Alternative Ways to Ius Commune
Alternative Ways to Ius Commune

The Europeanisation of Private Law
Anne L.M. Keirse and Marco B.M. Loos (eds.)

Alternative Ways to Ius Commune – The Europeanisation of Private Law

Intersentia Publishing Ltd.
Trinity House | Cambridge Business Park | Cowley Road
Cambridge | CB4 0WZ | United Kingdom
Tel.: +44 1223 393 753 | Email: mail@intersentia.co.uk

ISBN 978-1-78068-089-7
NUR 822

© 2012 Intersentia
Cambridge – Antwerp – Portland
www.intersentia.com | www.intersentia.co.uk

Cover picture: © Jose Wilson Araujo – dreamstime.com


No part of this book may be reproduced in any form, by print, photocopy, microfilm or any other means, without written permission from the publisher.
CONTENTS

The optional instrument and the Consumer Rights Directive: alternative ways to a new ius commune in contract law – introduction
Marco B.M. Loos and Anne L.M. Keirse ..................................... 1

1. Introduction ........................................................... 1
2. The development of European consumer law ............................... 1
   2.1. The 1975 Consumer Policy Programme ................................ 1
   2.2. The development of European consumer law: from marginal influence on private law into a machinery for change of substantive private law .... 4
      2.2.1. Lack of interest in European law and the impact of Francovich ... 4
      2.2.2. Product liability ............................................ 5
      2.2.3. The Directives on Unfair Contract Terms and Consumer Sales ... 6
   2.3. Competence in the area of European consumer law ................. 7
3. Political developments in the area of European contract law .......... 9
   3.1. The Communication on European contract law ....................... 9
   3.2. The 2003 Action Plan and the 2004 Communication on the Revision of the Consumer Acquis .......................................... 11
4. Private harmonisation projects .......................................... 12
5. The Draft Common Frame of Reference .................................. 15
6. The review of the consumer acquis ....................................... 16
7. The proposal for a Common European Sales Law ....................... 17

Private law, global governance and the European Union
Jan Wouters ............................................................ 21

1. Introduction .......................................................... 21
2. Private law-based transnational governance and the EU: three examples .... 23
   2.1. Private food safety standards ..................................... 23
   2.2. Private forest certification ....................................... 27
   2.3. Credit Default Swaps (CDS) ....................................... 29
3. How should the EU proceed? ........................................... 31
Cross-border family relations in Europe: towards a common European matrimonial property law based upon cooperation between private international law and substantive law

Katharina Boele-Woelki .................................................. 33

1. Preliminaries .......................................................... 33
2. Europeanisation of international family law ............................... 34
3. Property relations of international couples ................................ 37
   3.1. The conflict of laws approach ...................................... 37
   3.2. Differences in substantive law ..................................... 38
4. Bringing clarity to property rights for international couples .......... 38
   4.1. Global and regional unification of private international law ...... 40
   4.2. Bilateral unification of substantive law ............................ 40
   4.3. Regional harmonisation of substantive law ........................ 41
5. Establishment of a common European matrimonial property law ...... 42
   5.1. Which instrument? .................................................. 43
   5.2. Which regime? ..................................................... 45
   5.3. Scope of application .............................................. 45
6. Conclusion ........................................................... 46

A historical perspective on the protection of weaker parties: non-state regulators, colonial trade, and the market for junk bonds (16th–17th centuries)

Wim Decock ............................................................ 49

1. Introduction: non-state regulators and the history of private law .......... 49
2. Two cases for a new world .............................................. 51
3. Freedom, fairness and general contract law ................................ 53
4. Case 1: trading gold for toys ............................................. 55
5. Case 2: trading subprime debt ........................................... 58
6. Concluding observations: from morality to economics ................. 61

The impact of Directive 2011/83/EU on consumer rights

Anca D. Chiriţă ............................................................. 65

1. Introduction .................................................................. 65
2. Brief historic overview .................................................. 66
3. The analysis of the legislative intent .................................... 68
4. To whom is the directive addressed? .................................. 73
5. The substance of the directive ......................................... 75
6. The unfairness of contract terms ...................................... 79
7. Conclusions ............................................................. 82
The proposal for a Common European Sales Law: How its drafting process might affect the optional instrument’s added value for contract parties and its success

Esther van Schagen ...................................................... 85

1. Abstract .............................................................. 85
2. Introduction .......................................................... 86
3. The legal basis for the CESL ............................................. 87
   3.1. Optional harmonisation: Article 114 or 352 TFEU? ................... 88
   3.2. The empirical assessment of the legislator: a matter of discretion under Article 114 TFEU ........................................... 91
   3.3. The consultations on the feasibility study and the CESL: similar shortcomings .................................................... 95
4. A plea for more thorough justification of the CESL: the added value of consultations and the use of impact assessments ........................... 97
5. The case for a functional approach: legal practice as an additional starting point ........................................................ 101
   5.1. Boilerplate clauses, national laws and the CESL ........................... 103
      5.1.1. Alteration of contracts under the CESL .......................... 104
      5.1.2. ‘Time is of the essence’ clauses under the CESL: strict or lenient interpretation? .................................... 105
      5.1.3. Clauses limiting the consequences of mistake ................ 105
      5.1.4. The competence of the CJEU. .................................. 106
   5.2. A plea for studying international legal practice ...................... 106
6. Concluding remarks .................................................. 106

