

OXFORD

THE COMMON
EUROPEAN SALES
LAW IN CONTEXT

Interactions with English and German Law

EDITED BY

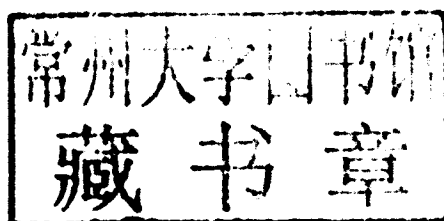
GERHARD DANNEMANN

STEFAN VOGENAUER

The Common European Sales Law in Context

Interactions with English and German Law

Edited by
GERHARD DANNEMANN
STEFAN VOGENAUER



Arts & Humanities
Research Council



Deutsche
Forschungsgemeinschaft

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

© The several contributors, 2013

The moral rights of the authors have been asserted

First Edition published in 2013

Impression: 1

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, without the
prior permission in writing of Oxford University Press, or as expressly permitted
by law, by licence, or under terms agreed with the appropriate reprographics
rights organization. Enquiries concerning reproduction outside the scope of the
above should be sent to the Rights Department, Oxford University Press, at the
address above

You must not circulate this work in any other form
and you must impose this same condition on any acquirer

Crown copyright material is reproduced under Class Licence
Number C01P0000148 with the permission of OPSI
and the Queen's Printer for Scotland

British Library Cataloguing in Publication Data

Data available

ISBN 978-0-19-967890-7

Printed and bound in Great Britain by
CPI Group (UK) Ltd, Croydon, CR0 4YY

Links to third party websites are provided by Oxford in good faith and
for information only. Oxford disclaims any responsibility for the materials
contained in any third party website referenced in this work.

European Contract Law unification projects have recently advanced from the Draft Common Frame of Reference (2009) to a European Commission proposal for an optional Common European Sales Law (2011) which is to facilitate cross-border marketing. This book investigates for the first time how CESL and DCFR rules would interact with various aspects of domestic law, represented by English and German law. Nineteen chapters, co-authored by British and German scholars, examine such interface issues, e.g. pre-contractual relationships, notions of contract, formation, interpretation, and remedies, extending to non-discrimination, third parties, transfers of rights, aspects of property law, and collective proceedings. They go beyond a critical analysis of CESL and DCFR rules by demonstrating where and how CESL rules would interact with neighbouring areas of English and German law before English and German courts, how domestic traditions might influence the application, which aspects might motivate sellers and buyers to choose or reject CESL, and which of the rules might serve as a model for national legislators. The findings are summarized in the final two chapters.

Gerhard Dannemann is Professor of English Law, British Economy and Politics, at the Humboldt-Universität zu Berlin.

Stefan Vogenauer is the Linklaters Professor of Comparative Law and Fellow of Brasenose College, University of Oxford and Director of the Oxford Institute of European and Comparative Law.

ALSO PUBLISHED BY
OXFORD UNIVERSITY PRESS

**Principles, Definitions and Model Rules of
European Private Law**

Draft Common Frame of Reference (DCFR)

Edited by Christian von Bar and Eric Clive

**The Max Planck Encyclopedia of European
Private Law**

Edited by Jürgen Basedow, Klaus J. Hopt,
Reinhard Zimmermann, and Andreas Stier

Principles of European Law

Sales (PEL S)

Ewoud Hondius, Viola Heutger, and
Christoph Jelschek

THE COMMON EUROPEAN SALES LAW IN CONTEXT

In memoriam Hans Stoll (1926–2012)

Preface

This book presents the results of an Anglo-German network of 38 researchers set up by the two editors in 2009 and generously co-funded by the Arts and Humanities Research Council and the Deutsche Forschungsgemeinschaft. This grant paid for three project conferences, the project staff in Berlin and Oxford, and for replacement staff for the two editors during the final year of the project.

We owe many thanks to the project staff: to Caroline Harvey and Christopher Schuller for their energy, diligence, punctuality, and unerring eye for any violations of citation rules, as well as for their superb linguistic editing and readiness to take on large additional tasks at short notice; to Arne Gutsche for setting up and maintaining the database; and to Kasper Steensgaard for his help in organizing the first project conference, and for having acted as voluntary database system administrator throughout the project. We also owe gratitude to Corinna Radke, Catherine Smith, Sylvena Zöllner and the student assistants at the Centre for British Studies at the Humboldt-Universität zu Berlin, and Jenny Dix at the Institute of European and Comparative Law at the University of Oxford, for their help with the project conferences and for alleviating the odd emergency in editing.

