

# LEGAL ENVIRONMENT FOR B2B CROSS-BORDER SALES BETWEEN CISG AND CESL

Lecturer **Charlotte ENE**<sup>1</sup>

Lecturer **Ileana VOICA**<sup>2</sup>

## Abstract

*The main purpose of the Proposal for a Regulation on a Common European Sales Law (CESL) is to establish “a comprehensive set of uniform contract law rules covering the whole life-cycle of a contract” In the field of B2B transaction, the CESL, a regional legal provision, seems to bear several similarities with the United Nations Convention on Contracts for the International Sale of Goods (CISG) of 1980. This paper will examine the relationship between both legal instrument for uniformisation of sales law at regional and global level. Thus, it will compare the provisions regarding the major aspects of the commercial sale contract, such as: the objectives, the scope of application, the formation of contract, the rights and obligations of the parties, and the conflict of laws problem, as well. In the end, it will be analyzed whether the CESL offer better solutions than those already found in the CISG in order to stimulate the cross-border sales.*

**Keywords:** CISG, CESL, Private International Law, Sales Law, harmonization, B2B transactions.

**JEL Classification:** K12, K22

## 1. Introduction

The cross-border businesses need a legal environment with certainty and predictability. Therefore, business persons involved in cross-border sales transactions may apply a uniform regime to their international sales of moveable goods stipulated by the United Nations Convention on Contracts for the International Sale of Goods – Vienna, 1980 (hereinafter CISG). At regional level, the European Commission proposed a new legal tool for governing the international sales contracts, a Regulation on a Common European Sales Law (hereinafter CESL)<sup>3</sup>, regarding both B2C and B2B transactions within internal market. “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.”<sup>4</sup>

This paper will examine the relationship between both legal instrument for uniformisation of sales law at regional and global level. Thus, it will compare the provisions regarding the major aspects of the commercial sale contract, such as: the objectives, the scope of application, the formation of contract, the rights and obligations of the parties, and the conflict of laws problem, as well. In the end, it will be analyzed whether the CESL offer better solutions than those already found in the CISG in order to stimulate the cross-border sales.

## 2. Relationship between CESL and CISG

One of the most successful international convention,<sup>5</sup> the CISG has 78 signatory states of which 23 are Member States of the European Union; with the exception of the United Kingdom, Portugal, Ireland and Malta.<sup>6</sup> According to Article 1, the CISG shall apply to the sale-purchase contract of

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<sup>1</sup> Charlotte Ene - Law Department, Bucharest University of Economic Studies, enecharlotte@gmail.com .

<sup>2</sup> Ileana Voica - Law Department, Bucharest University of Economic Studies, ileana\_voica@yahoo.com .

<sup>3</sup> Annex I to the *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final.

<sup>4</sup> Art.1 Proposal; see also Explanatory Memorandum to the CESL, COM (2011) 635 final, p.4.

<sup>5</sup> I. Schwenzer, P. Hachem, *The CISG - A Story of Worldwide Success*, in J. Kleinemann (Ed.), CISG Part II Conference, Iustus, Uppsala, 2009, p.140.

<sup>6</sup> It should also be noted that the Scandinavian countries do not apply Part II of the Convention, (containing the rules on contract formation); Estonia, Hungary, Latvia and Lithuania, have made an Article 96 reservation with respect to the application of Article 11 and 29; and it is expected that Portugal will join in the near future.

goods concluded between the parties having the places of business in different signatory states, or the conflictual norms establish the application of the law of a signatory party to the above mentioned convention, including the cross-border sales of the business persons from one of the 23 EU Member States that are contracting states to the CISG.

Synthesizing, the CISG governs the formation of the sale contracts, provides norms regarding the interpretation of the contract, stipulates the rights and obligations of parties, remedies for breach of contract. Also, CESL regulates the contract formation and interpretation, the obligation and remedies of the contracting parties, including the damages, the conditions of the restitution, and the prescription. With few exceptions (e.g. unfair contract terms), the spheres of application of the both legal instruments appear to be similar.

However, based on the Article 2(a) of the CISG, this international legal tool is concerned with facilitation of international B2B sales contracts, excluding B2C transactions. On the other hand, CESL is preoccupied with transborder european B2C sales contracts<sup>7</sup> and with small or medium-sized businesses (SME), namely is a business with less than 250 employees and an annual turnover not exceeding 50 million Euros;<sup>8</sup> according to the Article 7 of the Regulation, B2B transaction can be governed by the CESL only if at least one of the parties is a SME.

