Javier Plaza Penades and Luz M. Martinez Velencoso (eds.), European Perspectives on the Common European Sales Law, Springer 2015

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I.

The Draft Common European Sales Law (DCESL)[1] is only a quite narrow legislative proposal, a remaining political "dwarf" deriving from the academic "giant" named Draft Common Frame of Reference (DCFR)[2].[3] In its legislative resolution of 26 February 2014 on the DCESL and the introductory regulation (DReg CESL)[4], the European Parliament has suggested no less than 264 amendments, including in amendment 26 (art. 1(1) DReg CESL) the reduction of the material scope of application to "transactions for the sale of goods, for the supply of digital content and for related services ***which are conducted at a distance, in particular online,*** where the parties to a contract agree to do so"[5]. Against this background the new European Commission announced on 16 December 2014 that they are going to submit a modified proposal for a regulation on a Common European Sales Law. The reason for the Commission to modify the proposal is to "fully unleash the potential of e-commerce in the Digital Single Market."[6]

At this stage it is, therefore, quite possible that the future Common European Sales Law will contain even less general contract law provisions and will become streamlined for the usage in e- and m-commerce only, in particular in B2C transactions. Thereby, the "dwarf" CESL would even shrink. One possible task of a CESL–to be the germ cell for a future (optional) European contract or even private law–would no longer be fulfilled. Against this background an intensive debate about the strengths and weaknesses of a full Common European Sales law and the Commission's proposal thereon might be more needed than ever before. The book edited by *Javier Plaza Penades* and *Luz M. Martinez Velencoso* can be a great contribution to this debate.

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[1] Annex I, "Common European Sales Law" of the "Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law", COM(2011) 635 final of 11.10.2011, pp. 30 *et seq.*

[2] Christian von Bar/Eric Clive/Hans Schulte-Nölke (eds.), Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference (DCFR) –Outline Edition, Munich 2009: Sellier.

[3] In this direction the discussion on the symposium of 20. January 2012 in Würzburg. Cf. Report on the discussion in: Oliver Remien/Sebastian Herrler/Peter Limmer (Hg.), Gemeinsames Europäisches Kaufrecht für die EU? Analyse des Vorschlags der Europäischen Kommission für ein Europäisches Vertragsrecht vom 11. Oktober 2011 – Wissenschaftliches Symposium am 20. Januar 2012 in Würzburg, München 2012: C.H. Beck, e.g. p. 46.

[4] European Parliament legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011)0635 – C7-0329/2011 – 2011/0284(COD)).

[5] The accentuations are taken from the original quotation, i.e. the legislative resolution.

[6] Annex II "List of withdrawals or modifications of pending proposals" of the "Commission Work Programme 2015: A New Start", COM(2014) 910 final of 16.12.2014, p. 12.
On the position of the Commission cf. also http://www.ecommerce-europe.eu/news/2014/many-of-ecommerce-europes-priorities-taken-up-by-european-commission-in-2015.

II.

The title, "European Perspectives on the Common European Sales Law", seems a bit odd at first glance. The Common European Sales Law is a draft EU regulation. The perspective on EU law should, by the nature of that law which is to be interpreted autonomously according to the European methodology, always be a European one. But it holds true, of course, that every lawyer is biased by his or her home jurisdiction and that most volumes that have been published so far in English are dominated by authors from Germany, Austria, the Netherlands or England. Therefore, the goal of the editor to discuss the Common European Sales Law from a "European perspective" by looking at it "from the perspective of a number of scholars from different European countries"[7] is very creditable. The concept is honoured, however, only partially. Even though the authors come from five different Member States (Spain, Portugal, Germany, Norway and Poland) representing the different legal cultures on the continent (but excluding the UK and Ireland), 66 % of the articles are authored by legal scholars from Spain. Moreover, the authors address very different topics. Each topic is, therefore, discussed only from the perspective of one scholar from one Member State. However, having authors mostly from Spain, i.e. from a country with a Romanic legal tradition,[8] adds to the publications in English language on the Common European Sales Law, which are so far available on the market. Notwithstanding, most topics are discussed in the light of both the "stages of the text"[9] in the evolution of European contract law and a comparative law perspective, taking partly into consideration more than five national legal orders.

