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The CISG and European Private Law: When in Rome, Do as the Romans Do

Ingeborg Schwenzer* & Patrick Wittum**

Abstract: The greatest success of the Convention on Contracts for the International Sale of Goods (CISG) is probably the strong influence it has exerted on law reformers both at the domestic and the international level. Since its coming into force, there have been significant reforms of European private law through harmonization efforts of the European Union and legislative activities of its Member States. This article shows that there is a strong trend for their modernizations in the area of sale of goods and contract law to follow the solutions found under the CISG, especially concerning the definition of non-conformity and damages based on strict liability coupled with a foreseeability requirement. There are also occasional improvements like the exemption for impediments beyond the obligor's control barring both damages and explicitly also specific performance or the open recognition of gain-based damages. Still, some departures from the solutions of the CISG need to be criticized, amongst others narrow definitions of the concept of sale of goods, the foreseeability limitation for damages not applying in cases of gross negligence or fraud, and separate provisions for cases of hardship.

Résumé: Le plus grand succès de la Convention des Nations Unies sur les contrats de vente internationale de marchandises (CVIM) est probablement la forte influence qu'elle a exercée sur les réformes du droit civil, tant au niveau national qu'international. Depuis l'entrée en vigueur de la convention, le droit privé Européen a été significativement réformée grâce aux efforts d'harmonisation de l'Union européenne et à l'activités législatives de ses États membres. Cet article montre qu'il existe une forte tendance à ce que leurs modernisations dans le domaine de la vente de marchandises et du droit des contrats suivent les solutions trouvées dans le cadre de la CVIM, notamment en ce qui concerne la définition de la non-conformité et les dommages-intérêts fondés sur la responsabilité sans faute assortie d'une exigence de prévisibilité. Il y a aussi des améliorations occasionnelles, comme l'exonération pour l'inexécution due à un empêchement indépendant de volonté du débiteur, qui exclut à la fois obtenir des dommages-intérêts et, explicitement, l'exécution forcée, ou la reconnaissance ouverte des dommages basés sur les gains. Néanmoins, certaines divergences par rapport aux solutions de la CVIM sont critiquables, notamment la définition de marchandise, le fait que l'exception de la prévisibilité du dommage ne s'applique pas en cas de faute lourde ou dolosive, et le traitement distinct des cas d'imprévisions.

* (Prof. Dr, LL.M.) (Berkeley) Dean of Swiss International Law School and a professor emerita of private law at the University of Basel, Switzerland. Email: ingeborg.schwenzer@unibas.ch.

** Research assistant at the Center for European Integration Studies, University of Bonn. Many thanks to Arthur Abs, Martin Höne, Jakob Knapp, and Jonas Kobler for helpful comments. Errors remain our own. All webpages were last accessed on 2 May 2022. The final version of this contribution was submitted on 9 May 2022. Email: patrickwittum@gmx.de.

Zusammenfassung: Der größte Erfolg des UN-Kaufrechts-Übereinkommens (CISG) ist wahrscheinlich der starke Einfluss, den es auf Modernisierungen des Zivilrechts sowohl auf nationaler als auch auf internationaler Ebene ausgeübt hat. Seit Inkrafttreten des Übereinkommens gab es erhebliche Änderungen im europäischen Privatrecht durch die Harmonisierungsbemühungen der Europäischen Union und die Gesetzgebungstätigkeit ihrer Mitgliedstaaten. Dieser Artikel zeigt, dass bei allen Reformen im Bereich des Kauf- und Vertragsrechts eine starke Tendenz besteht, sich an den Lösungen des CISG zu orientieren, insbesondere bei der Sachmangeldefinition und dem verschuldensunabhängigen Schadensersatz beschränkt durch eine Vorhersehbarkeitsregel. Es gibt auch gelegentliche Verbesserungen wie die Entlastung für Hinderungsgründe außerhalb des Einflussbereichs des Schuldners, welche sowohl Schadenersatz als auch ausdrücklich die Erfüllungspflicht ausschließen, oder die offene Anerkennung von Gewinnabschöpfung als Schadenersatz. Gleichzeitig sind einige Abweichungen von den Lösungen des CISG zu kritisieren, unter anderem enge Definitionen des Warenbegriffs, die Nichtanwendbarkeit der Vorhersehbarkeitsregel in Fällen von grober Fahrlässigkeit oder Arglist und gesonderte Bestimmungen für Fälle von wirtschaftlicher Unmöglichkeit.

1. Introduction

1. When travelling to a foreign place, it is advisable to observe the local customs. This rule was already well known to Saint Ambrose, who shared travel advice with Saint Augustine for his trip to Rome around 390 AD.[1] Even up to forty years ago, the local custom in the realms of sales and contract law would have been the long tradition of the respective national laws. Whoever was looking for guidance here was therefore best advised to follow the old traditions, often going back to Roman law. Nowadays, if law reformers venture into the realms of sales and contract law, the United Nations Convention on Contracts for the International Sale of Goods (CISG) rightfully serves as the relevant standard. However, those who use the CISG as a guide in their domestic legislative activities should do so properly and not experiment without good reasons: When in Rome, do as the Romans do.

2. Adopted at the famous Vienna Conference in 1980, the CISG has 94 Contracting States today.[2] Nine of the ten leading exporting and importing nations

1 J. Speake (ed.), *Oxford Dictionary of Proverbs* (Oxford: Oxford University Press, 6th edn 2015), 'When in ROME, do as the Romans do'.

2 For the current status of the CISG, see https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status.

in world merchandise trade[3] are Member States of the CISG.[4] Furthermore, during the last years, more and more smaller countries have been joining the CISG.[5]

Beyond being the new lingua franca for international trade, the CISG served as a blueprint for numerous legislative efforts over the last 30 years. On the international level, the first edition of the UNIDROIT Principles on International Commercial Contracts (PICC) from 1994 were mostly a replica of the CISG.[6] In Africa, the Organisation on the Harmonisation of Business Law (OHADA) based the first edition of its general commercial law of 1998 on the CISG.[7] Finally, the drafters of the Principles of Asian Contract Law (PACL)[8] and – although to a much lesser extent – those of the 2017 Principles of Latin American Contract Law (PLACL)[9] were inspired by the CISG. On the domestic level, legislators around the world seeking to amend their respective legislation in the area of sale of goods and contract law more or less relied on the CISG. Outside of Europe, the most important examples can be found in the 2014 Argentine Civil and Commercial Code,[10] the 2017 revision of the Japanese Civil Code,[11] and the new Chinese Civil Code of 2020.[12]

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3 See World Trade Organization, *World Trade Statistical Review* (2021), p 58, www.wto.org/english/res_e/statis_e/wts2021_e/wts21_toc_e.htm.

4 The United Kingdom is the only exception. Hong Kong (ranking as top six exporter and top eight importer) recently passed the Sale of Goods (United Nations Convention) Ordinance, 7 Oct. 2021, www.gld.gov.hk/egazette/pdf/20212540/es12021254030.pdf.

5 Guatemala in 2021, Liechtenstein, North Korea and Laos in 2020, and Palestine in 2019.

6 The most recent version dates from 2016: *UNIDROIT Principles of International Commercial Contracts 2016*, www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/. See M.J. Bonell, 'The CISG, European Contract Law and the Development of a World Contract Law', 56. *Am.J.Comp.L. (American Journal of Comparative Law)* 2008, p (1) at 16–17.

7 The most recent version dates from 2010: Acte uniforme portant sur le droit commercial général (Uniform Act Relating to General Commercial Law), effective 15 May 2011, www.ohada.org/droit-commercial-general/. See M. Fontaine, 'Le projet d'Acte uniforme OHADA sur les contrats et les Principes UNIDROIT relatifs aux contrats du commerce international', 9. *Unif.L.Rev. (Uniform Law Review)* 2004, p 253; U.G. Schroeter, 'Das einheitliche Kaufrecht der afrikanischen OHADA-Staaten im Vergleich zum UN-Kaufrecht', 4. *Recht in Afrika* 2001, p (163) at 166–167.

8 The work on the principles of Asian contract law is still ongoing at the time of writing. See also S. Han, 'Principles of Asian Contract Law: An Endeavour of Regional Harmonization of Contract Law in East Asia', 58. *Vill.L.Rev. (Villanova Law Review)* 2013, p 589.

9 See R. Momberg & S. Vogenauer, 'The Principles of Latin American Contract Law: Text, translation, and introduction', 23. *Unif.L.Rev.* 2018, p 144.

10 Argentine Civil and Commercial Code of the Nation, effective 1 Aug. 2015, http://servicios.infoleg.gob.ar/infolegInternet/verNorma.do?id=235975. See E. Muñoz & I. Morfín Kroepfly, 'New Sales and Contract Law in Argentina and France. Models for Reform Inspired by the CISG and the PICC?', 22. *EJLR (European Journal of Law Reform)* 2020, p 183.

11 Act to Partially Revise the Civil Code, Japan, effective 1 Apr. 2020. See N. Kano, 'Reform of the Japanese Civil Code – The Interim Draft Proposal of 2013', 36. *Journal of Japanese Law* 2013, p (249) at 252–253.

12 Civil Code of the People's Republic of China, effective 1 Jan. 2021, English version, www.npc.gov.cn/englishnpc/c23934/202012/f627aa3a4651475db936899d69419d1e/files/47c164

3. A particularly strong influence of the CISG is felt in the European Union (EU) and the European Economic Area (EEA), both at the European level and in the law of their Member States. However, there are also some divergences. As regards the latter, there are occasional improvements, but it would often have been better to stay with the solutions found under the CISG.

First, we outline the special features of the CISG and contrast them with private law in Europe prior to the coming into force of the CISG (Part II). Second, we discuss to what extent unification projects and directives at the European level were influenced by the CISG (Part III). Third, we analyse reforms of domestic civil codes, law of obligations acts, and sale of goods acts in the Member States that were inspired by the CISG (Part IV).

2. Special Features of the CISG

4. The CISG represents a fruitful compromise between common law and civil law in the field of sale of goods and general contract law.[13] UNCITRAL, the body that drafted the CISG, brought together delegates from all parts of the world with very different legal backgrounds: At the original conference, there were nine seats for Africa, seven for Asia, five for Eastern Europe, six for Latin America, and nine for Western States.[14] UNCITRAL was thus in a perfect position to draft rules attractive around the globe,[15] especially in the difficult areas of breach of contract and the remedy mechanism.

2.1. Civil Law Jurisdictions

5. Civil law jurisdictions on the European continent, especially until the most recent reforms we are about to discuss, have been firmly based on Roman law. With regard to breach of contract, they displayed the well-known trinity of impossibility, late-performance, and defective performance.[16] Thus, the German Civil Code of 1900 and its followers excessively emphasized the distinction between impossibility and delay.[17] Legal systems of French descent also knew delay as a separate category

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89e186437eab3244495cb47d66.pdf. See M. Zou, *Chinese Contract Law and the 2020 Civil Code* (Reading: LexisNexis 2020), paras 1-25, 1-49.

13 M.J. Bonell, 56. *Am.J.Comp.L.* 2008, p 4; P. Schlechtriem, 'Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations', 10. *Juridica International* 2005, p 27.

14 I. Schwenzer, 'Introduction', in I. Schwenzer (ed.), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (Oxford: Oxford University Press, 4th edn 2016).

15 M.J. Bonell, 56. *Am.J.Comp.L.* 2008, p 2.

16 See E. Rabel, *Das Recht des Warenkaufs. Eine rechtsvergleichende Darstellung. 1. Band* (Berlin: De Gruyter 1964), pp 118-120, 126-128; R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press 1996), pp 783, 806-814.

17 *Ibid.*

of breach of contract and impossibility as a ground for excluding specific performance.[18] Moreover, main obligations and ancillary obligations such as packaging were distinguished.[19] In the case of avoidance[20] of the contract, even the manner how to assert the legal remedy differed from *ipso facto* avoidance or avoidance by declaration to the necessity of a court intervention to terminate the contract.[21] A prominent role was played by fault. Damages in general depended on fault of the party in breach; some legal systems even required fault for the remedy of avoidance.[22]

6. Moreover, desperate distinctions had to be made with regard to non-conformity of the goods. Roman law started from the principle of *caveat emptor* (let the buyer beware).[23] The seller was liable in damages only in cases of *dicta* (assurances), *stipulationes* (special promises) or *dolo malo* (fraud).[24] As regards market sales, liability was expanded by the *actio redhibitoria* (avoidance) and *actio quanti minoris* (price reduction).[25] Narrow constraints of liability for non-conforming goods (especially very short limitation periods) prompted an evasion to general remedies for non-performance.[26] Thus, in most civil law legal systems one differentiated between *peius* (non-conforming goods) and *aliud* (goods of a different kind),[27] the latter triggering the more generous remedies for non-

18 *Ibid.*; see also K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, translated by T. Weir (Oxford: Oxford University Press, 3rd edn 1998), pp 496, 499, 501.

19 I. Schwenzer & E. Muñoz, *Global Sales and Contract Law* (Oxford: Oxford University Press, 2nd edn 2022), paras 28.25–28.26 (ancillary obligations of the seller), 35.20–35.24 (ancillary obligations of the buyer), 41.32–41.33 (treatment of ancillary obligations in the context of remedies), all with numerous references.