Moreover, while the principal aim of CISG is the unification of substantive sales law that replaces national sales law, CESL provides an alternative option for another sales regime leaving the law of the each Member State unaffected. As the scholars underlined “the idea of an optional sales law with mandatory elements is an innovative European concept.”<sup>9</sup>

Since the CESL offer another choice of law, this situation may generate a conflict between it and the CISG. In order to clarify the relation between the above mentioned international legal instruments, it shall observe the provision of the proposed regulation regarding the choice of the CESL which represents an agreement of the parties to exclude the application of the CISG to their international sales contract.<sup>10</sup> Thus, while CISG requires an explicit choice to opt out, the CESL imposes to contracting parties to choose to opt in.<sup>11</sup>

### 3. The main aspects stipulated in both legal instruments: comparative approach

As we mentioned above, the CISG is only concerned with the formation of the contract, the rights and duties of the parties and the remedies in case of breach of contract. According to Article 4 CISG, however, this convention does not cover issues concerning the validity of the contract and of the standard terms, including the defects in consent, information duties, and the fairness and validity.

By comparison, CESL has a broader sphere of application which includes B2C contracts,<sup>12</sup> pre-contractual information duties,<sup>13</sup> unfair contract terms,<sup>14</sup> and it comprises rules regarding mistake, fraud, threat and exploitation.<sup>15</sup>

#### 3.1. Types of the covered contracts

First of all, both legal instruments govern sales of goods contracts. The CISG does not provide for a definition of the good, but it expressly specify the exclusion of “ships, vessels, hovercraft and

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<sup>7</sup> The Explanatory Memorandum explicitly states that the Proposal “is consistent with the objective of attaining a high level of consumer protection.”

<sup>8</sup> Article 7(2) of the Regulation.

<sup>9</sup> U.Magnus, *CISG and CESL*, “Max Planck Private Law Research Paper no.27/2012”, Max Planck Institute for Comparative and International Private Law, p.239.

<sup>10</sup> Recital 25 of the Proposal.

<sup>11</sup> N.Kornet, *The Common European Sales Law and the CISG. Complicating or Simplifying the Legal Environment?*, Maastricht European Private Law Institute Working Paper no.4/2012, p.9

<sup>12</sup> Articles 40–47 of CESL

<sup>13</sup> Articles 13–22 of CESL

<sup>14</sup> Articles 82–86 of CESL

<sup>15</sup> Articles 48–57 of CESL

or aircraft<sup>16</sup>, stocks, shares, investment securities, negotiable instruments or money<sup>17</sup>, and electricity.<sup>18</sup> Contrary to the silence of the CISG, the CESL defines goods as “any tangible movable items”<sup>19</sup>, including digital content as “data which are produced and supplied in digital form”<sup>20</sup> (digital games or software and excluding services in electronic form). It is generally accepted that CISG also covers the sale of digital content, „whether or not it is on a tangible medium.”<sup>21</sup>

According to its Article 3(2), the CISG governs also the mixed contract, if the supply of services does not represent the preponderant part of the duties of the debtors. On the other hand, the CESL excludes mixed contracts,<sup>22</sup> with the exception of the so-called related services, (i.e. any service related to the goods or digital content such as installation, maintenance, repair, etc.)<sup>23</sup>.

### 3.2. Seller's obligations

Seller has the same obligation under both international normative acts. The seller is obliged to deliver goods which conform with the contract, meaning that the goods are free of any defects and free of rights or claims of third parties. If the parties do not establish, the place of delivery is the seller's place of business, or the place where the goods have to be handed over to the independent carrier; and the time for delivery is a reasonable time (CISG) or a not undue delay (CESL) after the conclusion of the contract.

If the seller does not fulfill its obligations and is not excused, both instruments grant the buyer the same remedies: a claim for performance, damages, termination, price reduction and the right to withhold the own performance.

### 3.3. Buyer's obligations

The buyer has the same obligations under CISG and CESL. The main obligation of the buyer is to pay the price. “Payment of the price is due at the moment of delivery”<sup>24</sup> or at the date fixed by the parties. According to the provisions of the CISG, the payment becomes due independently of any request or other formality. On the other hand, the CESL regulates the payment by a third party and the imputation of payment where several payments are due.

According to both the CISG and the CESL, when the buyer has breached the contract, the seller has several remedies, such as: a performance claim (under the CISG with the reservation of acceptance of specific performance by national law), the right of termination, the right to withhold the own performance, damages and/or interest. Under CESL the interest rate is in accordance with the Late Payment Directive for businesses at 8% above the refinancing rate of the European Central Bank; an open under CISG.

