulation permits national law to determine the overriding mandatory character of a norm. German courts, for example, have shown great restraint in declaring provisions overriding and have decided that provisions, which mainly protect private interests, are not of overriding mandatory character. The fact that those provisions might reflexively protect public interests as a side effect does not affect this characterization.[94] French[95] and English[96] courts, on the other hand, have been less restrained. In England, for example, the Consumer Credit Act 1974[97] and the Unfair Contract Terms Act 1977[98] are generally considered overriding. At first sight it might be argued that, again, there is no overlap between CESL and these two Acts: credit agreements are explicitly excluded from the scope of CESL[99] and the Unfair Contract Terms Act 1977 is inapplicable to most international supply contracts.[100] While this might be true, there is still scope for substantial overlap.

First, Article 6(2) fails to exclude many forms of linked credit transactions from the scope of CESL. Article 6(2), as far as it is material for the present purposes, reads: CESL 'may not be used for contracts between a trader and a consumer where the trader grants or promises to grant to the consumer credit in the form of a deferred payment, loan or similar financial accommodation'. Taken literally, this provision would leave all forms of linked credit agreements, where a third party grants or promises to grant credit to the consumer exclusively for the purpose of financing the sale governed by CESL, within the scope of CESL. The mandatory requirements of CESL would then clash with the requirements laid down in national consumer credit legislation, such as the Consumer Credit Act 1974. In consequence, the sales contract might be governed by CESL whilst the linked credit agreement would be governed by national consumer credit law, which despite the revised Directive on Consumer Credit is still not well harmonized across the Member States. Different pre-contractual information requirements, cooling-down periods, remedies, etc would apply to both contracts leading to unnecessary fragmentation. In order to make CESL unavailable to sales contracts linked to a credit agreement with a third party, the wording of Article 6(2) CESL would have to be changed in order to align it with the definition of linked credit agreement in the Consumer Credit Directive.[101]

[94] BGH XI ZR 82/05, 13 December 2005 (2006) NJW 762.

[95] Cour de Cassation 1st Civil Chamber, 23 May 2006 (2006) Bulletin des arrêts de la cour de cassation civil, no 258.

[96] *English v Donnelly* 1958 SC 494, a Scottish decision, which is also relied on in England as precedent for the proposition that consumer credit law is of an overriding mandatory nature. See further Bisping (n 27) 248.

[97] See *OFT v Lloyds* [2008] 1 AC 316; this is misconceived; see C Bisping, 'Avoid the Statutist Trap. The International Scope of the Consumer Credit Act 1974' (2012) 8 JPIL 1.

[98] Dicey, Morris and Collins (n 62) 1-058; for a critique see FA Mann, 'Unfair Contract Terms Act 1977 and the Conflict of Laws' (1978) 27 ICLQ 661.

[99] CESL art 6.

[100] UCTA 1977 section 26.

[101] Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers, OJ L 133/66 in Art 3(n) defines linked credit agreements as including situations where the credit is granted by a third party.

Second, a more worrying clash might arise with UCTA. Term control is at the core of CESL[102] and one of the main attractions of CESL is that traders can rely on one single set of standard terms across the EU.[103] If UCTA were to apply, however, those standard terms would need adjusting to meet its requirements. Admittedly, UCTA does not cover many international supply contracts (which rather suggests that it is not, in fact, setting out overriding mandatory provisions at all), but it does apply to some. For example, UCTA section 26 excludes 'international supply contracts', those being contracts where the parties' places of business are located in different States and where either the goods are transported from one State to another, or where offer and acceptance occurred in different States.[104] However, where, for example, a seller enters into a contract in the consumer's country in relation to goods that are already in that country, UCTA continues to apply even though the seller is foreign and the parties have chosen to use CESL. In the eyes of CESL, the contract is a cross-border transaction and the parties may therefore choose CESL. In the eyes of English law, the contract is not an international supply contract and UCTA is therefore applicable in spite of the parties' preference for CESL. The trader's expectation of being able to rely on standard terms conforming to CESL is therefore disappointed.

Article 9(2) Rome I Regulation might be read as not preventing the applicability of CESL, since it provides that '[*n*]*othing in this Regulation* shall restrict the application of the overriding mandatory provisions of the law of the forum'.[105] As CESL is outside the Regulation it might therefore still be thought able to restrict the application of such provisions. This, however, cannot be true for two obvious reasons. First, CESL applies at the second step and only after the determination of a national law.[106] It is at the first step that the overriding mandatory provisions of the forum apply. Second, in line with other examples of uniform law, such as CISG, CESL can only supersede overriding national law where a State provides for the application of the uniform law rather than domestic law.[107] If the uniform law only applies by virtue of the choice of the parties, then it has to yield to the mandatory provisions of national law. CESL is thus subject to overriding mandatory provisions of the forum and potentially of third countries so the purpose of facilitating cross-border trade is not, therefore, achieved.

