

Monika Pauknerová

**Faculty of Law
Charles University Prag
Czech Republic**

pauknero@prf.cuni.cz





Relationship between CISG, Rome I Regulation and Common European Sales Law

- **1. CISG - Convention on contracts for the international sale of goods of 1980**
- **2. Rome I Regulation on the law applicable to contractual obligations of 2008**
- **3. Proposal for a Regulation on a Common European Sales Law of 2011**
- **= normative labyrinth of instruments applicable to international sales contracts**



1. Convention on contracts for the international sale of goods - CISG

- **1.1. Introduction, Scope of application**
- **77 contracting parties, all EU countries except for UK, Ireland, Portugal and Malta**
- **uniform and fair regime for commercial contracts for the international sale of goods**
- **includes substantive rules and is directly applicable to sales contracts that fall under its scope of application**



1.1. CISG - Scope of application

- **contracts for sale of goods between parties whose places of business are in different Contracting States, or when the rules of private international law lead to the application of the law of a Contracting State**
- **sales to consumers and sales of services excluded**
- **certain types of goods excluded**
- **applies only to international transactions**



1.2. CISG and party autonomy

- **Opting in to the CISG**
- **Opting out of the CISG – Article 6 CISG**
- **CISG and the choice of the applicable law:
“This contract is governed by Czech law
excluding the CISG.”**



1.3. CISG and the Czech Republic

- **Czechoslovakia declared that it would not be bound by subparagraph 1(b) of Article 1 CISG, that is, the CISG is only applicable to contracts between parties whose places of business are in the Contracting States (reservation under Article 95 CISG).**
- **The second possibility of applicability of the CISG - when the rules of private international law lead to the application of the law of a Contracting State - does not apply.**
- **Czech Republic and Slovakia - succession to the reservation in Article 95.**



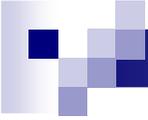
2. Rome I Regulation on the Law Applicable to Contractual Obligations

- **2.1. Introduction, Scope of application**
- **Article 7 (2) CISG:**
- **Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.**
- **=> Private international law**



Instruments on choice of law applicable to contracts

- **Regulation on the Law Applicable to Contractual Obligations (Rome I) applies only to contracts as from 17 December 2009**
- **Rome Convention on the Law Applicable to Contractual Obligations applies to contracts made after 1 July 2006**
- **Private International Law Act of 1963 applies to contracts concluded before - “older contracts”**
- **Incorporation of a non-State body of law?**



2.2. Rome I Regulation and CISG

- **Common principles: CISG as uniform substantive law (“direct rule”) takes precedence over conflict rules**
- **Article 25 (1) Rome I:**
- **“This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.” - narrow x extensive interpretation**



3. Common European Sales Law

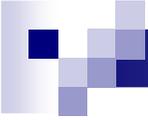
- **3.1. Background and scope**
- **Recital 14 of the Preamble to the Rome I:**
- **“Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.”**
- **=> Optional instrument - Proposal for a Regulation on a Common European Sales Law, adopted on 11 October 2011, Com (2011) 635 final**



3. Common European Sales Law

- **The CESL can be used for cross-border transactions**
- **for the sale of goods,**
- **for the supply of digital content and**
- **for related services where the parties to a contract agree to do so.**

- **The CESL may not be used for mixed-use contracts and instalment sales.**



3. Common European Sales Law

- **Applies to all business-to-consumer transactions and contracts between traders where at least one of the parties is an SME (small and medium-sized enterprise):**
- **Consumer contracts (B2C relations)**
- **Commercial contracts (B2B relations, at least one party being an SME)**
- **A Member State may decide to make the CESL available for commercial contracts where none of the parties is an SME.**



3. Common European Sales Law

- **“Goods” means any tangible movable items, except for e.g. electricity and natural gas**
- **“Digital content” means data which are produced and supplied in digital form, including video, audio, picture or written digital content, digital games, software and digital content which makes it possible to personalise existing hardware or software, except for e.g. financial services**
- **‘Related service’ means any service related to goods or digital content, such as installation, maintenance, repair or any other processing, provided by the seller or the supplier, except for e.g. transport services**



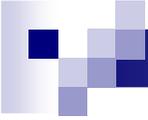
3.2. CESL – brief introduction

- **The Regulation intends to harmonise the contract laws of the Member States by creating within each MS' s national law a second contract law regime for contracts within its scope. This second regime should be identical throughout the European Union.**
- **Optional nature of the CESL: The CESL should apply on a voluntary basis, upon an express agreement of the parties, to a cross-border contract.**
- **Cross-border contracts - habitual residence of the parties in different countries of which at least one is a MS (contracts between traders)**



3.2. CESL – brief introduction

- **The Regulation sets out the objective and subject-matters, definitions, optional nature and agreement on the use of the CESL, specific requirements, duty to communicate judgments applying the CESL, etc.**
- **The Annex to the Regulation includes the proper substantive rules; it is divided into 8 parts and 18 chapters. The contents is as follows:**
- **Introductory provisions, Making a binding contract, Assessing what is in the contract, Obligations and remedies of the parties to a contract, Damages and interest, Restitution, and Prescription**



3.3. Relationship between CISG and CESL

- **Recital (25) of the Preamble to the future CESL Regulation:**
- **“Where the United Nations Convention on Contracts for the International Sale of Goods would otherwise apply to the contract in question, the choice of the Common European Sales Law should imply an agreement of the contractual parties to exclude that Convention.”**
- **=> In other words, the opting in to the CESL should imply opting out of the CISG.**



3.4. Rome I Regulation and CESL

- **Recital (10) of the Preamble to the future CESL Regulation:**
- **The agreement to use the CESL should be a choice exercised within the scope of the respective national law which is applicable pursuant to Rome I Regulation or in relation to Rome II Regulation, or any other relevant conflict of law rule. The agreement to use the CESL should therefore not amount to, and not be confused with, a choice of the applicable law within the meaning of the conflict-of-law rules and should be without prejudice to them. This Regulation will therefore not affect any of the existing conflict of law rules.**



3.5. CESL - Interpretation

- **Article 4 (2) - Annex:**
- **Issues within the scope of the Common European Sales Law but not expressly settled by it are to be settled in accordance with the objectives and the principles underlying it and all its provisions, without recourse to the national law that would be applicable in the absence of an agreement to use the Common European Sales Law or to any other law.**
- **=> In other words: Questions not expressly regulated are to be settled within the CESL principles and the otherwise applicable law shall not be applied - legal uncertainty.**



Conclusions

- **Many EU Member States have a critical approach to the CESL, in particular regarding the necessity of such an instrument, its legal basis and nature.**
- **Other EU Member States, as well as European Commission and European Parliament, strongly support this recent proposal.**
- **Concluding remarks**