Convergence in European Consumer Sales Law
A Comparative and Numerical Approach
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DISSERTATION

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by

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Lay-out by Marina Jodogne.

In loving memory of Grandfather

’S-a stins lumina lumii.’
ACKNOWLEDGEMENTS

The journey of writing one’s first book, especially of an academic nature, is infamously difficult. The rainbow of situations and emotions that come with this experience can barely be put into words, but this preface is dedicated to just that. After all, legal scholars might not have microspectrometers or telescopes (at least private lawyers do not), but we are supposed to master the art of the written or spoken word.

I have finally managed to complete my very own PhD saga. In other words, I made it through the extreme ups and downs inherent to this process: from the early confidence and enthusiasm in a new topic, to the troubled times of working out methodological details and finding the best way to package thoughts, to the gained ownership of the final result. This journey has been overwhelming in many ways, and the engine of the entire undertaking has not been my individual perseverance, but the amazing individuals who both guided and accompanied me through this odyssey.

In a world full of people who generally could not care less, I have been blessed to be surrounded by people who could not care more, and that first and foremost applies to my supervisors, Jan Smits and Caroline Cauffman. I genuinely could not have wished for better supervisors, better academics, or better persons. The amount of time and effort that both of them have put into the development of the ideas behind this manuscript, consisting of precious feedback and endless support, has been out of this world. Our dense meetings, for which both Jan and Caroline managed to always make enough room, have constantly challenged me to look at the project from their two very different perspectives and styles, one Dutch, the other Belgian, that had, among others, an essential commonality: the strive for academic excellence. They have taught me the value of high research standards and in the light of that I was inspired to follow in their footsteps and attempt to make a meaningful contribution to European consumer law. To achieve that, my research has taken me to an empirical territory considered controversial by some; yet I have learned from my supervisors that trying to be innovative might come with risks one needs to courageously assume, instead of shy away from. I am equally eternally grateful to both Jan and Caroline for all the opportunities they have given me in terms of personal development, both in research as well as in teaching. Had it not
been for Jan’s endorsement and nomination, I would have never been anywhere close to the Wynand Wijnen Education Prize, and had it not been for Caroline’s support and advice, I would have perhaps never become a doctoral candidate in the first place. I have listed here only a handful of reasons why I will forever be thankful to and for my supervisors; and while the complete list would probably be a self-standing novel, for now I would just like to emphasise that working under their supervision has been an amazing time that I will forever cherish, and I hope my manuscript does this experience justice.

My appreciation is also directed towards the Assessment Committee, for the time and willingness to assess my PhD manuscript. Gerard-René de Groot has been a constant source of wisdom on comparative law methodologies, which I have gotten glimpses of through long discussions but also through our great collaboration within the ambit of a course on this very topic. I am thus honoured that he has accepted to be the Chairperson of the Committee. I can say the same for the rest of the Committee members. Hans Schulte-Nölke has authored some of the most extensive studies in European consumer law to date, which have been a valuable stepping stone for this project. Mathias Siems’ work on numerical comparative law as an empirically-oriented methodology has also been central to this study, and I am thankful for having had the opportunity to discuss this with its original author in September 2015, with the occasion of the MEPLI Conference ‘Consumers Without Borders’. Lastly, but most certainly not least, I am especially indebted to Bram Akkermans, whose challenging questions and feedback pushed me to refine my understanding of what I wanted to achieve with this study (#bakebread), and nudged me to look into policy-making to obtain a better understanding of how harmonisation really works.

I would also like to thank Omri Ben-Shahar and Richard McAdams for their challenging yet enthusiastic comments on my research. I had the opportunity to present the findings of this study in the 2016 Summer Institute of Law and Economics organised by the Coase-Sandor Institute at the University of Chicago. The law and economics views expressed by Chicago faculty have tremendously helped me with improving the communication of my findings, as well as with endless inspiration for research spin-offs for the short-term future.

In the same vein, our own faculty members, Marcel Schaper, Niels Philipsen and Mariolina Eliantonio have played meaningful roles in the fine-tuning of my empirical ideas, either by participating in random creative brainstorming sessions, or suggesting literature from very different fields of law. Thus I am greatly indebted to their availability and feedback.

A self-standing recognition of appreciation must, without a doubt, be directed to our amazing Dean, Hildegard Schneider. Her constant support during the years in which I have completed my PhD has had an incredible impact in terms of my overall development in the faculty. Her passion for moot court competitions, out-of-the-box thinking, and student development have been a constant source of inspiration as well as respect.

A special thank you goes to my beloved paranymphs, Anna Beckers and Lucian Mircescu. Anna and I have bonded before through paranymphing duties, with the occasion of her outstanding PhD defense. However, her support has always gone
beyond any such duty. Her kind advice helped me soldier on through writing this manuscript, and it is all the more impressive as it comes from true friendship, and not just mere collegiality. As for Lucian, I am happy to have shared with him a fantastic UNU-MERIT Graduate School of Governance experience, which has been defining in my endeavour to embrace a more empirical view of the law, and to understand the importance of such a view for public policy.

