Chapter 29
Against a New Architecture of Consumer Law—A Traditional View

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Abstract In 2012, Hans Micklitz published his widely read *Gutachten* for the German Law Association (*Deutscher Juristentag—DJT*) on a new architecture of consumer law: 'Brauchen Konsumenten und Unternehmen eine neue Architektur des Verbraucherrechts?' In this paper, Micklitz proposes, among others, to replace current German legislation in consumer matters—which is scattered over various statutes including the Civil Code (*Bürgerliches Gesetzbuch*)—by a single Consumer protection act. At the *DJT* meeting in München, I was among those who opposed such plans, although only from a Dutch perspective. The discussion, as befits an organisation which aims at having an impact on *German* legislation, was held in the German language. Because not everyone who takes an interest in consumer law masters this language, Hans Micklitz has had the happy idea to have his paper translated into English. The translation has recently been published. In this paper for my friend Hans Micklitz I will likewise present my point of view, which I originally presented in German, in English.

29.1 Introduction

In 2012, Hans Micklitz published his widely read *Gutachten* for the German Law Association (*Deutscher Juristentag—DJT*) on a new architecture of consumer law: 'Brauchen Konsumenten und Unternehmen eine neue Architektur des Verbraucherrechts?'[1] In this paper, Micklitz proposes, among others, to replace current German legislation in consumer matters—which is scattered over various statutes including the Civil Code (*Bürgerliches Gesetzbuch*)—by a single Consumer protection act. At the *DJT* meeting in München, I was among those who opposed such plans, although only from a Dutch perspective. The discussion, as befits an organisation which aims at having an impact on *German* legislation, was held in

[1] H-W Micklitz, 'Brauchen Konsumenten und Unternehmen eine neue Architektur des Verbraucherrechts?', *Gutachten A zum 69. Juristentag* (Munich, Beck, 2012).

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K. Purnhagen, P. Rott (eds.), *Varieties of European Economic Law and Regulation,*
Studies in European Economic Law and Regulation 3, DOI 10.1007/978-3-319-04903-8_29,

the German language. Because not everyone who takes an interest in consumer law masters this language, Hans Micklitz has had the happy idea to have his paper translated into English.[2] The translation has recently been published.[3] In this paper for my friend Hans Micklitz I will likewise present my point of view, which I originally presented in German,[4] in English.

2012 was not the first time, that the German Law Association discussed consumer law. Nearly 40 years before, in 1974, similar ideas were discussed at its Hamburg meeting, then under the—at the time fashionable—banner of unfair contract terms (*allgemeine Geschäftsbedingungen*). I vividly recall—I not only participated in the 2012 meeting, but also in that of 1974– the discussion, on the basis of a *Gutachten* by Hein Kötz, whether consumer law should be integrated in the Civil Code or dealt with separately.[5] A major concern at the meeting was the question whether small and medium size enterprises should be protected and if so, how they should be demarcated from large enterprises. These are issues which have once again been brought into the limelight by the proposal for a Common European Sales Law of October 2011,[6] which has resulted in a plethora of books and law review articles.[7]

[2] This was before the German political parties CDU, CSU and SPD in their government programme of 26 November 2013 agreed to strive for an equal position of German in Europe, with English and French.

[3] H-W Micklitz, 'Do Consumers and Businesses Need a New Architecture of Consumer Law—A Thought Provoking Impulse' (2013) 32 *Yearbook of European Law* 266.

[4] A German language summary of my arguments may be found in *Verhandlungen des 69. Deutschen Juristentages* (Munich, Beck, 2012).

[5] H Kötz, 'Welche gesetzgeberischen Maßnahmen empfehlen sich zum Schutze des Endverbrauchers gegenüber Allgemeinen Geschäftsbedingungen und Formularverträgen?', *Verhandlungen des fünfzigsten Deutschen Juristentages* (Munich, Beck, 1974).

[6] Proposal for a Regulation on a Common European Sales Law, COM(2011) 635 final.