V. THE LESSONS TO BE LEARNT

The above discussion triggers the questions whether there are lessons to be learnt and how a more satisfactory outcome might be achieved. This requires first of all identifying what a satisfactory outcome might be. One view is that there is no need for CESL since there is no competition between legal systems in contract law. The differences between contract law regimes have, according to this view, no impact on consumers' and traders' willingness to engage in cross-border trade.[108] Another objection is that CESL infringes the principle of subsidiarity.[109] These concerns might cast doubt on the virtues of

[102] Arts 79–86.
[103] See only Eidenmüller et al (n 2) 270 and 286.
[104] UCTA 1977 section 26(3) and (4).
[105] Emphasis added.
[106] See above Part IVA.
[107] See above Part IVD.
[108] S Leible, 'Kollisionsrecht und vertikaler Regulierungswettbewerb' (2012) 76 Rabels Z 374, 387 ff.
[109] See eg the complaint by the German Bundestag available at <http://dipbt.bundestag.de/dip21/btd/17/080/1708000.pdf>.

uniform approaches in general and CESL in particular. Those taking such sceptical views would also argue in favour of allowing space for national considerations to be taken into account by respecting mandatory provisions in national law. Setting those concerns aside, if one accepts that cross-border trade can be facilitated by the introduction of CESL, then a satisfactory outcome would be one which reduces to the absolute minimum the room for national considerations in order to enhance predictability and reliability for the traders who are to be encouraged to engage in cross-border trade. This requires minimizing national interferences which risk rendering illusory the incentive of a single set of contract terms across the Member States. The question is, then, how can this best be achieved.

One possible way of doing so might be to follow an opt-out model and declare CESL automatically applicable in international contracts unless the parties explicitly opt out. In line with CISG, national mandatory provisions would then not prevail over CESL. Making CESL available by default potentially infringes the principle of subsidiarity to an even greater extent than the opt-in model and would also stifle jurisdictional competence to an even greater extent than the current proposal. It might also go against the interests of consumers, who normally rely on the applicability of their domestic law. Under the current proposal consumers will be alerted to the fact that CESL is applicable and basic information concerning it will have to be provided. Were CESL applicable by default consumers would not be alerted to this and would not be given any information on it. The opt-out model would thus not be in the parties' best interest and would further trigger subsidiarity concerns.

Another possibility would be for CESL to itself provide for its relationship to mandatory provisions. This too would require a change in the mode by which CESL is rendered applicable since the current approach means that mandatory provisions become applicable as a result of conflict of laws rules before CESL itself becomes applicable. This could only be overcome by CESL applying autonomously and having its own separate choice of law rules. This, however, could be seen as disturbing the choice of law system by creating unnecessary exceptions.

In the interests of the parties and of international harmony in decision-making, the best possible solution, it is submitted, is to rethink mandatory provisions in general. In this respect, it is again necessary to differentiate between mandatory provisions under Articles 3(3), 6(2) and 8 Rome I Regulation and overriding mandatory provisions under Article 9 Rome I Regulation. The relationship of the former to CESL can be addressed by inserting a simple sentence in each of those provisions to the effect that they shall not apply where the chosen law is CESL. This avoids any clash between those provisions and CESL and is not to the detriment of the consumer, who would now benefit from the higher level of protection offered under CESL. Overriding mandatory provisions cannot be so easily reconciled with CESL. As they are deemed to be of such central importance to a country's interests, they cannot be so easily sacrificed in order to achieve uniform and predictable results. It is, however, doubtful whether overriding mandatory provisions are in fact needed to safeguard a country's interests at all. It is submitted that the best way to overcome the clash between overriding mandatory provisions and CESL is to rethink the definition of overriding mandatory provisions. The current definition is too wide, as can be seen from the different approaches taken in Germany, on the one hand, and countries such as France and to some extent also England, on the other hand. The impact of rethinking the definition of overriding mandatory provisions

would reach further than just CESL. A general review of Article 9 Rome I Regulation would also limit the interference of overriding mandatory provisions in contracts that are not subjected to CESL. That Article 9 Rome I Regulation unduly interferes with contracts can be seen from the above discussion of contracts governed by CESL. Too much emphasis is laid on the legislator's intent for the purpose of determining the overriding character of a norm.[110] The intent is difficult to establish in many cases and courts have to substitute their own assessment for that of the legislator who, more often than not, has not considered the question at all. A better approach to defining overriding mandatory provisions would be to list the matters for which national legislators might make mandatory provisions of an overriding nature. This should also include a provision on European overriding rules. This solution bears some resemblance to the proposal submitted by the Max-Planck-Institute. The main difference is that the Institute's proposal would be limited to CESL whereas this suggestion treats CESL as part of the normal choice of law process and seeks to address the issue at a more general level.

