

Schulze / Zoll

European Contract Law

Second Edition

C.H.BECK · HART · NOMOS

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European Contract Law

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by

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Foreword

It is somewhat indicative of the nature of the developments in European contract law that a new edition of this volume was necessary just one year since the first edition. Legal science, practice and education have not only demanded a complete overview and structure of the extensive *acquis communautaire* but European contract law has also developed so rapidly since the first edition. Notably, the European Commission has ceased to pursue its proposal for a Common European Sales Law, yet the legal landscape has been shaped in particular by the new Package Travel Directive and Commission proposals for Directives on the Online Sale of Goods, and on the Supply of Digital Content. In addition, decisions from the CJEU have further developed, for instance, legislation on consumer guarantees, and the control of contract terms. Legal doctrine has also witnessed intense and lively discussions on the consequences of the ‘Digital Revolution’ for European contract law.

This new edition contains extensive changes and additions in order to accommodate the recent changes in European contract law. In comparison to the first edition, this second edition contains revisions in light of new approaches in European legislation, contract types and contract parties, unfair contract terms, performance obligations, and consequences of non-performance. Furthermore, this edition contains a sub-chapter on long-term contracts in European private law.

In considering the changes that arise for contract law from, above all, the new challenges presented by digitization, the new edition strives to fulfil an aim already outlined in the foreword to the first edition: to allow jurists from practice and legal science, as well as law students, to be a part of the on-going development of European contract law as a core element of European private law. Accordingly, the following volume conveys fundamental information on the content, methods and objectives of European legislation in this field and explains the interaction between legislation, case law, and legal science in the origins and development of European contract law. In particular, it attempts to outline the qualities of this supranational law and its innovative features in comparison to traditional contract law concepts. In so doing it seeks to serve as a guide to unfamiliar territory and promote an understanding of the characteristics of a new legal development.

The new edition is once more the product of numerous discussions between the authors. The chapters §§ 1; 3 II 1–6, III; 5; 6 I, IV, and 8 were written by Reiner Schulze, §§ 2, 3 I, II 7, 4, 6 II, III, and 7 by Fryderyk Zoll. The chapters authored by Fryderyk Zoll were completed as part of the project ‘Made in Europe – European Legal Standards of Quality for Services on the Global Competitive Market’ and funded by the Narodowy Centrum Nauki (National Science Centre) on the basis of decision Nr. DEC-2012/04/A/HS5/00709.

Foreword

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July 2017

Reiner Schulze/Fryderyk Zoll

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Abbreviations

| | |
|-------------------------------------|--|
| AcP | Archiv für die civilistische Praxis |
| ADR | Alternative Dispute Resolution |
| AG | Advocate General |
| AGB | Allgemeine Geschäftsbedingungen; general terms and conditions |
| Art(s) | Articles(s) |
| Bd. | Band; volume |
| B–B | Business-to-Business |
| B–C | Business-to-Consumer |
| BGH | Bundesgerichtshof; German Federal Court of Justice |
| BGHZ | Entscheidungen des Bundesgerichtshofs in Zivilsachen; Decisions of the German Federal Court of Justice (Civil Law) |
| Bianca/Grundmann EU Sales Directive | Bianca/Grundmann (eds), <i>EU Sales Directive: Commentary</i> (Intersentia 2002) |
| BT-Drucks. | Bundestagsdrucksache; Bundestag document |
| CESL | Common European Sales Law |
| CIEU | Contratto e impresa/europa |
| CJEU | Court of Justice of the European Union |
| CMLR | Common Market Law Review |
| Contract II | Research Group on the Existing EC Private Law (Acquis Group), <i>Principles of the Existing EC Contract Law (Acquis Principles) – Contract II: General Provisions, Delivery of Goods, Package Travel and Payment Services</i> (Sellier 2009) |
| CUP | Cambridge University Press |
| DCFR Full Edition | von Bar/Clive (eds), <i>Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) (Full Edition)</i> (Sellier 2009) |
| DNotZ | Deutsche Notar-Zeitschrift |
| EC | European Community |
| ECJ | European Court of Justice |
| ECLI | European Case Law Identifier |
| 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 |
| ELI | European Law Institute |
| EP | European Parliament |
| EULA | End User Licence Agreement |
| ERCL | European Review of Contract Law |
| ERPL | European Review of Private Law |
| et al. | Et alia; and others |