The editors call their book a "Commentary". This commentary is, however, not a commentary in the German tradition, *i.e.* that comments are written about every article of the draft regulation including its annex. Such volumes have, *inter alia*, already been edited by *Schulze*[10] and *Schmidt-Kessel*[11]. Further German style commentaries are being prepared at the moment.[12] Instead, the discussed volume addresses much broader issues in each chapter, such as the formation of contract *in toto*, focuses on the most important issues and leaves out some less important questions, which also form part of the regulation. Thereby, it looks much more like a handbook–or partly even like a textbook–on the draft regulation than like a German style commentary.

[7] *Javier Plaza Penadés/Luz M. Martínez Velencoso*, Preface, in: Javier Plaza Penades/Luz M. Martinez Velencoso (eds.), European Perspectives on the Common European Sales Law, Cham inter al. 2015: Springer, v-viii, v.

[8] An exception is Guido Alpa/Giuseppe Conte/Ubaldo Perfetti/Friedrich Graf von Westphalen (eds.), The Proposed Common European Sales Law - the Lawyers' View, Munich 2013: Sellier, which contains several contributions from Italian lawyers.

[9] "Stages of the text" is an attempt to translate the German term *Textstufen*, which has been introduced by *Reinhard Zimmermann* in his article *Reinhard Zimmermann*, Textstufen in der modernen Entwicklung des Europäischen Privatrechts, EuZW 2009, 319-323 and which has since been regularly used in the German debate on CESL.

[10] Reiner Schulze (ed.), Common European Sales Law (CESL) – Commentary, Munich *inter al.* 2012: C.H. Beck *inter al.*

[11] Martin Schmidt-Kessel (ed.), Der Entwurf für ein Gemeinsames Europäisches Kaufrecht – Kommentar, Munich 2014: Sellier.

[12] Cf. e.g. Dirk Staudenmayer (ed.), Beck`sche Kurz-Kommentare: Gemeinsames Europäisches Kaufrecht to be published in 2016.

III.

The book is structured according to the life circle of a contract, which is at the same time the structure of the annex of the draft regulation on a Common European Sales Law (DCESL). It can be divided into three parts.

The first two chapters deal with the background of the regulation and some issues relating to the rules of the regulation itself, but not the annex, which contains the material contract law rules. Chapter 1, "The Proposal for a Regulation on a Common European Sales Law (CESL): An Introduction" by *Ana Sofia Gomes* (pp. 1 *et seq.*) summarizes nicely the development of the academic research on European private law and the steps taken by the European institutions in order to develop a European private law since the 1980s (pp. 1-2). In this context it is, however, somewhat surprising that the Common Core on European Private Law project is named without further comment together in series with the project groups "Committee on European Private Law", the "European Academy of Private", the "Research Group on Existing EC Private European Law" and the "Study Group on a European Civil Code". Moreover, it is discussed in the context of "the European contract law debate", of which the Common European Sales Law is the "first legislative initiative to come out of" (p. 1). This could lead to the wrong impression, that the Common Core project would also draft restatement-like models codes, would have a unification agenda in the background of its academic research or would even have taken part in the preparation of the "stages of the text" of European contract law. The Common Core project group, instead, expressly rejects both.[13]
After shortly addressing the issue of the legal basis of a Common European Sales Law (pp. 7-8), the introductory chapter discusses two of the three main issues of the draft regulation on a Common European Sales Law itself, excluding the annex (DReg CESL): the object of the regulation (p. 8) and its scope of application (pp. 9-13) in the three dimensions, i.e. the personal, the territorial and substantive scope of application. It is very laudable that, in the context of the personal scope of application, the amendments suggested by the European Parliament in its legislative resolution[14] are discussed. Hereby, *Ana Sofia Gomes* concludes, concerning the personal scope of application, that the only amendment by the European Parliament is that the definition of consumer is specified (Amendments 5 and 32) but that the choice of whether the CESL applies also to BigB2BigB contracts is still left to the Member States. This conclusion is drawn from the fact that art. 13(b) Draft Regulation (DReg CESL)[15] is not amended by the European Parliament. It is, however, submitted that

