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The Young and the Restless: CESL and the rest of member state law

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Summary

This article deals with the (substantive) scope of the common European sales law (CESL), what it regulates or does not regulate, and how it relates to the remaining national law. It explores more specifically the implications of the EU nature of the CESL, i.e. the consequences of the fact that it is (European) Union law, and not just another kind of CISG where you can opt for. Although as CISG, it is part of domestic law, its position is in many other respects different mainly because CISG is not Union law, and the CESL is. As Union law, the CESL-Regulation takes precedence over - the rest of - national law. The question whether the CESL is – validly - chosen by the parties is thus not determined by the remaining national law, but by CESL itself. CESL displaces the rules of the otherwise applicable law insofar as the issue falls within the scope of CESL. The article tries to settle some demarcation issues in this regard. Further, it explores the possible effects of the principle of effectiveness or *effet utile* applied to CESL, and possible implications of the Charter of Fundamental Rights. Finally, it explores whether a duty to allow CESL in domestic contracts may follow from national constitutional law.

Der vorliegende Beitrag behandelt den (materiellen) Anwendungsbereich des Gemeinsamen Europäischen Kaufrechts (GEK), seine Regelungsbereiche und das Verhältnis, in dem es zu nationalem Recht steht. Insbesondere untersucht er die Auswirkungen der europäischen Natur des GEK, das heißt, die sich aus der Tatsache, dass es sich um (europäisches) Unionsrecht und nicht ein weiteres zur Option stehendes Instrument nach Art des UN-Kaufrechts (CISG) handelt, ergebenden Folgen. Auch wenn das CISG Teil des nationalen Rechts ist, unterscheidet sich seine Stellung in vielerlei Hinsicht von der des GEK, vor allem, weil nur letzteres unionsrechtlichen Charakter besitzt. Als Unionsrecht nimmt das GEK eine höherrangige Position gegenüber dem – restlichen – nationalen Recht ein. Die Frage, ob das GEK – wirksam – von den Parteien gewählt wurde, wird daher nicht durch das übrige nationale Recht, sondern durch das GEK selbst bestimmt. Das GEK verdrängt die Regeln des sonst anwendbaren Rechts soweit der fragliche Sachverhalt innerhalb des Anwendungsbereichs des GEK liegt. Der Beitrag versucht in diesem Zusammenhang einige Abgrenzungsprobleme zu lösen. Des Weiteren untersucht er die möglichen Auswirkungen der Anwendung des Grundsatzes der Effektivität oder *effet utile* auf das GEK sowie mögliche Auswirkungen der Grundrechtecharta. Schließlich eruiert er, ob eine Pflicht zur Zulassung des GEK bei nicht grenzüberschreitenden Verträgen aus nationalem Verfassungsrecht ableitbar ist.

Cet article traite du champ d'application (matériel) du droit commun européen de la vente (DCEV), ce qu'il réglemente et ce qu'il ne réglemente pas, et quel est son rapport avec le droit national. Il recherche plus spécifiquement les implications de la nature juridique européenne du DCEV, c'est-à-dire les conséquences du fait qu'il s'agit de règles faisant partie du droit de l'Union (européenne), et pas seulement un autre type de Convention sur la vente internationale de marchandises (CVIM) à caractère optionnel. Quoique, comme la CVIM, il fait également partie du droit interne, sa position est différente à de nombreux autres points de vue, principalement parce que la CVIM n'a pas le statut de droit de l'Union européenne alors que le DCEV l'a. En tant que droit de l'Union européenne, le Règlement DCEV prime sur le - reste du - droit national. La question de savoir si le DCEV a été – valablement – choisi par les parties n'est donc pas déterminée par le droit national, mais par le DCEV lui-même. Le DCEV supplante les règles du droit qui seraient, sinon, applicables, pour autant que la matière tombe dans le champ

d'application du DCEV. L'article tente d'établir à cet égard certaines démarcations. De plus, il étudie les effets possibles du principe de l'effet utile appliqué au DCEV, et les implications possibles de la Charte des droits fondamentaux. Enfin, il analyse la question de savoir si une obligation d'autoriser le DCEV dans des contrats nationaux peut découler du droit constitutionnel national.

