

KLUWER LAW INTERNATIONAL

PRIVATE LAW IN EUROPEAN CONTEXT SERIES

The Politics of European Sales Law

A Legal-Political Inquiry into the Drafting of
the Uniform Commercial Code, the Vienna
Sales Convention, the Dutch Civil Code and
the European Sales Directive in the Context of
the Europeanization of Private Law.

Bastiaan van Zelst



Wolters Kluwer

Law & Business

KLUWER LAW INTERNATIONAL

The Politics of European Sales Law

A Legal-Political Inquiry into the Drafting of the Uniform Commercial Code, the Vienna Sales Convention, the Dutch Civil Code and the European Consumer Sales Directive in the Context of the Europeanization of Contract Law

Bastiaan van Zelst



Wolters Kluwer

Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

Published by:

Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:

Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.care@aspenspubl.com

Sold and distributed in all other countries by:

Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper

ISBN 978-90-411-2752-5

© 2008 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without written permission from the publisher.

Permissions to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, United States of America. Email: permissions@kluwerlaw.com.

Printed in Great Britain

The Politics of European Sales Law

A Legal-Political Inquiry into the Drafting of the Uniform Commercial Code, the Vienna Sales Convention, the Dutch Civil Code and the European Consumer Sales Directive in the Context of the Europeanization of Contract Law

To Mariska

After all my dreaming I just want to come back home again
(A. Duritz)

Preface

Historically, the focus of scholars in the area of European Private Law has primarily been on the substantive part of the harmonization process. This has led to the underexposure of the most fascinating issue of the underlying politics of this process. Moreover, even though the processes in Europe, America and the Netherlands show strong resemblances, there has been virtually no comparative research as to the organization of these drafting processes compared to the European process and the political character of the uniform legislation eventually adopted in these jurisdictions.

This book seeks to fill these gaps and to contribute to the understanding of the political stakes in legislative processes, more generally in the area of sales law. With governments seeking to reduce the role of the State and to encourage market solutions to problems, the area of private law becomes a key regulatory instrument in ensuring that citizens obtain their basic needs. This makes research as to the effects and consequences of political activity in the drafting processes of private law instruments of great importance. This study aims to view the harmonization processes mentioned from a comparative, socio-political and legal perspective, fields of investigation that have been very much underexposed, in spite of the resemblances between the various processes.

Obviously, this book is in itself a political project. Although its first goal is to offer some awareness as to the various policy, political, moral, institutional and economic elements involved in the drafting of European private law, this volume would have never been written had the author fully agreed with the current course of proceedings in this area of politics. The book aims to offer to those involved in the process of the 'Europeanization' of private law an alternative view by comparing the efforts in Europe with those in four other sales law jurisdictions.

This project would not have been finished if not for the help of a number of people. Martijn, Jacobien, Chantal, Joasia, Jaap, Sacha, Gerard, Karel, Duncan and Mariska. Thank you so much for making this whole exercise possible.

The research has been concluded as of 1 April 2008. Later developments have not been taken into account.

Amsterdam, 15 May 2008

List of Abbreviations

ABA Journal	American Bar Association Journal
ABA	American Bar Association
ABLJ	American Business Law Journal
Alb. L. Rev.	Albany Law Review
ALI	American Law Institute
Am. J. Comp. L.	American Journal of Comparative Law
B2B	Business to Business
B2C	Business to Consumer
BEUC	Bureau Européen des Unions de Consommateurs
BGB	Bürgerliches Gesetzbuch
Brit. Y.B. Int'l L.	British Yearbook of International Law
Buff. L. Rev.	Buffalo Law Review
Bus. Law.	Business Lawyer
BW	Burgerlijk Wetboek
C.I.F.	Cost, Insurance, Freight
CPN	Communistische Partij Nederland
CASE & COM.	Case & Comment
CCA	Committee for Consumer Affairs of the Dutch Social and Economic Council
CCC	Consumers' Consultative Committee with the European Commission
CDA	Christen Democratisch Appèl
CEPC	Committee on the Environment, Public Health and Consumer Protection
CES	European Confederation of Trade Unions
CFR	Common Frame of Reference
Chi.-Kent. L. Rev.	Chicago-Kent Law Review
CISG	Convention on Contracts for the International Sale of Goods