Historical perspectives on the remedies

C.J. de Bruijn .......................................................... 111

1. Introduction ......................................................... 111
   1.1. Conformity with contract in the proposal .......................... 112
2. Liability for defective goods in Roman law ....................................... 113
   2.1. Origins of lack of quality ......................................... 113
3. Common law ........................................................ 118
4. Comparison and conclusions ........................................... 122
   4.1. Roman law ..................................................... 122
   4.2. Common law ................................................... 122

Remedies in the European harmonisation projects: enforced performance, termination and damages

Tâm Dang Vu .......................................................... 125

1. Introduction .......................................................... 125
2. Remedies in general ................................................... 127
   2.1. Scope .......................................................... 127
      2.1.1. Scope ratione materiae .................................... 127
      2.1.2. Scope ratione personae ................................ 128
## Contents

2.2. Structure ...................................................... 129  
2.3. Excused non-performance and non-performance caused by the creditor ..................................................... 131  
2.4. Cumulation and hierarchy of remedies. .......................... 132  
2.5. Terms excluding or restricting remedies – exemption clauses .......................... 133  
2.6. The influence of good faith and fair dealing ...................... 134  
3. Right to cure ......................................................... 136  
3.1. Conditions of applicability ....................................... 136  
3.1.1. Conditions of applicability of the right to cure in the PECL .............................. 137  
3.1.2. Conditions of applicability of the right to cure in the DCFR .............................. 137  
3.1.3. Conditions of applicability of the right to cure in the CESL .............................. 138  
3.2. Consequences .................................................. 139  
3.2.1. Consequences of the right to cure in the PECL .............................. 139  
3.2.2. Consequences of the right to cure in the DCFR .............................. 139  
3.2.3. Consequences of the right to cure in the CESL .............................. 140  
4. Requiring performance and damages ................................... 141  
4.1. Requiring performance of monetary obligations .................... 142  
4.1.1. Principle ................................................ 142  
4.1.2. Exceptions .............................................. 142  
4.1.3. Damages not precluded ................................... 143  
4.1.4. Incidence of the right to terminate/decline performance of the client/customer. ............................................. 143  
4.2. Requiring performance of non-monetary obligations ................ 144  
4.2.1. Principle ................................................ 144  
4.2.2. Exceptions .............................................. 145  
4.2.3. Loss of the right to enforce specific performance ..................... 146  
4.2.4. Additional rules for sales contracts between a trader and a consumer: repair and replacement. ............................................. 146  
4.2.5. Damages not precluded ................................... 147  
5. Termination ......................................................... 147  
5.1. Definition and scope ............................................ 147  
5.2. Grounds for termination ........................................ 147  
5.2.1. Termination for fundamental non-performance .............................. 147  
5.2.2. Termination after notice fixing additional time for performance. ............................................. 148  
5.2.3. Termination for anticipated non-performance .............................. 149  
5.2.4. Termination for inadequate assurance of performance ..................... 150  
5.2.5. Client’s right to terminate a service contract .............................. 150  
5.3. Scope of the right to terminate ..................................... 151  
5.4. Exercise of the right to terminate .................................. 151  
5.4.1. Notice of termination ..................................... 151  
5.4.2. Loss of the right to terminate .................................. 152  
5.5. Effects of termination ............................................ 152  
6. Damages ............................................................ 153  
6.1. General rules ................................................... 153
6.1.1. Right to damages ............................................... 153
6.1.2. Assessment of damage ........................................ 154
6.1.3. Substitute transaction and current price ....................... 155
6.2. Interest for late payment ........................................... 155
7. Conclusion .......................................................... 156

The seller's right to cure in the CISG and the Common European Sales Law
Sonja A. Kruisinga ...................................................... 157
1. Introduction ......................................................... 157
2. The position of the seller's right to cure in the Common European Sales Law . 159
3. The seller's right to cure within the time allowed for performance ........... 160
4. The seller's right to cure after the time allowed for performance .......... 160
4.1. The seller's right to cure in the CISG ............................... 161
4.2. The seller's right to cure in the UNIDROIT Principles and the PECL ... 162
4.3. The seller's right to cure in the DCFR and the Common European Sales Law ...................................................... 163
4.4. Does the seller's right to cure prevail over the buyer's remedies in the case of a breach of contract by the seller? ........................ 164
5. Conclusion .......................................................... 166