A. Introduction

1. The Common European Sales Law (CESL) is not even born yet. We do not know yet whether it will come into being and in which form and with which content precisely. It is thus eminently "young". And even after its birth its success is not evident. Unlike most other uniform instruments, it is an opt-in instrument¹. Whether it will be chosen and will remain chosen will certainly also depend on some critical rules, *i.e.* the choices the EU legislator will make as to its final version. This contribution starts anyway from the assumption that the CESL will be introduced via a EU Regulation with more or less the content of the published documents².

In this lecture, I will basically examine one question, or set of questions, only, namely the scope of the CESL itself, what it regulates or does not regulate, and how it relates to the remaining national law³. This is because in my view its success also depends on the extent to which there will be disparity among contracts under CESL because of the application of the remaining national law to those aspects of the contracts under CESL that are not regulated by the CESL itself.

I will limit the discussion to intra-EU cases.

2. In examining these questions, I wish to explore the implications of the EU nature of the CESL, *i.e.* the consequences of the fact that it is (European) Union law. The CESL is not just another kind of CISG where you can opt for. Although as CISG, it is part of domestic law, its position is in many other respects different mainly because CISG is not Union law, and the CESL is.

Being a Regulation, the CESL-Regulation (henceforth CESLR) has a double nature:

- it will automatically as such be part of domestic law (art. 288 TFEU and *Van Gend en Loos*⁴), and
- at the same time remain EU law, with all the special characteristics of Union law that this entails, such as:
 - taking precedence over the rest of national law (*Costa/ENEL*⁵)

¹ Other examples include the European legal persons (*Societas europea*, SCE, ...), IP rights (European trademark, design right) and optional cross-border procedures (Payment order, Small claims procedure) and to some extent the European Succession Certificate. See on the latter A. FÖTSCHL, "The Relationship of the European Certificate of Succession to National Certificates", *ERPL* 2010, 1259 ff.

² Unless otherwise indicated, I refer to the Proposal for a Regulation on CESL of 11 October 2011, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0635:FIN:en:PDF>.

³ This is a question that arises in relation to all incomplete optional instruments (and they are all incomplete), and has been studied *e.g.* in relation to the *Societas europea* or European intellectual property rights.

⁴ CJEU 5 February 1963, <http://curia.europa.eu/juris/documents.jsf?num=C-26/62>.

⁵ CJEU 15 July 1964, <http://curia.europa.eu/juris/documents.jsf?num=C-6/64>.

--- as secondary EU law, being subject to the primary EU law.

In other words, as is the case with soap characters⁶, EU rules do not play alone on the scene, and also have a Janus character. Further, as we will see *infra*, they are sometimes well clothed and sometimes naked..

B. The supremacy of the CESLR as EU law

3. As the CESL would be an opt-in instrument, scant much attention has been paid to the fact that the CESLR also takes precedence over - the rest of - national law, although this is particularly relevant for an 'incomplete' optional instrument⁷ and has some important implications.

First of all, it means that the question whether the CESL is – validly - chosen by the parties is not determined by the remaining national law, but by CESL itself (including art. 8 CESLR). On the other hand, the CESL does not deal with questions of illegality of contracts. Could it therefore be possible to invalidate the choice for CESL as illegal on the basis of member state law? In my opinion the answer is negative. The agreement to opt in is not only governed by CESL itself, it is also like a forum clause or an arbitration clause a clause whose validity must be assessed separately and autonomously on the basis of EU law alone. The requirement to give *effet utile* to the CESLR forbids subjecting that clause/choice to additional validity requirements under member state law.

Furthermore, whether an issue falls within the scope of the CESLR or not, is a matter that can be determined only by interpretation of the CESLR itself. Equally, it is only by interpretation of the CESLR itself that can be decided how the rules of CESL shall be interpreted.

