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BOOK REVIEW: "GLOBAL SALES AND CONTRACT LAW" INGEBORG SCHWENZER, PASCAL HACHEM AND CHRISTOPHER KNEE OXFORD UNIVERSITY 2012

Unification of private law is especially developed in the area of the law of contracts, primarily sales law. Widely elaborated comparative research has contributed to that effect. A milestone in this field is the works of Ernst Rabel with the treaties *Law of the Sale of Goods* (first published in 1936). *Global Sales and Contract Law* by three Authors: Ingeborg Schwenzer, Pascal Hachem, and Christopher Kee was published with the aim of providing an updated and comprehensive work on the contemporary sales law. Indeed, the goal has been achieved. The authors have covered approximately 60 different jurisdictions. That impressive number has been divided into seven groups, basing on language, geography and legal families: Arabic and Middle East countries, common law countries, East Asia, Eastern Europe and Central Asia, Ibero–America, sub–Saharan Africa (with France and Belgium), Germanic, and Scandinavian legal systems. Each of the

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above regions has been closely monitored by teams of native speakers in all six official languages of the United Nations plus German. Moreover, the Authors have included a study of uniform laws and projects with the most notable United Nations Convention on Contracts for the International Sale of Goods (1980, the CISG).

The outcome of that extensive research which was conducted between 2007 and 2011 is a work almost 900 pages long, based heavily on case law (more than 1300 cases from 58 jurisdictions) and literature. But it is not the length, nor the number of case law or legal writings that signifies the value of this book. The Authors have presented a detailed study of the most important institutions included in the sales contract. Doing that, they went beyond the scope of the CISG, which – serving as a compromise between different legal systems – has significant gaps, including the problem of validity of a contract, agency, the period of limitations or passing of a property title. Before moving to details of the book's content it is worth mentioning that the Authors have followed Rabel's function method. A functional comparative approach does not limit the study of law solely to legislation, but requires law–in–context research[1]. It relies on observance of how the legal problem is solved in different jurisdictions avoiding terminology and dogmatics of any specific legal system.

The Authors begin with the chapters on the development of domestic sales law and uniform laws and projects. They start from the roots of sales law, being Roman law. Among uniform laws and projects are covered: UNIDROIT Principles of International Commercial Contracts, the CISG, the Principles of European Contract Law (PECL) and Draft Common Framework of Reference. As to the latter, the Authors note the debate on a potential role of the future Common Framework of Reference. They question its usefulness as an optional instrument that can be chosen by the parties as the law applicable to their contract. It is suggested that for cross–border sales contracts CISG is available, whereas in the field of general contract law UNIDROIT Principles and PECL are opened for parties.

[1] M. Adams, J. Bomhof (eds), *Practice and Theory in Comparative Law*, Cambridge: Cambridge University Press 2012, pp. 263–264.

Furthermore, the attention is moved towards general remarks on private international law. The book discusses admissibility and restrictions on the choice of law, law applicable in the absence of such choice, and international commercial arbitration. As far as a choice of law clause in sales contracts is concerned, the Authors state that a clause choosing the specific law of a Contracting State to the CISG equals choice of the CISG itself. Indeed, the majority of the courts' decisions[2] and arbitral awards[3] share the view that such a clause does not amount to a derogation of the CISG, but that an express exclusion of the Convention is necessary. However, a suggestion was made that a choice of the law of a Contracting State ought to amount to an implicit exclusion of the Convention's application, since otherwise the choice of the parties would have no practical meaning[4]. Therefore, it might have been helpful to make a reference to the judgments, arbitral awards and legal writers supporting the opposite interpretation, even if it is a minority view[5].

The core of the book comprises chapters on contract formation, parties' obligations, and remedies. The Authors concentrate on offer and acceptance as the mode of contract conclusion. Doing that, they point to major difference between common law and Germanic systems (as well as the laws of Eastern Europe, Central, and Eastern Asia) concerning revocability of an offer. Germanic and the other mentioned jurisdictions rely on the binding nature of an offer. Meanwhile, common law generally

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[2] For example: *Surface protective film case*, Bundesgerichtshof [Federal Supreme Court] 25.11.1998, CLOUT case No. 270, Germany; *Furniture case*, Kantonsgericht [District Court] Nidwalden 3.12.1997, CLOUT case No. 220, Switzerland; *Sté Ceramique Culinaire de France v. Sté Musgrave Ltd.*, Cour de Cassation [Supreme Court] 17.12.1996, CLOUT case No. 206, France; *Smits v. Jean Quetard*, District Court's-Gravenhage 7.06.1995, Clout case No. 524, Netherlands; *Window elements case,* Oberlandesgericht [Court of Appeal] Hamm 9.06.1995, CLOUT case No. 125, Germany.

[3] For example: Germany 30.08.1996 Hamburg Arbitration Proceeding; 7660/JK, 23.08.1994 International Chamber of Commerce Court of Arbitration (Paris), UNILEX 1994; 54 0644/94, 5.04.1995 (Germany, Landgericht Landshut), UNILEX 1995.

[4] UNCITRAL digest of CISG Article 6 case law, available at http://www.cisg.law.pace.edu/cisg/text/e-text-06.html.