CLS	Critical Legal Studies
CMLRev.	Common Market Law Review
COFACE	Committee of Family Organizations in the European Communities
Colum. J. Eur. L.	Columbia Journal of European Law
Colum. L. Rev.	Columbia Law Review
Consum. L.J.	Consumer Law Journal
COREPER	Committee of Permanent Representatives
Council	Council of the European Community
CPS	Consumer Policy Service
DG	Directorate-General
DCFR	Draft Common Frame of Reference
EC	European Community
ECJ	European Court of Justice
ECLG	European Consumer Law Group
EESC	European Economic and Social Committee
ELJ	European Law Journal
EP	European Parliament
EPF	European Peoples Party
ERCL	European Review of Contract Law
ERPL	European Review of Private Law
ETUC	European Trade Union Confederation
EU	European Union
Euro Coop	European Community of Consumer Cooperatives
Europ. L. R.	European Law Review
F.O.B.	Free on Board
Food, Drug and Cosmetics L. J.	Food, Drug and Cosmetics Law Journal
GPV	Gereformeerd Politiek Verbond
Georget. L. J.	Georgetown Law Journal
Harv. L. Rev.	Harvard Law Review
Harv. Int'l L.J.	Harvard International Law Journal
Hastings L.J.	Hastings Law Journal
Hofstra L. Rev.	Hofstra Law Review
HR	Hoge Raad
Ill. L. Rev.	Illinois law Review
Int'l & Comp. L.Q.	International & Comparative Law Quarterly
Int'l L. Rev.	International Law Review
Int'l Rev. L. & Econ.	International Review of Law and Economics
JCP	Journal of Consumer Policy
J. Legal Stud.	Journal of Legal Studies
KNB	Koninklijke Notariële Broederschap
La. L. Rev.	Louisiana Law Review
Law & Contemp. Probl.	Law & Contemporary Problems
Law & Hist. Rev.	Law & History Review

Law & Soc. Inquiry	Law & Social Inquiry
Loy. L.A. L. Rev.	Loyola of Los Angeles Law Review
Maryland L. Rev.	Maryland Law Review
MEP	Member of the European Parliament
Mercer L. Rev.	Mercer Law Review
Mich. L. Rev.	Michigan Law Review
Minn. L. Rev.	Minnesota Law Review
N.C. J. Int'l L. & Com. Reg.	North Carolina Journal of International Law & Commercial Registration
N.Y. Int'l L. Rev.	New York International Law Review
NBW	Nieuw Burgerlijk Wetboek
NCCUSL	National Conference of Commissioners on Uniform State Laws
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad
NOVA	Nederlandse Orde van Advocaten
Nw. U.L. Rev.	Northwestern University Law Review
NYLRC	New York Law Revision Commission
Ohio St. L.J.	Ohio State Law Journal
Orgalime	European Engineering Industries Association
Oxford J. L. S.	Oxford Journal of Legal Studies
PPR	Politieke Partij Radicaal
PSP	Pacifistisch Socialistische Partij
PvdA	Partij van de Arbeid
Parl. Gesch. NBW	Parlementaire Geschiedenis Nieuw BW
PEB	Permanent Editorial Board
PECL	Principles of European Contract Law
PELS	Principles of European Law on Sales
PES	Party of European Socialists
RPF	Reformatorisch Politieke Federatie
Rabelsz.	Rabels Zeitschrift für Ausländisches und Internationales Privatrecht
RTDciv	Revue Trimestrielle de droit Civil
RUSA	Revised Uniform Sales Act
S. Tex. L. Rev.	South Texas Law Review
SANCO	Directorate General for Health and Consumer Affairs
SEA	Single European Act 1986
SER	Sociaal Economische Raad
SGP	Staatkundig Gereformeerde Partij
SG	Secretariat-General
SGECC	Study Group on a European Civil Code
SME	Small and Medium sized enterprise
SMU L. Rev.	SMU Law Review
Stan. L. Rev.	Stanford Law Review

Sydney L. R.	Sydney Law Review
Tex. Wesleyan L. Rev.	Texas Wesleyan Law Review
U. Miami L. Rev.	University of Miami Law Review
U. Pa. J. Int'l Econ. L.	University of Pennsylvania Journal of International Economic Law
U. Pa. L. Rev.	University of Pennsylvania Law Review
U. Queensland L.J.	University of Queensland Law Journal
UCC	Uniform Commercial Code
ULFC	Uniform Law on the Formation of Contracts
ULIS	Uniform Law on International Sale of Goods
UNCITRAL	United Nations Commission on International Trade Law
UNIA	Uniform Negotiable Instruments Act
UNICE	Union of Industrial and Employer's Confederations of Europe
UNIDROIT	International Institute for the Unification of Private Law
Unif. L. Rev.	Uniform Law Review
US	United States
USA	Uniform Sales Act
Va. J. Int'l l.	Virginia Journal of International Law
Va. L. Rev.	Virginia Law Review
VNO/NCW	Verbond van Nederlandse Ondernemingen/ Nederlands Christelijk Werkgeversverbond
VVD	Volkspartij voor Vrijheid en Democratie
Wash. U.L.Q.	Washington University Law Quarterly
Wis. L. Rev.	Wisconsin Law Review
Wm. and Mary L. Rev.	William and Mary Law Review
WPNR	Weekblad voor Privaatrecht, Notariaat en Registratie
Yale L. J.	Yale Law Journal
ZEuP	Zeitschrift für Europäisches Privatrecht

