

# LIMITS OF HARMONISATION AND CONVERGENCE

Dissimilarities  
within Similarities of Polish  
and German Contract Law

Edited by

Monika Jagielska, Elwira Macierzyńska-Franaszczyk

Ewa Rott-Pietrzyk, Fryderyk Zoll, Grzegorz Żmij

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Wolters Kluwer

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## LIST OF ABBREVIATIONS

ABGB	- Allgemeines Bürgerliches Gesetzbuch – Austrian Civil Code (AT)
Act on Consumer Rights	- Polish Act on Consumer Rights of 20 May 2014, Journal of Laws [Dz.U.] of 2017, item 683
B2B	- Business to Business
B2C	- Business to Consumers
B2P	- Business to Prosumer
BC	- Zeitschrift für Bilanzierung, Rechnungswesen und Controlling
BGB	- Bürgerliches Gesetzbuch – German Civil Code (DE)
BGH	- Bundesgerichtshof (German Federal Court of Justice)
BU ILJ	- Boston University International Law Journal
BVerwG	- Bundesverwaltungsgericht
CAD	- Commercial Agency 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, OJ L. 82, 31.12.1986, pp. 17–21
CESL	- Common European Sales Law – Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law
CISG	- United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980
CJEU	- Court of Justice of the European Union
CLR	- Contract Law Review
CO (Code of Obligations of 1933)	- Regulation by the President of the Republic of Poland of 27 October 1933 – Code of Obligations (Journal of Laws [Dz.U.] of 1933, No. 82, item 598) (PL)

- 
- Consumer Sales Act of 2002 – Act on Special Conditions of Consumer Sales and Amending the Civil Code of 27 July 2002, Journal of Laws [Dz.U.] of 2012, item 1176 (PL)
- 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, OJ L 171, 07/07/1999 P. 0012 – 0016
- 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
- DCFR – Draft Common Frame of Reference – Principles, Definitions and Model Rules of European Private Law
- DM – Deutsche Mark
- ECJ – European Court of Justice
- EJCLL – European Journal of Commercial Contract Law
- EPS – Europejski Przegląd Sądowy
- ERPL – European Review of Private Law
- EuCML – Journal of European Consumer and Market Law
- EuZW – Europäische Zeitschrift für Wirtschaftsrecht
- FRG – Federal Republic of Germany
- GewO – Gewerbeordnung
- HGB – Handelsgesetzbuch
- ICLQ – International and Comparative Law Quarterly
- JCL – Journal of Comparative Law
- KPP – Kwartalnik Prawa Prywatnego
- LG – Landsgericht (German District Court)
- MaBV – Makler und Bauträgerverordnung
- MLR – Modern Law Review
- MMR – Multimedia und Recht
- MP – Monitor Prawniczy
- NJW – Neue Juristische Wochenschrift
- NJW-RR – Neue Juristische Wochenschrift- Rechtsprechungs-Report Zivilrecht

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NP	- Nowe Prawo
NSA	- Naczelny Sąd Administracyjny (Polish Supreme Administrative Court)
OLG	- Oberlandsgericht (German Regional Court of Appeals) - Higher Regional Court
OR	- Obligationen Recht – Switzerland
OSN	- Orzecznictwo Sądu Najwyższego
OSP	- Orzecznictwo Sądów Polskich
OSPiKA	- Orzecznictwo Sądów Polskich i Komisji Arbitrażowych
P2P	- Prosumer to Prosumer
PCC	- Kodeks cywilny – Polish Civil Code of 23 April 1964, Journal of Laws [Dz.U.] of 2016, item 380
PCPC	- Kodeks postępowania cywilnego – Polish Civil Procedure Code of 17 November 1964, Journal of Laws [Dz.U.] of 2016, item 1822
PECL	- Principles of European Contract Law
PiP	- Państwo i Prawo
PPE	- Przegląd Prawno-Ekonomiczny
PP UW	- Przegląd Prawniczy Uniwersytetu Warszawskiego
PS	- Przegląd Sądowy
PUG	- Przegląd Ustawodawstwa Gospodarczego
PWPM	- Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego
RabelsZ	- Rabels Zeitung
RPEiS	- Ruch Prawniczy, Ekonomiczny i Socjologiczny
SA	- Sąd Apelacyjny (Polish Court of Appeal)
SC	- Studia Cywilistyczne
SGA	- Sale of Goods Act (EN)
SN	- Sąd Najwyższy (Polish Supreme Court)
SO	- Sąd Okręgowy (Polish Regional Court)
SOKiK	- Sąd Ochrony Konkurencji i Konsumentów (Polish Competition and Consumer Protection Court)
SP	- Studia Prawnicze
SPP	- Studia Prawa Prywatnego
SR	- Sąd Rejonowy (Polish District Court)
TPP	- Transformacje Prawa Prywatnego
TransLex-Principles	- Principles and rules of transnational commercial law