[13] Cf. e.g. *Ugo Mattei/Mauro Bussani*, The Trento Common Core Project, Speech delivered at the first general meeting on July 6 1995, online available at: http://www.common-core.org/node/8: "[W]e do not wish to force the actual diverse reality of the law within a map to reach uniformity [...]. Nor we wish to push in the direction of uniformity."; "This, again, because while we do not have the ambition of a complete Restatement-like coverage, we still need a rather extensive scope to give to our project scholarly significance, impact, visibility and appeal also outside of academic circles. This character of our project is [...] one of the differences with other projects on European Private Law like the Lando Commission [...]."

[14] European Parliament legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011)0635 – C7-0329/2011 – 2011/0284(COD)).

[15] Member States' options
A Member State may decide to make the Common European Sales Law available for:
[…]
(b) contracts where all the parties are traders but none of them is an SME within the meaning of Article 7(2).

this is editorial error. In the Commission's draft the limitation to the personal scope of application is introduced by art. 7(1) sentence 2 and art. 7(2) DReg CESL. Art. 13(b) DReg CESL also refers expressly to art. 7(2) DReg CESL. Art. 7 DReg CESL is, however, entirely replaced by Amendment 70 with the new art. 7, which now states: "The Common European Sales Law may be used only if the seller of goods or the supplier of digital content is a trader." Therefore, it is submitted that, as *Ana Sofia Gomes* rightly suggests as a possibility in footnote 57 (p. 10), if the amendments of the European Parliament were to enter into force, the CESL could be chosen independent of who the buyer is as long as the seller is a trader. Unfortunately, the extensive amendments suggested by the European Parliament concerning the substantive scope of application are not discussed.
The second chapter in the first part of the book focuses on the third important question regulated in DReg CESL: The choice of the Common European Sales law. In the chapter entitled "Some Private International Law Issues", *Guillermo Palao Moreno* starts again by presenting some insights into the historical development of CESL (pp. 17-19), the object of the DCESL and the legal basis for its enactment (p. 19). Those parts are by and large a repetition of what has already been discussed in chapter 1. Since the second chapter focuses on the "rules of applicability" of DCESL, the material scope of application is, consequently, discussed first (pp. 20-21). Again, it is not referred to the legislative resolution of the European Parliament, which suggests several partly far-reaching changes. Therefore, this is also more or less a repetition of what has already been discussed in chapter 1. Thereafter, the territorial scope of application is discussed quite extensively (pp. 21-24). The presentation of the opt-in character of the DCESL and the different requirements for the validity of the choice of DCESL in B2B and B2C contracts nicely summarizes the main position that can be found in literature so far (pp. 24-27). In this section the relationship between the CESL and the CISG is addressed, as well (pp. 27-28). As to the idea that a choice of law of the CESL would be an implied exclusion of the applicability of CISG, the author is very critical. *Guillermo Palao Moreno* suggests instead that a choice of law clause opting for CESL should always expressly reject the application of CISG (p. 28). In the last section of the chapter entitled "Material Choice" (pp. 28-32), the private international law issues in the stricter sense are addressed, in particular the problems that arise in the context of private international law concerning consumer protection and in relation to contracts concluded with partners from non-EU member states.

The next three chapters (chapter 3-5) discuss issues relating to the formation and interpretation of contracts in the wider sense. It starts with chapter 3 ("Formation of Contract", pp. 37 et seq.) by *Jakub J. Szczerbowski*, in which the basic requirements for the conclusion of a contract are discussed. Thereby, the author mainly discusses two issues: the differentiation between agreements binding in honour only and contracts which are enforceable in a court of law (1.) and the different models of contract formation, i.e. offer and acceptance, negotiations and auctions (2.). The author discusses the issues by reference to Roman law and the laws of several Member States, in particular Polish, German and English law, and to the DCFR and PECL. The dogmatic details of the DCESL are, however, partly missing. In the context of the differentiation of mere morally binding agreement and legally binding contract, it is rightly presented that neither *causa* nor *consideration* is required for an enforceable contract under DCSEL but that the only relevant criteria is the legal intent. However, the double structure of the required intention to be legally bound (according to art. 10(1) DCESL at the level of the notice, i.e. at the level of offer and acceptance as in Germany,