Summary of Contents

Table of Contents	ix
Preface	xvii
List of Abbreviations	xix
Chapter 1 Introduction	1
Chapter 2 Analytical Framework	19
Chapter 3 The Uniform Commercial Code	35
Chapter 4 The Vienna Sales Convention	87
Chapter 5 The New Dutch Civil Code	137
Chapter 6 The Consumer Sales Directive and the DCFR	169
Chapter 7 Comparing the Processes	233

Epilogue	243
Bibliography	247
Index	261

Table of Contents

Preface	xvii
List of Abbreviations	xix
Chapter 1	
Introduction	1
1.1 Outline of the Research	2
1.1.1 Objectives	2
1.1.2 Method	2
1.1.3 Structure	3
1.2 A Brief History of European Private Law	4
1.2.1 Early Academic, Political and Legislative Efforts	4
1.2.2 Commission Communications	6
1.2.2.1 The First Communication	6
1.2.2.2 An Action Plan for European Contract Law	8
1.2.2.3 The Way Forward	9
1.2.2.4 Follow Up and Recent Developments	9
1.2.2.4.1 <i>First Progress Report</i>	9
1.2.2.4.2 <i>Green Paper on the Review</i>	10
1.2.2.4.3 <i>Second Progress Report</i>	11
1.2.2.4.4 <i>Results of the 2007 Green Paper Consultation</i>	11
1.2.2.4.5 <i>Publication of the (Draft) CFR</i>	12
1.3 Political Stakes in (Sales) Law?	13
1.3.1 Other Experiences	14
1.3.2 Critique of the Neutrality of Legislative Processes	15
1.3.3 Politics vs Policy?	16

Chapter 2	
Analytical Framework	19
2.1 Comparative Method	19
2.1.1 Legal Systems Chosen	20
2.1.2 Rules Chosen	21
2.2 Political Analysis; The Continuum Method	21
2.2.1 Ideals of Individualism and Altruism in the American Debate	22
2.2.2 The Continuum Method: Visualizing Relationships between Rule Alternatives	23
2.2.2.1 Altruism \neq Distribution	24
2.2.2.2 Extremes of the Continuum	25
2.2.2.3 The Importance of Altruism and Individualism in the Systems under Examination	25
2.2.2.4 The Relativity of Rule Solutions	26
2.2.2.5 Possible Problems with the Altruism/Individualism Continuum	26
2.2.2.6 An Example from Practice: Pre-contractual Good Faith	27
2.2.3 Altruism and Individualism in the European Debate	28
2.2.3.1 Differentiating Weak/Strong and Altruism/Individualism	28
2.2.3.2 Distributive Trends in the European Interpretation of 'the Social'?	29
2.2.4 The Use of the Continuum as a Methodological Tool	30
2.2.4.1 The Choice for Differentiation between Weak/Strong and Altruism/Individualism	30
2.2.4.2 An Issue of Perspective	32
2.2.4.3 Buyer/Seller Continuum	33
Chapter 3	
The Uniform Commercial Code	35
3.1 Sponsoring Organizations of the UCC	36
3.1.1 The National Conference of Commissioners	36
3.1.2 The American Law Institute	37
3.2 Genesis of the UCC	38
3.2.1 The Jurisprudence of the UCC: Regulation or Facilitation?	40
3.2.2 The UCC: Destined to be a Draft?	42
3.2.2.1 The Start of the Drafting on the Uniform Sales Act	42
3.2.2.2 The Official Start of the UCC Project	43
3.2.2.3 The Code Subjected to Political Opposition	44
3.2.3 The Article 2 Revision Process	45