C. The rule on applicable rules in CESLR itself

4. If we consider the Draft CESLR, article 11 states in this regard: “*Only the CESL shall govern the matters addressed in its rules*”. CESL is the exclusive instrument of regulation of the issues regulated in CESL, they are federally pre-empted, to use an American expression⁸.

In the amendments of the European Parliament, there is the additional clarification that this comes “*instead of the contract law regime that would in the absence of such an agreement, govern the contract within the legal order determined as the applicable law*”.

Although this should, in my view, be obvious, it is nevertheless useful to point this out, as some commentators continue to see problems in the relationship with the Rome-I-Regulation^{9, 10}.

⁶ The title “the Young and the Restless” is obviously inspired by the name of the television soap opera that in a way preceded the better known “the Bold and the Beautiful”.

⁷ In relation to other ‘incomplete’ optional instruments, such as the *societas europea*, this specific question does not seem to have attracted a lot of attention either. There is more literature on this question in relation to European optional procedures, such as the payment order procedure or the small claims procedure.

⁸ For an attempt to a more general theory of Union pre-emption in EU law, see A. ARENA, “The Doctrine of Union Preemption in the EU Single Market; between Sein and Sollen”, *Jean Monnet Working Paper* 03/10, <http://www.jeanmonnetprogram.org/papers/10/100301.pdf>. See esp. 5.3.6. on optional instruments.

⁹ Regulation 593/2008 on the law applicable to contractual obligations, <http://eur-lex.europa.eu/legal-content/EN/NOT/?uri=CELEX:02008R0593-20080724>.

However, as long as we are dealing with intra-Union contracts, there can be no doubt: insofar as Rome-I leads to the application of other rules than the rules of the chosen law (e.g. in consumer contracts on the basis of Art. 6 Rome-I), CESL also displaces those rules of the thus applicable law insofar as the issue falls within the scope of CESL. The CESLR is in relation to the Rome-I-Regulation both a *lex posterior* and a *lex specialis* and thus *derogat* (the fact that Rome-I itself gives precedence only to particular conflict of law rules (art. 27 Rome-I) does not mean that the European legislator could not *later on* implicitly set aside a Rome-I rule). The domestic rules on consumer contracts are inapplicable insofar as the issue in question is regulated by the CESL. It is true, however, that this requires a localisation within the Union (in one of the member States) to start with¹¹.

5. Whether the issue is regulated or not can be found in Recitals 26¹² and 27¹³ of the CESLR. The European Parliament has proposed to include them in the text of Article 11a of the Regulation. Recital 29 is probably even more radical, as it does not only deal with interpretation, but also with gap filling, and - unlike art. 7 CISG - precisely excludes the subsidiary role of national law within the scope of the CESL¹⁴:

“The rules of the Common European Sales Law should be interpreted autonomously in accordance with the well-established principles on the interpretation of Union legislation. Questions concerning matters falling within the scope of the Common European Sales Law which are not expressly settled by it should be resolved only by interpretation of its rules without recourse to any other law. The rules of the Common European Sales Law should be interpreted on the basis of the underlying principles and objectives and all its provisions”.

As Hugh Beale wrote¹⁵: a topic can be within the scope of application though there is no rule of the CESL on it – the result is then that it is up to the parties. As a continental lawyer, I would add to the latter *“subject to the requirements of good faith and fair dealing”* and other underlying principles. But whatever one may think of the latter, it is certainly not up to the otherwise applicable national law.

¹⁰ Arguing that the CESL does not avoid the restrictions of the Rome-I-regulation completely, *inter alia*, M. M. FOGT, “Private International Law Issues in Opt-Out and Opt-In Instruments of Harmonization: the CISG and the Proposal for a Common European Sales Law”, 19. *Columbia Journal of European Law* 2012-13, p (83) 109 ff. Doubts are raised also by C. BISPING, “The Common European Sales Law, Consumer Protection and Mandatory Overriding Provisions in Private International Law”, 62. *ICLQ* 2013, 463.

