

Schulze / Zoll

# European Contract Law

C.H.BECK · Hart · Nomos

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by

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2016

C.H.BECK · Hart · Nomos

*Published by*

Nomos Verlagsgesellschaft, Waldseestraße 3-5, 76530 Baden-Baden, Germany,  
email: vertrieb@nomos.de

*Co-published by*

Verlag C.H.BECK oHG, Wilhelmstraße 9, 80801 München, Germany,  
email: bestellung@beck.de

and

Hart Publishing, 16C Worcester Place, Oxford, OX1 2JW, United Kingdom,  
email: orders@isbs.com

Published in North America (US and Canada) by Hart Publishing,  
c/o International Specialized Book Services,  
930 NE 58<sup>th</sup> Avenue, Suite 300, Portland, OR 97213-3786, USA,  
email: orders@isbs.com

ISBN 978-3-8487-2194-8 (Nomos)

ISBN 978-3-8452-6510-0 (eLibrary)

ISBN 978-3-406-68537-8 (C.H.BECK)

ISBN 978-1-50990-042-8 (Hart Publishing)

First Edition 2016

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# Foreword

Contract law is at the centre of the development of European private law. Thirty years of European directives and CJEU jurisprudence have contributed to the growth of an extensive *acquis communautaire* with its innovative approaches and increasing influence on the laws of the Member States. Furthermore, drafts such as the Principles of European Contract Law and legislative projects such as the European Commission's Proposal for a Common European Sales Law have also contributed to the conceptual development and structure of this new area of law. The development of European contract law requires contributions from jurists across Europe, therefore this volume intends to allow practitioners, students and scholars to participate in an ever growing, dynamic and highly interesting area of modern law. In order to do so the volume provides fundamental information about the content, methods and objectives of European legislation in the field of contract law and explains the interaction between the legislator, judges and academics during the creation of European contract law. It particularly attempts to show European contract law's characteristics as supranational law as well as the innovative features vis-à-vis traditional concepts in contract law. Above all, the volume strives to guide jurists along an often unfamiliar path and to promote an understanding of the characteristics of a new legal development.

The focus on the features of this development as well as the resulting structures is all the more important as this volume has been published at a time of great uncertainty regarding the next legislative steps in European private law. The European Commission has announced that it will retract its Proposal for a Common European Sales Law and will instead take other measures; though as yet no light has been cast on the form or scope of these measures. It is however likely that future legislation will relate to issues on online trading and 'digital contracts'. These recent developments may cause the reader to ask whether the Common European Sales Law's key role in this volume on European contract law is now superfluous. However, this concern is unfounded as the volume was not conceived with the intention to illustrate the individual doctrinal features of European private law but rather to depict how the legal system is developing and the important contributions made by the various different legal sources. The emerging *acquis communautaire* is involved in a tense relationship with the laws of the Member States, the EU legislator, the EU courts as well as academic drafts – above all in the form of comprehensive proposals aiming at greater coherency in European contract law. The Common European Sales Law indeed reflected a new stage in the development of a European contract law, though similar comments also apply to proposals such as the Draft Common Frame of Reference, the 'Acquis Principles' and many others.

The volume attempts to show how a system arises from the dialogue between the different sources; in this respect it is not limited to current legislation. It

adopts a method employed by the ‘Acquis Group’ which seeks to use fragmented European sources in order to create a system. The system is vastly different from the legal systems of the Member States which, however, also influence the development of a system of common European law. It will be seen from this volume that the development has certainly been dynamic, yet its path has taken many twists and turns. The Common European Sales Law will not vanish without a trace as it will have long-term influence on the features of the European legal landscape and will serve as a ‘reference’ for the future development of European private law.

