

# Competition in international sales law: introduction to special issue

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# EUROPEAN BUSINESS LAW REVIEW



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# Competition in International Sales Law: Introduction to Special Issue

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## Abstract

In 2011 the European Commission published a proposal for a Regulation on a Common European Sales Law (CESL). This contribution forms the introduction to a special issue of the *European Business Law Review*, discussing the proposed CESL from the viewpoint of competition. If the CESL would be introduced, commercial parties engaged in cross-border transactions within the European Union will have to make an informed choice between the available legal regimes (CESL, CISG and national laws). The question then becomes which of these regimes is the most attractive for parties. The common theme throughout the contributions by Dalhuisen, Kornet, Kruisinga, Low and Meyer is that the Common European Sales Law in its present form will not be an attractive competitor on the European law market.

## 1. Introduction

In 2011 the European Commission published a proposal for a Regulation on a Common European Sales Law (CESL).<sup>1</sup> The Commission proposes to create a European set of rules on cross-border contracts of sale that leaves the choice to opt in to these rules to the contracting parties. This proposal clearly differs from existing methods to achieve convergence in the area of contract law, such as the method of European harmonisation by way of directives (mostly of relevance to consumer contracts), the creation of a model law that states can opt into (as in the case of the American Uniform Commercial Code) and unification by way of a treaty (such as the Vienna Convention on Contracts for the International Sale of Goods).

If the European legislature will be successful in introducing the CESL, a new competitor will be added to the market for sales laws. Commercial parties engaged in cross-border transactions within the European Union will have to make an informed choice between the available legal regimes. These include not only the CESL and the CISG, but also the various national laws, either applicable by default or by explicit

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<sup>1</sup> Proposal for a Regulation on a Common European Sales Law, COM (2011) 635 final. The genesis of the Proposal is described in detail in the contribution of Sonja Kruisinga.

choice under the Rome I Regulation.<sup>2</sup> This special issue of the European Business Law Review is devoted to this choice. Those who ‘shop’ in the market for laws<sup>3</sup> will be even more spoilt for choice than they are today. But how ought such choice to be made? Though their scope is not identical, there is significant overlap amongst for example the CISG and the CESL. Substantively, the two instruments show marked similarities and differences. In view of the tendency of commercial parties to opt out of the CISG, the question becomes whether the proposed CESL would be a more attractive alternative.

## 2. Contributions to This Special Issue

The present special issue thus contributes to the on-going discussion<sup>4</sup> about the proposed CESL from the specific perspective of *choice*. It asks how the competitive advantage of the different sales law regimes should be assessed. The first contribution, written by Jan Dalhuisen, approaches this question from a general perspective. Dalhuisen makes two main points. The first is that harmonisation projects often fail because of a lack of acceptance in international commercial practice. There are two main reasons for this. One is the lack of real involvement of those for whom these instruments are intended. The case of the CESL is an apt one: if there would be a real need for the CESL, business parties would ask for it themselves. This is perhaps an argument in favour of the creation of model laws that can still be amended to the needs of a national audience before actually being enacted; the 1985 UNCITRAL Model Law on International Commercial Arbitration may provide an example. The other reason for failure of harmonisation projects would lie in the lack of a clear method: texts such as the Principles of European Contract Law,<sup>5</sup> Draft Common Frame of Reference<sup>6</sup> and CESL are based on the continental model of the civil code, implying a top-down approach to the making of private law and a State monopoly in setting rules. International commercial law on the other hand is characterised by a great variety of sources, including a big role for

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<sup>2</sup> Regulation 593/2008 on the law applicable to contractual obligations.

<sup>3</sup> See for this terminology e.g. Erin O’Hara and Larry Ribstein, *The Law Market* (Oxford University Press 2009), Horst Eidenmüller, *Recht als Produkt* 64 *Juristenzeitung* 641 (2009) and Hein Kötz, *The Jurisdiction of Choice: England and Wales or Germany?* 18 *European Review of Private Law* 1243–1257 (2010).

<sup>4</sup> The (draft) Proposal is discussed at length in 19 *European Review of Private Law* 709 (2011), no. 6 (special issue), 20 *Zeitschrift für Europäisches Privatrecht* (2012), no. 4 (special issue); 19 *Maastricht Journal of European and Comparative Law* 3 (2012), no. 1 (special issue), 21 *European Review of Private Law* 1 (2013), no. 1, 50 *Common Market Law Review* (2013), no. 1 and by Martin Schmidt-Kessel (ed.), *Ein einheitliches europäisches Kaufrecht?* (Sellier 2012); Hans Schulte-Nölke et al. (eds), *Der Entwurf für ein optionales europäisches Kaufrecht* (Sellier 2012).

<sup>5</sup> Ole Lando & Hugh Beale (eds), *Principles of European Contract Law*, Parts I and II (Kluwer 2000) and Ole Lando et al. (eds), *Principles of European Contract Law*, Part III (Kluwer 2003).