¹¹ See, *inter alia*, M. M. FOGT, 19. *Columbia Journal of European Law* 2012-13, p (83) 108.

¹² *Apart from the rights and obligations of the parties and the remedies for non-performance, the Common European Sales Law should therefore govern pre-contractual information duties, the conclusion of a contract including formal requirements, the right of withdrawal and its consequences, avoidance of the contract resulting from a mistake, fraud, threats or unfair exploitation and the consequences of such avoidance, interpretation, the contents and effects of a contract, the assessment and consequences of unfairness of contract terms, restitution after avoidance and termination and the prescription and preclusion of rights. It should settle the sanctions available in case of the breach of all the obligations and duties arising under its application.*

¹³ *All the matters of a contractual or non-contractual nature that are not addressed in the Common European Sales Law are governed by the pre-existing rules of the national law outside the Common European Sales Law that is applicable under Regulations (EC) No 593/2008 and (EC) No 864/2007 or any other relevant conflict of law rule. These issues include legal personality, the invalidity of a contract arising from lack of capacity, illegality or immorality, the determination of the language of the contract, matters of non-discrimination, representation, plurality of debtors and creditors, change of parties including assignment, set-off and merger, property law including the transfer of ownership, intellectual property law and the law of torts. Furthermore, the issue of whether concurrent contractual and non-contractual liability claims can be pursued together falls outside the scope of the Common European Sales Law.*

¹⁴ Compare also article I-1:102 DCFR.

¹⁵ In his comments made for the Statements of the European Law Institute (ELI) on the CESL.

Indeed, it follows clearly from the wording of the CESLR that, regardless of whether or not an issue is addressed (expressly) in the rules of CESL, the remaining national law is inapplicable if the issue nevertheless falls within the scope of CESL. As said, this is different in CISG, where Article 7 (2) states that “(questions concerning matters governed by the 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”. In the CESLR there is no case of “absence of such principles”! Even if no Union principles are readily available, they are made out of what the Courts find as common in the laws of the member states. And given the origin of CESL, the DCFR should be taken into account when formulating these underlying general principles and interpreting CESL¹⁶.

D. Applications – the border between the young and the restless

6. Let me now attempt to settle some possible demarcation disputes.

Under the CESL, a contract may be avoided on four grounds that can be described as defects of consent. As a result, a contract under CESL cannot be avoided on the basis of other such grounds stipulated under national law. The only exception will probably be the avoidance of a contract concluded through an agent on the basis of a conflict of interest, this rule being contained in article II-6:109 DCFR, in the chapter on Representation. According to recital 27, representation is out of the scope of the CESL.

7. May a term in a CESL contract be qualified as an unfair term on the basis of national law if it is not unfair under CESL? The matter of unfair terms has been fully harmonised in CESL. Thus, where the unfairness test in the draft CESL does not apply to individually negotiated terms, the clause in question cannot be invalidated on the basis of national rules on unfair terms that include in their scope individually negotiated terms, it can only be so invalidated on the basis of other mandatory provisions of the CESL itself. The same applies to any additional prohibitions contained in national law that have not been retained in CESL.

8. Does the CESL also harmonise the rules on unfair trading practices? It does, but only insofar as they overlap with rules of contract law. The European Parliament has, accordingly, proposed that this issue be clarified in Amendment 15.

9. The question may also arise in relation to certain rules that would not be considered as contract law rules in their country of origin. Thus, for example, does the CESL allow a right acquired under a CESL contract – let us assume against a debtor that is a company - to be diminished or “crammed down” by imposing upon a non-consenting creditor a *Scheme of Arrangement* as provided by the UK Companies Act 2006, Part 26 and 27?

The proceedings triggering such an imposition are clearly not an insolvency proceeding under the Insolvency Regulation 1346/2000¹⁷. Although the classification of the rules allowing such cramming down is unclear, the latter are definitely rules of substantive law, and in terms of the EU rules on conflict of law, must be regarded as falling within the law of obligations, and therefore, in relation to contractual creditors, rules of contract law.