Abbreviations

| | |
|----------------|--|
| etc. | Et cetera; and the rest |
| et seq. | Et sequentia; and the following |
| EU | European Union |
| EuCML | Journal of European Consumer and Market Law |
| EUI | European University Institute |
| EuZW | Europäische Zeitschrift für Wirtschaftsrecht |
| EWS | Europäisches Wirtschafts- und Steuerrecht |
| FEDSA | Federation of European Direct Selling Associations |
| GPR | European Union Private Law Review |
| HanseLR | Hanse Law Review |
| HK-BGB | Schulze et al., <i>Bürgerliches Gesetzbuch – Handkommentar</i> (9th edn, Nomos 2017) |
| HZ | Historische Zeitschrift |
| ibid. | Ibidem; in the same place |
| i.e. | Id est; that is |
| IMCO | Internal Market Committee (European Parliament) |
| IWRZ | Zeitschrift für Internationales Wirtschaftsrecht |
| JR | Juristische Rundschau |
| JURI | Legal Affairs Committee (European Parliament) |
| JZ | JuristenZeitung |
| LQR | Law Quarterly Review |
| M-EPLI | Maastricht Faculty of Law European Private Law Institute |
| MJ | Maastricht Journal of European and Comparative Law |
| MLR | Modern Law Review |
| MMR | Multimedia und Recht |
| MüKo BGB | <i>Münchener Kommentar zum Bürgerlichen Gesetzbuch: BGB</i> (C.H. Beck) |
| n | Footnote |
| No. | Number |
| NJW | Neue Juristische Wochenschrift |
| NVwZ | Neue Zeitschrift für Verwaltungsrecht |
| ODR | Online Dispute Resolution |
| OJ | Official Journal of the European Union |
| OUP | Oxford University Press |
| Oxf J Leg Stud | Oxford Journal of Legal Studies |
| Para(s) | Paragraph(s) |
| QB | Queen's Bench Division |
| RabelsZ | Rabels Zeitschrift für ausländisches und internationales Privatrecht |
| Reg | Regulation |
| RGZ | Decisions of the Reich Court (Civil Law) |
| RIDC | Revue internationale de droit comparé |
| Riv.Dir.Civ. | Rivista di Diritto Civile |
| RTD Civ. | Revue Trimestrielle de Droit Civil |

Abbreviations

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| Schlechtriem/Schwenzer CISG | Schwenzer (ed), <i>Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods</i> (4th edn, OUP 2016) |
| Schmidt-Kessel CESL | Schmidt-Kessel (ed), <i>Der Entwurf für ein Gemeinsames Europäisches Kaufrecht – Kommentar</i> (Sellier 2014) |
| Schulze CESL | Schulze (ed), <i>Common European Sales Law – Commentary</i> (Nomos 2012) |
| Staudinger BGB | <i>J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB</i> (Sellier) |
| SE | Societas Europaea |
| SI | Statutory Instrument |
| SME | Small and Medium-sized Enterprise |
| UN | United Nations |
| VUWLR | Victoria University of Wellington Law Review |
| WM | Wertpapier-Mitteilungen |
| ZEuP | Zeitschrift für Europäisches Privatrecht |
| ZIP | Zeitschrift für Wirtschaftsrecht |
| ZJS | Zeitschrift für das Juristische Studium |
| ZRP | Zeitschrift für Rechtspolitik |