20 'Avoidance', as used under the CISG, is the internationally neutral term. It is thus to be preferred over the PICC's terminology of 'termination', which carries preconceptions from domestic legal systems like English law.

21 I. Schwenzer & E. Muñoz, *Global Sales and Contract Law*, paras 47.178–47.188 (*ipso facto* avoidance), 47.189–47.197 (termination by court order), and 47.198–47.211 (avoidance by declaration), all with numerous references; K. Zweigert & H. Kötz, *Comparative Law*, p 496.

22 I. Schwenzer & E. Muñoz, *Global Sales and Contract Law*, paras 44.59–44.84 (fault-based damages) with numerous references; K. Zweigert & H. Kötz, *Comparative Law*, pp 490–494, 499–501. German law prior to the 2001 reforms featured fault-based avoidance in §§ 325, 326 German Civil Code (see text accompanying *infra* n. 216).

23 R. Zimmermann, *Law of Obligations*, pp 305–307.

24 R. Zimmermann, *Law of Obligations*, pp 308–310.

25 R. Zimmermann, *Law of Obligations*, pp 311–322.

26 J. Basedow, 'Towards a Universal Doctrine of Breach of Contract: The Impact of the CISG', 25. *Int. Rev. Law Econ. (International Review of Law and Economics)* 2005, p (487) at 491.

27 I. Schwenzer & E. Muñoz, *Global Sales and Contract Law*, paras 31.09–31.25 with numerous references; J. Basedow, 25. *Int. Rev. Law Econ.* 2005, p 491.

performance. Likewise, many legal systems treated defects in quality different from those in quantity, the latter giving rise to remedies for partial non-performance.[28]

2.2. Common Law Jurisdictions

7. In contrast, the common law legal systems in general start from a uniform breach of contract approach.[29] The remedies do not depend on the type of breach but rather on its intensity. Based on strict liability, damages are the primary remedy that can be asked for in case of any breach of contract.[30] The party in breach can only be exempted on the narrow grounds of frustration, i.e., where performance is physically or commercially impossible or would be radically different from that which was undertaken.[31] Recoverable damages are generally limited to those within the parties' reasonable contemplation as a not unlikely result of the breach.[32] Moreover, termination is only possible where the breach surpasses a certain threshold.[33]

The question of whether or not a breach of contract is sufficiently serious is traditionally addressed in English law and jurisdictions still close to English law by the difficult distinction between conditions, warranties, and innominate terms.[34] Last, regarding the conformity of the goods, the law implies terms relating to description, fitness for particular purpose, satisfactory quality, and correspondence with sample.[35]

2.3. Modern Approach of the CISG

8. It is remarkable how the CISG dealt with the chaotic situation found in domestic legal systems. First, it simplified the structure of remedies. The remedial response does not depend on the type of breach like in civil law legal systems (cause-oriented approach) but rather on the intensity of the breach like in common law legal systems (uniform breach of contract approach).[36] Under the CISG, the most important remedy of damages is available for any type of breach,[37] whereas

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28 I. Schwenzer & E. Muñoz, *Global Sales and Contract Law*, paras 31.57-31.62 with numerous references.

29 K. Zweigert & H. Kötz, *Comparative Law*, p 503.

30 K. Zweigert & H. Kötz, *Comparative Law*, pp 503-504.

31 E.G. McKendrick, 'Discharge by Frustration or Force Majeure Clauses', in H. Beale (ed.), *Chitty on Contracts* (London: Sweet & Maxwell, 34th edn 2021), paras 21-001.

32 H. Beale, 'Damages', in *Chitty on Contracts*, paras 29-128.

33 E.G. McKendrick, 'Termination for Breach', in *Chitty on Contracts*, paras 27-010.

34 K. Zweigert & H. Kötz, *Comparative Law*, pp 505-507.

35 Sections 12-15 Sale of Goods Act 1979.

36 J. Basedow, 25. *Int. Rev. Law Econ*. 2005, pp 490, 492; K. Zweigert & H. Kötz, *Comparative Law*, p 513.

37 Articles 45(1)(b), 61(1)(b) CISG.

avoidance[38] and substitute performance[39] require a fundamental breach of contract under Article 25 CISG. Damages do not depend on fault but are available if the other party 'fails to perform any of his obligations under the contract or this Convention'.[40] However, there is a broader possibility of exemption than under the common law systems for breaches where 'the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences'.[41] Recoverable damages are limited to 'the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract'.[42] Remedies are always effected by declaration of the aggrieved party.[43] Consequently, there is neither *ipso facto* avoidance nor is any court intervention required.

9. Furthermore, considerable simplification can be found with regard to non-conformity. All the aforementioned subtle distinctions (*aliud* v. *peius*, quantity, and packaging) are avoided by the CISG. Instead, the CISG applies a broad notion of non-conformity treating defects in quality, quantity, and kind of the goods as well as packaging alike.[44]

10. Last but not least, the CISG greatly facilitates dealing with contracts for goods to be manufactured and mixed contracts. In domestic legal systems, contracts for goods to be manufactured are often not governed by the rules on sales law but rather by those on contracts for work and labour.[45] As regards mixed contracts, the question of whether in a given case the rules on sales or those on services apply more often than not appears to be arbitrary and unpredictable.[46] Under the CISG, it is first clarified that '[c]ontracts for the supply of goods to be manufactured or produced are considered sales, unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or

38 Articles 49(1)(a), 64(1)(a), 72(1) CISG.

39 Articles 46(2), 28 CISG.

40 Articles 45(1)(b), 61(1)(b) CISG.

41 Article 79(1) CISG.

42 Article 74, sentence 2 CISG.

43 Articles 49(1), 64(1), 72, 26 CISG.

44 Article 35(1) CISG refers to quality, quantity, description (i.e., delivery of an *aliud*) and packaging.

45 See P. Perales Viscasillas, 'Evolving Concepts of the Contract for Sale of Goods: From and Before the CISG, To and Beyond the EU Directive 1999/44 on the Sales of Consumer Goods', 38. *UCC L. J. (Uniform Commercial Code Law Journal)* 2005, p (137) at 140, 147–151 with references to France, Germany, Italy, Portugal, Spain, Switzerland, and UK.

46 See I. Schwenzer, J. Ranetunge & F. Tafur, 'Service Contracts and the CISG', 38. *J.L.& Com. (Journal of Law and Commerce)* 2019/2020, p (305) at 312–314.

production'.[47] Furthermore, a mixed contract is entirely governed by the CISG's rules on sales law except if the service obligations form the preponderant part of the contract.[48]

3. Influence on the European Level

11. Against this backdrop, some steps were taken at the European level in the direction of harmonizing the national private laws of its Member States. Of course, the CISG as the international standard was an important aid in the European harmonization process.

3.1. 1999 Consumer Sales Directive

12. The first important impact of the CISG on EU law was the 1999 Consumer Sales Directive.[49] At first sight, this might be surprising.[50] Whereas the CISG in principle applies to B2B contracts,[51] the 1999 Consumer Sales Directive dealt only with B2C contracts.[52]

13. Compared to the CISG, the 1999 Consumer Sales Directive was based on a narrower definition of goods as tangible movable items.[53] By contrast, the now prevailing view under the CISG holds that it applies if software is permanently transferred to the buyer, irrespective of the mode in which it is delivered.[54] With regard to contracts for goods to be manufactured, the 1999 Consumer Sales Directive followed the CISG's approach and subjected these contracts exclusively

47 Article 3(1) CISG.

48 Article 3(2) CISG.

49 Dir. 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, http://data.europa.eu/eli/dir/1999/44/oj. The inspiration of many rules by the CISG is acknowledged by the Commission in the *Explanatory Memorandum to the Proposal for a European Parliament and Council Directive on the sale of consumer goods and associated guarantees*, COM(95) 520 final, pp 5 (generally), 11 (on Art. 2), 12 and 13 (on Art. 3), and 14 (on Art. 5).

50 See S. Grundmann, 'Consumer Law, Commercial Law, Private Law – How Can the Sales Directive and the Sales Convention be so Similar?', 14. *EBLR (European Business Law Review)* 2003, p (237) at 247-248; S. Kruisinga, 'What do Consumer and Commercial Sales Law Have in Common? A Comparison of the EC Directive on Consumer Sales Law and the UN Convention on Contracts for the International Sale of Goods', 9. *ERPL* (*European Review of Private Law)* 2001, p 177.

51 Article 2(a) CISG excludes sales 'of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use'.

52 Article 1(1) of the 1999 Consumer Sales Directive.

53 Article 1(2)(b) of the 1999 Consumer Sales Directive.

54 E. Muñoz, 'Software technology in CISG contracts', 24. *Unif.L.Rev.* 2019, p (281) at 285-290; S. Green & D. Saidov, 'Software as Goods', *JBL (Journal of Business Law)* 2007, p 161; I. Schwenzer & P. Hachem, in *Schlechtriem & Schwenzer*, Art. 1, para. 18.

to the rules on sales.[55] Unfortunately, the question of mixed contracts containing sales as well as services obligations was not addressed by the Directive.[56]

14. The most important novelty introduced by the 1999 Consumer Sales Directive was the concept of conformity with the contract.[57] The Directive abandoned the classical distinction between non-performance and defects of the goods which had been dominant in many European legal systems.[58] Article 2(1) of the 1999 Consumer Sales Directive required the seller to deliver goods to the consumer which are in conformity with the contract of sale.[59] Article 2(2) added a presumption that the goods conform with the contract if they meet a list of four objective requirements. In comparison with Article 35(2) CISG,[60] however, the Directive blurred the important distinction between contractual designation of conformity and the statutory default rule by requiring the goods to comply both with contractual requirements as well as the default criteria for non-conformity.[61]

Three of the four objective criteria mentioned in Article 2(2)(a)–(c) of the 1999 Consumer Sales Directive were more or less similar to Article 35(2)(a)–(c) CISG. However, it is remarkable that fitness for particular purpose could only be relied upon by the consumer if the seller had *accepted* the particular purpose.[62] This provided less consumer protection than could be achieved under the corresponding provision of the CISG, which only requires that the buyer could

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55 Unlike Art. 3(1) CISG, Art. 1(4) of the 1999 Consumer Sales Directive does not contain an exception where the buyer supplies a substantial part of the materials. However, under Art. 2(3) 1999 Directive cases where the lack of conformity has its origin in materials supplied by the consumer are deemed not to be a lack of conformity.

56 In ECJ 7 Sep. 2017, ECLI:EU:C:2017:638, *Schottelius* v. *Seifert*, the court highlights that the only reference to mixed contracts can be found in Art. 2(5) of the 1999 Consumer Sales Directive which deems incorrect installation to be equivalent to lack of conformity of the goods. Thus, the service for the installation of goods, when associated with the sale, does fall within the scope of the Directive. See L. Bertino, 'Service Contracts and EU Directive 1999/44 on Consumer Sales. Some reflections on CJEU Schottelius and on the proposed Directive on the sale of goods', 7. *Journal of European Consumer and Market Law* 2018, p 211.

57 *Explanatory Memorandum*, p 11: 'The wording was to a large degree inspired by Article 35(2) of the Vienna Convention'.

58 *Ibid.*: 'In conformity with [...] the Vienna Convention, the traditional distinction in certain legal orders between the obligation to deliver and the legal guarantee covering hidden defects is abandoned [...]'. The distinction alluded to is the one of *aliud/ peius* already discussed, text accompanying *supra* n. 27.

59 This rule is comparable to Art. 35(1) CISG without, however, listing different factors such as quantity, quality, description, and packaging.

60 Under Art. 35(2) CISG, the objective requirements only apply if the parties have not agreed otherwise.

61 U. Huber, 'Modellregeln für ein Europäisches Kaufrecht', *ZEuP* (*Zeitschrift für Europäisches Privatrecht)* 2008, p (708) at 718–719.

62 Article 2(2)(b) of the 1999 Consumer Sales Directive.

reasonably rely on the seller's skill and judgement.[63] Further, a rule on usual packaging like Article 35(2)(d) CISG could not be found in the 1999 Consumer Sales Directive.[64] A truly innovative feature was added by the 1999 Consumer Sales Directive in so far as public statements by third parties might also be used to define what is required under the contract.[65] Further, the 1999 Directive devoted a separate clause to incorrect installation or installation manuals as a case of non-conformity (the 'IKEA clause').[66] However, since the CISG governs ancillary service obligations by virtue of Article 3(2), the same results can be achieved under Article 35(2)(a) CISG without express mentioning of installation obligations.[67]

15. As the 1999 Directive was only concerned with non-conformity of the goods, the remedies were likewise restricted. The primary remedy was repair or replacement unless impossible or disproportionate.[68] This largely corresponded to Articles 46(2) & (3) CISG whereas European civil codes historically had not known a right of repair or replacement.[69] Price reduction or avoidance (which the Directive calls 'rescission'[70]) could only be asked for if repair or replacement was excluded, or if the seller acted too late or with significant inconvenience to the consumer.[71] Again, the CISG could possibly offer a higher protection to the consumer.[72] Price reduction and damages are available without any extra requirements.[73] Avoidance only depends on the fundamentality of the breach (which may be influenced by whether repair or replacement is possible).[74]

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63 Article 35(2)(b) CISG; see S. Troiano, 'The CISG's impact on EU Legislation', in F. Ferrari (ed.), *The CISG and its Impact on National Legal Systems* (Munich: sellier 2008), p (345) at 359-360.