[7] See among others R Schulze (ed), *Common European Sales Law (CESL)* (Baden-Baden, Nomos, 2012), with chapters by C Wendehorst on the 'chapeau' and Arts. 58–65 (interpretation), H Schulte-Nölke on Arts. 1–6 and 9–12 (general principles), D Mazeaud and N Sauphanor-Brouillaud on Arts. 7 and 79–86 (unfair contract terms), F Zoll on Arts. 8, 87–122 (digital content) and 140–158 (transfer of risk, rights and duties), G Howells on Arts. 13–29 (precontractual relations), T Watson on Arts. 13–29 (precontractual relations) and 140–158 (transfer of risk, rights and duties), E Terryn on Arts. 30–39 (formation), R Schulze on Arts. 40–47 (right to withdraw), T Pfeiffer on Arts. 48–57 (defects of consent), E-M Kieninger on Arts. 66–78 (contents and effects), G Dannemann on Arts. 123–139 (duties of the buyer), D Možina on Arts. 159–171 (compensation and interest), M Lehmann on Arts. 172–177 (restitution) and P Møgelvang-Hansen on Arts. 178–186 (prescription); G Dannemann and S Vogenauer (eds), *The CESL in context* (Oxford, Oxford University Press, 2013), with chapters by G Howells, B Marten and W Wurmnest on linguistic aspects, K Steensgaard and C Twigg-Flesner respectively C Harvey and M Schillig on pre-contractual duties and formation, R Schulze and J Morgan on the cooling-off period, G McMeel and C Grigoleit on interpretation, J Cartwright and M Schmidt-Kessel on 'Willensmängel', P Hellwege and L Miller on unfair contract terms, R Freitag and T Krebs on agency, A Burrows and C Busch on contracts and third parties, H Beale and W-G Ringe on assignment, the late H Unberath and E McKendrick on unforeseen circumstances, C Schuller and A Zenefels on the duties of seller and buyer, H MacQueen, B Dauner-Lieb and P Tettinger on specific performance and the right to cure, M Chen-Wishart and U Magnus on termination, price reduction and compensation of damages and J Devenney and T Pfeiffer on the control of unfair contract terms by collective action; I Claeys

It is submitted that consumer law could occasionally profit from contemplating past experiences: lessons learned from the not so distant past.

29.2 Un peu d'histoire

The architecture of consumer law is not uncontested in Germany and the Netherlands. Germany at first opted for separate treatment of consumer law. Several reasons may have been behind this choice: the idea that consumer protection is something ethereal, which eventually will pass away—not sufficiently serious to spoil the eternal beauty of the *Bürgerliches Gesetzbuch*, or the idea that European directives—and consumer law often is inspired by the EU—should be incorporated in separate legislation because EU rules must be interpreted differently from domestic law, or the vision that consumer law encompasses both public, private and procedural law and it would be improper to separate these issues. Whatever may have been the reason, the first wave of consumer statutes, such as the *AGB-Gesetz* and the *Produkthaftungsgesetz*, were not incorporated in the *BGB*. This all changed with the *Schuldrechtsreform*. The German legislature stood before the choice of implementing the Consumer sales directive by way of *kleine Lösung* (small solution) or to use the directive as a catalyst to overhaul contract law in general by way of *grosse Lösung* (big solution)—and in the meantime sneak in a number of other reform proposals which had been dormant for some 20 years. Germany opted for the latter and in the meantime also chose to include most—not all: the Product liability act was left outside—consumer statutes in the Civil Code.[8] Because of the German constitutional rule that bills have to be decided upon within one parliamentary period, there was considerable pressure on the German Parliament to accept the reform of the Civil Code.

The Germans did not stop here: in 2013, they enacted a medical contract law, which was also incorporated in the Civil Code.[9] In this, they followed—probably unwittingly[10]—the Dutch example, where the Medical contract statute had already

and R Feltkamp (eds), *The draft common European sales law: towards an alternative sales law?* (Antwerp, Intersentia, 2013).