UCC	- Uniform Commercial Code (USA)
UKlaG	- Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen
ULIS	- Uniform Law on the International Sale of Goods
UplCC	- Principles of International Commercial Contracts 2010
UWG	- Gesetz gegen den unlauteren Wettbewerb
ZEuP	- Zeitschrift für Europäisches Privatrecht
ZfPW	- Zeitschrift für die gesamte Privatrechtswissenschaft

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# INTRODUCTION

## I. Aim of the project

The withdrawal of the draft for the Common European Sales Law (CESL) is an important caesura in the further development of European law.<sup>1</sup> It cannot be denied that this withdrawal means more than a simple reconsideration of the legislative intention, which happens regularly in everyday parliamentary work. The draft for the CESL was driven by the idea of a new approach to the development of European law.<sup>2</sup> Instead of only completing national laws by punctual interventions coming from the national legal systems, the Commission was seeking to develop a fully-fledged autonomous European system of contract law with quite a broad scope of application.<sup>3</sup> The adoption

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<sup>1</sup> See, the comment of E. Clive, *Proposal for a Common European Sales Law withdrawn*, European Private Law News, 7 January 2015; *idem*, The proposed new digital single market contract law Directives, European Private Law News, 19 January 2016; K. Norris, *Common European Sales Law: A Missed Opportunity or Better Things to Come?*, 37 Business Law Review, Vol. 37, Issue 1, 2016, pp. 29–32.

<sup>2</sup> M. Schmidt-Kessel (ed.), *Der Entwurf für ein gemeinsames Europäisches Kaufrecht, Kommentar*, 2014, p. 15; W. Popiolek, *Instrument opcjonalny a ochrona konsumenta*, [in:] M. Jagielska, E. Rott-Pietrzyk, A. Wiewiórska-Domagalska (eds.), *Kierunki rozwoju europejskiego prawa prywatnego. Wpływ europejskiego prawa konsumenckiego na prawo krajowe*, Warszawa 2012, pp. 71–76; J. Beldowski, M. Zachariasiewicz, *Nowy etap harmonizacji prawa umów w UE* (part I), EPS, June 2012, p. 5; as well as COM/2011/0635 final – 2011/0284 (COD).

<sup>3</sup> As to the substantive scope of the CESL, see M.E. Storme, *The Young and the Restless: CESL and the Rest of Member State Law*, ERPL, 2015, Vol. 23 Issue 2, pp. 217–229; see also: O. Lando, H. Beale, *Principles of European Contract Law, Part I: Performance, Non-Performance and Remedies*, 1995; B. Fuchs, E. Rott-Pietrzyk, M. Zachariasiewicz,

of the CESL would mean a qualitative transformation of the existing European contract law.<sup>4</sup> If the CESL was adopted, it would probably receive mixed responses from the *acquis communautaire*.<sup>5</sup> In the process of interpreting the directives, the CESL, although not directly applicable, would serve as the basis for the interpretation of remaining European law.<sup>6</sup> Nowadays the CESL's functions can be perceived also from the perspective of non-binding rules.<sup>7</sup> In this context, there are still other potential functions of the CESL that could be of some use (after its withdrawal). As non-binding law, it can be used by the parties in transnational contracts as a specific mechanism, the so-called “choice of law” on a substantive law level,<sup>8</sup> likewise PECL,<sup>9</sup> UPICC,<sup>10</sup> DCFR,<sup>11</sup>

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[in:] W. Popiołek (ed.), *System Prawa Handlowego*, Vol. 9: *Międzynarodowe prawo handlowe*, p. 42; D. Wolski, *Wątpliwości dotyczące podstaw traktatowych projektu rozporządzenia w sprawie Europejskiego Prawa Sprzedaży (Common European Sales Law)*, PWPW, Vol. X, A.D. MMXII, p. 138.

<sup>4</sup> 4.3. Option III “Improve the quality of legislation already in place”, COM(2001), pp. 15–16.

<sup>5</sup> A. Colombi Ciacchi, *Contents and Effects of Contracts – Lessons to Learn from the Common European Sales Law*, 2016, p. 76.

<sup>6</sup> Article 4 (1) CESL.

<sup>7</sup> In this way, the misgivings of H. Schulte-Nölke and F. Zoll have become a reality; see their text: *Starting from e-Commerce instead of Sales Contracts – choosing the right fields of application of the EU Optional Instrument*, [in:] M. Jagielska, E. Rott-Pietrzyk, A. Wiewiórowska-Domagalska (eds.), *Kierunki...*, p. 94.