64 The lacuna was partially remedied by adjusting the time for the passing for risk of loss, Art. 20 of Dir. 2011/83/EU of 25 Oct. 2011 on consumer rights, http://data.europa.eu/eli/dir/2011/83/oj.

65 M.J. Bonell, 56. *Am.J.Comp.L.* 2008, p 7; S. Grundmann, 14. *EBLR* 2003, pp 240-241; S. Kruisinga, 9. *ERPL* 2001, p 181; S. Troiano, in *CISG and Impact*, pp 360-361.

66 Article 2(5) of the 1999 Consumer Sales Directive.

67 S. Troiano, in *CISG and Impact*, pp 371-372.

68 Article 3(3) of the 1999 Consumer Sales Directive.

69 While under the CISG repair is also available unless unreasonable [Art. 46(3) CISG], replacement lies only where the non-conformity is a fundamental breach of contract [Art. 46(2) CISG]. In practice, the difference may not be too great as replacement will usually be disproportionate in case of a non-fundamental non-conformity; see S. Troiano, in *CISG and Impact*, p 365; S. Grundmann, 14. *EBLR* 2003, p 244.

70 This terminology is unfortunate considering that rescission is usually associated with setting aside the contract due to mistake, fraud, duress and similar vitiating factors.

71 Article 3(5) of the 1999 Consumer Sales Directive.

72 According to S. Grundmann, 14. *EBLR* 2003, p 243 restricting the right to avoid the contract under the 1999 Consumer Sales Directive in truth aims at reducing the costs of remedies.

73 Articles 45(1)(b), 50 CISG.

74 Article 49(1)(a) CISG.

3.2. Principles of European Contract Law (PECL)

16. Endeavours to unify European contract law more generally date back to as far as 1995 when the first part of the PECL[75] were published.[76] The PECL are a set of general contract law principles drawn up by European contract law academics.[77] Even though they do not contain any specific rules on sales law such as non-conformity of the goods, they display a great resemblance to the CISG.[78] As will be seen at the national level below, the EU and EEA Member States have frequently taken reference to the PECL in reforming their civil law codifications, and thus indirectly to the CISG.

17. As the CISG, the PECL apply a uniform concept of breach.[79] Likewise, avoidance of the contract (called 'termination'[80]) depends on a fundamental breach (called 'fundamental non-performance').[81] Liability for damages is not based on the fault of the breaching party. Rather, it is decisive whether the loss was foreseeable at the time of the conclusion of the contract.[82] However, notions of fault creep in through the backdoor. First, for the finding of fundamental non-performance in Article 8:103(c) PECL, one criterion is whether the non-performance is intentional

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75 O. Lando & H. Beale (eds), *Principles of European Contract Law, Part I: Performance, non-performance and remedies* (The Hague: Kluwer Law International 1995); O. Lando & H. Beale (eds), *Principles of European Contract Law, Part I and II (Combined and Revised)* (The Hague: Kluwer Law International 2000); O. Lando et al. (eds), *Principles of European Contract Law, Part III* (The Hague: Kluwer Law International 2003). An online copy of the PECL's provisions can be found at, www.trans-lex.org/400200.

76 For a historical account, see R. Zimmermann, 'Ius Commune and the Principles of European Contract Law: Contemporary Renewal of an Old Idea', in H. MacQueen & R. Zimmermann (eds), *European Contract Law: Scots and South African Perspectives* (Edinburgh: Edinburgh University Press 2006), p 1.

77 R. Zimmermann, *Max Planck Encyclopedia of European Private Law*, 'Principles of European Contract Law', https://max-eup2012.mpipriv.de/index.php/Principles_of_European_Contract_Law_(PECL).

78 O. Lando & H. Beale, *PECL pt. I & II*, p xxv: 'The United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) has been a particularly fruitful sources of ideas for the Principles'.

79 Article 8:101(1) PECL: 'Whenever a party does not perform an obligation under the contract and the non-performance is not excused under Article 8:108, the aggrieved party may resort to any of the remedies set out in Chapter 9.'; see J. Basedow, 25. *Int. Rev. Law Econ*. 2005, p 492.

80 For criticism of this terminology, see *supra* n. 20.

81 Articles 9:301(1), 8:103 PECL compared to Arts 49(1)(a), 64(1)(a), 72, 25 CISG. As regards the definition of fundamental breach, it is an improvement that Art. 8:103(b) PECL leaves away the ambiguous element of detriment, cf. U. Huber, *ZEuP* 2008, p 726.

82 Articles 9:501-9:510 PECL, with the possibility of exemption under Art. 8:108 PECL; compare Arts 45(1)(b), 61(1)(b), 74-77 CISG, with the possibility of exemption under Art. 79 CISG. It appears that the foreseeability limitation under Art. 9:503 PECL ('foreseeable as a likely result of its non-performance') is stricter than under Art. 74 sentence 2 CISG ('possible consequence of the breach of contract'); cf. U. Huber, *ZEuP* 2008, p 732.

or not. Second, with regard to damages, Article 9:503 PECL provides that the foreseeability restriction applies only unless the non-performance was intentional or grossly negligent.[83] This runs counter to a strict liability scheme and does not enhance clarity and predictability.[84]

18. A true improvement to the CISG is the PECL's clarification that an impediment beyond the control frees the obligor both from paying damages and specific performance.[85] Although similar results can also be reached under the CISG,[86] the PECL's clarification seems helpful.

19. A significant difference between PECL and CISG can finally be found with regard to the rules on change of circumstances. Whereas change of circumstances is considered an impediment under Article 79 CISG,[87] the PECL devote a separate provision to cases of hardship.[88] Primarily, the parties have the duty to renegotiate the contract[89]; in case of a failure of renegotiation, the court may adapt or terminate the contract.[90] However, a statutory duty to renegotiate is neither necessary nor desirable: There is practical difficulty to force unwilling parties into renegotiations, and damages are difficult to prove since the outcome of the negotiations is unclear.[91] The same is true of court adaption or termination: The court is not in the best position to rewrite the parties' bargain and its decision often comes too late.[92] Last, traditional remedies lead to satisfactory results: if one party makes an offer to perform under different terms, the other party will not be entitled

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83 This rule exception mechanism goes back to Art. 1150 of the Code Civil 1804 (France), which however only excluded the restriction of foreseeability in cases of intentional behaviour (*par son dol*); Arts 1231–1233 Code Civil, its modern equivalent after the 2016 reforms (discussed in this article, text accompanying *infra* n. 299), refers to gross negligence or malice (*due à une faute lourde ou dolosive*) and this thus even closer to the wording PECL.

84 R. Zimmermann, 'Limitation of Liability for Damages in European Contract Law', 18. *Edinburgh Law Review* 2014, p (193) at 208–210.

85 Article 8:108 PECL; also Art. III.-3:104 DCFR.

86 Y. Atamer, in S. Kröll, L. Mistelis & P. Perales Viscasillas, *UN Convention on the International Sale of Goods. A Commentary* (München/Oxford/Baden-Baden: Beck/Hart/Nomos, 2nd edn 2018), Art. 79, paras 16–21; I. Schwenzer, in *Schlechtriem & Schwenzer*, Art. 79, paras 53–55.

87 CISG-AC Opinion No. 7, *Exemption of Liability for Damages under Article 79 of the CISG* (Rapporteur: M. Garro), 12 Oct. 2007, www.cisgac.com/cisgac-opinion-no7/; CISG-AC Opinion No. 20, *Hardship under the CISG* (Rapporteur: E. Muñoz), 2–5 Feb. 2020, http://cisgac.com/opinion-no20-hardship-under-the-cisg/.

88 Article 6:111 PECL; also Arts III.–1:110 DCFR.

89 Article 6:111(2) PECL; under Arts III.–1:110(3)(d) DCFR, renegotiation is only a prerequisite for the obligor's right to obtain relief, but there is no obligation to renegotiate.

90 Article 6:111(3) PECL; also Arts III.–1:101(2) DCFR.

91 I. Schwenzer & E. Muñoz, 'Duty to renegotiate and contract adaptation in case of hardship', 24. *Unif.L.Rev.* 2019, p (149) at 161–162; the criticism was also recognized by the drafters DCFR who did not include a provision on damages, see Arts III.–1:110, Comment C DCFR.

92 I. Schwenzer & E. Muñoz, 24. *Unif.L.Rev.* 2019, pp 165–167.

to avoid the contract as there is no fundamental breach if it can reasonably be expected to accept this offer.[93]

3.3. Draft Common Frame of Reference (DCFR)

20. The DCFR, published in 2009,[94] is an academic draft for a future European Civil Code funded by the Commission.[95] Since the DCFR heavily relied on the PECL as far as the area of general contract law is concerned,[96] both instruments are almost identical with regard to remedies for non-performance and change of circumstances.[97] Unlike PECL, the DCFR also contains rules on sale of goods. In principle, these rules primarily build upon the 1999 Consumer Sales Directive.[98] At least some of the flaws of the Directive have been corrected by returning to the solutions offered by the CISG. For example, while goods are still perceived to be corporal movables only,[99] the rules on sales apply with the appropriate adaptions to contracts conferring, in exchange for a price, rights in information or data, including software and databases.[100] Further, like under Article 35(2)(b) CISG, fitness for a particular purpose is only excluded where the buyer could not reasonably rely on the seller's skill and judgment.[101]

3.4. Draft Common European Sales Law (CESL)

21. On the basis of the DCFR, the EU embarked on the ambitious project to establish a CESL in 2011.[102] It did not content itself with consumer protection as under the former directives but rather suggested to offer an opt-in instrument for

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93 I. Schwenzer & E. Muñoz, 24. *Unif.L.Rev.* 2019, pp 172-174.

94 C. von Bar et al., *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)* (Munich: sellier 2009).

95 For an overview, see H. Eidenmüller, F. Faust, H.C. Grigoleit, N. Jansen, G. Wagner & R. Zimmermann, 'The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems', 28. *OJLS (Oxford Journal of Legal Studies)* 2008, p (659) at 660-669.

96 von Bar et al., *DCFR*, 'Introduction', paras 49-53; criticized by H. Eidenmüller et al., 28. *OJLS* 2008, p 699.

97 See the analysis of T. Pfeiffer, 'Von den Principles of European Contract Law zum Draft Common Frame of Reference', *ZEuP* 2008, p 679.

98 On the DCFR's rules on sale of goods see the detailed assessment by U. Huber, *ZEuP* 2008, p 708.

99 The definition of goods can be found in the DCFR's Annex.

100 Articles IV.A.-1:101(2)(d) DCFR.

101 Articles IV.A.-2:302(a) DCFR; for a criticism on Art. 2(2)(b) of the 1999 Consumer Sales Directive, see the text accompanying *supra* n. 62.

102 *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM(2011) 635 final, https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52011PC0635.

B2B transactions too.[103] This approach, however, was doomed to fail from the very beginning.[104] The project was abandoned by the European Commission in December 2014.[105]

22. To begin with, CESL was only to apply to B2C transactions and B2B transactions where at least one party was a small or medium-sized enterprise (SME).[106] However, it would have been difficult for the trader to assess whether the contracting party qualified as an SME.[107] Further, CESL seemed to assume that the SME party was always on side of buyer, which is unrealistic.[108] For other cases of B2B transactions, an opt-in solution by the parties was envisaged.[109]

On top, CESL was only designed to apply to cross-border transactions in Europe.[110] However, such an approach would have further complicated international trade: Businesses would have had to consider three levels: domestic, regional, and global. Therefore, they would need three (and not only two) different sets of templates and standard terms for their contracting.[111]

Regarding the sphere of application, again CESL restricted the definition of goods to tangible movable items.[112] This narrow and rather outdated definition of goods required that, in addition to 'sale of goods', the 'supply of digital content' had to be mentioned separately in all relevant provisions.[113] While the CISG can apply to mixed contracts,[114] CESL explicitly excluded training services which are

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103 Articles 3, 8 CESL-Regulation; see M.W. Hesselink, 'How to Opt into the Common European Sales Law? Brief Comments on the Commission's Proposal for a Regulation', 20. *ERPL* 2012, p 195.

104 See H. Eidenmüller, N. Jansen, E.-M. Kieniger, G. Wagner & R. Zimmermann, 'The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law', 16. *Edin.L.R. (Edinburgh Law Review)* 2012, p 301; I. Schwenzer, 'The Proposed Common European Sales Law and the Convention on the International Sale of Goods', 44. *UCC L.J.* 2012, p 457.

105 D. Anagnostopoulou, 'The Withdrawal of the Common European Sales Law Proposal and the European Commission Proposal on Certain Aspects Concerning Contracts for the Online and Other Distance Sales of Goods', in M. Heidemann & J. Lee (eds), *The Future of the Commercial Contract in Scholarship and Law Reform* (London/Exeter: Springer 2018), p (127) at 131–133.