Price reduction as a remedy in European contract law and the consumer acquis
Sanne Jansen ........................................................... 169
1. Introduction .......................................................... 169
2. Price reduction as a remedy in the European consumer acquis ............. 170
2.1.1. General ......................................................... 172
2.1.2. Scope of application .......................................... 173
2.1.3. Price reduction: a self-help remedy .......................... 177
2.1.4. Conditions of application .................................... 178
2.1.4.1. Reciprocal contracts: consumer sales contracts and package travel contracts .......................... 178
2.1.4.2. A traveller's remedy – a buyer's remedy .......... 179
2.1.4.3. A remedy for excused and unexcused non-performance ...................................................... 179
2.1.4.4. Does the non-performance need to be fundamental? 182
2.1.4.5. A remedy before and after the payment of the price . 182
2.1.4.6. The right to cure and price reduction ............... 182
2.1.5. How to exercise price reduction? ................................ 183
2.1.5.1. A remedy chosen by the consumer/traveller? ... 183
2.1.5.2. Requirement of notification? ...................... 183
2.1.6. The effect of price reduction ................................... 184
2.1.7. Price reduction compared to other remedies ..................... 185
2.2. The distance-selling Consumer Rights Directive .......................... 186
### Contents

3. Price reduction in the European harmonisation projects: PECL, DCFR, *Principes Contractuels Communs, Acquis* Principles and CESL (proposal)  ... 189
   3.1. General  .................................................................................................................. 189
   3.1.1. Provisions  .......................................................................................................... 189
   3.1.2. Origin of price reduction .................................................................................... 190
   3.2. Scope of application ............................................................................................. 190
   3.3. Price reduction: a self-help remedy ..................................................................... 193
   3.4. The conditions of application .............................................................................. 194
   3.4.1. A breach of a reciprocal contract/reciprocal obligation ................................. 194
   3.4.2. A buyer’s/customer’s remedy? .......................................................................... 196
   3.4.3. A remedy for excused and unexcused non-performance ............................... 196
   3.4.4. The non-performance does not need to be fundamental/significant ............... 198
   3.4.5. Price reduction before and after the payment of the price ............................... 199
   3.4.6. Right to cure for the debtor and price reduction ............................................ 199
   3.5. How to exercise the remedy of price reduction? .............................................. 201
   3.5.1. A remedy chosen by the creditor ...................................................................... 201
   3.5.2. Requirement of notification and examination? .............................................. 201
   3.6. The effect of price reduction .................................................................................. 204
   3.6.1. The amount of the price reduction ................................................................... 204
   3.6.2. Price reduction, a remedy to maintain the contract ......................................... 208
   3.7. Price reduction compared to other remedies ...................................................... 209
   3.7.1. Price reduction and damages ........................................................................... 209
   3.7.2. Price reduction and partial termination ............................................................ 211
   3.8. Price reduction and partial termination ............................................................... 211

4. Perspectives and conclusion ..................................................................................... 216

Suspension as a temporary defence in European contract law
Sanne Jansen. ............................................................................................................ 219

1. Introduction .............................................................................................................. 219
2. General ..................................................................................................................... 220
   2.1. Provisions ............................................................................................................. 220
   2.2. Underlying reasons and origin ............................................................................ 221
3. Suspension: a self-help remedy .............................................................................. 222
4. Conditions of application .......................................................................................... 223
   4.1. Scope of application: reciprocal contract/obligation ......................................... 222
   4.2. The order of performance and anticipatory suspension ..................................... 223
   4.3. (Un)excused non-performance ........................................................................... 225
   4.4. The non-performance does not need to be fundamental ................................... 225
   4.5. Suspension and the right to cure ....................................................................... 225
5. How to exercise the remedy of price reduction? ...................................................... 227
   5.1. A duty to give notice? ......................................................................................... 227
   5.2. Suspension must be invoked in good faith ......................................................... 228
6. The effect of suspension .......................................................................................... 228
   6.1. No non-performance ........................................................................................... 228
6.2. Temporary suspension in whole or in part ............................................. 228
7. Conclusion .......................................................................................... 229

Rethinking the treatment of the mitigation of loss under the Common European Sales Law
Anne L.M. Keirse .................................................................................. 231

1. Introduction: two different tendencies ......................................................... 231
2. Is it all or nothing, or somewhere in between? .............................................. 232
   2.1. Reconciling tensions between fundamental principles .............................. 232
   2.2. A historical and comparative overview ................................................. 233
   2.3. Legal consequences of a failure to mitigate the loss ............................... 238
   2.4. Forgotten heritage ................................................................................... 246
3. A call for a proportional approach .............................................................. 247
   3.1. Spirit of the age ....................................................................................... 247
   3.2. Groundwork ............................................................................................ 248
   3.3. Appraisal .................................................................................................. 249
   3.4. A balanced approach ............................................................................. 251
4. Conclusion ................................................................................................. 252