The starting point for a review of the definition of Article 9 has to be a reconsideration of the origin of the current definition, which is the judgment in *Arblade*.[111] In that case the ECJ, as it then was, had to decide on the compatibility of Belgian public order employment legislation with the principle of freedom of services under EU law. A French company carrying out construction work in Belgium had not complied with Belgian labour and social security legislation requiring payment of minimum wages and keeping of social security registers. The court held that 'national provisions compliance with which has been deemed so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relations within that State'[112] may constitute grounds that validly restrict the freedoms guaranteed by EU law.[113] The French construction company could therefore be subject to Belgian criminal charges for non-compliance with such rules. The ECJ held that most of the Belgian public order rules were inapplicable because similar provisions were in force in France which adequately protected the construction workers[114] or because the rules in question were not 'appropriate for securing the attainment of the objective which they pursue and [instead went] beyond what is necessary in order to attain it'.[115] Whilst the current definition of mandatory provisions in Article 9 Rome I Regulation is undoubtedly based on the formula in *Arblade*, all of the qualifications to that formula that the ECJ also set out in *Arblade* were simply ignored. Article 9 Rome I Regulation only looks at the legislator's intent to protect the social, economic or political order of a country. It does not, however, allow for a comparison with the rules existing in another State in the same area. With respect to CESL, this means that the level of protection which it affords cannot be taken into account when deciding whether a national overriding provision is to be applied. The *Arblade* decision, however, requires that there be such a comparison. Similarly, any consideration of whether the purpose of the legislation in question requires their application is currently not envisaged by Article 9 Rome I Regulation, at least not where the legislator has clearly spelled out that the legislation is to have overriding effect. In cases where legislation is silent as to its

[110] Bisping (n 27) 245, 249.
[111] Joined cases C-369/96 and C-376-96, [1999] ECR I-8453.
[112] ibid 29.
[113] ibid 31 and 33.
[114] ibid 34, 39, 51 and 64.
[115] ibid 35.

international scope, this test ought to be part of the adjudicating court's interpretative exercise. In addition to that, the formula in *Arblade* is of doubtful usefulness in the private law context of the conflict of laws because it was laid down as an exception to compliance with market freedoms under EU law in a public law context. The validity of the employment contract, its enforceability and performance where not at stake in *Arblade*. In sum, one might say that the test in *Arblade* was not meant to apply in the conflict of laws context at all, and that only half of it has been transplanted into the Rome I Regulation in any case. This is not the place to elaborate further on the proposed definition of overriding mandatory provisions. What this article hopes to have shown is how intrusive the present Article 9 Rome I Regulation is and why it needs rethinking.

VI. CONCLUSION

The drafters of CESL have underestimated the overlap between private international law and CESL. In particular, they have failed to appreciate the possible interferences by simple and overriding mandatory provisions of national law. Due to the optional character of CESL it is necessary to assess in every case whether the rules of CESL or those of the consumer's home law are more favourable to the consumer. In purely internal situations, likewise, mandatory provisions of national law could not be disapplied even though the national legislator has decided to make CESL available for those contracts. There are several possible ways to address that issue. It is suggested that the best solution is to make minimal changes to the Rome I Regulation in order to clarify its relationship to CESL. The relationship to overriding mandatory provisions is more difficult to rationalize. At present, there is a strong emphasis on the national legislator's intention and as the provisions are considered to safeguard crucial interests of the national States, no deviation from these provisions is possible. Different Member States have further interpreted this definition in different ways so that there is a lack of uniformity across the Member States. This not only creates an obstacle to the uniform application of CESL and to the users' ability to rely on the effectiveness of their standard terms of contracting, it also creates uncertainty and unpredictability in other situations. It is therefore suggested that the definition of overriding mandatory provisions needs radical rethinking with a view to limiting its scope and placing emphasis on a European notion of overriding rules.

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