[8] See R Zimmermann, *The new German law of obligations/Historical and comparative perspectives* (Oxford, Oxford University Press, 2005).

[9] See C Katzenmeier, 'Der Behandlungsvertrag—Neuer Vertragstypus im BGB' (2013) *Neue Juristische Wochenschrift* 817 ff, especially 818.

[10] Although K Kubella in her PhD thesis *Patientenrechtegesetz* (Heidelberg, Springer, 2011) 38–51, does mention the earlier Dutch statute. See also I Slabbers and CJJM Stolker, 'The Netherlands' in M Faure and H Koziol (eds), *Cases on Medical Malpractice in a comparative perspective* (Vienna, Springer, 2001) 146 (also tranlated in German) and the German translation of the Dutch medical contract statute by F Nieper and AS Westerdijk, *Niederländisches Bürgerliches Gesetzbuch—Bücher 7 und 7A Besondere Verträge* (Munich, Beck, 1994) 177–468. See in English I Giesen and E Engelhard, 'Medical liability in the Netherlands' in BA Koch (ed), *Medical liability in Europe* (Berlin, de Gruyter, 2011) 361.

been incorporated in the Civil Code some 20 years earlier.[11] Likewise, the integration of consumer law in the narrower sense in the German *BGB* had its predecessor in the Netherlands in 1992, when a new Civil Code was enacted. One of the purposes of the new Dutch Code was to bring back substantive private law into the Civil Code. And indeed, the once unitary Landlease statute (*Pachtwet)* for example, which contained private substantive, administrative and procedural paragraphs, was split up, with the substantive private law moving into the Civil Code. On a more limited level, the Door-to-door sales act, at the occasion of the implementation of the Consumer rights directive, will move into the Dutch Civil Code as well. The integration of Dutch civil law is not wholly complete: financial transactions are still scattered over various statutes.[12]

The integration movement has never been wholly uncontested in the two countries. Inpired by the French *Code de la consommation*, in the Netherlands Willem van Boom has argued that keeping together two different systems—consumer contract law and commercial contract law—appears forced.[13] The author enters a plea for dividing contract law into two divisions: one for contracts with natural persons and the other for contracts with commercial companies.[14]

In Germany a similar battle has evolved. Hannes Rösler in his Münchner PhD thesis pleads for a separate consumer law,[15] as does Thomas Zerres in his Rostocker *Habilitationsschrift*.[16] The integration in civil law has likewise been contested by writers such as Pierre Frotscher,[17] Bettina Heiderhoff,[18] Kai Udo Wiedenmann[19] and of course Micklitz. Caroline Meller-Hannich on the other hand in her Bonner *Habilitationsschrift* 'Verbraucherschutz im Schuldvertragsrecht'

[11] See E Hondius, 'The development of medical liability in the Netherlands' in E Hondius (ed), *The development of medical liability* (Cambridge, Cambridge University Press, 2010) 132.

[12] On the quality of this legislation see R Wibier, *De kredietcrisis en privaatrecht* (Inaugural lecture Tilburg, 2011).

[13] WH van Boom, 'Algemene en bijzondere regelingen in het vermogensrecht' (2003) *RM Themis* 297, 305.

[14] See for similar arguments RRR Hardy, *Differentiatie in het (Europees) contractenrecht/Rechtsvergelijkende studies naar de consument, de ondernemer en hun overeenkomsten* (The Hague, Boom, 2009) and RJ Tjittes, *De hoedanigheid van contractspartijen* (Deventer, Kluwer, 1994).

[15] H Rösler, *Europäisches Konsumentenvertragsrecht/Grundkonzeption, Prinzipien und Fortentwicklung* (Munich, Beck, 2004). See also id, *Europäische Gerichtsbarkeit auf dem Gebiet des Zivilrechts* (Tübingen, Mohr, 2012).