¹⁶ See M. M. FOGT, 19. *Columbia Journal of European Law* 2012-13, p (83) 107.

¹⁷ <http://eur-lex.europa.eu/legal-content/EN/NOT/?uri=CELEX:32000R1346>, see article 2 (a) and Annex A.

In other words: Rome-I will apply, and the question arises whether such a cram-down is a matter within or outside the matters regulated by CESL. Among the list of issues included in Recitals 26 and 27, it falls under the rules on performance and non-performance. Thus, opting for CESL should protect a party contracting with a British company¹⁸ against the possibility of a cram down imposed by a British Scheme of Arrangement. Some may disagree that this is the outcome resulting from CESL being the law applicable to this issue; however, in that case, this conclusion follows, in my view, from the effective protection requirements discussed below.

E. Overriding mandatory provisions of the remaining national law?

10. Whereas article 9 (2) of the Rome-I-Regulation states that “*Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum*”, there is no scope for overriding mandatory rules of national law in a contractual relationship under the CESL.

Under CESL, these rules only apply where the CESLR, having precedence over the remaining member state law, does not exclude their application. Where CESL states, in Article 1, that the freedom to conclude a contract and determine its contents is subject to any applicable mandatory rules, this cannot be understood as meaning any national mandatory rules. National mandatory rules on matters within the scope of CESL are excluded unless CESL explicitly leaves them unaffected.

It is true that CESL does not “address” illegality or immorality of the contract. However, the question whether a rule is a matter of illegality or immorality has to be determined on the basis of the CESLR and EU law in general; it is not sufficient that it be qualified illegality under national law. The European Parliament has therefore proposed (Amendment 14) to clarify the position by stipulating that, where the grounds for illegality or immorality are addressed in CESL, the issue in question will fall within the scope of CESL.

Evidently, there may also be grounds for illegality or immorality according to the rules of Union law other than those of CESL (including e.g. a contracts restricting competition (art. 101 TFEU), contracts infringing a trade embargo, etc.). One could also consider the public policy exception as a general principle of Union law, but this requires that the issue be considered as contrary to public policy not only under national law, but also under Union law rules

F. Consequences of 4 (3) TEU and the doctrine of *effet utile*

11. The EU nature of the CESL rules has further implications that have also hitherto been neglected in the literature on CESL. Regulations oblige the member states not only to what is explicitly regulated, but also to all measures necessary to give full effect to Union law (*effet utile*, effectiveness principle). This now follows from art. 4 (3) (2) of the TEU: “*The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union*”. The ECJ has developed in a sizeable body of case law – beginning with the *Rene* and *Comet* decisions – dealing with the various aspects of this effectiveness principle¹⁹.

¹⁸ Reference is made here to “a British company” although the rules of S. 27 Companies Act are, in my view, to be classified as rules coming within the law of obligations (which thus apply where Rome-I (or Rome-II) refers to UK law), as, in practice, their application requires proceedings to have been brought in the UK and thus, in intra-EU cases, that the UK Courts have jurisdiction under the Brussels-I-Regulation.

¹⁹ as regards the literature that first developed this principle see, *inter alia*, J. BRIDGE, “Procedural aspects of the enforcement of European community law through the legal systems of the member states”, *ELR* 1994, 28 ff.; R. CARANTA, “Judicial protection against member states: a new *jus commune* takes shape”,

Thus, where CESL fails to stipulate all the rules and remedies necessary to give full effect (*effet utile*) to the CESLR, the member states are bound to provide those rules and remedies.

12. This is evidently not a new problem. Many “EU rights” arrive naked or scantily dressed on the national scene and have to be “vested” in remedies. On the other hand, it is true that CESL *does*, in principle, actually contain the remedies and other measures required to give effect to the contractual rights covered, apart from the “procedural” means (given that these remedies will need to be sought in the procedures applicable in the member states and regulated by the procedural law of that member state). Nevertheless, even CESL rights may need some more dressing or apparel than is found in the CESL itself, and national law will then have to provide it. The duty of the member states to give full effect to CESL rights will then be governed by the basic principles of effectiveness and equivalence (as developed in the ECJ case law since *Rene* and *Comet*).