We are naturally most grateful to all authors. It must have been difficult for most of them to find the extra time that the topic and the project set-up required for their contributions. We also owe thanks to Alex Flach from Oxford University Press for his continuous support, and to Deborah Renshaw for editing the book on behalf of OUP.

Hans Stoll belongs to the great scholars of the post-war generation whose comparative studies laid the foundations for what later would become known as European Private Law. He introduced one of us to comparative legal scholarship. This book is dedicated to his memory.

Gerhard Dannemann and Stefan Vogenauer
Berlin and Oxford, November 2012

It was with immense sadness that, at the stage of reading the proofs, we learned of the untimely death of Hannes Unberath who contributed to this book. He was a valuable member of the 'CFR in Context' project and will be missed greatly.

GD and SV

List of Abbreviations

AC	Law Reports, Appeal Cases, House of Lords and Privy Council (1890–)
ACSR	Australian Corporations and Securities Reports
AcP	<i>Archiv für die civilistische Praxis</i>
ACQP	Research Group on the Existing EC Private Law (Acquis Group), Principles of the Existing EC Contract Law (Acquis Principles) (2007/2009)
Adm	High Court of Admiralty
A-G	Attorney-General
AG	Advocate-General (in ECJ and CJEU cases)
AGBG	<i>Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen</i> (German Act on Standard Contract Terms) of 9 December 1976
AGG	<i>Allgemeines Gleichbehandlungsgesetz</i> (German General Act on Equal Treatment) of 14 August 2006
All ER	All England Law Reports
All ER (Comm)	All England Law Reports (Commercial Cases)
All ER (D)	All England Direct Law Reports (Digests)
ALR	Australian Law Reports
App Cas	Law Reports, Appeal Cases, House of Lords and Privy Council (1875–1890)
ArgLR	Argus Law Reports
Art(s)	article(s)
B & Ad	Barnewall & Adolphus' King's Bench Reports
B & C	Barnewall and Cresswell's King's Bench Reports
B & S	Best & Smith's Queen's Bench Reports
B2B	business-to-business
B2C	business-to-consumer
B2SME	business-to-small and medium-sized enterprise
BAG	<i>Bundesarbeitsgericht</i> (German Federal Labour Law Court)
Bamberger/Roth/contributor	HG Bamberger and H Roth (eds), <i>Kommentar zum Bürgerlichen Gesetzbuch</i> , vol I: §§ 1-610, CISG (3rd edn, 2012)

BB	<i>Der Betriebs-Berater</i>
BCC	British Company Cases
Beav	Beavan's Rolls Court Reports
BeckOK-BGB/contributor	<i>Beck'scher Online-Kommentar</i> BGB, available at < http://beck-online.beck.de >
BeckRS	<i>Beck-Rechtsprechung</i> , available at < http://beck-online.beck.de >
BGB	<i>Bürgerliches Gesetzbuch</i> (German Civil Code) of 1 January 1900
BGH	<i>Bundesgerichtshof</i> (German Federal Court of Justice)
BGHZ	<i>Entscheidungen des Bundesgerichtshofes in Zivilsachen</i>
BIICL	British Institute for International and Comparative Law
BLR	Building Law Reports
BT-Drs	<i>Bundestags-Drucksache</i>
CA	Court of Appeal
Cal App	California Appellate Reports
Camp	Campbell's Nisi Prius Cases
CB	Common Bench Reports
CBNS	Common Bench Reports, New Series
Cciv	<i>Code civil</i> (French Civil Code) of 1804
CCP	Court of Common Pleas
CESL	(Proposal for a) Common European Sales Law
cf	compare
CFR	Common Frame of Reference
ch(s)	chapter(s)
Ch	High Court of Chancery; or Law Reports, Chancery Division (1890 –)
ChD	Chancery Division of the High Court of Justice; or Law Reports, Chancery Division (1875–1890)
CISG	United Nations Convention on Contracts for the International Sale of Goods (Vienna, 11 April 1980)
CISG-online	Internet database about the CISG, University of Basel (< http://www.cisg-online.ch/index.html >)
CJEL	Columbia Journal of European Law
CJEU	Court of Justice of the European Union
Cl & F	Clark & Finnelly's House of Lords Cases
CLC	Commercial Law Cases
CLJ	Cambridge Law Journal
CLR	Commonwealth Law Reports
CMLR	Common Market Law Reports