<sup>6</sup> Christian Von Bar & Eric Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (Sellier 2009), six vols.

international conventions and custom, leading to a continuous competition among various sets of norms. This fits in with previous pleas<sup>7</sup> in favour of legal diversity and of a bottom up approach to legal convergence: if consensus is lacking on the benefits of harmonisation, competition among laws is a viable alternative to top-down harmonisation.

The contributions by Nicole Kornet and Sonja Kruisinga put the proposed CESL to the test of competitiveness. They both argue that the main factor relevant to choice is whether a legal regime offers businesses certainty and predictability. This is indeed one of the most important factors in choosing for one legal regime or the other. Kornet looks into interpretation and enforceability of standardised contract terms. She shows that the CESL cannot avoid fragmentation of the regulatory framework. In addition, the many open-ended norms in the CESL (including abundant references to good faith and reasonableness) will lead to uncertainty in the absence of a European court that is able to give effective guidance in interpreting the CESL. This means that the CESL will not be able to avoid the 'homeward trend' that we know from the CISG. Kruisinga, discussing the incorporation of standard terms in CISG and CESL, is also sceptical whether the CESL will enhance legal certainty. This makes them both sceptical about the willingness of businesses to consciously choose for the CESL as a set of as of yet untested rules.

What the contributions by Kornet and Kruisinga imply is that businesses will need to carry out a thorough assessment of each individual sales law regime to establish whether it is best suited for their purposes. However, this ideal may not be in line with how actors make their decisions in reality. Gary Low, in a contribution entitled 'A psychology of Choice of Laws' therefore asks how attractive choice actually is. Could it be that the introduction of CESL leads to choice overload and if so, can this be overcome? Borrowing from the extensive literature on psychology, Low explains that the possibility in cross-border transactions to choose not only between (not opting out of) the CISG and CESL, but also out of more than 100 national contract law regimes, may induce a fear of not being able to make the best possible choice. This is likely to lead firms to stick to the default situation or to their current choice of a specific national regime. However, it does matter how familiar firms are with making choices: a multinational company may struggle less than a small firm when being confronted with choice overload. Incentives are vital: if a party is not interested at all in the applicable law, or if jurisdictions are largely similar, there is little to gain from a choice at all. What can be done, however, is to present the available options in the best possible way, something psychologists also have something to say about.

The choice of a legal regime is not only dependent on the substance of the regime itself and on psychological factors. It will also be influenced by the environment in which the regime has to operate. This environment can be more or less favourable to a choice for a specific set of rules. In his contribution, Olaf Meyer therefore shows

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<sup>7</sup> Cf. e.g. Anthony Ogus, *Competition between National Legal Systems: A Contribution of Economic Analysis to Comparative Law* 48 *International and Comparative Law Quarterly* 405 (1999); Eva-Maria Kieninger, *Wettbewerb der Privatrechtsordnungen im europäischen Binnenmarkt* (Mohr Siebeck 2002).

how important it is to develop an infrastructure in which a set of rules can thrive: any uniform sales law needs to be *promoted*. The CISG is a nice example of this. It would not have had its present place without elaborate treatment in the academic literature (including textbooks and commentaries wholly devoted to the CISG), the introduction of case law collections (in particular online databases such as CLOUT, the website of Pace University and the UNCITRAL Digest of case law) and the training of new generations of practitioners (including the Willem C. Vis Moot Court competition). Meyer rightly asks whether these ways of promotion that helped the CISG to gain a place in the 'living law' could also be useful in advancing the CESL. His conclusion is that this may be more difficult for the CESL than it was for the CISG, also in view of the CESL's applicability to both B2B and B2C transactions and its character as an opt-in instrument.

### 3. Conclusions

This introduction cannot do justice to the wealth of arguments brought forward in the various contributions to this special issue.<sup>8</sup> The common theme is that the Common European Sales Law in its present form will not be an attractive competitor on the European law market. The European Commission provides three reasons why the CISG would be defective and why the proposed CESL could do better.<sup>9</sup> A good reason put forward by the Commission is that the CISG is ratified by only 23 of the 27 European member states whereas the CESL will be available for any firm doing business in the European Union. There is reason for scepticism about the two other used arguments. The Commission rightly says that the CISG does not regulate all aspects of the contract of sale. However, the CESL equally leaves important parts of sales law unregulated, including illegality and any proprietary aspect of the sale. The other argument is that a uniform interpretation of the CISG cannot be ensured in the absence of a supranational court. This is also true, but as was seen above the CESL is not likely to do much better. This calls for amending the present proposal.

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<sup>8</sup> The contributions were all discussed in draft form at the Maastricht European Private Law Institute Roundtable 'Competition in International Sales Law', held at Maastricht University on 15 June 2012.

<sup>9</sup> Proposal, p 5.