### 3.4. Force Majeure and Hardship

The CISG as well as the CESL provide that the debtor is exempted from liability for damages in case of a force majeure, meaning an impediment beyond its control.<sup>25</sup> By contrary to the CISG, the CESL contains specific provisions on variation or termination the contract by court in case of a change of circumstances which render performance more onerous for the debtor (commonly referred to as hardship).

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<sup>16</sup> Article 2(e) of CISG

<sup>17</sup> Article 2(d) of CISG

<sup>18</sup> Article 2(f) of CISG

<sup>19</sup> Article 2(h) of the Regulation.

<sup>20</sup> Article 2(j) of the Regulation

<sup>21</sup> U. Magnus, *op.cit.*, p.234

<sup>22</sup> Article 6 of the Regulation

<sup>23</sup> Article 2(m) of the Regulation

<sup>24</sup> Article 126(1) of CESL.

<sup>25</sup> Article 79 of CISG; Article 88(1) of CESL.

#### 4. Concluding remarks

This paper aims to compare the provisions of the CISG and the CESL regarding B2B cross-border transactions in order to determine the similarities and the differences.

From this point of view, it has to be stressed that the objectives of both legal tools are distinctly: while CISG provides a balanced regulation for international sales concluded between businesses, CESL has in view to protect “weak” buyers, either consumers or small and medium enterprises. „These different objectives influence the whole structure of both instruments.”<sup>26</sup>

The comparison shows further that both instruments provide the same basic solutions with respect to the rights and obligations of the parties. However, CESL is more favorable to the buyer than CISG; also, the previous one contains additional provisions based on the solutions found in application of CISG.

As has been stated: “..., the CESL “simply” adds a new choice for businesses by inserting a new, regional instrument between the national laws of the Member States and the international sales convention. Rather than simplifying the legal environment, such a step adds to its complexity.”<sup>27</sup>

#### Bibliography

1. *Communication from the Commission to the Council and the European Parliament on European Contract Law*, COM(2001) 398, 11.7.2001,
2. *Communication from the Commission to the European Parliament and the Council, A more coherent European Contract Law: an Action Plan*, COM(2003) 68, 12.2.2003,
3. *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final, 11.10.2011,
4. *United Nations Convention on International Sale of Goods*, Vienna, 1980;
5. P.Berger, *The Creeping Codification of the Lex Mercatoria*, Kluwer, 1999,
6. M.W.Hesselink, *How to opt into the Common European Sales Law. Brief comments on the Commission's proposal for a Regulation*, “European Review of Private Law”, no.1/2012,
7. P.Huber, A.Mullis, *The CISG: A New Textbook for Students and Practitioners*, Sellier European Law Publishers, 2007,
8. N.Kornet, *The Common European Sales Law and the CISG. Complicating or Simplifying the Legal Environment?*, Maastricht European Private Law Institute Working Paper no.4/2012,
9. S.Kröll, L.Mistelis, P.Perales Viscasillas, *UN Convention for the International Sale of Goods (CISG)*, München: C.H. Beck, 2011,
10. M.B.M.Loos, H.N.Schelhaas, *Commercial sales: the Common European Sales Law compared to the Vienna Sales Convention*, Centre for the Study of European Contract Law, Working Paper Series, no.14/2012,
11. U.Magnus, *CISG and CESL*, “Max Planck Private Law Research Paper no.27/2012”, Max Planck Institute for Comparative and International Private Law,
12. J.P.Penadés, L.M.M.Velencoso, (ed), *European Perspectives on the Common European Sales Law*, Springer International Publishing Switzerland, 2015,
13. M.Piers, C.Vanleenhove, *Another step towards harmonization in EU contract law: the Common European Sales Law*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2151256](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2151256) (last visited on 10 October 2015)
14. P.Schlechtriem, I.Schwenzer, *Commentary on the UN Convention on the International Sale of Goods*, Munich: C.H. Beck, 3rd. ed., 2010,
15. I.Schwenzer, *The Proposed Common European Sales Law and the Convention on the International Sale of Goods*, „Uniform Commercial Code Law Journal”, vol.44, no.4, November 2012,
16. M.-J.Smits, *Party Choice and the Common European Sales Law, or: How to Prevent the CESL from Becoming a Lemon on the Law Market*, Maastricht European Private Law Institute, 2012,
17. L.Spagnolo, *Green Eggs and Ham: The CISG, Path Dependence, and the Behavioural Economics of Lawyer's Choices of Law*, *International Sales Contracts*, vol.6 “Journal of Private International Law”, no.2/2010,

<sup>26</sup> U.Magnus, *op.cit.*, p.254.

<sup>27</sup> N.Kornet, *op.cit.*, p.18.