106 Article 7 CESL-Regulation.

107 H. Eidenmüller et al., 16. *Edin.L.R.* 2012, p 304.

108 I. Schwenzer, 44. *UCC L.J.* 2012, p 462.

109 The Member States had the option to open CESL to opt-ins in B2B situations under Art. 13 CESL-Regulation.

110 Article 4 CESL-Regulation.

111 I. Schwenzer, 'Global Unification of Contract Law', 21. *Univ.L.R.* 2016, p (60) at 70.

112 Article 2(h) CESL-Regulation; for the notion that the CISG applies to the sale of software, see text accompanying *supra* n. 54.

113 R. Feltkamp & F. Vanbossele, 'The Optional Common European Sales Law: Better Buyer's Remedies for Seller's Non-performance in Sales of Goods?', 19. *ERPL* 2011, p (873) at 881–883; I. Schwenzer, 44. *UCC L.J.* 2012, p 460.

114 Article 3(2) CISG, on which see the text accompanying P. Perales Viscasillas, 38. *UCC L.J* 2005.

very important in practice and established a separate regime for breach of service obligations.[115] When compared to the CISG, CESL appears much more complicated and wordier.[116]

23. By and large, the CESL replicated the rules of the DCFR. Thus, it was suggested that it would have been better for the drafters to simply follow the model of Article 35 CISG.[117] Moreover, liability for the breach of service obligations was fault-based.[118] Hence, adjudicators would have faced the difficult task of attributing consequences of non-performance to goods or services parts in order to decide what regime of liability to apply.[119] Unlike under the PECL and DCFR, however, it is to be welcomed that CESL did not exclude the foreseeability exception in cases of intention or gross negligence.[120]

3.5. 2019 Sale of Goods and Supply of Digital Contents and Services Directives

24. After the demise of CESL, the European Commission rescued[121] some of its core contents into two full harmonization directives: the 2019 Digital Contents Directive[122] and 2019 Sale of Goods Directive[123] – the latter one replacing the 1999 Consumer Sales Directive.[124]

25. Although the notion of goods as tangible movable items was enriched to cover items which incorporate or are interconnected with digital content or a digital service, contracts relating to digital content and digital services simpliciter (i.e., without any relationship to a tangible item) are still not encompassed.[125] Hence the second directive on the supply of digital contents and services was necessary.

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115 Article 2(m) CESL-Regulation, Arts 147–158 CESL; see I. Schwenzer, 44. *UCC L.J.* 2012, pp 460–461.

116 I. Schwenzer, 44. *UCC L.J.* 2012, p 477.

117 H. Eidenmüller et al., 16. *Edin.L.R.* 2012, p 334.

118 Article 148(2) CESL.

119 I. Schwenzer, 44. *UCC L.J.* 2012, p 461.

120 Article 161 CESL; see text accompanying *supra* n. 83.

121 See M. Lehmann, 'A Question of Coherence. The Proposals on EU Contract Rules on Digital Content and Online Sales', 23. *MJ (Maastricht Journal of European and Comparative Law)* 2016, p (752) at 753.

122 Dir. (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, http://data.europa.eu/eli/dir/2019/770/oj.

123 Dir. (EU) 2019/771 of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, http://data.europa.eu/eli/dir/2019/771/oj.

124 Article 23 of the 2019 Sale of Goods Directive.

125 Article 2(5) of the 2019 Sale of Goods Directive.

Not only may this separation give rise to questions of demarcation.[126] Furthermore, the content of the two Directives is to a large extent identical. That such a duplication would not have been necessary is confirmed by the possibility of Member States to enact a uniform regime for both sales and the supply of digital contents.[127] In that respect, the more generous interpretation of the term goods under the CISG proves superior.[128] As regards the supply of digital services, which are also covered by the 2019 Digital Contents Directive, the CISG could not apply though.

It may be welcomed that the 2019 Digital Contents Directive clarifies that it also applies where the consideration provided by the consumer in exchange for the digital content or service is personal data.[129] In practice, this means that the provider of free applications on the internet (e.g., Facebook or Google) may be held liable under the Directive even though they receive the consumer's personal data instead of a payment. As novel as this rule may seem, similar results can be achieved under the CISG because correctly viewed the CISG also applies to sale of data and barter transactions.[130]

Although the Digital Contents Directive regulates *digital* services, mixed contracts with *physical* service obligations are not covered.[131] For example, if a consumer buys a new computer and contracts for installation services with the trader, the latter services are not covered by the Directive. Under the CISG, a failure to install the software could be judged under Article 35 CISG because the preponderant part of the obligation does not relate to services.[132]

26. With regard to conformity of goods and digital content and services, the 2019 Directives bring European sales law closer to the CISG than the 1999

126 See I.F. Chacon, 'Some considerations on the material scope of the new Digital Content Directive: Too much to work out for a common European framework', 29. *ERPL* 2021, p (517) at 528-534; B. Zöchling-Jud, 'Das neue Europäische Gewährleistungsrecht für den Warenhandel', *GPR* (*Zeitschrift für Gemeinschaftsprivatrecht)* 2019, p (115) at 118-119; J. Vanherpe, 'White Smoke, but Smoke Nonetheless: Some (Burning) Questions Regarding the Directives on Sale of Goods and Supply of Digital Content', 28. *ERPL* 2020, p (251) at 254-255.

127 Recital 12 of the 2019 Digital Contents Directive; see e.g., the Austrian Consumer Warranty Act, discussed in the text accompanying *infra* n. 233.

128 Compare M. Lehmann, 23. *MJ* 2016, p 760.

129 Article 3(1) of the 2019 Digital Contents Directive. The 2019 Sale of Goods Directive, however, does not contain a similar rule.

130 I. Schwenzer, in *Schlechtriem & Schwenzer*, Art. 1, paras 18 (sale of data), 11 (barter); when combined, these two approaches lead to the same results as under the 2019 Digital Contents Directive.

131 Article 3(1) of the 2019 Digital Contents Directive only refers to '*digital service*'; under Art. 3(2), it also applies where the digital content or service is developed in accordance with the consumer's specifications. Other physical services are excluded by Art. 3(6) and recital 33.

132 Article 3(2) CISG.

predecessor.[133] Now description, type, quantity, and quality are expressly mentioned.[134] Whereas under the CISG, description refers to delivery of an *aliud*,[135] the difference between type and description under the 2019 Sale of Goods Directive is not clear.

Moreover, the Directives add many words to the subjective and objective requirements like functionality, compatibility, interoperability and other features like durability, security and updates.[136] The definitions for compatibility, functionality, and interoperability all refer to the purpose of use, which is already covered as an objective requirement by particular purpose or ordinary use.[137] Consequently, the rules become wordier and there is a danger that features not mentioned or not even known today might be considered to be excluded by converse argument.[138]

Furthermore, amendments to the 1999 Directive by DCFR and CESL are again being abandoned for no obvious reason. Like under the CISG, the DCFR and CESL excluded fitness for particular purpose only where the buyer could not reasonably rely on the seller's skill and judgment.[139] Under the 2019 Directives, however, the threshold for establishing fitness for particular purpose is higher. It requires acceptance by the seller as under the 1999 Directive.[140] This clearly operates to the detriment of the consumer buyer.[141]

27. As regards remedies, it is noteworthy that the 2019 Sale of Goods Directive explicitly provides that the seller must at its own expense remove non-conforming goods and pay for reinstallation.[142] From a functional point of view, this is a claim for damages. The provision goes back to the ECJ's judgment in *Weber/Putz*.[143] In that case, the fault-based rule under the German law of damages prevented the buyer from claiming the relevant costs from the seller.[144] It was therefore essential to hold the seller (strictly) liable under the remedy of repair and replacement.

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133 The wording of Arts 5-8 of the 2019 Sale of Goods Directive and Arts 6-9 of the 2019 Digital Contents Directive is very similar – another indicia that both could have been combined in a uniform regime.

134 Article 6(a) of the 2019 Sale of Goods Directive and Art. 7(a) of the 2019 Digital Contents Directive (the latter not mentioning type as a separate category besides description).

135 I. Schwenzer, in *Schlechtriem & Schwenzer*, Art. 35, para. 11.

136 Articles 6(a) (d), 7(d) of the 2019 Sale of Goods Directive and Arts 7(a) (d), 8(b) of the 2019 Digital Contents Directive.

137 All these terms are defined with many words in Art. 2(8) (9), and (10) of the 2019 Sale of Goods Directive and Art. 2(10) (11), and (12) of the 2019 Digital Contents Directive respectively.

138 B. Zöchling-Jud, *GPR* 2019, p 122: 'brings little new'.

139 Articles IV.A-2:302(a) DCFR and Art. 100(a) CESL.

140 Article 2(2)(b) of the 1999 Consumer Sales Directive, Art. 6(b) of the 2019 Sale of Goods Directive, and Art. 7(b) of the 2019 Digital Contents Directive.

141 See text accompanying *supra* n. 62.

142 Article 14(3) of the 2019 Sale of Goods Directive.

143 ECJ 16 Jun. 2011, ECLI:EU:C:2011:396, *Weber/Putz*.

144 Section 280(1) sentence 2 German Civil Code.

As the 2019 Directives still do not deal with damages,[145] the case law of the ECJ has now been codified within the rules on repair or replacement. Under the strict liability system of the CISG, similar distortions are not necessary.[146]

The equating of the prerequisites for price reduction and avoidance has been retained by the 2019 Directives.[147] However, compared to the 1999 Directive, what might be considered a step in the right direction is that the buyer may ask for immediate price reduction or avoidance if the lack of conformity is of such a serious nature as to justify this.[148] In doing so, the 2019 Directives emphasize the intensity of the breach of contract which sounds similar to the fundamental breach doctrine under Article 25 CISG. With regard to price reduction, the CISG is still more buyer friendly than the 2019 Directives.[149] Moreover, the Directives now explicitly require avoidance to be affected by declaration like under Article 49(1) CISG[150]; this implicitly excludes termination by court decision as it was the rule in countries with law of French descent.[151]

4. National Level

4.1. Implementation of European Consumer Directives in National Laws

28. While all EU Member States were obliged to implement the 1999 Consumer Sales Directive, their ways of implementation differ considerably.[152] Most chose to transpose the Directive as a special statute or as part of a separate consumer code.[153] Some included the Directive into their civil code, law of obligations or

145 Recitals 18, 61, Art. 3(6) 2019 Sale of Goods Directive and recital 73, Art. 3(10) 2019 Supply of Digital Contents and Services Directive.

146 See CISG-AC Opinion No. 21, *Delivery of Substitute Goods and Repair under the CISG* (Rapporteurs: I. Schwenzer and I. Beimel), 3 and 4 Feb. 2020, rule 7, http://cisgac.com/opinion-no-21-/Delivery%20of%20Substitute%20Goods%20and%20Repair%20under%20the%20CISG/.

147 There was a change in terminology from 'rescission', on which see *supra* n. 70, to 'termination', on which see *supra* n. 20.

148 Article 13(4)(c) of the 2019 Sale of Goods Directive and Art. 14(4)(c) of the 2019 Digital Contents Directive.

149 Price reduction is generally available under Art. 50 CISG in every case where the goods do not conform with the contract.

150 Article 16(1) of the 2019 Sale of Goods Directive and Art. 15 2019 Digital Contents Directive.

151 See text accompanying *supra* n. 21.

152 See H.-P. Mansel, 'Kaufrechtsreform in Europa und die Dogmatik des deutschen Leistungsstörungsrechts: Kaufrecht in Europa nach der Umsetzung der Verbrauchsgüterkauf-Richtlinie', 204. *AcP (Archiv für Civilistische Praxis)* 2004, p 396.

153 Bulgaria, Cyprus, Finland, France, Ireland, Italy, Latvia, Luxembourg, Malta, Portugal, Romania, Slovenia, Spain, Sweden, and the United Kingdom (at that time still an EU Member State). See the

sale of goods act but kept them as separate rules for B2C contracts.[154] Both approaches may lead to awkward situations, for example two slightly different definitions for non-conformity of the goods.[155] Only Austria, Croatia, Estonia, Germany, Greece, Hungary, the Netherlands, and Poland have included the Directive into their respective civil codes, expanding parts to all sales or even all contracts.

29. As regards the 2019 Directives, all Member States were required to adopt implementation measures with effect from 1 January 2022.[156] At the time of writing, the transposition of only 20 states is reported on the EUR-lex website.[157] For the 2019 Sale of Goods Directive, the Member States chose to follow more or less the same path as they did for the 1999 Consumer Sales Directive. However, it seems that no one chose to expand the rules of the 2019 Digital Contents Directive beyond B2C transactions. In Poland, a draft legislation transposes both 2019 Directives in a separate Consumer Rights Act.[158] Hence, the provisions implementing and generalizing the 1999 Directive will be repealed.

4.2. Direct Amendments of National Laws in View of the CISG

30. Beyond the necessary transposition of the European consumer directives, some countries amended their civil codes, law of obligation acts, or sale of goods acts in more or less alignment with the CISG. It is important to highlight that our aim here is to trace the major trends. For some Member States, our sources are mainly English translations of the updated national civil codes as well as English-language scholarly writings. We have also always looked at the latest version of any given law in the local language, where necessary with the help of a translation program.

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transposition measures reported on the EUR-lex website, https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:31999L0044.