13. In order to understand the full implications of this means, there are, fortunately, some interesting precedents available, namely the optional instruments in the field of civil procedure. They are found especially in Regulation 861/2007 establishing a European Small Claims Procedure²⁰ and Regulation 1896/2006 creating a European order for payment procedure²¹. They provide a clear example where the rules of the Regulation are insufficient to give full effect²². This is much less so in the case of CESL - nevertheless the possibility cannot be excluded that, even in those areas expressly excluded from CESL, member state law could be set aside on the basis of the effectiveness principle.

CMLR 1995, 703 ff.; D. CURTIN, "The decentralized enforcement of community law rights. Judicial snakes and ladders", in *Constitutional adjudication in European community and national law. Essays for the Hon. Mr. Justice T.F. O'Higgins*, 1992, 33 ff.; W. van GERVEN, "Bridging the gap between community and national laws : towards a principle of homogeneity in the field of legal remedies ?", CMLR 1995, 679 ff.; F. JACOBS, "Remedies in National Courts for the Enforcement of Community Rights", in *Hacia un nuevo orden internacional y europeo, estudios en homenaje al profesor Don Manuel Diez de Velasco*, Tecnos Madrid 1993, 969 ff.; L. KEUS, "Europees privaatrecht - een bonte lappendeken", *Preadviezen Vereniging voor burgerlijk recht en Nederlandse Vereniging voor Europees Recht*, Vermande Lelystad 1993; S. PRECHAL, "EC requirements for an effective remedy", in *Remedies for breach of EC law* (ed. J. Lonbay & A. Biondi), Wiley Chichester/N.Y, 3 ff.; S. PRECHAL, "Community law in national courts (the lessons from Van Schijndel)", 35. CMLR 1998, 681 ff.; S. PRECHAL, "Judge-Made Harmonisation of National Procedural Rules: A Bridging Perspective", in J. WOUTERS & J. STUYCK, *Principles of Proper Conduct for Supranational, State and Private Actors in the European Union: Towards a Ius Commune* (Colloquium in honour of Walter van Gerven 15-16 september 2000), p 39 ff.; W. VAN GERVEN, "Of Rights, Remedies and Procedures", 37. CMLR 2000, 501 ff.

Much more on this subject has been published since then, *inter alia* more recently V. TRSTENJAK & E. BEYSEN, "European consumer protection law: Curia semper dabit remedium?", 48. CMLR 2011, 95 ff.; J. ENGSTRÖM, *The Europeanisation of Remedies and Procedures through Judge-Made Law. Can a Trojan Horse Achieve Effectiveness?*, Hart Oxford 2015.

²⁰ <http://eur-lex.europa.eu/legal-content/EN/NOT/?uri=CELEX:32007R0861>.

²¹ <http://eur-lex.europa.eu/legal-content/EN/NOT/?uri=CELEX:32006R1896>.

²² For an analysis on its impact specifically on Belgian law, see M.E. STORME, "[De verhouding tussen de Europese verordening inzake geringe vorderingen en het interne Belgische procesrecht](#)", lezing [Colloquium invordering van geldschulden vanuit grensoverschrijdend en belgisch perspectief](#), in *Ius & Actores* 2009, p 19 ff. (<http://www.storme.be/euinvordering.pdf>) = "Le rapport entre les Règlements européens en matière de procédure (en particulier celle relative aux petites créances) et le droit judiciaire interne belge", *Revue de la Faculté de droit de l'Université de Liège* 2010, p. 5 ff. (= <http://www.storme.be/procedureeuropeenne.pdf>).

14. The principle of equivalence will only be of occasional relevance here. It could be infringed where, for example, national law laid down that rights arising from CESL were incapable of assignment, whereas rights under domestic sales law can be assigned, or where, under national law, additional burdens would be imposed on the assignment of CESL claims.