<sup>8</sup> “The choice of law” on substantive law level is something different from both choice of law in the PIL (e.g. in Article 3 (1) Rome I) sense and an opt-in instrument (as CESL intended to be according to Article 3 CESLR).

<sup>9</sup> The first part of PECL was published in 1995: *The Principles of European Contract Law. Part I*. The first and the second part are joint and published with commentary in 2000: O. Lando, H. Beale, *Principles of European Contract Law, Parts I and II*, prepared by the Commission on European Contract Law, 2000. The third part of PECL was finally drawn up and published in 2003: *Principles of European Contract Law. Part III*.

<sup>10</sup> International Institute for the Unification of Private Law (UNIDROIT), *Principles of International Commercial Contracts 2010*, Rome, available at: <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>.

<sup>11</sup> *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR), Interim Outline Edition, prepared by Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group)*, Ch. von Bar, E. Clive, H. Schulte-Nölke (eds.), Munich 2008 (Outline Edition from 2009). The second edition contains comments inserted in six volumes (eds. Ch. von Bar, E. Clive), as Full Edition 2009.

the Acquis Principles<sup>12</sup> or the TransLex-Principles.<sup>13</sup> By using CESL this way,<sup>14</sup> it could be shown, among other things, that this instrument is functional to the parties of international transactions.<sup>15</sup>

Some Member States<sup>16</sup> did not want to accept a development of European contract law with CESL on the scene for various reasons, and therefore the legislative process of CESL was stopped.<sup>17</sup> After long

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<sup>12</sup> Research Group on the Existing EC Private Law (Acquis Group), Principles of the Existing EC Contract Law (Acquis Principles), Contract I. Pre-contractual Obligations, Conclusion of Contract, Unfair Terms, Munich 2007; and Principles of the Existing EC Contract Law (Acquis Principles), Contract II. General Provisions, Delivery of Goods, Package Travel and Payment Services, Munich 2009.

<sup>13</sup> TransLex-Principles are the systematic online collection of principles and rules of transnational commercial law, available at: [https://www.trans-lex.org/principles/of-transnational-law-\(lex-mercatoria\)](https://www.trans-lex.org/principles/of-transnational-law-(lex-mercatoria)).

<sup>14</sup> It sometimes happens with the other acts of the model, in particular PECL, UPICC. The clauses covering the “choice” of non-binding law are to be found in some model contracts elaborated by International Chamber of Commerce (ICC), e.g. in The ICC Model Commercial Agency Contract, 2 ed., ICC Publication 2002, rep. in 2004 (Article 24.1.A (c)). Maybe the promotion of the mentioned CESL function for international transactions could change the present “negative” attitude to this act, negating the need of its binding force as an opt-in instrument.

<sup>15</sup> A substantive choice of law (CESL or other) does not exclude the need to search for the law applicable to the contract according to the PIL rules by the state court (the situation is different in arbitration courts); as to the details of choice of model law (substantive law level), see E. Rott-Pietrzyk, [in:] M. Pazdan (ed.), *System Prawa Prywatnego*, Vol. 20B: *Prawo prywatne międzynarodowe*, Warszawa 2015, pp. 121, 133–139; *eadem*, *Swoboda stron w zakresie materialnoprawnego wyboru prawa modelowego (soft law)*, [in:] A. Dańko-Roesler, A. Oleszko, R. Pastuszko (eds.), *Rozprawy z prawa prywatnego oraz notarialnego: księga pamiątkowa dedykowana Profesorowi Maksymilianowi Pazdanowi*, Warszawa 2014, pp. 323 et seq.

<sup>16</sup> It is interesting that Poland, Luxembourg and Estonia are in favour of the act creating a pan-European contract law for cross-border online sales. Unfortunately, most member states remained against it, or simply did not see it as a priority. Germany, Austria and the UK questioned the legal basis of the proposed CESL (on the basis of information delivered by EurActiv.com, Common European Sales Law faces rocky reception, 24.03.2014).