The volume is based on the many discussions between the authors and their work together on a number of research projects. Its content and structure are based on the German edition (Nomos, April 2015) though with several additions (in particular on interpretation, change of circumstances, and an ‘outlook’) and updates. The Chapters 1, 3 I and IV, 5, 6 I and IV, 8 were written by Reiner Schulze and Chapters 2, 3 II and III, 4, 6 II and III, 7 by Fryderyk Zoll. These latter chapters formed part of the project ‘Made in Europe – European Legal Standards of Quality of Services Performed under the Competitive Conditions of the Global Market. The Model Solutions for Law of Obligations Oriented on Services’. The project was funded by the Narodowe Centrum Nauki (National Science Centre) under the decision no. DEC-2012/04/A/HS5/00709.

The authors would like to take this opportunity to once again thank their research assistants, Darja Bäßler, Benedikt Beierle, Sven Coerdes, Johannes Fiukowski, Benjamin Hassing, Julia Henning, Monika Kubela, Jana Schulte, and Claudia Switenko for their contribution to the German version and therefore in providing the basis for this English version. The authors especially thank Jonathon Watson for preparing the English version; the full responsibility remains however with the authors.

*September 2015*

*Reiner Schulze  
Fryderyk Zoll*

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# Abbreviations

|                             |   |
|-----------------------------|---|
| ABGB                        | Allgemeines bürgerliches Gesetzbuch; Austrian Civil Code  |
| AcP                         | Archiv für die civilistische Praxis   |
| ACQP                        | Principles of the Existing EC Contract Law (Acquis Principles)  |
| ADR                         | Alternative Dispute Resolution  |
| ADR Directive               | Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes                                   |
| AGB                         | Allgemeine Geschäftsbedingungen; general terms and conditions   |
| Art(s)                      | Articles(s)   |
| Bd.                         | Band; volume  |
| BGB                         | Bürgerliches Gesetzbuch; German Civil Code  |
| BGHZ                        | Entscheidungen des Bundesgerichtshofs in Zivilsachen; Decisions of the German Federal Court of Justice (Civil Law)  |
| BT-Drucks.                  | Bundestagsdrucksache; Bundestag document  |
| BW                          | Burgerlijk Wetboek; Dutch Civil Code  |
| CESL                        | Common European Sales Law   |
| CESL-D                      | Common European Sales Law (Draft Annex I)   |
| CESL-Reg-D                  | Common European Sales Law (Draft Regulation)  |
| CISG                        | United Nations Convention on Contracts for the International Sale of Goods  |
| CJEU                        | Court of Justice of the European Union  |
| CMLR                        | Common Market Law Review  |
| Code Civil                  | French Civil Code   |
| Codice Civile               | Italian Civil Code  |
| Commercial Agents Directive | Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents                           |
| Consumer Credit Directive   | Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers  |
| Consumer ODR Regulation     | Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes                                 |
| CoPECL                      | Common Principles of European Contract Law  |
| Consumer Rights Directive   | Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights  |
| Consumer Sales Directive    | Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees                |
| Cultural Objects Directive  | Directive 2014/60/EU of the European Parliament and of the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State |
| CUP                         | Cambridge University Press  |

## Abbreviations

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| DCFR   | Draft Common Frame of Reference   |
| Distance Marketing of Financial Services Directive | Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services  |
| DNotZ  | Deutsche Notar-Zeitschrift  |
| EC   | European Community  |
| ECHR   | European Convention on Human Rights   |
| ECJ  | European Court of Justice   |
| E-Commerce Directive                               | Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market |
| ECR  | European Court Reports  |
| ECTHR  | European Court of Human Rights  |
| Ed(s)  | Editor(s)   |
| Edn  | Edition   |
| EEC  | European Economic Community   |
| E.g.   | Exempli gratia; for example   |
| EGBGB  | Einführungsgesetz zum Bürgerlichen Gesetzbuche; Introductory Act to the German Civil Code   |
| Employment Equality Directive                      | Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation  |
| EP   | European Parliament   |
| ERCL   | European Review of Contract Law   |
| ERPL   | European Review of Private Law  |
| E-Signature Directive                              | Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures   |
| Etc.   | Et cetera; and the rest   |
| Et seq.  | Et sequential; and the following  |
| EU   | European Union  |
| EUI  | European University Institute   |
| EuZW   | Europäische Zeitschrift für Wirtschaftsrecht  |
| EWS  | Europäisches Wirtschafts- und Steuerrecht   |
| Gender Directive                                   | Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services                               |
| GPR  | European Union Private Law Review   |
| HK-BGB   | Bürgerliches Gesetzbuch – Handkommentar   |
| HZ   | Historische Zeitschrift   |
| i.e.   | Id est; that is   |
| INCOTERMS  | International Commercial Terms  |
| Insurance Mediation Directive                      | Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation  |
| JR   | Juristische Rundschau   |