[5] *Leather/textile wear case*, Italy 19.04.1994 Florence Arbitration proceeding; Cour de Cassation [Supreme Court] 2205 D, 17.12.1996, UNILEX 1997, CLOUT abstract no. 206, France; Bezirksgericht Weinfelden 23.11.1998, UNILEX 1998, Switzerland; M. Karollus, *UN-Kaufrecht. Eine systematische Darstellung für Studium und Praxis*, Wien, New York: Springer 1991, pp. 38-39.

allows the offeror to cancel his offer. Irrevocability means that the offeror may withdraw his offer only until it becomes effective. That moment may be differently established depending on the particular solutions of the jurisdiction, including the point in which the offer reaches the offeree or when the offeree has become accustomed with it. However, in all instances when an offer reaches the offeree, the offeror is bound by it. On the contrary, common law countries allow for free revocation of an offer until the contract is concluded, usually – according to so called mailbox rule – until the acceptance by offeree is dispatched. Yet, even those jurisdictions adopting a revocability rule state exceptions to it, e.g. in common law fixing a certain period of time for acceptance or making a firm offer under common law prevents revocation. Thus, what seemed to be a great disparity, is not such in practice. The Authors point to an interesting solution that has been chosen within the CISG, which relies on a mixture of two approaches – a "happy fusion" of two, as written by the Authors. The Vienna Convention allows for both, revocation and withdrawal of an offer, whereas the former is possible up to a moment in which an acceptance has been dispatched, and the latter only until an offer reaches offeree. As in common law systems, free revocability is prevented by fixing a period of time for acceptance or firm offer.

Among other issues considered in a chapter on seller's obligations a question arises whether a seller is under a duty to deliver goods in conformity with the public law requirements of the buyer's state. The Authors answer it in a three–fold manner. Firstly, they analyze such a requirement as a contractual stipulation. A suggestion is made that where a buyer intends to resell or use goods on a market with public restrictions, he should insert those conditions into a contract. Otherwise, he runs a risk of receiving goods in conformity with a contract, but for him useless. Secondly, the Authors consider conformity with public law requirements as fitness for particular purpose. The latter is a default prerequisite for conformity in all legal systems, obliging a seller to deliver goods fit for a particular purpose made explicitly or impliedly by a buyer. A milestone decision in that respect is the "New Zealand mussels case" decided by the German Supreme Court in 1995, according to which a seller is not obliged to comply with the public law provisions of a buyer's state. An exclusion was made for cases in which the same requirements exist in

the country of a seller, where the buyer has notified the seller about them or where the seller is aware of them, for example because he previously contracted with a party from the buyer's state. In the circumstances of the "New Zealand mussels case" the buyer has not informed the seller about the particular purpose, i.e. a designated market of resale. The Authors support the view expressed in the judgment that when a buyer informs a seller about the destiny of goods, a particular purpose as to compliance with the public law requirement has been made. Thirdly and finally the Authors consider, what if a buyer neither contractually binds a seller to deliver in conformity with public law provisions, nor does he inform a seller about a particular purpose. Is he still bound to fulfill those requirements under fitness for ordinary use prerequisite? Generally sales laws demand that the seller deliver goods fit for ordinary use, that is usable in such way as is typical for that kind of goods. The authors clarify that the majority – following the New Zealand Mussels case – holds that under the fitness for ordinary use test, the seller is not bound to deliver in compliance with the public law requirements. They indicate however that this shall not be necessarily true for instances where the seller is a large multinational company with resources allowing for superior knowledge of public law requirements in places of the goods' destination. In the controversy among legal writers on the issue of whether the compliance with public law provisions should be dealt with under the fit for particular purpose test or under fitness for ordinary use, the Authors opt for the former.

A relatively new problem of the compliance of goods with ethical values is also addressed. It is clear that when a contract calls for it, the quality of goods encompasses the observance of basic ethical values. Thus, polo shirts produced with the use of child labor are not in conformity with the contract demanding acknowledgement of ethical values in the course of production[6]. More problematic is the question of whether conformity with ethical values is required under fitness for ordinary use. Can a buyer claim that goods lack average quality and endurance since a seller manufactured them breaching basic ethical values? The Authors share an approach under which obedience to minimum ethical standards, common generally to all international codes of conduct, is required.

[6] An example taken from XX Willem C. Vis International Commercial Arbitration Moot.

One of the basic differences between common law and civil law jurisdictions in terms of parties' remedies is attitude to specific performance. Common law has been traditionally considered as hostile towards specific performance, whereas in civil law countries it has been seen as a basic remedy available to the parties. As a reasoning for the common law approach the book provides a doctrine of efficient breach of contract. According to the above a party should be allowed to breach a contract and pay damages, if by doing so the party would be better of than by performing under the contract. On the contrary, civil law systems are based on the principle *pacta sunt servanda*, which requires parties to fulfil what they have promised under a contract. On an international level the CISG provides for specific performance for both, a seller and a buyer. However, it allows courts to evade granting such remedy unless it is required to endorse specific performance under its own law. In the book it is proposed that above cannot be seen as a compromise solution, as suggested by some scholars[7]; rather the Convention preserves both solutions at the same time.

Apart from solely legal discussion the Authors include a chapter concerning the modern practice of international sales law. In it a reader may find very interesting data on the estimated number of the CISG exclusions, clauses most often included in contracts, and the popularity of dispute resolution clauses.

A Polish reader may feel a deficiency of references to Polish law in the footnotes. A statement may serve as an example on advertisements, price lists and circulars as calls for tenders, not offers. The same regulation may be found in Article 71 of the Polish Civil Code. However, in an extensive footnote one will not find recourse to Polish law. Similar examples may be multiplied. On such occasions it is worth recalling the explanation provided by the Authors, stating that omission among the references to any specific jurisdiction should not be understood as to imply that the proposition is not valid for that jurisdiction.

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[7] J. O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, The Hague: Kluwer Law International 1999, pp. 218–228; J. Lookofsky, *The 1980 United Nations Convention on Contracts for the International Sale of Goods, Art. 28, Specific Performance*, [in:] J. Herbots (ed.), R. Blanpain (ed. et al.), *International Encyclopaedia of Laws – Contracts*, Suppl. 29, December 2000, pp. 1–192.