[16] T Zerres, *Die Bedeutung der Verbrauchsgüterkaufrichtlinie für die Europäisierung des Vertragsrechts—Eine rechtsvergleichende Untersuchung am Beispiel des deutschen und englischen Kaufrechts* (Munich, Sellier, 2007).

[17] P Frotscher, *Verbraucherschutz beim Kauf beweglicher Sachen* (Frankfurt, Lang, 2004).

[18] B Heiderhoff, *Grundstrukturen des nationalen und europäischen Verbrauchervertragsrechts* (Munich, Sellier, 2004).

[19] KU Wiedenmann, *Verbraucherleitbilder und Verbraucherbegriff im deutschen und europäischen Privatrecht* (Frankfurt, Lang, 2004).

pleads for incorporation of the present consumer contract law in existing codifications.[20]

The Micklitz school has strong support in Southern Europe. Apart from France,[21] that is the case in Italy,[22] Luxembourg,[23] Portugal[24] and Spain.[25] Austria, with on the one hand its *Konsumentenschutzgesetz* and on the other the incorporation of consumer contract provisions in the Civil Code, is somewhere in between.[26] Belgium, where a Consumer Code has also been proposed,[27] has recently opted for the adoption of a Code of Economic Law. The solution of a Consumer Code has also been deplored, either for practical reasons—several authors have criticised the bad drafting technique of the *Code de la consommation*—or for more theoretical reasons as we shall see below (at 7.).

At the moment, the main focus of the battle is in Central and Eastern Europe.[28]

At the political—in the sense of *Rechtspolitik*—level, the movement for integration seems to have the upper hand at least in countries such as Germany and the Netherlands. A clear indication is the rejection by the *DJT*—by a vote of 52 against 20, with five abstentions—of the Micklitz proposal for an integrated consumer protection statute.

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[20] C Meller-Hannich, *Verbraucherschutz im Schuldvertragsrecht/Private Freiheit und staatliche Ordnung* (Tübingen, Mohr, 2006).

[21] Code de la consommation. See J Calais-Auloy and H Temple, *Droit de la consommation,* 8th ed (Paris, Dalloz, 2010); G Raymond, *Droit de la consommation* (Paris, Litec, 2008) and more generally L Fin-Langer, *L'équilibre contractuel* (Paris, Librairie générale, 2002).

[22] Act of 30 July 1998, Gazzetta *Ufficiale* 14 August 1998, on which G Alpa, *Il diritto dei consumatori* (Bari, Laterza, 2002) and C Amato, *Per un diritto europeo dei contratti con i consumatori—Problemi e tecniche di attuazione della legislazione comunitaria nell'ordinamento italiano e nel Regno Unito* (Milan, Giuffrè, 2003).

[23] Code de la consommation of 10 August 2011.

[24] Lei de defesa do consumidores. See the annotated code by E Cardoso, *Lei de defesa do consumidores—Comentada e anotada 2012* (Coimbra, Coimbra Editore, 2012) and on mandatory law J Morais Carvalho, *Os contratos de consumo, Reflexão sobre a autonomia privada no direito do consumo* (Lisbon, Almedina 2012).

[25] Ley general para la defensa de los consumidores y usuarios. See S Cámara Lapuente (ed), *Comentarios a las normas de protección de los consumidores* (Madrid, Colex, 2011) and LM Miranda Serrano and J Pagador López, *Derecho (privado) de los consumidores* (Madrid, Pons, 2012).

[26] B Lurger and S Augenhofer, *Österreichisches und Europäisches Konsumentenschutzrecht,* 2nd ed (Vienna, Springer, 2008).

[27] T Bourgoignie , *Éléments pour une théorie du droit de la consommation/Au regard des développements du droit belge et du droit de la Communauté économique européenne* (Brussels, Bruylant, 1988). See also T Bourgoignie et al. *Voorstel voor een algemene wet inzake de bescherming van de consument* (Brussels, Ministry of Economic Affairs, 1995).

