

BOOK REVIEW

Martin Schmidt-Kessel (ed.), *Ein einheitliches europäisches Kaufrecht? Eine Analyse des Vorschlags der Kommission*, Munich, sellier.european law publishers, 2012, approx. 565 pages, ISBN 978-3-86653-213-7

Hans Schulte-Nölke, Fryderyk Zoll, Nils Jansen, & Reiner Schulze (eds.), *Der Entwurf für ein optionales europäisches Kaufrecht*, Munich, sellier.european law publishers, 2012, approx. 435 pages, ISBN 978-3-86653-209-0

For more than twenty years, the law on the contracts of sale has been in the focus of the harmonization and unification movement in Europe. The unification idea has recently reached a new level with the publication of a draft regulation on sales law within the European Union. The proposal for a Common European Sales Law (CESL) suggests itself as an optional sales law regime which would stand alongside the existing domestic sales laws of each Member State and which could be rendered applicable by explicit agreement between the contracting parties (so-called opt-in mechanism). Each Member State would thus have two sales laws, the domestic rules, which would remain unchanged, and the CESL, as a unified set of rules concerning sales law and some aspects of general contract law (for the CESL proposal does not limit itself to sales law but does also establish some general contract law principles and includes rules on the formation of contracts, pre-contractual duties of information, and avoidance of the contract on the ground of mistake, fraud, threat or unfair exploitation).

Views on the necessity of such an optional instrument, and on the quality of the present proposal, differ greatly. They have given rise to numerous publications, conferences, sessions and symposia. The two books presented here are representative of the academic discussion which is currently taking place in Germany. Both of them are written in German and are essentially directed to the German reader. The volume edited by Schulte-Nölke et al. additionally contains brief English summaries with the quintessence of each contribution – a helpful tool not only for those not fluent in German but also for everyone who is looking for a brief overview of a chapter.

- Two voluminous books (joining, *nota bene*, an abundance of articles published in national and international law reviews);
- Both of which appeared in print in the same year and with the same publisher;
- Both of which are of similar style (both books are subdivided in separate contributions and are written by different authors); and
- Both of which are targeting the German-speaking market!

The duplication might at first sight lead to the provocative question: necessity or luxury? Well, certainly the former. In fact, the editors made different choices with regard to the issues raised by the proposed European sales law directive. The concepts and provisions of the proposal are often appreciated differently. Finally, and despite the similar structure of the books, they approach the questions in a

different manner. For example, the book edited by Schulte-Nölke et al. attaches greater significance to the drafting history of the proposal, by devoting not only a chapter to it but by providing also for an extensive synopsis of more than 125 pages, which compares the final text of the CESL proposal, both in English and German, to the preliminary stage of the present proposal (the so-called feasibility study). The contributions in Schulte-Nölke *et al.* do also often refer to the various precursor and intermediate stages of the CESL proposal, such as the Principles of European Contract Law (PECL), the Draft Common Frame of Reference (DCFR) or the Principles of the Acquis Group. Thus, the reader interested in the drafting history, for example, the question of how the definition and the consequences of 'mistake' and 'pre-contractual information duties' had been conceived in the German Civil Code, the PECL and the DCFR, and how they were changed – and interwoven – in the course of the drafting process, will find useful references particularly in this book (see, with regard to the mentioned example, the contribution by Jansen, pp. 169 *et seq.*).

The books also differ with regard to the choice and the number of fundamental questions (or questions of principle) addressed in each of them, as well as with respect to the intensity in which they are discussed. The volume edited by Schmidt-Kessel focuses primarily on the analysis of the subject matter of the CESL proposal; accordingly, the discussion of general questions, such as the optional nature of the proposal, the relation between the envisaged optional instrument and the existing EU-Directives, or whether there is a sufficient legal basis in EU law, which would allow for the adoption of a common European sales law, limits itself to approximately eighty pages, whereas the double is devoted to those questions in the book edited by Schulte-Nölke et al. Unsurprisingly, several reservations are expressed and unsolved questions regarding the scope of application of the proposed instrument are pointed out; but except for Müller-Graff (in Schmidt-Kessel, pp. 51 *et seq.*, and in Schulte-Nölke *et al.*, pp. 21 *et seq.*), who criticizes the lack of competence and the optional character of the proposal (a critique often raised), in both of the books, the idea of a common European sales law is not seriously called into question.

The specific provisions and concepts under the CESL proposal, however, are all the more criticized, especially in the book edited by Schmidt-Kessel. The subject matter of the proposal is 'put to the acid test' and, it must be added, hardly survives it (with a few exceptions, *e.g.* the statute of limitations). Inconsistencies and changes to the worse, as compared to the CISG or the EU Consumer Sales Law Directive, are revealed, as are superfluous or unnecessarily complicated provisions, structural deficiencies or the sometimes heterogeneous terminology. Several of the contributions in the book edited by Schulte-Nölke et al. read in a similar vein, with some of them (Kieninger, p. 225; Faust, p. 277; see also Stürner, p. 83) concluding that the drafting process should be slowed down for the benefit of a better quality of the proposal.

The analyses in both books generally are of meticulous accuracy and thus precious contributions to the discussion on sales, services and general contract law in Europe, however the story of the CESL continues.

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