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BOOK REVIEW

L. Gutkin, *Die Europäisierung der AGB-Kontrolle von Preisänderungsklauseln* *

Review by Marco B.M. Loos **

In this book, which was first defended in Augsburg as a Ph.D. thesis in 2017, Gutkin describes the Europeanization of the unfairness-test for price change clauses in standard contract terms. The goal (page 35) is to define the prerequisites that must be met for price change clauses to become part of standard contract terms. To that end, she compares the Unfair Contract Terms Directive ('the directive') and the case-law of the Court of Justice on the requirements for price change clauses with the national case-law on these requirements. With 'national law', however, only *German* law is meant. This is represented also in the list of literature mentioned at the end of the book, which almost exclusively mentions literature in German. The focus on German law already becomes clear on the very first textual page of the book (page 31), where she indicates that the directive, because of the priority for community law, forms a *second* test for the control of unfair terms in consumer contracts: a European perspective would simply have forgone on the national test. That is not to say that this makes the book uninteresting to read for non-German scholars. To the contrary - German law on standard contract terms is more developed than in many other legal systems, and these other legal systems therefore can often learn from the German experience in this area.

Gutkin starts her exposé by indicating that German law does not contain a coherent, overarching notion of clauses allowing for the change of the price (page 36-39) and then chooses to use price amendment clauses ('Preis Anpassungsklausel') as overarching notion in her book (page 39). This notion includes terms that allow for a later *determination* of the price in case the parties have left the price open when the contract was concluded ('Preisbestimmungsvorbehalte', page 40), and terms that allow for a *change* of the price that was agreed when the contract was concluded ('Preisänderungsklauseln', page 41). She then distinguishes (page 42-55) between numerous types of price change clauses, leading to a distinction between (1) clauses that 'automatically' lead to a change of the clause, e.g. because the change is connected to specified developments on the market, to additional costs made in the performance of the contract, or to changes of an objective index, (2) clauses under which the trader reserves the right to change the price at his reasonable discretion ('nach billigem Ermessen', in line with § 315 BGB), and (3) clauses that require a

* Berlin: Duncker & Humblot, 2018, 485 p.

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renegotiation of the contract price. The scope of the research is limited to the first two types of price change clauses. The book is then divided in 5 parts. In the first part (chapters 1-2) Gutkin discusses the meaning and interpretation of the Unfair Contract Terms Directive, whereas parts 2 (chapters 3-5), 3 (chapters 6-8) and 4 (chapters 9-10) deal with transparency, the unfairness test and the consequences of unfairness of price change terms. Part 5 contains the conclusions of the book.

The most interesting part of the book is part 2 on transparency. In chapter 3, Gutkin sets out the European requirements and the application thereof in German law. I agree with Gutkin that when determining whether a standard contract term is transparent, the yardstick of the average consumer is to be applied (page 120). In that respect, she argues, the consumer is assumed to possess the knowledge of everyday life ('das alltägliche Leben') that is brought to her by mass media or general schooling, but not legal or specialist expertise (page 121). General language may be used, but specific jargon not; simple calculation and logic is allowed, as well as simple conclusions based on the term's surroundings. However, a term lacks transparency when the consumer can only understand it after she has read it several times and has spent some time thinking over what it might mean (page 123).

She rightly concludes that the requirements of Articles 4(2) and 5 Unfair Contract Terms Directive have been properly implemented in § 307 of the German Civil Code, but that the transparency requirement has a broader meaning in German law (page 161-162). She argues that the system and background of the directive and the case-law of the Court of Justice result in the fact that the transparency requirement constitutes a separate *category* of unfairness, whereas under German law it constitutes a specific *form* of unfairness - but in effect the same outcome is normally reached as the lack of transparency typically results in unfairness (page 162). I am not so sure whether this reflects the current status at the European level. First, I'm not convinced that the case-law of the Court goes this far. Moreover, in his conclusion in case C-621/17, ECLI:EU:C:2019:411 (Kiss/Kiss), AG Hogan even argued that a term lacking transparency should merely be interpreted *contra proferentem* and should not be found unfair. If the Court would follow the AG's conclusion, there would be a watershed between European and German law in this respect. In this respect, AG Hogan seems to understand the transparency requirement only in a formal sense. I think he is downplaying the transparency requirement too much here - in my mind, Gutkin (page 133) is right when she points to the CJEU's decision in the *Gutiérrez Naranjo*-case when arguing that there is also a substantive side to transparency. The notions of formal and substantive transparency are then further explored in Chapters 4 (page 164-185) and 5 (page 186-264).

The book's composition may look to be somewhat odd. Whereas one might expect that in a book on price change clauses these clauses would constitute the core of the analysis, this is in fact not the case. Instead, Gutkin discusses (several aspects of) the Unfair Contract Terms Directive and their counterpart in German

law. She then draws conclusions from this and subsequently applies them to price change clauses. This for instance has as a result that of chapter 4's 20 pages on formal transparency, less than four pages (page 171-172 and 183-185) actually deal with price change clauses. However, looking from the angle of *Europeanization* of the unfairness testing of price change terms, this is certainly a choice that can be defended. Moreover, in this way the results of the research are opened to all academics interested in (German) research on unfair terms (and transparency of terms), and researchers need not be scared away by the focus on price change terms. And that is a good thing, as Gutkin certainly has something to say on all these matters.