G. Possible effects of the principle of effectiveness

15. Let us explore some possible applications of this principle.

Recital 27 explicitly excludes from the scope of CESL the determination of the language of the contract. This does not, however, prevent national rules on language requirements from being set aside on the basis of the relevant ECJ case law on free movement, at least in cross-border contracts. Language legislation normally pursues objectives recognised by the case law as being legitimate, but this does not mean that its effect is invariably proportionate. See e.g. the ECJ in *Anton Las*²³, where the Court accepted that a member state may require the use of a certain language (in this case in a labour contract), but may not prohibit the parallel /or additional use of another language.

16. Recital 27 explicitly excludes from the scope of CESL the issue of set-off in the event of mutual debts. The matter is thus left to the national law applicable by virtue of art. 17 Rome-I (“*Where the right to set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted*”). In the event of insolvency, it is sufficient that either the requirements of the *lex fori concursus*, or those of the law applicable to the claim against which the right to set-off is asserted (Article 4 (2) (d) and 6 Insolvency Regulation), be met. There is thus a *favor compensationis*, motivated in recital 26 of the Insolvency Regulation: “*In this way, set-off will acquire a kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises*”.

Does national law in relation to set-off thus remain wholly unaffected by the CESLR? A rule on set-off is also assumed to be contained in article 184 CESL (renewal of prescription by acknowledgment implied in set-off. More importantly, Article 85 c CESL presumes a clause to be unfair where it inappropriately excludes or limits the right to set-off rights that the consumer may have against the trader against the amount the consumer may owe the trader. How is it possible to assess the appropriateness of set-off clauses in the absence of any rules as to whether set-off applies in a given situation?

17. Recital 27 explicitly excludes from the scope of CESL the question whether concurrent contractual and non-contractual liability claims can be pursued simultaneously. Nevertheless, I would dare to propose that the unlimited concurrency of tort actions - as possible in some member states - would militate against the *effet utile* of CESL. The effectiveness of the latter requires that traders selling in the whole EU under the same regime should not be confronted in some of them with the possibility of claims in tort law which contradict the outcome of CESL, unless other uniform or harmonised rules apply, such as the rules implementing the Product Liability Directive, apply. To allow such claims in tort would also reintroduce widely disparate rules on limitation of actions / prescription, which clearly frustrates the object of legal uniformity in this field.

18. Finally, one could raise the issue as to whether courts are under an obligation to apply the law *ex officio*? Here also, national traditions differ. As to unfair terms in consumer contracts, it is well

²³ <http://curia.europa.eu/juris/documents.jsf?num=C-202/11>.

established that the court is under an automatic duty to examine the fairness or unfairness of the terms²⁴. The same holds true for other EU consumer protection rules²⁵. Similar considerations accordingly apply to the rules of consumer protection in CESL – *i.e.* not only the rules specifically aimed at consumer contracts, but also all the other mandatory CESL rules in the case of consumer contracts. In relation to any other rules, the general principles developed by the ECJ in, *inter alia*, *Van Schijndel* apply²⁶.

H. Effects of the Charter

19. Another consequence of CESL as an optional EU instrument is the relevance of the EU Charter of fundamental rights. Under its article 51, the Charter also applies to the Member States when they are implementing Union law. The CESL is actually Union law, so what could be the relevance of the Charter for contracts governed by CESL?

Where CESL states, in Article 1, that the freedom to conclude a contract and determine its contents is subject to any applicable mandatory rules (as to which ones, see above), this is under the reservation that these rules do not restrict contrary to the provisions of the Charter “*the freedom to conduct a business in accordance with Union law and national laws and practices*” (Article 16 of the Charter).

The protection afforded by this Article covers the freedom to exercise an economic or commercial activity, the freedom of contract and free competition (deduced by the ECJ - in *DEB*²⁷ and *Sky Österreich t. Österreichischer Rundfunk*²⁸ - from the explanations relating to that article). The freedom of contract includes, in particular, the freedom to choose with whom to do business (ECJ in *Neu*²⁹), and the freedom to determine the price of a service (ECJ in *C-437/04 Commission v Belgium*³⁰ and in *F-TEX*³¹).