CML Rev	Common Market Law Review
Co Litt	Coke on Littleton
COM	Document of the European Commission intended for communication to the public
ConstLJ	Construction Law Journal
CoPECL	Common Principles of European Contract Law
Cowp	Cowper's King's Bench Reports
CP	Law Reports, Common Pleas
CRD	Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights ('Consumer Rights Directive')
CSD	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 ('Consumer Sales Directive')
CSIH	Court of Session, Inner House
CSOH	Court of Session, Outer House
D & Sm	De Gex & Smale's Chancery Reports
DC	Divisional Court
DCFR	Study Group on a European Civil Code and Research Group on the Existing EC Private Law (Acquis Group), Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (2009)
DCFR IOE	Interim Outline Edition of the DCFR (2008)
DCFR Introduction	C von Bar et al, 'Introduction' in DCFR, pp 1–46
DCFR Principles	C von Bar et al, 'Principles' in DCFR, pp 57–99
DL-InfoV	<i>Verordnung über Informationspflichten für Dienstleistungserbringer</i> (German Provision of Services (Information Duties) Regulations) of 12 March 2010
East	East's Term Reports, King's Bench
Ebenroth/Boujong/Joost/Strohn/contributor	CT Ebenroth, K Boujong, D Joost, and L Strohn, <i>HGB-Kommentar</i> (2nd edn, Munich: Vahlen 2008)
EBLR	European Business Law Review
EC	European Community
ECJ	European Court of Justice
ECR	European Court Reports

ed(s)	editor(s)
edn	edition
EEA	European Economic Area
EEC	European Economic Community
eg	for example
EGBGB	<i>Einführungsgesetz zum Bürgerlichen Gesetzbuch</i> (German Civil Code Implementing Act) of 1 January 1900
EGLR	Estates Gazette Law Reports
EMLR	European Media Law Reports
ER	English Reports
ERCL	European Review of Contract Law
Erman/contributor	W Erman et al (eds), <i>Bürgerliches Gesetzbuch: Kommentar</i> (13th edn, 2011)
ERCL	European Review of Contract Law
ERPL	European Review of Private Law
et al	and others
EU	European Union
EuR	<i>Europarecht</i>
EuZW	<i>Europäische Zeitschrift für Wirtschaftsrecht</i>
EWCA	England and Wales Court of Appeal
EWCA Civ	England and Wales Court of Appeal (Civil Division)
EWHC	England and Wales High Court
EWHC (Comm)	England and Wales High Court (Commercial Court)
Ex	Court of Exchequer
ExD	Law Reports, Exchequer Division
FCA	Federal Court of Australia
FS	A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback, 3 May 2011 ('Feasibility Study')
FS 2nd	Revised version of the FS, published as a working document of the European Commission online on 6 September 2011 and entitled 'Contract Law, Work in Progress, Version of 19 August 2011'
GPR	<i>Zeitschrift für Gemeinschaftsprivatrecht</i>
Grabitz/Hilf/Nettesheim	E Grabitz, M Hilf, and M Nettesheim (eds), <i>Das Recht der Europäischen Union</i> (47th edn, 2012)