[28] See for instance M Karanikic, H-W Micklitz and N Reich (eds), *Modernising consumer law—The experience of the Western Balkan* (Baden-Baden, Nomos, 2012); J Lazar, 'Entwicklung des slowakischen Privatrechts' (2013) *Zeitschrift für Europäisches Privatrecht* 789; R Schulze and F Zoll (eds), *The law of obligations in Europe—A new wave of codifications* (Munich, Sellier, 2013).

29.3 Consumer Law in Germany

Before coming to my opposition to the Micklitz thesis, let me first say something about German consumer law, more especially consumer contract law. There is in my view no doubt, that German consumer law is the best developed in Europe. Every other nation has much to learn from their German colleagues. This is apparent in all four main sources of the law, although perhaps it is less pronounced in legislation, which—in Germany as elsewhere—is heavily influenced by EU directives. Case law emanating from Germany is of major interest for several reasons—here I have Dutch law in mind. The first reason is that there is so much of it: almost everytime in which a Dutch lawyer will look in vain for a Dutch precedent, a search in German case law will provide an answer.[29] Not that the German precedent will necessarily be followed, but at least it provides Dutch practitioners with the arguments which have to be pondered. A second reason is the impact of constitutional law—absent (save for the influence of the European Convention on Human Rights) in the Netherlands. A third reason is the discussion in case law of European law, although that admittedly is mainly going on in the highest courts. But the main source which attracts foreign lawyers to Germany is its doctrinal work. There are the great commentaries,[30] including those who bear on civil law but because of the incorporation of consumer law include the latter. There are the many PhD dissertations, there are the many law review articles. And there are the *Habilitationsschriften*, this beautiful German institution for lawyers to prepare for a chair.

Let me give some examples—without in the least striving for completeness. There is the book by Josef Drexl on 'Die wirtschaftliche Selbstbestimmung des Verbrauchers'.[31] Then there is the above-mentioned study by Bettina Heiderhoff on European consumer contract law[32]. This author defends the thesis that the original aim of consumer law: protecting the weak party, has paradigmatically changed in Europe towards and protection of the well-advised consumer.[33] Christoph Reimann analyses the partition in three separate parts of classical *BGB* civil law, the

[29] An example from my own research: when I had to deal with 'Briefkastenverschmutzung'-one's mail box being used for commercial advertising notwithstanding a 'no' sticker—there was not a single court case to be found in the Netherlands, but in Germany a whole jurisprudence existed.

[30] The most thorough book on European consumer law, with 32 chapters, is the German language commentary by N Reich and H-W Micklitz, *Europäisches Verbraucherrecht,* 4th ed. (Baden-Baden, Nomos, 2003). In 2009, under the title *Understanding EU consumer law* and now with P Rott as third author, an English language version was published (Antwerp, Intersentia, 2009) . See also M Tamm and K Tonner (eds), *Verbraucherrecht* (Baden-Baden, Nomos, 2012).

[31] J Drexl, *Die wirtschaftliche Selbstbestimmung des Verbrauchers—Eine Studie zum Privat- und Wirtschaftsrecht unter Berücksichtigung gemeinschaftsrechtlicher Bezüge* (Tübingen, Mohr, 1998).

[32] Heiderhoff, *Grundstrukturen*, 456.

[33] Ibid, 189.

special private law for commercial contracts and the special law for consumer transactions.[34]

European consumer law in specific areas may be found in the Freiburger *Habilitationsschrift* by Alexander Bruns on exemption clauses[35], in the Regensburger *Habilitationsschrift* of Phillip Hellwege on unfair contract terms and general contract law,[36] in the study from Hannover on consumer sales by Andreas Schwartze[37] and in the Oldenburger *Habilitationsschrift* by Wolfgang Seiler on consumers and the internet.[38] The latter author concludes that consumer protection measures should rather be deleted and deregulation should set in.[39] European private law may also be found in the Hagener *Habilitationsschrift by* Markus Stoffels on specific contracts which have not been regulated by statute.[40] In his Frankfurter *Habilitationsschrift* on cross-border consumer transactions, Gralf-Peter Calliess finds German and European law on cross-border consumer contracts to be so utterly incoherent and complicated, that they cannot establish legal certainty and justice on the electronic market.[41]