154 Belgium, Czechia, Denmark, Lithuania, Netherlands, Slovakia. See the transposition measures reported on the EUR-lex website, https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:31999L0044.

155 See the example of Czechia, text accompanying *infra* n. 271.

156 Article 24(1) of the 2019 Sale of Goods Directive and Art. 24(1) of the 2019 Digital Contents Directive.

157 As of 9 May 2022. See the transposition measures reported for 2019 Sale of Goods Directive, https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=uriserv:OJ.L_.2019.136.01.0028.01.ENG, and the 2019 Digital Contents Directive, https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32019L0770. Belgium, Ireland, Greece, the Netherlands, Poland, Slovenia, Slovakia, and Sweden are still missing.

158 See M. Namysłowska, A. Jabłonowska & F. Wiaderek, 'Implementation of the Digital Content Directive in Poland: A Fast Ride on a Tandem Bike against the Traffic', 12. *JIPITEC* (*Journal of Intellectual Property, Information Technology and E-Commerce Law)* 2021, p (241) at 245.

4.1.1. Nordic Countries

31. The Nordic countries[159] (i.e., Denmark, Norway, Sweden, Finland, and Iceland) have a common history of unified law.[160] At the beginning of the 20th century, Sweden, Denmark, and Norway enacted uniform Sale of Goods and Contract Acts.[161] When the CISG entered into force, the Nordic countries seized the opportunity to reform their Sale of Good Acts.[162]

32. As a starting point, the drafters of the new Nordic Sale of Goods Acts used the provisions of Articles 1–6, 30–88 CISG.[163] Thus, the Acts reproduce the CISG's rules on contracts for goods to be manufactured and mixed contracts.[164] Further, the general provisions on non-conformity follow Article 35 CISG almost verbatim.[165] Moreover, damages are in principal based on strict liability with a foreseeability limitation and a possibility of exemption similar to Article 79 CISG.[166] Last, the contract can be avoided in cases of delay and defective performance where the breach is of substantial importance.[167]

33. However, there still remain some peculiarities. First, the remedies for breach of contract were split up in provisions on delay and on lack of conformity; there are no provisions on other breaches like ancillary duties.[168] Thus, other breaches of contract are governed by the general uncodified law of obligations.[169] Second, the

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159 On the terminology see U. Bernitz, 'What is Scandinavian Law? Concept, Characteristics, Future', 50. *Sc.St.L. (Scandinavian Studies in Law)* 2007, p (13) at 15–16.

160 *Ibid.*; B. Gomard, 'Civil Law, Common Law and Scandinavian Law', 5. *Sc.St.L.* 1961, p 27; J. Ramberg, 'Unification of Sales Law – A Look at the Scandinavian States', 8. *Univ.L.R.* 2003, p 201.

161 J. Ramberg, 'The Vanishing Scandinavian Sales Law', 50. *Sc.St.L.* 2007, p 257; C. Ramberg, 'The Hidden Secrets of Scandinavian Contract Law', 50. *Sc.St.L.* 2007, p 249.

162 Finnish Sale of Goods Act 1987, English version, www.finlex.fi/en/laki/kaannokset/1987/en19870355_19940017.pdf; Norwegian Sale of Goods Act 1988, https://lovdata.no/dokument/NL/lov/1988-05-13-27; Swedish Sale of Goods Act 1990, www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/koplag-1990931_sfs-1990-931; Icelandic Sale of Goods Act 2000, www.althingi.is/lagas/nuna/2000050.html; Denmark did not enact a new Sale of Goods Act.

163 The similarity is evident when laying the respective tables of content side-by-side, see L. Sevón, 'The New Scandinavian Codification on the Sale of Goods and the 1980 United Nations Convention on Contracts for the International Sale of Goods', in P. Schlechtriem (ed.), *Einheitliches Kaufrecht und nationales Obligationenrecht* (Baden-Baden: Nomos 1987), p (343) at 350.

164 § 2 Finnish, Norwegian, Swedish and Icelandic Sale of Goods Acts. Unfortunately, it appears from the translation that the Finnish and Swedish Sale of Goods Acts are limited to the sale of movable property [§ 1(1)]; thus, the sale of digital goods is probably ruled out.

165 § 17 Finnish, Norwegian, Swedish and Icelandic Sale of Goods Acts; see L. Sevón, in *Einheitliches Kaufrecht*, p 352.

166 §§ 27, 40 Finnish, Norwegian, Swedish and Icelandic Sale of Goods Acts.

167 §§ 25, 39 Finnish, Norwegian, Swedish and Icelandic Sale of Goods Acts.

168 §§ 27, 40 Finnish, Norwegian, Swedish and Icelandic Sale of Goods Acts; see L. Sevón, in *Einheitliches Kaufrecht*, p 353.

169 See V. Hagstrøm, 'The Scandinavian Law of Obligations', 50. *Sc.St.L.* 2007, p 113.

fault principle was retained with regard to the recoverability of certain losses. Whereas a strict liability regime applies to direct losses, indirect losses may only be recovered if the party in breach has been at fault.[170] In practice, the distinction is almost impossible to draw and leads to unpredictability.[171] This was one of the main reasons why Denmark did not join the other Nordic countries in their amendments of the Sale of Goods Acts.[172] Instead, it retained the 1906 version.[173]

4.1.2. Netherlands

34. Immediately after World War II, the Netherlands started to modernize their Civil Code.[174] In the process, the CISG and its predecessors had an important influence.[175] The major part of the revised Dutch Civil Code took effect on 1 January 1992.[176]

35. In principle, the Dutch Civil Code follows the uniform breach approach found under the CISG.[177] However, there is an additional requirement of default unless performance is impossible.[178] With regard to avoidance, the concept of

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170 §§ 27, 40, and 67 Finnish, Norwegian, Swedish, and Icelandic Sale of Goods Acts; see B. Sandvik, 'Direct and Indirect Loss Under "Catch-22" in the Nordic Law of Sales', 38. *Sc.St.L.* 1999, p 25; J. Ramberg, 50. *Sc.St.L.* 2007, pp 260-261; L. Sevón, in *Einheitliches Kaufrecht*, p 355.

171 J. Ramberg, 'Unification of Sales Law – A Look at the Scandinavian States', 8. *Univ.L.R.* 2003, p (201) at 203; J. Lookofsky, 'Denmark', in *CISG and Impact*, p (113) at 127-128.

172 *Ibid.*

173 Many thanks to Naja Marie Sanvig Knudsen, Alexander Luther Ræhrgaard Nielsen, and Natasha Sabrina Rafn for clarifying the position of Denmark to the authors. All errors remain our own.

174 E. Hondius & A. Keirse, 'Does Europe Go Dutch? The Impact of Dutch Civil Law on Recodification in Europe', in R. Schulze & F. Zoll (eds), *The Law of Obligations in Europe: A New Wave of Codifications* (Munich: Sellier 2013), p (303) at 304-309; J.M. Smits, 'The German Schuldrechtsmodernisierung and the New Dutch Civil Code: A Study in Parallel', in O. Remien (ed.), *Schuldrechtsmodernisierung und Europäisches Vertragsrecht* (Tübingen: Mohr Siebeck 2008), p 117.

175 S.A. Kruisinga, 'The Netherlands', in L.A. DiMatteo (ed.), *International Sales Law: A Global Challenge* (Cambridge: Cambridge University Press 2014), p (486) at 487; M.W. Hesselink, 'The Ideal of Codification and the Dynamics of Europeanisation: The Dutch Experience', 12. *ELJ (European Law Journal)* 2006, p (279) at 285.

176 Book 3 on patrimonial law in general, book 5 on property law, book 6 on the law of obligations and Title 7.1 on sale and exchange. For an English translation, see www.dutchcivillaw.com/civilcode general.htm.

177 Articles 6:74, 6:265 Dutch Civil Code; see M. van Kogelenberg, 'Failure in performance of an obligation in Dutch law: A confusing mix of national, transnational and linguistic interpretation', in C.G. Breedveld-de Voogd et al. (eds), *Core Concepts in the Dutch Civil Code. Continuously in Motion* (Deventer: Wolters Kluwer 2016), p (89) at 91-92.

178 Articles 6:74(2), 6:265(2) Dutch Civil Code, which normally requires the obligee to provide a written notice; see M. van Kogelenberg, in *Core Concepts Dutch Civil Code*, p 92.

fundamental breach was not followed.[179] Still, no court involvement is required anymore. Instead, avoidance can be effected by declaration of the aggrieved party.[180] Moreover, the new Civil Code features a provision on hardship: although the parties are not required to renegotiate the contract, the court may adapt or terminate the contract on the application of one of the parties.[181]

A somewhat hybrid approach is taken regarding damages. There is a general requirement that the loss can be imputed to the debtor, but imputability is understood to encompass the concepts of foreseeability and fault; regard must also be had to the nature of the damage, the nature of liability, and the seriousness of the unlawfulness.[182]

36. Last, the rule on non-conformity shows great similarities to Article 35 CISG.[183] Therefore, only minor changes were necessary in the implementation of the 1999 Consumer Sales Directive.[184] Otherwise, its rules were not extended beyond B2C transactions. Likewise, the implementation of the 2019 Sale of Goods and Digital Contents Directives will mostly be restricted to B2C relationships.[185]

4.1.3. Baltic States

37. The Baltic States[186] (i.e., Estonia, Latvia, and Lithuania) formed part of the Soviet Union from 1939 onwards. After regaining independence in 1991, Latvia re-enacted its old civil code from the brief period of independence in the 1930s.

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179 Article 6:265 Dutch Civil Code; see M. VAN KOGELENBERG, in *Core Concepts Dutch Civil Code*, pp 98–103.

180 Article 6:267 Dutch Civil Code; see U. DROBNIG, 'Das neue niederländische Bürgerliche Gesetzbuch aus vergleichender und deutscher Sicht', 1. *ERPL* 1993, p (171) at 186.

181 Article 6:258 Dutch Civil Code; such a court adaption mechanism was already criticized in the context of PECL, see the text accompanying *supra* n. 83.

182 Article 6:74(1) Dutch Civil Code; see I. SCHWENZER & E. MUÑOZ, *Global Sales and Contract Law*, para. 44.62.

183 Article 7:17 Dutch Civil Code; notably, the distinction between *aliud* and *peius* has been abandoned, Art. 7:17(3) Dutch Civil Code.

184 Act of 6 Mar. 2003 to adapt Book 7 of the Civil Code to the Directive on certain aspects of the sale of and guarantees for consumer goods, Official Gazette of the Kingdom of Netherlands 2003, 110, effective 1 May 2003, www.recht.nl/doc/stb2003-110.pdf?wid=22. See E. HONDIUS, 'In Conformity with the Consumer Sales Directive? Some Remarks on Transposition into Dutch Law', 9. *ERPL* 2001, p 327.

185 See M.B.M. LOOS, 'The (Proposed) Transposition of the Digital Content Directive in the Netherlands', 12. *JIPITEC* 2021, p 229.

186 See S. OSIPOVA, 'Baltische Rechtstradition', in H. HEISS (ed.), *Zivilrechtsreform im Baltikum* (Tübingen: Mohr Siebeck 2006), p 3.

In comparison, Lithuania and Estonia started preparing new civil codes, taking reference inter alia to the CISG and PECL.[187]

38. Lithuania enacted a new Civil Code with effect from 1 July 2001.[188] Most notably, the provisions on non-conformity show many similarities to Article 35 CISG.[189] Thus, the delivery of different goods or of a different quantity are considered a non-conformity.[190] There is also a separate provision on packaging.[191] While Lithuania transposed European consumer protection directives into its Civil Code, they were kept as separate rules for B2C relationships.[192] This is unfortunate in that the rules have many parallels and thus unnecessary duplications arise. Moreover, the aggrieved party may avoid the contract in case of an essential violation of the contract.[193] Last, a new provision on hardship was introduced: it stipulates a duty to renegotiate and the possibility to apply to the court for adaption or termination of the contract.[194]

39. In Estonia, the new Law of Obligations Act took effect on 1 July 2002.[195] Like the CISG, the Estonian Law of Obligations Act adopts a uniform concept of breach with a list of possible remedies.[196] Avoidance is also linked to the fundamentality of the breach.[197] Unlike under the CISG, a non-fundamental breach by delivery of non-conforming goods can be upgraded to a fundamental one by setting a *Nachfrist.* This difference can be justified by the fact that domestic contracts are

187 P. Varul, 'The New Estonian Civil Code', in *Zivilrechtsreform Baltikum*, p (51) at 52; T. Göttig, 'Estnisches und deutsches Leistungsstörungsrecht im Vergleich zum UN-Kaufrecht und den Grundregeln des Europäischen Vertragsrechts', *ZfRV* (*Zeitschrift für Europarecht, Internationales Privatrecht und Rechtsvergleichung)* 2006, p 138.

188 Lithuanian Civil Code, Official Gazette of the Republic of Lithuania, 2000, No 74-226, effective 1 Jul. 2001, English version, http://elibrary.lt/resursai/DB/LPD/Istatymai/Istatymai/pd_10a.pdf.