GRUR	<i>Gewerblicher Rechtsschutz und Urheberrecht</i>
H & C	Hurlstone & Coltman's Exchequer Reports
HCA	High Court of Australia
HGB	<i>Handelsgesetzbuch</i> (German Commercial Code) of 1 January 1900
Hk-BGB/contributor	R Schulze (ed), <i>Bürgerliches Gesetzbuch: Handkommentar</i> (7th edn, 2012)
HKK/contributor	M Schmoeckel, J Rückert, and R Zimmerman (eds), <i>Historisch-kritischer Kommentar zum BGB</i> (2001–)
HL	House of Lords
ICLQ	International and Comparative Law Quarterly
ICR	Industrial Cases Reports
IheringsJB	<i>Jahrbücher für die Dogmatik des heutigen römischen und deutschen Rechts</i>
InsO	<i>Insolvenzordnung</i> (German Insolvency Act) of 1 January 1999
IPRax	<i>Praxis des Internationalen Privat- und Verfahrensrechts</i>
J	Justice
Jauernig/contributor	O Jauernig (ed), <i>Bürgerliches Gesetzbuch mit Allgemeinem Gleichbehandlungsgesetz (Auszug): Kommentar</i> (14th edn, 2011)
JBL	Journal of Business Law
JCL	Journal of Contract Law (Australia)
JuS	<i>Juristische Schulung</i>
JZ	<i>Juristenzeitung</i>
KB	Law Reports, King's Bench Division
KBD	King's Bench Division of the High Court of Justice (1875 –)
Keen	Keen's Rolls Court Reports
L & TR	Landlord and Tenant Reports
LG	<i>Landgericht</i> (German District Court)
LGDJ	<i>Librairie Générale de Droit et de Jurisprudence</i>
LJ	Lord Justice
LJJ	Lord Justices
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
Lloyd's Rep	Lloyd's List Law Reports

Lloyd's Rep PN	Lloyd's Law Reports Professional Negligence
LM	<i>Entscheidungen des Bundesgerichtshofs</i> , collection published by Lindenmaier and Möhring
LQR	Law Quarterly Review
LR	Law Review
LT	Law Times Reports
Ltd	Limited
MDR	<i>Monatsschrift für deutsches Recht</i>
MLR	Modern Law Review
MüKo/contributor	K Rebmann et al (eds), <i>Münchener Kommentar zum Bürgerlichen Gesetzbuch</i> (6th edn, 2012)
MüKoHGB/contributor	K Schmidt (ed), <i>Münchener Kommentar zum Handelsgesetzbuch</i> (2nd edn, 2005–2007)
MüKoInsO/contributor	HP Kirchhof, HJ Lwowski, and R Stürner (eds), <i>Münchener Kommentar zur Insolvenzordnung: InsO</i> (2nd edn, 2008)
n(n)	footnote(s)
NB2NB	between parties who are not businesses
New Rep	New Reports
NJOZ	<i>Neue Juristische Online-Zeitschrift</i>
NJW	<i>Neue Juristische Wochenschrift</i>
NJW-RR	<i>Neue Juristische Wochenschrift-Rechtsprechungsreport Zivilrecht</i>
no(s)	number(s)
NP	<i>Nisi prius</i>
NZBau	<i>Neue Zeitschrift für Baurecht und Vergaberecht</i>
NZV	<i>Neue Zeitschrift für Verkehrsrecht</i>
OFT	Office of Fair Trading (UK)
OGH	<i>Oberster Gerichtshof</i> (Austria)
OGHZ	<i>Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Zivilsachen</i>
OHADA	Organization for the Harmonization of Business Law in Africa
OJ	Official Journal of the European Communities
OJLS	Oxford Journal of Legal Studies
OLG	<i>Oberlandesgericht</i> (German Higher Regional Court)
OLGR	OLG-Report

OLGZ	<i>Entscheidungen der Oberlandesgerichte in Zivilsachen einschließlich der freiwilligen Gerichtsbarkeit</i>
OUP	Oxford University Press
P	Law Reports, Probate
PC	Privy Council
P2P	person-to-person
p(p)	page(s)
Palandt/contributor	<i>Palandt's Kommentar zum Bürgerlichen Gesetzbuch</i> (71st edn, 2012)
para(s)	paragraph(s)
PCID	pre-contractual information duty
PD	Law Reports, Probate, Divorce & Admiralty Division
PECL	Commission on European Contract Law, Principles of European Contract Law (1995/2000/2003)
PEL	Principles of European Law
PICC	UNIDROIT, UNIDROIT Principles of International Commercial Contracts 2010
QB	Court of Queen's Bench; or Law Reports, Queen's Bench Division (1891–1901, 1952–)
QBD	Queen's Bench of the High Court of Justice; or Law Reports, Queen's Bench Division (1875–1890)
QC	Queen's Counsel
R	The Queen/The King
RabelsZ	<i>Rabels Zeitschrift für ausländisches und internationales Privatrecht</i>
RC	Ruling Cases
Reg	Regulation
Reg-CESL	Proposal for a Regulation on a Common European Sales Law of 11 October 2011, COM(2011) 635 final
Restatement 2nd	Restatement of the Law Second, Contracts (USA, 1979)
RG	<i>Reichsgericht</i> (Supreme Court of the German Empire)
RGBI	<i>Reichsgesetzblatt</i>
RGRK/contributor	<i>Das Bürgerliche Gesetzbuch mit besonderer Berücksichtigung der Rechtsprechung des Reichsgerichts und des Bundesgerichtshofs</i> ('Reichsgerichtsratekommentar') (12th edn, 1982–)