29.4 Competition of Legal Systems

Should we strive for a unitary private law at all, or is a competition of legal systems as envisaged by CESL preferable? The question is well known from American company law, where corporations are allowed to choose their own system for incorporation, which usually results in the law of the State of Delaware being chosen. In her Hamburger *Habilitationsschrift* Eva-Maria Kieninger looks into the possibility which the opt-in system has for European company and consumer law.[42] Her conclusion is that such competition of legal systems may be of interest for European

[34] C Reymann, *Das Sonderprivatrecht der Handels- und Verbraucherverträge—Einheit, Freiheit und Gleichheit im Privatrecht* (Tübingen, Mohr, 2009).

[35] A Bruns, *Haftungsbeschränkung und Mindesthaftung* (Tübingen, Mohr, 2003).

[36] P Hellwege, *Allgemeine Geschäftsbedingungen, einseitig gestellte Vertragsbedingungen und die allgemeine Rechtsgeschäftslehre* (Tübingen, Mohr, 2010).

[37] A Schwartze, *Europäische Sachmängelgewährleistung beim Warenkauf—Optionale Rechtsangleichung auf der Grundlage eines funktionalen Rechtsvergleichs* (Tübingen, Mohr, 2000).

[38] W Seiler, *Verbraucherschutz auf elektronischen Märkten—Untersuchung zu Möglichkeiten und Grenzen eines regulativen Paradigmenwechsels im internetbezogenen Verbraucherprivatrecht* (Tübingen, Mohr, 2006).

[39] See also A Wiebe, *Die elektronische Willenserklärung—Kommunikationstheoretische und rechtsdogmatische Grundlagen des elektronischen Geschäftsverkehrs* (Tübingen, Mohr, 2002).

[40] M Stoffels, *Gesetzlich nicht geregelte Schuldverträge/Rechtsfindung und Inhaltskontrolle* (Tübingen, Mohr, 2001).

[41] G-P Calliess, *Grenzüberschreitende Verbraucherverträge—Rechtssicherheit und Gerechtigkeit auf dem elektronischen Weltmarktplatz* (Tübingen, Mohr, 2006).

[42] E-M Kieninger, *Wettbewerb der Privatrechtsordnungen im Europäischen Binnenmarkt* (Tübingen, Mohr, 2000).

company law, but in consumer protection competition is of such minimal financial interest that suppliers probably could not care less.

29.5 The German Experience

A functional approach of the structure of the law is not wholly inconceivable. Actually, there is a number of domains, such as banking & insurance, construction law, entertainment law, environmental law, health law, juvenile law, labour law, landlease, military law, sport & the law, which have achieved some form of independence. Often they have their own infrastructure : associations, faculty chairs, law reviews, ministerial positions and sometimes even statutory provisions. Mostly this is on a piecemeal basis. Occasionally, a more systematic approach of a functional division is promoted. A major example was the division of the law in the former German Democratic Republic. There, the *Zivilgesetzbuch* was based on a functional division as between the various activities in one's life. A similar division has sometimes even been defended in Western countries.[43] The practical impact of the German Code has been limited. But whatever the outcome, from a theoretical perspective the objection is clear. The great advantage of integrating civil law in a civil code, procedural law in a procedural code etc, is that a unity of civil law, of procedural law etc is attained.