3.2.4	Criticism of the (Revision) Process	46
3.2.4.1	Diverging Standards, Interest Group Pressure, Representation and Independence	47
3.2.4.1.1	<i>Quality Standards and Unbalanced Interest Group Influence</i>	47
3.2.4.1.2	<i>Transparency and Political Accountability</i>	48
3.2.4.1.3	<i>Representation</i>	48
3.2.4.2	Structure or Culture?	49
3.2.4.2.1	<i>Actors in the Process and the Form of Rules</i>	49
3.2.4.2.2	<i>Thesis and Application</i>	50
3.2.4.3	State versus Federal Legislation	51
3.3	Political Issues in the Development of the UCC	52
3.3.1	The Definition of a Merchant	52
3.3.1.1	The 1941 Draft	53
3.3.1.2	The RUSA 1944	54
3.3.1.2.1	The Post 1949 Drafts and the Deletion of the Merchant Expansion Provision	55
3.3.1.3	Analysis	56
3.3.1.3.1	<i>Altruism/Individualism Continuum</i>	57
3.3.1.3.2	<i>Buyer/Seller Continuum</i>	57
3.3.2	Remedies; Availability, Modification, Limitation, Exclusion	58
3.3.2.1	Availability of Remedies	58
3.3.2.1.1	<i>The 1940 and 1941 Drafts</i>	58
3.3.2.1.2	<i>Amendments to the 1944 Draft</i>	59
3.3.2.1.3	<i>UCC 1949 and Beyond</i>	60
3.3.2.2	Modification, Limitation and Exclusion of Remedies	61
3.3.2.2.1	<i>Early Drafts</i>	61
3.3.2.2.2	<i>The 1944 Draft</i>	62
3.3.2.2.3	<i>UCC 1949 and Later Drafts</i>	63
3.3.2.3	Analysis	65
3.3.2.3.1	<i>Altruism/Individualism Continuum</i>	65
3.3.2.3.2	<i>Buyer/Seller Continuum</i>	66
3.3.3	Modification of Warranties	67
3.3.3.1	The Development of Section 2-316 UCC	67
3.3.3.2	Analysis	70
3.3.3.2.1	<i>Altruism/Individualism Continuum</i>	70
3.3.3.2.2	<i>Buyer/Seller Continuum</i>	71
3.3.4	Standard Form Contracts and Unconscionability	71
3.3.4.1	The 1949 and 1950 drafts	72
3.3.4.2	The 1951 Editorial Board Meeting	73
3.3.4.3	The NYLRC and the Editorial Board Supplement	74
3.3.4.4	Analysis	75
3.3.4.4.1	<i>Altruism/Individualism Continuum</i>	76
3.3.4.4.2	<i>Buyer/Seller Continuum</i>	76

3.3.5	Distribution of Liability	77
3.3.5.1	The 1940 and 1941 Drafts	77
3.3.5.2	The 1944 Draft	79
3.3.5.3	Discussion and Amendment on the Basis of the 1944 Meetings	80
3.3.5.4	Development of Strict Liability after 1950	81
3.3.5.5	Analysis	82
3.3.5.5.1	<i>Altruism/Individualism Continuum</i>	83
3.3.5.5.2	<i>Buyer/Seller Continuum</i>	83
3.4	Conclusion	84
Chapter 4		
The Vienna Sales Convention		87
4.1	A Brief History of Uniform International Sales Law before the CISG	87
4.1.1	UNIDROIT	87
4.1.2	ULIS and ULFC	89
4.2	The Coming into Being of the CISG	90
4.2.1	The Organization of UNCITRAL and the Drafting Process	91
4.2.2	Criticism of the CISG's Decision Making Process	93
4.2.3	The Politics of the CISG?	94
4.2.3.1	North vs South, East vs West and Developed vs Developing Nations	96
4.2.3.2	Methodological Difficulties	97
4.3	Political Issues in the Development of the CISG	98
4.3.1	The Scope of the Convention	98
4.3.1.1	The Geographical Scope of the CISG	98
4.3.1.1.1	<i>Early Discussions in the Working Group</i>	98
4.3.1.1.2	<i>Commission Debate</i>	100
4.3.1.1.3	<i>Secretariat's Report and the Working Group's Response</i>	101
4.3.1.1.4	<i>Commission and Conference Debates</i>	102
4.3.1.2	Consumer Sales	103
4.3.1.2.1	<i>Early Working Group Debates</i>	103
4.3.1.2.2	<i>Discussion during the Sixth Session (1975)</i>	104
4.3.1.3	Analysis	105
4.3.1.3.1	<i>Altruism/Individualism Continuum</i>	107
4.3.1.3.2	<i>Buyer/Seller Continuum</i>	108
4.3.2	Remedies under the Convention	109
4.3.2.1	Early Discussions: The Third Session	110
4.3.2.1.1	<i>Article 41 of the Draft</i>	110
4.3.2.1.2	<i>Article 42 of the Draft</i>	110
4.3.2.1.3	<i>Article 43 and 44 of the Draft</i>	111