Legislation and Other Sources

| | |
|-----------------------------|--|
| ABGB | Allgemeines bürgerliches Gesetzbuch; Austrian Civil Code |
| ACQP | Principles of the Existing EC Contract Law (Acquis Principles) European Research Group on Existing EC Private Law (Acquis Group) (ed), <i>Principles of the Existing EC Contract Law (Acquis Principles) Contract I</i> (Sellier 2007) and <i>Contract II</i> (Sellier 2009) |
| 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 and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L165/63 |
| AGB-Gesetz 1976 | Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen; German Act on Standard Business Terms |
| BGB | Bürgerliches Gesetzbuch; German Civil Code |
| BW | Nieuwe Burgerlijk Wetboek; Dutch Civil Code |
| CESL | Common European Sales Law Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law COM(2011) 635 final. |
| CESL-D | Common European Sales Law (Draft Annex I) |
| CESL-Reg-D | Common European Sales Law (Draft Regulation) |
| CFR | Charter of Fundamental Rights of the European Union [2016] OJ C202/389 |
| CISG | United Nations Convention on Contracts for the International Sale of Goods |
| Coach Passenger Regulation | Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 Text with EEA relevance [2011] OJ L55/1 |
| 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 [1986] OJ L382/17 |
| Consumer Credit Directive | Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC [2008] OJ L133/66 |
| 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, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64 |
| 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 [1999] OJ L171/12 |

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| 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 and amending Regulation (EU) No 1024/2012 (Recast) [2014] OJ L159/1 |
| DCFR | Draft Common Frame of Reference Prepared by Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), <i>Principles, Definitions and Model Rules of European Private Law</i> (Sellier 2009) |
| Denied Boarding Regulation | Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004] OJ L46/1 |
| Digital Content Directive | Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content COM (2015) 634 final |
| Digital Content Directive – Council | Proposal for a Directive on certain aspects concerning contracts for the supply of digital content COM(2015) 634 final – File 8800/17 (8 May 2017) |
| 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 and amending Council Directive 90/619/EC and Directives 97///EC and 98/27/EC [2002] OJ L271/16 |
| Distance Selling Directive | Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19 |
| Doorstep Selling Directive | Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31 |
| ECHR | European Convention on Human Rights |
| 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 [2000] OJ L178/1 |
| eDIAS Regulation | Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC [2014] OJ L257/73 |
| 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 [2000] OJ L303/16 |
| GDPR | Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L 119/1 (General Data Protection Regulation) |

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| 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 [2004] OJ L373/37 |
| Geo-blocking Regulation | Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC COM(2016) 289 final |
| Insurance Distribution Directive | Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution [2016] OJ L26/19 |
| 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 [2011] OJ L48/1 |
| 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 [2000] OJ L156/17 |
| Life Assurance Directive | Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance [2002] OJ L345/51 |
| Markets in Financial Instruments Directive; MiFID | Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC [2002] OJ L145/1 |
| Misleading and Comparative Advertising Directive | Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising [2006] OJ L376/21 |
| 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 and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 [2014] OJ L60/34 |
| 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 and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [2013] OJ L 163/1 |
| Online Sales Directive | Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods COM (2015) 635 final |
| OR | Obligationenrecht; Swiss Law of Obligations |
| Package Travel Directive | Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC [2015] OJ L326/1 |
| Package Travel Directive (1990) | Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L158/59 |

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| 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 amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC [2007] OJ L187/5 |
| PECL | Principles of European Contract Law Lando/Beale (eds), <i>Principles of European Contract Law – Parts I & II</i> (Kluwer 1999) and Lando et al. (eds), <i>Principles of European Contract Law – Part III</i> (Kluwer 2003) |
| PEL | Principles of European Law |
| PICC | UNIDROIT Principles of International Commercial Contracts |
| 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 [2000] OJ L180/22 |
| Rail Passenger Regulation | Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations [2007] OJ L315/14 |
| 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 [2008] OJ L177/6 |
| Services Directive | Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36 |
| Ship Passenger Regulation | Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 [2010] OJ L334/1 |
| TEU | Treaty on the European Union [2016] OJ C202/13 |
| TFEU | Treaty on the Functioning of the European Union [2016] OJ C202/47 |
| 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; UCPD | 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 and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2009] OJ L149/22 |
| Unfair Terms Directive | Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29 |
| UWG | Gesetz gegen den unlauteren Wettbewerb; German Unfair Competition Act |

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