189 Articles 6.327, 6.333 Lithuanian Civil Code.

190 Articles 6.329, 6.333(7) Lithuanian Civil Code.

191 Article 6.342 Lithuanian Civil Code.

192 L. Didžiulis, 'EU Digital Content Directive and Evolution of Lithuanian Contract Law', 12. *JIPITEC* 2021, p 260.

193 Articles 6.217, 6.334(1) No 4, 6.379(1) Lithuanian Civil Code.

194 Article 6.204 Lithuanian Civil Code. The similar rule of Art. 6:111 PECL was already criticized, see text accompanying *supra* n. 88.

195 Estonian Law of Obligations Act of 26 Sep. 2001, effective 1 Jul. 2002, English version, www.riigiteataja.ee/en/eli/506112013011/consolide.

196 §§ 100, 101 Estonian Law of Obligations Act; see T. Göttig, *ZfRV* 2006, p 140.

197 § 116 Estonian Law of Obligations Act is almost a verbatim adoption of Art. 25 CISG; see T. Göttig, *ZfRV* 2006, pp 145–146; P. Varul, 'CISG: A Source of Inspiration for the Estonian Law of Obligations', 8. *Univ.L.R.* 2003, p 209; P. Schlechtriem, 'The New Law of Obligations in Estonia and the Developments Towards Unification and Harmonisation of Law in Europe', *Juridica International* 2001, p (16) at 21.

different from international ones.[198] The remedy of price reduction has been expanded and is available not only for all kinds of breaches but also for all types of contracts.[199] As regards damages, the principle of fault has been discarded and replaced by strict liability coupled with the possibility of an exemption that closely mirrors Article 79 CISG.[200] Recoverable losses must be foreseeable at the time of the conclusion of the contract unless the damage is caused intentionally or due to gross negligence.[201] This mechanism has already been criticized in the context of PECL.[202] Likewise, there is a new provision on hardship requiring the parties to renegotiate the contract similar to the PECL.[203]

As regards the 1999 Consumer Sales Directive, it was considered important to integrate its rules into the Estonian Law of Obligations Act.[204] Thus, the rule on conformity of the goods is very similar to Article 35 CISG.[205] While the rules of the 2019 Digital Contents Directive were introduced into the general part of the Law of Obligations Act, they are restricted to B2C transactions.[206] To implement the 2019 Sale of Goods Directive, a new rule on conformity of goods with the terms of the contract in consumer sales was created.[207] As a consequence, the previously uniform rules on non-conformity are now fragmented.

4.1.4. Germany

40. Modernization of the German Civil Code already started in the late 1970s. While initially a broad alignment of the law on breach of contract with the CISG was suggested, it was later insisted to retain certain elements of traditional German

198 See U. Huber, 'CISG – Structure of Remedies', 71. *RabelsZ (The Rabel Journal of Comparative and International Private Law)* 2007, p (13) at 33-34.

199 § 112 Estonian Law of Obligations Act; see T. Göttig, *ZfRV* 2006, p 147.

200 § 103 Estonian Law of Obligations Act; T. Göttig, *ZfRV* 2006, p 143; P. Varul, 8. *Univ.L.R.* 2003, p 209; P. Schlechtriem, *Juridica International* 2001, p 21.

201 § 127(3) Estonian Law of Obligations Act; see P. Varul, 8. *Univ.L.R.* 2003, p 209.

202 See text accompanying *supra* n. 83.

203 § 97 Estonian Law of Obligations Act; for a criticism of the similar provision of the PECL, see text accompanying *supra* n. 90.

204 I. Kull, 'Transposition of the Digital Content Directive (EU) 2019/770 into Estonian Legal System', 12. *JIPITEC* 2021, p (249) at 252.

205 § 217 Estonian Law of Obligations Act.

206 §§ 62^{4}-62^{22} Estonian Law of Obligations Act as implemented by the Act amending the Law of Obligations Act and the Consumer Protection Act (transposing the directives on digital content, consumer sales and amended consumer rights), RT I, 24 Nov. 2021, 1, effective 1 Jan. 2022, www.riigiteataja.ee/akt/124112021001. See I. Kull, 12. *JIPITEC* 2021, p 253.

207 § 217^{1} Estonian Law of Obligations Act.

legal thinking.[208] The new law of obligations was enacted with effect from 1 January 2002.[209]

41. Under the 2002 German law of obligations, the starting point is a uniform concept of breach.[210] However, old distinctions according to the type of breach still exist. First, there are different additional requirements to claim damages depending on the type of breach.[211] Second, damages for initial impossibility were not integrated into the new system.[212] Third, there is no uniform concept of breach in the system of avoidance.[213]

Damages and avoidance are now recognized as concurrent remedies in accordance with Articles 45(2), 61(2) CISG.[214] Further, while fault is still necessary to claim damages,[215] it is no longer required for avoidance in cases of delay.[216] Unlike under the CISG, a fundamental breach of contract is not a direct requirement for avoidance.[217] Rather, the aggrieved party can avoid the contract after the expiry of a *Nachfrist*, which can be dispensed with in cases that would also qualify as fundamental breaches under the CISG.[218] In any case, avoidance is excluded in the case of insignificant breaches.[219] In substance, therefore, there is considerable agreement with the CISG.

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208 See generally R. Zimmermann, 'Remedies for Non-Performance. The revised German law of obligations, viewed against the background of the Principles of European Contract Law', 6. *Edin.L.R.* 2002, p 271; P. Schlechtriem, 'International Einheitliches Kaufrecht und neues Schuldrecht', in B. Dauner-Lieb, H. Konzen & K. Schmidt (eds), *Das neue Schuldrecht in der Praxis* (Köln: Heymanns 2003), p 71.

209 Law on the Modernization of the Law of Obligations of 26 Nov. 2001, effective 1 Jan. 2002, Federal Law Gazette Volume 2001 Part I No 37, 3138, English translation, www.gesetze-im-internet.de/englisch_bgb/.

210 § 280(1) BGB; see J. Basedow, 25. *Int. Rev. Law Econ.* 2005, p 492; P. Schlechtriem, in *Neues Schuldrecht*, p 74; R. Zimmermann, 6. *Edin.L.R.* 2002, pp 287–288.

211 §§ 280(2), 286 BGB and §§ 280(3), 281–283 BGB; see R. Zimmermann, 6. *Edin.L.R.* 2002, p 288; J. M. Smits, in *Schuldrechtsmodernisierung und Europäisches Vertragsrecht*, p 117.

212 § 311a(2) BGB; see R. Zimmermann, 6. *Edin.L.R.* 2002, p 288.

213 §§ 323–326 BGB. Thus, it was possible to integrate cases of initial impossibility; see C.-W. Canaris, 'Teleologie und Systematik der Rücktrittsrechte', in D. Baetge, J. von Hein & M. von Hinden (eds), *Die richtige Ordnung. Festschrift für Jan Kropholler zum 70. Geburtstag* (Tübingen: Mohr Siebeck 2008), p (3) at 21.

214 § 325 BGB; see P. Schlechtriem, in *Neues Schuldrecht*, p 77.

215 §§ 280(1) sentence 2, 286(4) BGB. Practical differences compared to the CISG's strict liability approach arise in particular in the event that the seller has obtained the goods from a third party and these were already defective, of which the seller was unaware; see U. Huber, *ZEuP* 2008, p 741.

216 P. Schlechtriem, in *Neues Schuldrecht*, p 77.

217 C.-W. Canaris, in *Festschrift Kropholler*, pp 8–9.

218 § 323(1) & (2) BGB; see P. Schlechtriem, in *Neues Schuldrecht*, p 78.

219 § 323(5) sentence 2 BGB.

Moreover, the contract is no longer void in cases of initial impossibility.[220] The previous case law on change of circumstances as a basis for adapting (or terminating) the contract was also codified.[221]

42. As regards the new rules on sale of goods, the influence of the CISG is felt more clearly and intensified by the transposition of the 1999 Consumer Sales Directive. The rules on non-conformity are almost identical to the Directive and apply to all kinds of sales contracts.[222] Hence, there is no longer any distinction between *peius* and *aliud*.[223] Defects in quantity are now also treated as cases of non-conformity.[224] Finally, following the implementation of the 2019 Sale of Goods Directive,[225] defects in packaging are also considered a non-conformity.[226] The rules of the 2019 Digital Contents Directive were not extended beyond B2C transactions.[227]

4.1.5. Austria

43. Since 1811, the Austrian Civil Code has known a general notion of non-conformity for all contracts with consideration in the general law of obligations.-[228] Against this backdrop, the 1999 Consumer Sales Directive's rules on conformity with the contractual agreement, description, sample or model, and public statements, as well as the rights of the aggrieved party were transposed into the Civil Code.[229] Other features like the rule on installation were implemented in a separate Consumer Protection Act.[230] Unlike in Germany, it was felt that there was not enough time for a more thorough overhaul of the Civil Code.[231]

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220 § 311a(1) BGB.

221 As discussed above, text accompanying *supra* n. 90, the CISG's approach of treating impediments and hardships on the same footing seems preferable.

222 U. Huber, 'Contract Formation and Non-Performance in German Law', in *Law of Obligations in Europe*, p 201.

223 § 434(2) sentence 2, (3) sentence 2 BGB version effective 1 Jan. 2022.

224 Prior to the most recent reforms prompted by the 2019 Sale of Goods Directive, only delivery of too little was considered a non-conformity (§ 434(3) BGB), while there was no rule about delivery of too much.

225 Law on the Regulation of the Sale of Goods with Digital Elements and Other Aspects of the Contract of Sale of 25 Jun. 2021, effective 1 Jan. 2022, Federal Law Gazette Volume 2021 Part I, 2133, www.bgbl.de/xaver/bgbl/start.xav-__bgbl__%2F%2F*%5B%40attr_id=%27bgbl121s2133.pdf%27%5D__1641301909137.

226 § 434(2) sentence 2, (3) sentence 2 BGB version effective 1 Jan. 2022.

227 §§ 327-327u German Civil Code.

228 §§ 922 et seqq. Austrian Civil Code; see C. Jeloschek, 'The Transposition of Directive 99/44/EC into Austrian Law', 9. *ERPL* 2001, p (163) at 166-167.

229 §§ 922, 932 Austrian Civil Code as implemented by the Federal Act amending the warranty law in the General Civil Code and the Consumer Protection Act as well as the Insurance Contract Act of 8 May 2001, Federal Law Gazette for the Republic of Austria Part I No 48/2001, 1019, www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2021_I_175/BGBLA_2021_I_175.pdfsig.

230 § 9a Consumer Protection Act; see C. Jeloschek, 9. *ERPL* 2001, pp 168-170.

231 H.-P. Mansel, 204. *AcP* 2004, p 414.

Therefore, Austria still distinguishes between delay, impossibility, and non-conformity.[232]

44. To implement the 2019 Directives, a new Consumer Warranty Act was created.[233] As regards questions of non-conformity, the provisions of the 2019 Sale of Goods and Digital Contents Directives were merged and systematized.[234] This shows that the Directives could also have avoided unnecessary duplications.[235] By outsourcing the consumer rules, Austria is now in the unfortunate situation of having two similar but not identical regimes of non-conformity.

4.1.6. Greece

45. In implementing the 1999 Consumer Sales Directive, Greece is one of the few countries besides Germany and Austria that have generalized the rules on non-conformity to govern all kinds of sales contracts.[236] However, like in Austria, there was not enough time for a reform of the entire civil code due to strict implementation deadline.[237] Thus, the general law on breach of contract is still based on the old distinction between impossibility, delay, and defective performance. With regard to damages, Greece retained the fault-based approach.[238] At the date of writing, it is not yet reported on the EUR-lex website how Greece implemented the 2019 Sale of Goods and Digital Contents Directives.[239]

4.1.7. Slovenia and Croatia

46. Slovenia and Croatia both were part of the Kingdom of Yugoslavia and then the Socialist Federal Republic until 1992. Yugoslavia had already enacted a Law of Obligation Act in 1978 that was influenced by the CISG's predecessors and drafts

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232 §§ 918–919 (delay), §§ 878, 920–921 (impossibility), and §§ 929 et seqq. Austrian Civil Code (non-conformity); see M. Schauer, 'Grundprinzipien des Leistungsstörungsrechts im ABGB, UN-Kaufrecht und in den PECL – eine vergleichende Skizze', in H. Honsell et al. (eds), *Privatrecht und Methode. Festschrift für Ernst A. Kramer* (Basel/Genf/München: Helbing & Lichtenhahn 2004), p 627.

233 Federal law enacting a federal law on warranties in consumer contracts for goods or digital services and amending the General Civil Code and the Consumer Protection Act of 9 Sep. 2021, Federal Law Gazette for the Republic of Austria Part I No 175/2021, effective 1 Jan. 2022, www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2021_I_175/BGBLA_2021_I_175.pdfsig.

234 B. Zöchling-Jud, 'Digital Consumer Contract Law and New Technologies. Implementation of the Digital Content Directive in Austria', 12. *JIPITEC* 2021, p (221) at 225.

235 See text accompanying *supra* n. 127.

236 Article 534 Greek Civil Code as implemented by Law 3043/2002; see G.I. Arnokouros, 'The Transposition of the Consumer Sales Directive into the Greek Legal System', 9. *ERPL* 2001, p 259; H.-P. Mansel, 204. *AcP* 2004, pp 415–423; E. Zervogianni, 'Greece', in *CISG and Impact*, p (163) at 176.