29.6 The Case for Integration

I finally come to the point raised by Hans Micklitz. Incorporation of all consumer law in a separate statute has a number of advantages. Having together in a single statute all rules relating to consumers, whether of an administrative, civil or procedural nature may be handy for users of the law. It also may promote a uniform terminology. Such a code will do away with the traditional division between public law and private law, which no longer is tenable. A Consumer code may also facilitate implementation of EU directives. Finally, according to Micklitz, civil law and consumer law simply do not go together: 'the dynamic of consumer law cannot be reconciled with the stability of the BGB'[44]. The integration in Germany in his view has only been formal and not substantive. Civil law is like a heavy tanker ship 'which can change its direction in only a limited way and needs time for every change of direction. In contrast to this, specific rules appear to be almost sailing boats which can change their direction quickly and easily, but which are exposed to wind and

[43] FW Grosheide, 'Invoering vermogensrecht NBW aanstaande? Of beter ten halve gekeerd dan ten hele gedwaald?' (1977) *Weekblad voor Privaatrecht, Notariaat en Registratie* nos 5407/5408.

[44] Micklitz, 'Do Consumers and Businesses Need a New Architecture of Consumer Law', 270.

weather—that is to say political current—in a far stronger way'.[45] Although the metaphor is admirable, it is incorrect. A quick look at for instance family law shows that this supposedly heavy tanker ship is in need of new legislation or constitutional review almost on an annual basis and that political views (on gay marriage or neutral gender) are of the essence.

Some of the disadvantages are also clear. One such disadvantage is obvious : the careful fabric of law, divided over various codifications, is lost. The consumer sale of goods is a very likely candidate for inclusion in a Consumer Code. Because duplication of such provisions in both a Consumer Code and the Civil Code seems undesirable, this would mean that the consumer sale of goods would have to be moved out of the Civil Code. This in turn would mean that the most visible of all specific contracts would not be dealt with in the Civil Code. It is suggested that this is not a good idea. There is also the very practical argument, raised in Munich: why should the legislature waste time on an exercise which will be costly and time-consuming.

There is another argument shared by a more limited number of authors[46]—and apparently not by Hans Micklitz who does not address it in his *Gutachten*. It runs like this. Civil Codes used to be based on the paradigm of freedom of contract. This is still the case, but it has been suggested that this principle is now accompanied by a second principle, that of protection of the weak party.[47] Civil Codes have first encompassed such rules in the area of employee protection, later extended to hire-purchase and the law of landlord and tenant. Consumer law, when incorporated in a Civil Code, constitutes a major part thereof.

As we have witnessed above, patient protection is now also regulated by Civil Codes in Germany and the Netherlands. Consumer protection now constitutes a major part of contract law. The result is that protection of the weak party may now be found in many parts of the Civil Code. To such an extent, that the authors mentioned are correct in no longer qualifying such protection as an exception, but rather a principle on the same level as freedom of contract. A theoretical debate? Certainly, but one with practical consequences as well. Firstly, exceptions tend to be constructed in a restrictive way; general principles do not. Secondly, once protection of the weak party is considered a paramount principle, this has the consequence that it may even be applied where no specific statutory rules exist, in the area of new specific contracts for example, or when small and medium enterprises are concerned. It is not contended here that if consumer protection were to be removed from a Civil Code, this general principle of protecting the weak would be abandoned straigth away, but chance would be that it would. And it is better not to risk the chance.

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[45] Ibid.

[46] B Lurger, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union* (Vienna, Springer, 2002). At the *DJT* meeting in München, this idea was brought forward by Stefan Grundmann.

[47] E von Hippel, *Der Schutz des Schwächeren* (Tübingen, Mohr, 1982).

29.7 Conclusions

One of the recurrent themes of consumer protection in Europe is that of its place in the legislative architecture: where to deal with the statutory provisions. Several options are available. There is the integration in private law codification, currently in fashion in Germany and the Netherlands. There is the model of a separate statute, at the moment en vogue in Southern Europe. Central and Eastern Europe still are a battle ground. Belgium, with its upcoming Code of Economic Law, is in a third group all by itself. If the Common European Sales Law is approved, the question may at one time also be raised at a European level.

Hans Micklitz has entered a strong plea for a separate statute. I have likewise argued in favour of integration. *Que sera, sera. Whatever will be, will be. The future's not ours to see. Que sera sera. What will be, will be*.[48]

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