Also deserving endless praise is my family: my mother, Cornelia Goanță, my father, Viorel Goanță, my brother Florin Goanță and my sister-in-law, Loredana Din. Apart from being incredibly supportive, they have all been greatly helpful as well. My mother – also a lawyer – has given me priceless legal advice on procedural aspects of Romanian unfair contract terms, and my brother and sister-in-law have provided me with daily consumer experiences in the field of online sales, in the light of their online tyre business. As for my father, words are not enough to thank him for the hundreds of hours he spent helping me on a wide array of research tasks: finding case law, finding sources, double-checking bibliographic references, and so on and so forth. With this occasion I have witnessed how my father, a military engineer, has achieved outstanding legal research skills.

Moreover, I would also like to thank my Japanese brother, Mark Kawakami, for being an inspiration and always playing devil’s advocate during our numerous formal and informal discussions. This helped me become absolutely convinced that the world needs empirical legal research. I am also grateful for Mark’s delicious Juicy Lucys, and shared scifi preferences: watching Star Wars and Star Trek in good company can definitely alleviate some of the negative side-effects of PhD editing.

As part of my teaching obligations during my PhD time I have been engaged in many activities, but I hold one of them particularly dear to my heart, as its inspiring nature has most certainly changed the way in which I see legal education. My new colleague and friend, Gwen Noteborn, has been the mastermind behind our 2015 ‘Google Glass in the legal classroom’ project, one of the most fun teaching activities I have ever undertaken. I am incredibly grateful to have been a part of this.

Also during my PhD time in Maastricht, our MEPLI corridor has been our home (perhaps too much so). My fantastic MEPLI colleagues Anna Berlee, Jiangqiu Ge, William Bull, Daniel On, Nicole Kornet, Katja Zimmerman, Caroline Calomme, Pim Oosterhuis, Kate O’Reilly, Adela Ognean, Serban Vacarelu, Thera Dieleman, Agustin Parisé, Lars van Vliet as well as non-MEPLI colleagues Matteo Bonelli, Mieke Olaerts, Sascha Hardt, Tanja van der Meer, Catherine de Rijdt, Ria Wolleswinkel, have contributed to making Maastricht University feel like a family, and not just a workplace. I will forever treasure this.

Marina Jodogne has been my rock in the weeks leading up to the submission of this manuscript. Her eagle-eye editing, her amazing composure in front of deadlines and her wise advice have been the balancing act ensuring the successful completion of this project. Marina, I know you will have to review these lines, so let me say it here as well: thank you from the bottom of my heart.

Of course, no list would be complete without acknowledging some of the amazing students I have had the pleasure of getting to know and work with along the years of my PhD and beyond. I would like to explicitly mention the fantastic Jasmine Styles, Merle Temme, Andrea Rigamonti, Olav de Wit, Luca Büken, Anca Bliort, Stefan Cirjan, Felix Pflücke, Benedikt Schmitz, Rikke Øksnes, Simon Schneider and Harvey
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Cătălina Goanţă
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LIST OF ABBREVIATIONS

AG Advocat General
Art. Article
B2B Business to Business
B2C Business to Consumer
BGB Bürgerlich Gesetzbuch (German Civil Code)
BW Burgerlijk Wetboek
CC French Civil Code
CCAS Consumer Codes Approval Scheme
CESL Common European Sales Law
CFR Common Frame of Reference
CI Convergence Index
CJEU Court of Justice of the European Union
CPR Consumer Protection for Unfair Trading Regulations
CRD Consumer Rights Directive
CSE Comparison Shopping Engine
DCFR Draft Common Frame of Reference
DE Deutschland (Germany)
DG Directorate-General
ECR European Case Report
EEC European Economic Community
EFTA European Free Trade Association
ESME European Securities Market Expert
EU European Union
EUR Euros
FR France
fsQCA fuzzy set Qualitative Comparative Analysis
MvT Memorie van Toelichting
NCA National Consumer Agency
NL the Netherlands
No. Number
<table>
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<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
</tr>
<tr>
<td>OFT</td>
<td>Office of Fair Trading</td>
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<tr>
<td>OHIM</td>
<td>Office for Harmonisation in the Internal Market (Trade Marks and Designs)</td>
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<td>OJ</td>
<td>Official Journal</td>
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<tr>
<td>Para.</td>
<td>Paragraph</td>
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<tr>
<td>PECL</td>
<td>Principles on European Contract Law</td>
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<tr>
<td>PEL S</td>
<td>Principles of European Law of Sales</td>
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<tr>
<td>RO</td>
<td>Romania</td>
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<tr>
<td>SGSA</td>
<td>Supply of Goods and Services Act 1982 (UK)</td>
</tr>
<tr>
<td>SI</td>
<td>Statutory Instrument (Ireland)</td>
</tr>
<tr>
<td>SME</td>
<td>Small and Medium-Sized Enterprise</td>
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<tr>
<td>SoGA</td>
<td>Sale of Goods Act 1979 (UK)</td>
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<tr>
<td>TEC</td>
<td>Treaty Establishing the European Community</td>
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<tr>
<td>TEU</td>
<td>Treaty on the European Union</td>
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<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<tr>
<td>TSI</td>
<td>Trading Standards Institute</td>
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<tr>
<td>UK</td>
<td>United Kingdom</td>
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<tr>
<td>US</td>
<td>United States</td>
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<tr>
<td>UWG</td>
<td>Gesetz gegen den unlauteren Wettbewerb (German Unfair Commercial Practices Act)</td>
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