Any limitation on the exercise of these rights and freedoms must according to Article 52(1) of the Charter be provided for by law and respect the essence of those rights and freedoms and, in compliance with the principle of proportionality, must be necessary and actually meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others (ECJ in *Sky Österreich t. Österreichischer Rundfunk*³²).

Although these requirements will only rarely not be met, the EU nature of the CESL means that it is capable of being reviewed in the light of the Charter as well as the other rules of primary EU law, rather than in the light of national constitutional law.

²⁴ ECJ 26 October 2006, *Mostaza Claro*, <http://curia.europa.eu/juris/documents.jsf?num=C-168/05>; ECJ 26 April 2012, *Nemzeti Fogyasztóvédelmi Hatóság t. Invitel*, <http://curia.europa.eu/juris/documents.jsf?num=C-472/10>; ECJ 30 May 2013, *Jörös t. Aegon*, <http://curia.europa.eu/juris/doc20uments.jsf?num=C-397/11>.

²⁵ See, *inter alia*, M. EBERS, “From Océano to Asturcom: Mandatory Consumer Law. Ex Officio Application of European Union Law and Res Judicata”, *ERPL* 2010, 823 ff.; H. SCHEBESTA, “Does the National Court Know European Law? A Note on Ex Officio Application after Asturcom”, *ERPL* 2010, 847 ff.

²⁶ ECJ 14 December 1995, <http://curia.europa.eu/juris/documents.jsf?num=C-430/93>.

²⁷ ECJ 22 December 2010, <http://curia.europa.eu/juris/documents.jsf?num=C-279/09>.

²⁸ ECJ 22 January 2013, <http://curia.europa.eu/juris/documents.jsf?num=C-283/11>, no. 42.

²⁹ ECJ 10 July 1991, *Neu*, <http://curia.europa.eu/juris/documents.jsf?num=C-90/90>, no. 13.

³⁰ ECJ 22 March 2007, *Commission v Belgium*, <http://curia.europa.eu/juris/documents.jsf?num=C-437/04>, no. 51

³¹ ECJ 19 April 2012, <http://curia.europa.eu/juris/documents.jsf?num=C-213/10>, no. 45.

³² ECJ 22 January 2013, <http://curia.europa.eu/juris/documents.jsf?num=C-283/11>, no. 48.

I. Inländerdiskriminierung

20. National constitutional law may, on the other hand, play a role in relation to the question whether to make CESL available for domestic contracts.

In its Article 13 (a), the CESLR leaves this option to the member states. By failing to extend to domestic contracts the possibility to opt-in to CESL, this amounts to an *Inländerdiskriminierung*³³. Now, in terms of national constitutional law, a member state that fails to make CESL available for domestic contracts treats its own traders unequally. The fact that such unequal treatment is justified under EU law as a matter of limitation of the jurisdiction of the EU does not mean that member states are justified to make such choices under the national Constitution, which will very probably prohibit discriminatory laws (not to mention under Protocol 12 to the European Convention on Human Rights). It is, moreover, very difficult to argue that this unequal treatment is necessary for a legitimate purpose, as national law cannot prevent domestic traders from concluding contracts under CESL via a branch located abroad, and thus render the contract a cross-border one under Article 4 (2) *inuncto* (6) CESLR.

If a member state were to allow contracting parties to opt into CESL in the cases of Article 13 (a), the applicable law would be CESL itself and thus retain its nature as EU law. Were a member state to allow opting into CESL outside the scope of Article 13 (a) also, the rules would, on the other hand, be purely national by nature.

21. To conclude this little *tour d'horizon* in honour of Hugh Beale: the Young CESL may leave other parts of national law Restless, but if we are Bold enough in our interpretation, it may have a Beautiful future.

³³ On this question, see an early comment by W. VAN GERVEN, "Bridging the gap between community and national laws: towards a principle of homogeneity in the field of legal remedies ?", *CMLR* 1995, 679 v.