RGZ	<i>Entscheidungen des Reichsgerichts in Zivilsachen</i>
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 (Rome I) [2008] OJ L177/6
Rome II Regulation	Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40
Russ & Ry	Russell & Ryan's Crown Cases Reserved
s(s)	section(s)
SAcLJ	Singapore Academy of Law Journal
SALJ	South African Law Journal
Schlechtriem/Schwenzer/contributor	P Schlechtriem and I Schwenzer (eds), <i>Commentary on the UN Convention on the International Sale of Goods (CISG)</i> (3rd (English) edn, 2010)
Schulze/contributor	R Schulze (ed), <i>Common European Sales Law (CESL): Commentary</i> (2012)
SC	Session Cases (Scotland)
SCLR	Scottish Civil Law Reports
SCV	Supreme Court of Victoria (Australia)
SCWA	Supreme Court of Western Australia
SGA 1979	Sale of Goods Act 1979
SGCA	Singapore Court of Appeal
SI	Statutory Instrument
SIN	Statutory Information Notice
SLR	Scottish Law Reporter
SLR (R)	Singapore Law Reports (Reissue)
SLT	Scots Law Times
SMEs	Small and medium-sized enterprises
Staudinger/contributor (year)	<i>J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen</i>
STS	<i>Sentencia Tribunal Supremo</i> (Spain)
TCC	Technical and Construction Court
TCLR	Technology and Construction Law Reports
Term Rep	Durnford & East's Term Reports, King's Bench
TEU	Treaty on European Union (2009)
TFEU	Treaty on the Functioning of the European Union (2010)

UCC	Uniform Commercial Code (USA)
UTCCR	Unfair Terms in Consumer Contracts Regulations 1999
UCTA	Unfair Contract Terms Act 1977
UKHL	United Kingdom House of Lords
UKlaG	<i>Unterlassungsklagengesetz</i> (German Act on Injunctive Relief) of 27 August 2002
UKPC	United Kingdom Privy Council
UKSC	United Kingdom Supreme Court
ULF	Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods 1964
UNIDROIT	International Institute for the Unification of Private Law
UNTS	United Nations Treaty Series
Ulmer/Brandner/Hensen	G Christensen, A Fuchs, M Habersack, C Schäfer, H Schmidt, P Ulmer, and A Witt (eds), <i>AGB-Recht</i> (11th edn, 2011)
US Ct of Apps	United States Court of Appeals
UWG	<i>Gesetz gegen den unlauteren Wettbewerb</i> (German Unfair Competition Act) of 3 July 2004
v	versus
VCC	Vice Chancellor's Court
VersR	<i>Versicherungsrecht</i>
Vogenauer/Kleinheisterkamp/contributor	S Vogenauer and J Kleinheisterkamp (eds), <i>Commentary on the UNIDROIT Principles of International Commercial Contracts</i> (2009)
vol(s)	volume(s)
VVW	<i>Verlag Versicherungswirtschaft</i>
WLR	Weekly Law Reports
WM	<i>Wertpapier-Mitteilungen</i>
Wolf/Lindacher/Pfeiffer	M Wolf, M Lindacher, and T Pfeiffer (eds), <i>AGB-Recht Kommentar</i> (5th edn, 2009)
ZEuP	<i>Zeitschrift für europäisches Privatrecht</i>
ZfBR	<i>Zeitschrift für deutsches und internationales Baurecht</i>
ZIP	<i>Zeitschrift für Wirtschaftsrecht</i>
ZPO	<i>Zivilprozessordnung</i> (German Code of Civil Procedure) of 5 December 2005
ZvglRWiss	<i>Zeitschrift für vergleichende Rechtswissenschaft</i>