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Identities in contract: Consumer law, private law and EU law in context with Guido Alpa's work

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Tuesday, **29th July 2025**
Consumer Law and Technological Innovation – Civil and common law perspectives

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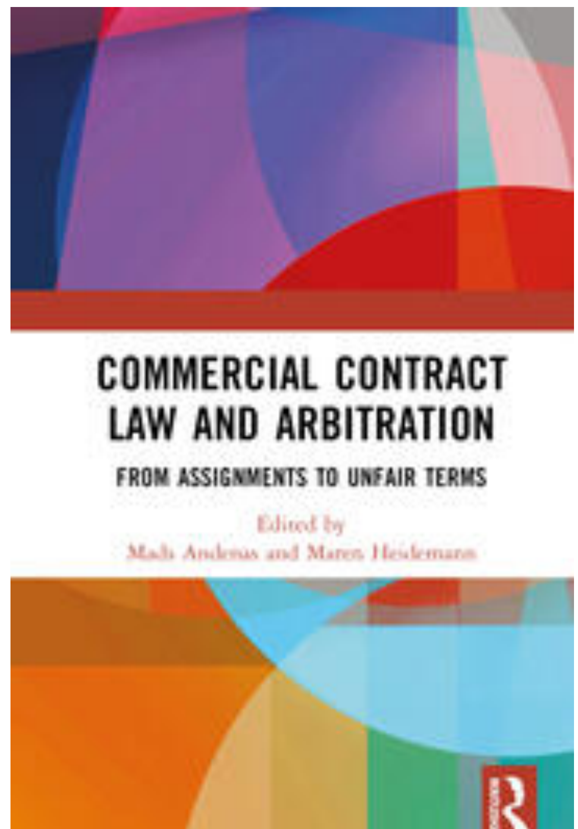
Guido Alpa at the LCF- Book series board, Council and Academic Board.

Commercial Contract Law and Arbitration. From Assignments to Unfair Terms .Edited By Mads Andenas, Maren Heidemann

Routledege 2024.



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Guido’s last contributions to LCF publications

Guido discussed consumer law in these two chapters –

- 7. The "Ownership" of Personal Data
- 9. On the Contractual Power of Digital Platforms

Consumer law, private law and EU law

- Consumer law is always EU law as well as private contractors contract law
- Prof. Alpa discussed it in the context of his profound knowledge of European private in the classical sense, beyond EU law. In “Grundlagen” (*Fondazione,* foundations*)* he describes the concepts and principles of private and contract law in different European jurisdictions and puts them in context.
- In the two chapters he contributed to the LCF volume he discusses black letter EU consumer law in the context of specific contract law and private law settings. (T&Cs and the notion of ownership)

Our interest in consumer law at the LCF and today

- Focus suggested by co-organisers
- My interest in the underlying concepts of consumer law
- In particular the idea of "identities"
  - Maren Heidemann, 'Identities in contract – merchant law in Europe and the future of European contract law' 23 Maastricht Journal of European and Comparative Law 667
- Where I recommend focussing on the transaction instead of the parties, ie the acting persons
- At the LCF this also ties in with the work of Prof. Jan Dalhuisen (emeritus Prof. at King"s College) who introduces the term professional contract as a counterpart to the consumer contract and looks at minimum standards instead of privileges for consumers.

Commercial Contracts

- Is there a definition for this term?
- Is there a need a for a distinctly ‘commercial’ contract and
- what is its counterpart?

Merchant law

- A technical term?
- A traditional term
- Is merchant law identical to the modern use of the term *lex mercatoria?*

Examples of merchant law in Europe

- National commercial codes
  - *Handelsgesetzbuch – Germany*
  - *Code de Commerce – France*
  - *Unternehmensgesetzbuch – Austria*
  - *Codice Civile (since 1942 integrated) – Italy*
  - *Codigo de Commercio – Spain*
  - *Uniform Commercial Code – USA*

Two major historic approaches in Europe

- Subjective approach
  - identity based, the description of the acting person is the angle
    - Historically derived from a [privileged] class of persons within feudal society – 'commercial men', merchants
- Objective approach
  - 'action' based, description of commercial acts are the angle
    - Historically attributed to the emergence of Napeleon's Code Civil of 1807, hence the post revolutionary, 'republican' approach

Based on this understanding

- what is the current prevailing approach taken by the EU legislature?

- is there any need for a notion of commercial contract?

Merchant law in the UK?

commercial contract law as an integral part of contract law

No technical terms for merchants, businessmen, traders

No separate legislation

‘Commercial contracts’ ?