and at the level of the entire contract as such as in England according to art. 30(1)(b), art. 30(3) DCESL)[16] is not even mentioned. For the interpretation of the intention to be legally bound, *Jakub J. Szczerbowski* argues (p. 39): "However, the future interpretation of the intention to be legally bound is uncertain. One of the possibilities is that the courts will revert to the old rules they have previously used to assess the validity of a contract [i.e. to *causa* and *consideration*]. This is not necessarily a bad thing, as gradual change in private law is usually better than a revolution." It is submitted that this position is to be rejected. Neither the principle of *causa* nor of *consideration* exists in all EU Member States. If courts would in fact continue to apply their old doctrines, the autonomous and uniform interpretation of the new EU directive would be impossible. Therefore, a new European doctrine on this issue needs to be developed, independent of the question of whether this is to be regarded as a revolution or an evolution of private law.

Thereafter, *Carmen Azcárraga Monzonís* and *Raquel Guillén Catalán* (pp. 45 *et seq.*) discuss the consumer right of withdrawal, which is basically a transformation into DCSEL of those rights already currently contained in the European Consumer Rights Directive (2011/83/EU)[17]. In chapter 4, entitled "The Mandatory Nature of the Right of Withdrawal", the authors also compare the rules contained in DCSEL with the way the Consumer Rights Directive or its predecessors have been implemented in Spanish law.

The next chapter (chapter 5), "The Integration of Advertising Statements into the Content of the Contract" by *Francisco Infante Ruiz* (pp. 67 *et seq.*), falls in between the issues of formation and interpretation of a contract. Thereby, the chapter is basically a comment on art. 69 DCSEL and evaluates it against the background of the DCFR and a comparative analysis of English, German and Spanish law. The author convincingly concludes that art. 69 DCSEL has shortcomings from a technical and a material point of view and that the rules contained in the DCFR are better, both from a theoretical and a practical perspective. It is particularly highlighted that some national laws are more consumer protective than the DCSEL and that it is a shortcoming that, in B2B contracts, art. 69 DCSEL does not treat the seller and the buyer equally. The amendments suggested by the European Parliament (Amendment 140-142 of the legislative resolution) are not discussed in the article. Although they introduce some progress from a technical point of view, they would, however, not be able to overcome the main point of critique raised by *Francisco Infante Ruiz.*, i.e. the article has not lost any of its actuality.

Hans Fredrik Marthinussen addresses in chapter 6 ("Unfair Contract Terms", pp. 93 et seq.) the issue of unfair standard terms by presenting the rules contained in DCESL in the light of the DCFR and comparing them to the Nordic contract acts. The dogmatic structure and the differences between B2B and B2C contracts are well presented. The author concludes (p. 98) that the common European standard on the unfairness of a standard term in the DCESL is a step forward in the development of European contract law, as the directives

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[16] On this in detail see e.g. *Tobias Pinkel/Christoph Schmid/Josef Falke*, Funktionalität und Legitimität des Gemeinsamen Europäischen Kaufrechts – Eine Einführung, in: Tobias Pinkel/Christoph Schmid/Josef Falke (eds.), Funktionalität und Legitimität des Gemeinsamen Europäischen Kaufrechts, Baden-Baden 2014: Nomos, 35-79, 55-56.

[17] Namely the 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. Those rights used to be regulated in the directives 85/577/EEC and 97/7/EC which used to have minimum harmonizing effect, so that the transformation in national law could be different e.g. concerning the period in which the right existed.

so far leave room for the national courts to develop their own standards against the background of their legal orders.[18] Finally, he is in favour of the European development of a restricted test of unfair contract terms, even if they are individually negotiated (p. 99). In particular for B2C contracts, he presents very convincing arguments.