## Abbreviations

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| JZ   | JuristenZeitung   |
| Late Payment Directive                     | Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions                          |
| Late Payment Directive 2000                | Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions                             |
| Life Assurance Directive                   | Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance   |
| Markets in Financial Instruments Directive | Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments   |
| MJ   | Maastricht Journal of European and Comparative Law  |
| MLR  | Modern Law Review   |
| MMR  | Multimedia und Recht  |
| Mortgage Credit Directive                  | Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property |
| MüKo                                       | Münchener Kommentar zum Bürgerlichen Gesetzbuch   |
| n  | Footnote  |
| No.  | Number  |
| NJW  | Neue Juristische Wochenschrift  |
| nyr  | Not yet reported  |
| ODR  | Online Dispute Resolution   |
| OJ   | Official Journal of the European Union  |
| OR   | Obligationenrecht; Swiss Law of Obligations   |
| OUP  | Oxford University Press   |
| Package Travel Directive                   | Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours  |
| Para(s)                                    | Paragraph(s)  |
| Payment Services Directive                 | Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market                                   |
| PECL                                       | Principles of European Contract Law   |
| PEL  | Principles of European Law  |
| PICC                                       | Principles for International Commercial Contracts   |
| QB   | Queen's Bench Division  |
| RabelsZ                                    | Rabels Zeitschrift für ausländisches und internationales Privatrecht  |
| Racial Equality Directive                  | Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin                  |
| Reg  | Regulation  |
| RGZ  | Decisions of the Reich Court (Civil Law)  |
| RIDC                                       | Revue internationale de droit comparé   |
| Riv.Dir.Civ.                               | Rivista di Diritto Civile   |

## Abbreviations

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| Rome I Regulation                     | Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations   |
| RTD Civ.                              | Revue Trimestrielle de Droit Civil   |
| Schmidt-Kessel CESL                   | Schmidt-Kessel (ed), Der Entwurf für ein Gemeinsames Europäisches Kaufrecht – Kommentar (Sellier 2014)   |
| Schulze CESL                          | Schulze (ed), Common European Sales Law – Commentary (Nomos 2012)  |
| SE                                    | Societas Europaea  |
| Services Directive                    | Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market   |
| SI                                    | Statutory Instrument   |
| SME                                   | Small and medium-sized enterprise  |
| TEU                                   | Treaty on the European Union   |
| TFEU                                  | Treaty on the Functioning of the European Union  |
| Timeshare Directive                   | Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts |
| Unfair Commercial Practices Directive | Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market   |
| UN                                    | United Nations   |
| UNIDROIT Principles                   | UNIDROIT Principles of International Commercial Contracts  |
| UWG                                   | Gesetz gegen den unlauteren Wettbewerb; German Unfair Competition Act  |
| VUWLR                                 | Victoria University of Wellington Law Review   |
| ZEuP                                  | Zeitschrift für Europäisches Privatrecht   |
| ZIP                                   | Zeitschrift für Wirtschaftsrecht   |
| ZJS                                   | Zeitschrift für das Juristische Studium  |
| ZRP                                   | Zeitschrift für Rechtspolitik  |