- The ‘identities’ created by traditional continental merchant law are of a general nature
- Merchants can be subject to exclusive rules of contract law, such as shorter prescription periods, silent acceptance, inspection duties etc.
- Generally, however, contracts are **not** distinguished by ‘consumer’ or ‘commercial contracts’ as special types in traditional European contract law. Contractual duties are based on the **contract type**,[sale, service, tenancy, long term etc] not the ‘identity’ of the acting party.

Examples of traditional merchant law in detail

- French Code de Commerce
  - Book I, titles I and II Articles L110and L121
  - listing commercial acts and
  - defining traders

Examples of traditional merchant law in detail

- German Handelsgesetzbuch
  - §§ 1and 2

  - these two provisions introduce a range of technical terms and their definitions
  - *Kaufmann, Gewerbe, Unternehmen, Handelsgewerbe* - Merchant, Trade, Undertaking and Commercial Trade
  - which have no direct counterpart in English or Scots law. My translation is therefore an approximation. The English legal language uses related terms in an informal and colloquial manner such as business, businessman, trade or commerce.

Examples of traditional merchant law in detail

- Austrian Unternehmensgesetzbuch
  – §§ 1, 2 and 4

  - This code has been reformed in 2007.
  - It has replaced the former *Handelsgesetzbuch* that was derived form the older German (Prussian and imperial) codifications sharing a lot of case law across borders since 1938
  - and took the opportunity to adjust its language to the new custom developed in EU legislature

  - the legal consequences of being classed as an 'entrepreneur' remain very similar, though. The term is defined and used as a technical term.

Examples of traditional merchant law in detail

- US Uniform Commercial Code
  - Article 2 Part 1
    - **Here we find element of ‘skill’ required in a merchant . The provision is describing elements of sales contracts, though, not merchants and their duties in general.**

International commercial contract law

- Vienna Convention on the International Sale of Goods, 1980
  - Articles 1 and 2
  - Here, neither the identities nor the nature of the contract are taking centre stage, the provision is a **scope provision**.
  - This convention in my view contains the most elegant way of defining its sphere of application leaving enough room for the national legal systems to accomodate its scope.

International and European commercial contract law

- CESL – proposal for a Common European Sales Law 2011
  - Articles 1, 2 and 7 of the Regulation (the *Chapeau)*
  - These articles are scope provisions as well as defining the identities of the contractual parties.
  - CESL also refers to the contract in these provisions in order to define the scope.
  - The two corresponding identities created here are the ‘consumer’ and the ‘trader’. Traders are subdivided into traders and SMEs.

European regulations and directives affecting contracts

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

Official Journal L 171 , 07/07/1999 P. 0012 - 0016

Article 1

Scope and definitions

(a) consumer: shall mean any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession;

…

(c) seller: shall mean any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession;

European regulations and directives affecting contracts

- Package Travel Directive (old) 1990
  - Articles 2
    - **creates three identities:**
      - organizer
      - retailer
      - consumer
- Package Travel Directive (new, Proposal) 2013
  - Preamble, Recital 7 and Article 3
    - **creates four identities**
      - traveller - to include 'business travellers'
      - trader
      - organiser
      - retailer

European regulations and directives affecting contracts

- Passengers Rights Regulation 2004
  - Preamble, Recital 1 and Article 2
    - **creates one identity of**
      - passenger
    - **and four counterparts of**
      - air carrier
      - operating air carrier
      - community carrier
      - tour operator
    - **It also refers expressly to the 'organiser' and its meaning created in the Package Travel Directive 2009 (Art.2). It also refers to 'consumer protection' in a general way provided by the EU Treaties, Art. 169 TFEU. (Preamble)**

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European regulations and directives affecting contracts

- Time Share Directive 1994 (old)
  - Preamble, Recital 1 and Article 2
    - **creates two identities of**
      - vendor and
      - purchaser
- Time Share Directive 2009 (new)
  - Articles 1 and 2
    - **create two identities of**
      - consumer and
      - trader
      - defined in Art. 2
    - **it also defines types of contract where the consumer as one of the parties is part of the definition.**

European regulations and directives affecting contractual disputes

- Brussels I (old) 2001 and new (2012)
  - Preamble, Recital 1 and Article 2
    - **uses the identity of**
      - consumer
    - **but defines contracts as consumer contracts, not the consumer as such (Art.15 (1)**
    - **The purpose of the contract is the defining factor in this definition.**