237 H.-P. Mansel, 204. *AcP* 2004, p 415.

238 E. Zervogianni, in *CISG and Impact*, pp 175–180.

239 As of 9 May 2022. See https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=uriserv:OJ.L_.2019.136.01.0028.01.ENG and https://eur-lex.europa.eu/legal-content/DE/NIM/?uri=CELEX:32019L0770.

of the CISG.[240] After gaining independence, new law of obligations acts were enacted based on the old Yugoslav act.

47. The new Slovenian Law of Obligations Act took effect on 1 January 2002.[241] It did not contain any conceptual changes and only minor modifications compared to its Yugoslav predecessor.[242] Thus, there is still no uniform concept of breach, and a very different treatment of non-performance, defective performance, and impossibility.[243] However, certain features of the CISG's predecessors can still be found, such as *ipso facto* avoidance.[244] Damages are based on strict liability, the foreseeability principle, and a possibility of exemption for circumstances arising (only) after the conclusion of the contract that the party in breach could not have overcome or avoided.[245] Still, the foreseeability limitation is excluded where the breach was grossly negligent or intentional as under the PECL.[246]

There are also a few interesting features which deserve special attention. First, a great improvement over the system under the CISG is that gains of the party in breach are explicitly to be considered when calculating damages.[247] Moreover, the rule on change of circumstances, unlike under the PECL, does not allow the court to adapt the contract but only to terminate it; the parties are under no duty to renegotiate.[248] The contract will not be terminated where the other party offers or agrees to an equitable variation of the relevant terms of the contract.[249] Allowing the court only to terminate the contract avoids some of the uncertainties normally associated with change of circumstances and is close to the solution found under the CISG.[250]

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240 M. Baretić & S. Nikšić, 'Croatia', in *CISG and Impact*, p (93) at 103; D. Možina, 'Breach of Contract and Remedies in the Yungoslav Obligations Act: 40 Years Later', *ZEuP* 2020, p (134) at 136.

241 Law of Obligations Act, Official Gazette of the Republic of Slovenia, No 83/01 of 25 Oct. 2001, effective 1 Jan. 2002, English version, www.uil-sipo.si/fileadmin/upload_folder/zakonodaja/povezano/Obligations-Code_Slovenia_2001.pdf.

242 D. Možina, *ZEuP* 2020, pp 135, 167 speaks of a missed opportunity.

243 D. Možina, *ZEuP* 2020, pp 137–138.

244 Articles 104(1), 105(3) Slovenian Law of Obligations Act; see D. Možina, *ZEuP* 2020, pp 153–154. The same applies in Croatia, see Arts 361(1), 362(3) Croatian Law of Obligations Act.

245 Articles 239(2)–(4), 240, 243(1) Slovenian Law of Obligations Act; see D. Možina, *ZEuP* 2020, pp 157–159. The same applies in Croatia, see Arts 342(2), 343, 346(1) Croatian Law of Obligations Act.

246 Article 243(2) Slovenian Law of Obligations Act; see D. Možina, *ZEuP* 2020, p 160; for a criticism of this rule-exception mechanism, see text accompanying *supra* n. 83. The same applies to Croatia, see Art. 346(2) Croatian Law of Obligations Act.

247 Article 243(3) Slovenian Law of Obligations Act. The same applies to Croatia, see Art. 346(3) Croatian Law of Obligations Act. Some authors also advocate in favour of disgorgement of profits under Art. 74 CISG, see I. Schwenzer, in *Schlechtriem & Schwenzer*, Art. 74, para. 45.

248 Article 112 Slovenian Law of Obligations Act; see D. Možina, *ZEuP* 2020, p 142. In Croatia, however, it seems like the aggrieved party may also request the court to adapt the contract, see Art. 369(1) Croatian Law of Obligations Act.

249 Article 112(4) Slovenian Law of Obligations Act.

250 See text accompanying *supra* n. 91.

In contrast, there is no reason why the legislator changed the requirement of foreseeability at the time of the conclusion of the contract to foreseeability at the time of breach.[251] Usually, parties make their assessment of risk at the time when they enter into a contract. Taking reference to the point in time of breach is a significant expansion of their liability.[252]

48. Since the 2006 Croatian Law of Obligations Act[253] is also based on the Yugoslav predecessor, most of the points just mentioned also apply to Croatian law.[254] Unlike Slovenia, however, foreseeability is correctly linked to the time of conclusion of the contract.[255] What is more, Croatia directly implemented the 1999 Consumer Sales Directive into the Law of Obligations Act.[256] In doing so, the rules on non-conformity were extended first to B2B and C2C relationships and second to all types of contracts with consideration.[257] When implementing the 2019 Sale of Goods Directive, the definition of non-conformity was updated to fit the European requirements.[258] In contrast, the 2019 Digital Contents Directive was transposed in a separate act.[259]

4.1.8. Romania

49. Romania reformed its civil code of 1865, which was strongly influenced by French law, with effect from 1 October 2011.[260] Besides from turning to a monist system, the legislator is said to have taken inspiration from the CISG, PICC, and PECL in the areas of remedies.[261] Most remedies available in case of

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251 Article 243(1) Slovenian Law of Obligations Act.

252 D. Možina, *ZEuP* 2020, p 160.

253 Law of Obligations Act, Official Gazette of the Republic of Croatia, No 35/05, English version, www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation__Civil-Obligations-Act.pdf.

254 The footnotes in the previous paragraph also refer to Croatia where a given rule also applies under the Croatian Law of Obligations Act.

255 Article 346(1) Croatian Law of Obligations Act.

256 I. Kanceljak, 'Reform of Consumer Sales Law of Goods and Associated Guarantees – Possible Impact on Croatian Private Law', 2. *EU and Comparative Law Issues and Challenges Series* 2018, p (586) at 599–600.

257 Articles 357(1) (3), 401 Croatian Law of Obligations Act; see I. Kanceljak, 2. *EU and Comparative Law Issues and Challenges Series* 2018, p 600.

258 Article 401 Croatian Law of Obligations Act as amended by the Law on Amendments to the Law on Obligations of 12 Nov. 2021, Law Gazette 126/2021, 15, effective 1 Jan. 2022, https://narodne-novine.nn.hr/clanci/sluzbeni/2021_11_126_2134.html.

259 Law on Certain Aspects of Contracts for the Delivery of Digital Content and Digital Services, Law Gazette 110/2021, 1, effective 1 Jan. 2022, www.zakon.hr/z/2968/Zakon-o-određenim-aspektima-ugovora-o-isporuci-digitalnog-sadržaja-i-digitalnih-usluga.

260 Law No 287/2009 on the Civil Code of 24 Jul. 2009, effective 1 Oct. 2011, http://legislatie.just.ro/Public/DetaliiDocument/175630.

261 L. Bojin, 'The Law of Obligations in Romania', in *Law of Obligations in Europe*, p (377) at 382–383.

breach of contract are now listed in a single provision.[262] However, damages are still fault-based coupled with the foreseeability requirement.[263] Like under the PECL, the foreseeability limitation does not apply where the non-performance is intentional or due to gross negligence.[264] As regards avoidance, Romania abolished the requirement of court involvement.[265] A new regulation on hardship was also introduced.[266]

4.1.9. Czechia

50. Shortly after gaining independence in 1989, Czechoslovakia split up into what is now Czechia and Slovakia. In 2012, Czechia enacted a brand-new civil code, which took effect on 1 January 2014.[267] It features a monist system which means that most European consumer law was transposed in the new code.[268]

51. As regards the non-conformity of the goods, there are obvious similarities to the CISG.[269] The primary reference point for conformity is the contractual agreement; apart from that, every departure from the usually expected quality, type, quantity and packaging is covered.[270] However, there is a different definition of non-conformity for consumer sales[271] and a general definition of non-conformity covering all types of contracts with consideration.[272] Thus, the question arises as to what is the relationship to the general definition. Moreover, since the rules of the CISG and the 1999 Consumer Sales/2019 Sale of Goods Directives are so similar, it

262 Article 1516 Romanian Civil Code.

263 Articles 1533, 1547 Romanian Civil Code. However, fault is presumed under Art. 1548 Romanian Civil Code; see C. Alunaru, 'Contract Formation and Non-performance in Romanian Law', in *Law of Obligations in Europe*, p (387) at 393, 395.

264 Article 1533 Romanian Civil Code; for a criticism of this rule-exception mechanism, see text accompanying *supra* n. 83.

265 Article 1550(1) Romanian Civil Code; see C. Alunaru, 'Die Entwicklung des Zivilrechts in Rumänien', 63. *Osteuropa Recht* 2017, p (283) at 303.

266 Article 1271 Romanian Civil Code; on which see B. Oglinda, 'The Theory of Imprevision in the Context of the Economic Crisis and the New Romanian Civil Code (NCC)', 1. *Perspectives of Business Law Journal* 2012, p 230.

267 Law No 89/2012, effective 1 Jan. 2014, www.zakonyprolidi.cz/cs/2012-89.

268 L. Tichý, 'Czech and European Law of Obligations at a Turning Point', in *Law of Obligations in Europe*, p (27) at 36; M. Selucká, 'Contract Formation and Non-performance in Czech Civil Law', in *Law of Obligations in Europe*, p 51.

269 U. Magnus, 'Das Kaufrecht im tschechischen Entwurf eines neuen Zivilgesetzbuchs – ein Vergleich mit internationalen und europäischen Regelungen', in P. Apathy et al. (eds), *Festschrift für Helmut Koziol zum 70. Geburtstag* (Wien: Jan Sramek Verlag 2010), p (255) at 258.

270 §§ 2095–2098, 2099(1) Czech Civil Code.

271 § 2161 Czech Civil Code.

272 § 2161 Czech Civil Code (non-conformity in the context of consumer sales); §§ 1914–1920 Czech Civil Code (non-conformity in the context of the general rules on non-conformity).

is doubtful whether it makes sense to have two different regimes for consumer and all other types of sales.[273]

52. Further, the aggrieved party may avoid the contract if remedying the defect is not possible or if the breach is a material one.[274] Although the rule is to be welcomed in substance, it is provided for in slightly different wording at four points throughout the code.[275] Again, duplication could have been easily avoided. Damages for breach of contract can be combined with the other remedies,[276] and it appears that strict liability coupled with an exemption similar to Article 79 CISG were introduced.[277] Last, the new rules on change of circumstances provide for a duty to renegotiate the contract and empower the court to adapt the contract.[278]

4.1.10. Hungary

53. Under the Socialist regime in 1959, Hungary enacted its first civil code. After regaining its independence in 1989, the Socialist civil code was initially kept (with significant reforms). In 2013, however, Hungary enacted a new civil code that took effect on 15 March 2014.[279] It was inspired by the PICC, the PECL, the DCFR, and the CISG, amongst others.[280]

54. The regime of remedies for breach of contract closely follows the approach of the CISG. To begin with, the new Code generally starts from a uniform breach of contract approach with avoidance and damages in principle open for any case of non-performance.[281]

Still, there are specific rules on delay, defective performance, and impossibility modifying the general rules.[282] Moreover, damages are now based on strict

273 U. Magnus, in *Festschrift Koziol*, p 270.

274 §§ 1923, 2002, 2106(1)(d), 2169(1) Czech Civil Code.

275 § 1923 Czech Civil Code (avoidance in the context of the general rules on non-conformity); § 2002 Czech Civil Code (avoidance in the context of the general rules on avoidance); § 2106(1)(d) Czech Civil Code (avoidance in the context of the general rules on sale of goods), § 2169(1) Czech Civil Code (avoidance in the context of sale of consumer goods).

276 § 1925 Czech Civil Code.

277 § 2913 Czech Civil Code; not clear in the English-language literature.

278 §§ 1764–1766 Czech Civil Code; see M. Selucká, in *Law of Obligations in Europe*, p 61; L. Tichý, in *Law of Obligations in Europe*, p 38.

279 Act V of 2013 on the Civil Code, effective 15 Mar. 2014; English translation, www.ilo.org/dyn/natlex/docs/ELECTRONIC/96512/114273/F720272867/Civil_Code.pdf.

280 Á. Fuglinszky, 'The Reform of Contractual Liability in the New Hungarian Civil Code. Strict Liability and Foreseeability Clause as Legal Transplants', 79. *RabelsZ* 2015, p (72) at 76; G. Czirfusz & B.A. Keserű, 'Hungary', in P. Lavický et al. (eds), *Private Law Reform* (Brno: Masarykova Univerzita 2014), p (171) at 178.

281 §§ 6:137, 6:140, 6:142 Hungarian Civil Code.