<sup>17</sup> Compare, Ch. Twigg-Flesner, *CESL, Cross-Border Transactions and Domestic Law: Why a Dual Approach Could Work (Although CESL Might Not)*, ERPL, 2015, Vol. 23, Issue 2, pp. 231–249. The author argues that the step taken towards a cross-border regulation is a positive one, but that further work on the substance of a CESL is needed; he prefers the cross-border CESL to be automatically applicable, not optional. See also, H. Beale, *Hopes for the CESL: A Brief Response to DiMatteo, Loos, Schulte-Nölke, Storme, and Twigg-Flesner*, ERPL, 2015, Vol. 23, Issue 2, pp. 251–262; J.M. Smits,



and intense discussions (which reached their climax in the first decade of this century), the European Union decided to continue with the primary developed technique of harmonising the laws of the Member States by punctual legislation, only completing the traditional national systems.<sup>18</sup> The (at least temporary) collapse of the idea of the CESL has inspired the Commission to reconsider the ways of developing the *acquis communautaire*. The Commission has entered an area of digital contracts.<sup>19</sup> This step has several consequences. The area of digital contracts is still an undeveloped legislative matter at the level of national laws.<sup>20</sup> The Commission has undertaken several projects to fill this gap by genuine European law.<sup>21</sup> Therefore, two directives have been proposed – a directive on the supply of digital content<sup>22</sup> and the online and distance sales directive.<sup>23</sup> European law will probably remain focused on the digital agenda in the long run. This is a good strategy. The legislative lacu-

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*New European Proposals for Distance Sales and Digital Contents Contracts: Fit for Purpose?*, ZEuP 2016, pp. 319–324.

<sup>18</sup> For details, see J. Beldowski, M. Zachariasiewicz, *Nowy...*, pp. 5–7; and fragments written by the following authors: B. Fuchs, E. Rott-Pietrzyk, M. Zachariasiewicz, [in:] W. Popiołek (ed.), *Międzynarodowe...*, pp. 36–37.

<sup>19</sup> The European Commission Digital Agenda for Europe, May 2010; J. Beldowski, M. Zachariasiewicz, *Nowy...*, p. 8; D. Wolski, *Wątpliwości...*, p. 148, D. Wallis, *Digital Agenda: the role of the legal community in helping the EU legislator*, EuCML, 2016/1.

<sup>20</sup> J. Gołaczyński, *Konsument a Internet, a próby harmonizacji i unifikacji prawa prywatnego*, [in:] M. Jagielska, E. Rott-Pietrzyk, A. Wiewiórowska-Domagalska (eds.), *Kierunki rozwoju...*, pp. 203–212.

<sup>21</sup> J. Gołaczyński, *Umowy elektroniczne w prawie prywatnym międzynarodowym*, Warszawa 2007, pp. 30–32; R. Schulze, D. Staudenmayer, *Digital Revolution – Challenges for Contract Law*, [in:] R. Schulze, D. Staudenmayer (eds.), *Digital Revolution – Challenges for Contract Law in Practice*, Baden-Baden 2016, pp. 19–21; D. Staudenmayer, *Digitale Verträge – Die Richtlinienvorschläge der Europäischen Kommission*, ZEuP 2016, pp. 801–831; A. de Franceschi, *European Contract Law and the Digital Single Market: Current Issues and New Perspective*, [in:] A. de Franceschi (ed.), *European Contract Law and the Digital Single Market. The Implications of the Digital Revolution*, Cambridge 2016, pp. 4–5.

<sup>22</sup> Proposal for a directive of the European Parliament and of the Council on Certain Aspects Concerning Contracts for the Supply of Digital Content, COM/2015/0634 Final – 2015/0287 (COD).

<sup>23</sup> 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/2015/0635 final – 2015/0288 (COD); M. Wendland, *Ein neues europäisches Vertragsrecht für den Online-Handel?*, EuZW 2016, p. 126.

In 2015 the European legislator stopped the legislative process concerning the Common European Sales Law. The fully-fledged autonomous European system of contract law met with a mixed reception among the EU Member States. The European Union decided to continue the process of harmonisation of the laws by selective legislation complementing the traditional national systems. Despite the progressive development of the *acquis communautaire*, there is still the need for further harmonisation of the law of contracts.

The differences between national systems of contract law give rise to numerous impediments in the internal market. Even seemingly similar laws result in different interpretations and solutions in particular cases. The identical legal rules are not a guarantee of its exact understanding in different states. This is clearly visible even in the case of neighbouring countries with a similar legal tradition, like Poland and Germany. Despite the fact that the German law has often inspired the Polish doctrine and case law and the German method of legal reasoning has impacted the Polish jurisprudence, these two systems are in many aspects quite different from each other.

The existing dissimilarity and at the same time proximity of Polish and German contract law make a fascinating field for legal analysis. In the book we examine Polish and German law from the perspective of case law. The core of the analysis are German cases concerning various legal issues resulting from the lack of conformity in the contract of sale, specific work contract and donation contract. The main findings of the German cases are subsequently analysed with reference to the substantive Polish law. The adopted method of analysis makes this book the unique and inspiring collection of comparative arguments and reflections on law and methods of legal reasoning adopted in Germany and Poland.

The book is recommended to academics and legal practitioners in the field of contract law. It is also invaluable for Polish and German judges as a source of comparative argumentation derived from German and Polish law.



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