European regulations and directives affecting contractual disputes

- Rome I 2008
  - Preamble, Recital 1 and Article 2
    - **uses the identities of**
      - consumer and
      - professional
    - **but defines contracts as consumer contracts, not the consumer as such in Art. 6 in the same way as Brussels I but with the addition of the professional as the counterpart.**
    - **The purpose of the contract is the defining factor in this definition but from the point of view of the consumer, the professional is just ‘acting’. His/her purpose is not defined.**

Meaning of legal terms according to their context

- **Method of construction of a term according to a potential three tier test:**
  - the understanding of an ordinary businessman (plain language)
  - the meaning in a domestic legislative setting
  - the meaning in an international legislative framework, eg treaty.
- ***Memec* case series, *Fothergill v Monarch Airlines***

Implementation of EU 'identities' into national law – A new 'European' dichotomy?

- German Civil Code, Book I, Title one,
  - pragmatic list of implemented EU law
  - §§ 13 and 14 create and define the identities of consumer and entrepreneur [this is the literal translation. 'Trader' seems to reflect more the German *Gewerbetreibender* and therefore another technical term that is extensively defined in the HGB and trade tax and trade licencing codes (*Gewerbeordnung, Gewerbesteuer*).
- Is the use of language randomly chosen given the large range of terms used in EU texts? Does the definition correspond to source texts?
- Does this lower the threshold of responsibilities compared to the mdefinition of merchant? Is there a *de minimis* rule as in merchant law?
- Is not rather the **purpose** of the contract the centre of attention?

Other uses of 'entrepreneur' or 'enterprise' / undertaking in German and European law

- The term 'undertaking' denotes an identity in EU competition law after Art. 101 TFEU.
- The term 'entrepreneur' receives its own definition in taxation law, corporate and income tax act. It defines the applicability of VAT and income tax according to the source of income identified relying upon this definition.
- For this reason the term must have a legally defined technical meaning.
- It clearly differs throughout the legal system and all four uses of this term stand alone and unrelated to each other.
- Can this be tolerated on the long term?

Back to the 'Napoleonic' approach?

- In view of the excessive confusion caused by the case by case creation of identities.

- would not the 'purpose' of the contract – the objective approach – be a more promising starting point for the distinction between commercial and non-commercial contracts?

- Is a notion of commercial contract needed?

CISG as a counterpart to EU consumer protection legislation

- The scope provision of CISG describes its applicability to international commercial contracts

- The scope provisions of CESL describe its applicability to international (albeit EU) 'consumer contracts' which could be seen as a counterpart to commercial contracts. These could be renamed 'private contracts'.

Purpose of the contract

- The purpose is indeed the decisive difference between commercial and non-commercial contracts.
- The purpose is irrelevant to a contract in many European jurisdictions. It is not identical to the notions of *cause, Rechtsgrund* or *consideration.*
- The purpose defines the attitude or relationship of the contracting party to the object of contracting - the goods or services.
- The purpose of the merchant is to 'resell' but not to obtain the object as such on his own purchase or manufacture.
- The purpose of the 'consumer' is to keep the object. The object is the reason why he or she enters into the contract.

Conclusions

- It should be the contract which decides about the nature of the transaction and its legal consequences rather than the identities of the contracting parties.
- The purpose and ensuing discrepancy of interest [almost defective consent?] is therefore a suitable distinctive criterion to define ‘consumer’ and ‘commercial contracts’.
- It helps to explain why the ‘consumer’ is usually regarded as the ‘weaker party’ and needs protection.
- The ‘skills’ aspect contained in the traditional European and US codifications is important to explain this, too.
- The EU legislature should therefore work on a revision of its texts.

Conclusions

- There is currently no dedicated commercial contract law at EU level that would address B2B trading as such despite express objective to facilitate internal market.

- Not only B2B transactions are commercial contracts.

- B2C transactions are commercial contracts from the point of view of the trader/merchant.

- This insight can be used as a starting point to review the reasons why the ‘weaker’ interest within those transactions needs protecting.

- A thorough analysis of this problem can help to integrate EU legislation better into national laws and prevent further dilution of terminology and the integrity of those legal systems.

Conclusions

- Merchant law in the traditional European sense sets the scene for trade and commerce as well as for the consumers dealing with the traders.
- The legal consequences attached to the status of merchant concern contractual rules such as shorter prescription periods, silent acceptance, inspection rules and so forth
- but also reporting and accounting obligations that are in the interest of trade itself.
- They are a mixture of public regulation expressing public policies and ancient self-regulating custom.
- This element of self regulation cannot be abolished.