282 §§ 6:153–6:155 (delay), §§ 6:157–6:178 (defective performance), and §§ 6:179–6:182 Hungarian Civil Code (impossibility).

liability coupled with a foreseeability exception.[283] Like under the PECL, the foreseeability exception does not apply in cases of intentional non-performance (gross negligence is not mentioned).[284] Additionally, the code distinguishes between direct and consequential damages; the former are always recoverable irrespective of foreseeability. It is to be expected that this distinction will be very difficult to apply in practice.[285] Like under Articles 77, 79 and 80 CISG, the party in breach can be exempted where the 'damage occurred in consequence of unforeseen circumstances beyond its control, and there had been no reasonable cause to take action for preventing or mitigating the damage'.[286]

Moreover, avoidance is available where the interest in the contractual performance has ceased, i.e., where there is a fundamental breach in CISG terminology.[287] The codification also features a hardship provision for long term contractual relationships with the possibility of contract amendment by court order.[288]

55. Last, Hungary generalized the rules on non-conformity found in the CISG and the 1999 Consumer Sales Directive to apply not only to B2C contracts, but to all types of contracts.[289] However, the rules of the 2019 Sale of Goods and Digital Contents Directives were implemented in a separate government decree,[290] thus fragmenting the general rules on non-conformity.

4.1.11. France

56. The French Civil Code has seen very little reforms since coming into force in 1804.[291] Over the years, the need was felt to modernize and adapt the code.[292]

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283 §§ 6:142 sentence 1, 6:143(2) Hungarian Civil Code; see Á. Fuglinszky, 79. *RabelsZ* 2015, p 76, who notes at 81–83 that it may be problematic that strict liability also applies to best efforts contracts.

284 § 6:143(2) and (3) Hungarian Civil Code; for a criticism of this rule-exception mechanism, see text accompanying *supra* n. 83.

285 See the discussion of Á. Fuglinszky, 79. *RabelsZ* 2015, pp 86–88.

286 § 6:142 sentence 2 Hungarian Civil Code; see L. Vékás, 'About Contract Law in the New Hungarian Civil Code', 6. *ERCL (European Review of Contract Law)* 2010, p (95) at 98; Á. Fuglinszky, 79. *RabelsZ* 2015, pp 79–81.

287 § 6:140 Hungarian Civil Code.

288 § 6:192 Hungarian Civil Code.

289 See § 6:157 Hungarian Civil Code.

290 Government Decree 373/2021. (VI. 30.) on the detailed rules of contracts between consumers and businesses for the sale of goods and the provision of digital content and the provision of digital services, Law Gazette 123, effective 2 Jan. 2022, https://njt.hu/jogszabaly/2021-373-20-22.

291 S. Rowan, 'The New French law of contract', 66. *ICLQ (International & Comparative Law Quarterly)* 2017, p (805) at 806.

292 E. Muñoz & I. Morfín Kroepfly, 22. *EJLR* 2020, pp 184–185; for more details of the genesis and the motives of the 2016 reforms, see S. Rowan, 66. *ICLQ* 2017, pp 807–811.

Thus, with effect from 1 October 2016, the sections on contracts and law of obligations were entirely restructured.[293] Still, the reforms did not integrate consumer law into the Civil Code.[294]

57. Most importantly, the remedies for breach of contract have been collected and restructured in Book 3, Title 3, section 5 on 'non-performance of the contract'.[295] At the outset, there is a new article that lists the five remedies available to the party 'to which the commitment has not been executed, or has been executed imperfectly'.[296] Under the hood, the law on damages did not change significantly. Therefore, delay damages require notice and are to be distinguished from damages for final non-performance.[297] Exemption for *force majeure* is now defined in an almost verbatim adoption of Article 79(1) CISG.[298] Recoverable damages are limited to those foreseeable at the time of the conclusion of the contract, unless the non-performance is due to gross negligence/ fraud.[299]

Price reduction, which was previously restricted to sales contracts,[300] is now available for every contract in case of defective performance.[301] Further, avoidance by notice is now formally recognized.[302] In substance, the contract may be avoided where the breach is sufficiently serious.[303] While sounding familiar to the notion of fundamental breach, a definition like under Article 25 CISG is not provided for.[304] On top, there are various procedural safeguards which unduly restrict the right to avoid.[305] At the same time, the legislator missed the chance to provide for

293 Ordinance No 2016-131 of 10 Feb. 2016 reforming the law of contracts, the general regime and proof of obligations, effective 1 Oct. 2016, English translation, www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf.

294 Instead, there is a separate Consumer Code; see S. Grundmann & M.-S. Schäfer, 'The French and the German Reforms of Contract Law', 13. *ERCL* 2017, p (459) at 467–468, 474–475.

295 S. Rowan, 66. *ICLQ* 2017, p 821.

296 Article 1217 French Civil Code.

297 Articles 1231, 1344 French Civil Code; compare with Art. 1146 old French Civil Code.

298 Articles 1231–1231, 1218 French Civil Code; see E. Muñoz & I. Morfín Kroepfly, 22. *EJLR* 2020, p 205; T. Genicon, 'The Exception d'Inexécution', in J. Cartwright & S. Whittaker (eds), *The Code Napoléon Rewritten. French Contract Law after the 2016 Reforms* (Oxford: Hart Publishing 2017), p 291. Compare with Art. 1148 old French Civil Code.

299 Article 1231-1233 French Civil Code; compare with Art. 1150 old French Civil Code. For a criticism of the rule-exception mechanism in the case of fraud or gross negligence, see *supra* n. 83 and accompanying text.

300 S. Grundmann & M.-S. Schäfer, 13. *ERCL* 2017, p 477.

301 Article 1223 French Civil Code.

302 Article 1226 French Civil Code. Previously, the 1804 Civil Code required the aggrieved party to apply to the court to terminate the contract [Art. 1184 of the 1804 French Civil Code]; on exceptions under the old law, see K. Zweigert & H. Kötz, *Comparative Law*, p 498.

303 Article 1224 French Civil Code; see generally S. Rowan, 'Termination for Contractual Non-performance', in *Code Napoléon Rewritten*, p 317.

304 See the criticism of S. Rowan, 66. *ICLQ* 2017, p 829.

305 S. Rowan, 66. *ICLQ* 2017, p 824.

avoidance in case of an anticipatory breach.[306] Moreover, the 2016 reforms introduced a new hardship provision.[307] While existing jurisprudence had always rejected the idea,[308] the new article provides for a duty to renegotiate and adaption or termination by the court.[309]

58. It is certainly a missed opportunity that the provisions on sales were not affected by the 2016 reforms. Hence, different remedies apply where the statutory warranty for hidden defects is breached.[310] In these cases, the buyer may resort to avoidance or price reduction (with a limitation period of two years).[311] Damages are only available in the case of knowledge.[312] Only in the case of non-delivery, the modern regime of general remedies discussed above applies (with a limitation period of five years).[313] As a consequence, the distinction between *peius* and *aliud* will still be of great importance even in 2022.[314]

5. Conclusion and Outlook

59. Overall, we can clearly identify a trend of European private law to adopt solutions found under the CISG. On the European level, the 1999 Consumer Sales Directive adopted much of the definition of non-conformity from the CISG, abandoning the old *peius* and *aliud* distinction. Under the 2019 Sale of Goods Directive, the convergence is even clearer, now also addressing packaging and quantity. The true extent of the influence is evident when considering that these directives had to be transposed in all 27 EU Member States[315]; in some, they were even extended beyond their original sphere of application while

306 The absence is surprising in the light of earlier reform projects, see S. Rowan, 66. *ICLQ* 2017, pp 829–830.

307 Article 1195 French Civil Code; see generally B. Fauvarque-Cosson, 'Does Review on the Ground of Imprévision Breach the Principle of the Binding Force of Contracts?', in *Code Napoléon Rewritten*, p 187.

308 S. Rowan, 66. *ICLQ* 2017, pp 820–821.

309 See E. Muñoz & I. Morfín Kroepfly, 22. *EJLR* 2020, p 206; for a criticism for this type of hardship provision, see text accompanying *supra* n. 91.

310 Article 1641 French Civil Code; see E. Muñoz & I. Morfín Kroepfly, 22. *EJLR* 2020, p 200.

311 Articles 1644, 1648 French Civil Code; see E. Muñoz & I. Morfín Kroepfly, 22. *EJLR* 2020, p 200.

312 Article 1645 French Civil Code. However, a professional seller is taken to always know of the defects of the goods it is dealing with, see K. Zweigert & H. Kötz, *Comparative Law*, p 502.

313 Article 2224 French Civil Code (five years limitation period); see E. Muñoz & I. Morfín Kroepfly, 22. *EJLR* 2020, p 200.

314 On which see the text accompanying *supra* n. 27.

315 The 1999 Consumer Sales Directive also had to be transposed in the UK, which was still an EU Member State at that point in time.

others implemented similar rules independent of transposing the consumer directives. Considering the EEA, we find rules very similar to Article 35 CISG applying beyond B2C transactions in 12 national laws.[316]

Furthermore, the PECL, DCFR, and CESL were valuable tools in reform discussions as they cover wider areas of private law than the CISG and thus make it easier to translate its core elements to general contract law. It was therefore possible for 16 EU and EEA Member States to modernize their laws with regard to breach of contract and the remedy mechanism.[317] Today, strict liability, exemption for impediments beyond control, and limitation of damages by a criterium of foreseeability are found in eleven European countries.[318] Likewise, the concept of avoidance based primarily on the intensity of the breach features in eight Member States.[319] Other countries like the Netherlands, Germany, Slovenia, and Croatia use the formal criterium of *Nachfrist* to the same effect. Further, the Netherlands, Romania, and France now formally recognize avoidance by declaration instead of court involvement, and Germany removed fault as a requirement for avoidance in cases of delay. Last, the uniform breach of contract approach found its way, with restrictions, into the law of five Member States.[320]

60. Apart from these convergences with the CISG, there are also some departures from rules found under the CISG. It is to be welcomed that under the PECL exemption also bars specific performance. Further, Slovenia introduced the possibility of gain-based damages. However, there are also some divergences where it would have been better to stay with the solutions found under the CISG. To begin with, the narrow definition of sale of goods at the European level made it necessary to introduce the 2019 Digital Contents Directive. Further, the foreseeability exception in cases of gross negligence or fraud found under the PECL, DCFR and in six Member States[321] is not convincing. Likewise, fixing the time for foreseeability to the point of breach of contract like in Slovenia needs to be criticized. On top, the distinction between direct and indirect loss in the Nordic countries has deterred Denmark from joining the new Sale of Goods Acts. Finally, a separate hardship clause for cases of change of circumstances like under the PECL, DCFR, CESL, and the law of 10 Member States[322] is neither necessary nor desirable to appropriately

316 Austria, Croatia, Czechia, Estonia, Finland, Germany, Greece, Hungary, Iceland, Lithuania, the Netherlands, and Norway.

317 Austria, Croatia, Czechia, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Lithuania, the Netherlands, Norway, Romania, Slovenia, and Sweden.

318 Croatia, Czechia, Estonia, Finland, France, Hungary, Iceland, Norway, Romania (only foreseeability), Slovenia, and Sweden.

319 Czechia, Estonia, Finland, France (with restrictions), Hungary, Iceland, Lithuania, and Sweden.

320 Estonia, France, Germany, Hungary, and the Netherlands.

321 Croatia, Estonia, France, Hungary, Romania, and Slovenia.

322 Croatia, Czechia, Estonia, France, Germany, Hungary, Lithuania, the Netherlands, Romania, and Slovenia.

deal with the arising problems. Rather, the approach of the CISG which does not distinguish between impediments and hardship is preferable. Of the approaches chosen in Europe, the approach of Slovenia still seems to be passable; it only empowers the court to terminate the contract unless an acceptable offer of modification was made. While the DCFR and the Netherlands also empower the court to modify the contract, at least they do not provide for a duty to renegotiate.

61. Among the reformers, 'classic' civil law countries like France and Germany are conspicuous for their attachment to more traditional elements of their respective civil codes, i.e., their local customs. In contrast, other countries like Estonia and Hungary are much more open to follow modern international standards. It certainly begs the question whether the ideal of legal unity justifies sacrifice of self-determination on the domestic level. Of course, law reformers should not blindly follow the rules of the CISG because of external force (*ratione imperii*). Nevertheless, the CISG has a large number of rules in its core area which are very convincing (*imperio rationis*). Therefore, the CISG rightfully inspires law reformers not only in Europe but all over the world.[323] If in 2022 Saint Augustine travelled to the realms of sales and contract law, he should be advised to be guided by the CISG and not to experiment without compelling reasons. This finding may be of particular interest for those countries that are considering a reform of their civil law codification, such as Italy,[324] Spain,[325] or Belgium.[326]

323 See for instance the recent reforms in Argentine, Japan, and China, *supra* nn. 10–12.

324 See L. Balestra, V. Cuffaro, C. Scognamiglio & G. Villa, 'Proposte di riforma del codice civile: prime riflessioni', 5. *Il Corriere giuridico* 2019, p 589; E. Scoditti, *L'importanza della riforma del codice civile nel pensiero di Giuseppe Conte*, www.questionegiustizia.it/articolo/l-importanza-della-riforma-del-codice-civile-nel-pensiero-di-giuseppe-conte_24-03-2020.php.

325 See M. Valenzuela & M. Angel, *La modificación del Código Civil en materia de obligaciones y contratos*, https://diariolaley.laleynext.es/dll/2019/10/28/la-modificacion-del-codigo-civil-en-materia-de-obligaciones-y-contratos1.

326 See F. Peeraer & I. Samoy, 'The Belgian Civil Code: How to Restore its Central Position in Modern Private Law?', 24. *ERPL* 2016, p 601.