Chapters 7 to 15 discuss issues related to the performance and enforcement of contracts which are: Chapter 7 "Breach of Contract" by *Martin Schmidt-Kessel* and *Eva Silkens* (pp. 111 *et seq.*), chapter 8 "Change of Circumstances" by *Luz M. Martínez Velencoso* (pp. 137 *et seq.*), chapter 9 "Non Conformity of Goods and Digital Content and its Remedies" by *María Paz García Rubiox* (pp. 163 *et seq.*), chapter 10 "Passing of Risk" by *Francisco Oliva Blázquez* (pp. 183 *et seq.*), chapter 11 "Contract for the Supply of Digital Content" by Javier Plaza Penadés (pp. 207 *et seq.*), chapter 12 "Obligations and Remedies Under a Related Service Contract" by *M. José Reyes López* (pp. 225 *et seq.*), chapter 13 "Damages and Interest" by *Matthias Lehmann* (pp. 243 *et seq.*), chapter 14 "Restitution" by *Adela Serra Rodríguez* (pp. 263 *et seq.*) and chapter 15 "The Rules on Prescription" by *Luz M. Martínez Velencoso* and *Andrew O'Flynn* (pp. 287 *et sec.*).
Within the scope of this book review, it is not possible to discuss all of those contributions individually. Only two further articles will be discussed in order to illustrate the different approaches taken by the authors in addressing their topics.
The contribution by *Luz M. Martínez Velencoso* on the adaptation of a contract due to an unexpected change in the circumstances which form the background of the contract is basically a comment on art. 89 DCESL. He starts by presenting the rule contained in DCESL in the light of the "stages of the text" in the evolution of European contract law, i.e. the PECL and the DCFR (pp. 137-141) before discussing the dogmatic structure of art. 89 DCESL (pp. 141-143). Thereafter, *Luz M. Martínez Velencoso* compares the law of no less than seven European countries concerning the question of change in circumstances, namely of France, Germany, Italy, the Netherlands, Switzerland, England and Spain (pp. 144-157).
The author concludes that a common core of the law on the change of circumstances exists in Europe. Convincingly, he argues that three common requirements need to be met (p. 159):

> *1. The contract must have been fundamentally affected by an exceptional event.*
> *2. The event must not have been regulated in the contract or not contemplated (as it was not foreseeable) by the parties at the time of the conclusion of the contract.*
> *3. The risk of the supervening event should not have been attributed to either party under a statue of contractual provision*

As to the effect of the application of the rule concerning the change of circumstances, the differences in the European legal orders are more vital and the solution taken by the CESL (putting a duty to renegotiate on the parties and, for parties failing to reach an agreement, handing the power to adapt the contract over to an court or tribunal) is not common. Nonetheless the author concludes (p. 161) that

> *the application of art. 89 CESL would not be problematic in the various European countries as there are a lot of similarities between the different European legal systems in this field both in the terms used and the results achieved, as well as in its treatment by the legal scholars.*

[18] Cf. ECJ C-237/02 – *Frankfurter Kommunalbauden*.

A quite different approach is taken e.g. by *Javier Plaza Penadés* in chapter 11 ("Contract for the Supply of Digital Content", pp. 207 *et seq.*) both in scope of the topic and form of his article. After giving an introduction to the topic, the author discusses the relevant EU regulations and directives having an effect on contracts for the supply of digital content, in particular the rules on copyright, consumer law and e-commerce (pp. 212-216). Thereafter, he summarizes the relevant rules on that type of contract in the DCESL (pp. 216-222). This much more textbook-like approach is a very sensitive and valuable way of addressing a topic with which most lawyers are not yet as familiar with as with contracts for the supply of physical goods.

IV.

In sum the book is very valuable both for readers that want to get a first impression of the Common European Sales Law and want to use the volume as a kind of text book, because the book covers most of the very important issues of the draft regulation, and for readers that are already experts in the CESL and search for more information on specific topics. The clear structure of the book and the very useful index at the end make it easy for anyone to find out where the issues he or she is looking for are discussed.
One thing is, indeed, a bit unfortunate for those who want to use the book as a starting point for further research. The volume uses a combination of footnotes and the typical social science style for citations. Where the references are made in the social science style in the text, some authors always refer to articles or books *in toto* and not to specific pages. That makes it, of course, unnecessarily difficult to find and use the sources for one's own research.

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