The Principles of European Contract Law and the Harmonisation of Private Law in Europe

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1. Introduction

Over the last decade the drafting of ‘principles’ of private law has become more and more popular. The two best-known sets of principles are in the field of contract law, where both a ‘European’ set and a set intended to have value for the whole world were drafted. These Principles of European Contract Law (PECL) and Unidroit Principles of International Commercial Contracts (UP) were joined by several other projects in which it is tried to establish European principles. Apart from another set of principles on contract law drafted by the Gandolfi group, European principles were formulated in the areas of obligations in general, trust law and insolvency law. At present, work is going on in the fields of specific contracts, tort law, enrichment, securities and family law.

Although most of these projects to draft principles have gained a lot of attention, one of the questions that still needs to be answered is to what extent principles can serve a role in the harmonisation process within the European Union. If one believes (some of) the drafters of the PECL, this question seems to have an easy answer: at some time in the future, a

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2 Rome 1994. Also see http://www.unidroit.org/english/principles/pr-main.htm
4 Part III of the PECL contains in majority rules on obligations in general.
7 Within the so-called ‘Study group on a European civil code’ led by Chr. Von Bar (see Chr. Von Bar, Le groupe d’études sur un code civil européen, RIDC 53 (2001), 127), of which the provisional results are available at http://www.sgecc.net. Also see Viola Heutger, Konturen des Kaufrechtskonzeptes der Study Group on a European Civil Code, ERPL 2003, 155 ff.
8 Not only the Study group on a European civil code is working on such principles, also the (Vienna based) European Group on Tort Law is working on these (see J. Spier & O. Haazen, The European Group on Tort Law and the European Principles of Tort Law, ZEuP 7 (1999), 469 and http://civil.udg.es/tort).
9 Both enrichment and credit securities are covered by the Study group on a European civil code. See http://www.sgecc.net.
10 This group is led by K. Boele-Woelki and publishes the European Family Law Series (first volume: Antwerp 2003).
European Contract Code will have to be implemented and the PECL can serve as a first attempt to draft such a code. In this view, a European code will eventually replace national legal systems in the field of contract law. The question whether this is possible will be discussed in this contribution, together with several other ways in which the PECL can contribute to the harmonisation of contract law in Europe. I will leave aside the questions whether there is any need for harmonisation of contract law and whether there is a basis for a Contract Code in the EC-Treaty.\footnote{These questions are discussed in, for example, Jan Smits, The Making of European Private Law, Antwerp-Oxford-New York 2002, Chapters 1 and 2.}

In the following, attention will first be paid to the various objectives the PECL may have (Par. 2). In order to establish what the contribution of the PECL to harmonisation may be, it then is necessary to consider the nature of principles as such: what is it to draft ‘European principles’? (Par. 3). Finally, the third part of the PECL will be used as an illustration of my main thesis that it should be left to legal practice to decide whether the PECL will be applied or not (Par. 4).

2. The Five Objectives of the PECL

According to their drafters, the PECL have four different objectives.\footnote{Parts I and II, xxiii and art. 1:101 PECL; cf. Part III, xv ff.} Let me distinguish these in three goals that are supposed to be of immediate importance and one goal that is supposed to play a role on the longer term.\footnote{This is also the view held by the drafters. See Parts I and II, xxiv and Part III, xvi.} All four objectives can play a role in the harmonisation process, be it each in a different way. In addition, it is possible to identify still a fifth objective that is not mentioned by the drafters, but that is, in my view, one of the most important goals of drafting principles in general: the role such principles can play in legal education and research, although – as we shall see – to attribute this function to Principles is not undisputed.

2.1. Express Adoption by the Parties

A first objective of the PECL is that they offer contracting parties the possibility to have their contract governed by a set of ‘neutral’ principles.\footnote{‘Express adoption by the parties’: Parts I and II, xxiii, Comment C to art. 1:101 (at 96) and art. 1:101 (2) PECL; Part III, xv.} Because the express aim of the drafters of the PECL is to record the European common core of solutions to problems of contract law and even to propose solutions that are ‘progressive’ in comparison with the traditional national legal systems,\footnote{Parts I and II, xxii.} contracting parties may be tempted to adopt the PECL as their default rules. They can do so for example by stating that ‘This contract is subject to the Principles of European Contract Law’. Of course, the national mandatory law (that would be applicable to the transfrontier contract according to the rules of private international law) then still remains in force.\footnote{Also see art. 1:103 PECL.}

The question is whether this view of the drafters is attainable in legal practice. Two objections need to be made. The first is of a more technical nature and relates to the rules of conflict law. It is certainly possible that parties adopt the PECL as part of their contract by simply copying the provisions or by making a reference to them (‘This contract incorporates the PECL’).\footnote{Cf. Comment C to art. 1:101 (at 96).} In fact, this is as if parties use the PECL as a checklist for drafting their contract, instead of making use of standardised model contracts. But can parties also choose the PECL as their applicable law instead of choosing for a national legal system? In case of a

\footnote{\textsuperscript{12} These questions are discussed in, for example, Jan Smits, The Making of European Private Law, Antwerp-Oxford-New York 2002, Chapters 1 and 2.\textsuperscript{13} Parts I and II, xxiii and art. 1:101 PECL; cf. Part III, xv ff.\textsuperscript{14} This is also the view held by the drafters. See Parts I and II, xxiv and Part III, xvi.\textsuperscript{15} ‘Express adoption by the parties’: Parts I and II, xxiii, Comment C to art. 1:101 (at 96) and art. 1:101 (2) PECL; Part III, xv.\textsuperscript{16} Parts I and II, xxii.\textsuperscript{17} Also see art. 1:103 PECL.\textsuperscript{18} Cf. Comment C to art. 1:101 (at 96).}
contract between contracting parties of different European countries, the EC Convention on the Law Applicable to Contractual Obligations 1980\(^ {19} \) is applicable. Art. 3 of this Convention (implicitly) states that only a \textit{national} legal system can be chosen as applicable law. This seems to indicate that a choice of law for the PECL is not possible. Various authors have however defended the opposite.\(^ {20} \) I am inclined to agree with these authors, although it is of course not likely that as long as uncertainty exists in this respect, parties will in fact choose for the PECL. They will prefer a choice of law for a national legal system, in order to be certain about its applicability.

In addition to this, it should be pointed out that there is less uncertainty about applying the PECL in arbitration proceedings. If the PECL are made applicable in an arbitration clause, arbitrators may apply the PECL as if it were a national legal system. Not only art. 28 of the UNCITRAL Model Law on International Commercial Arbitration of 1985 allows this (which is not so relevant to Europe as of the EU Member States only Scotland and Cyprus adopted this model law), but also several national rules on arbitration law do so. The mere fact that this is technically possible does not mean, however, that parties will \textit{in fact} do so. This leads me to the second objection.

My second objection relates to empirical evidence on contract practice. Although such evidence is unfortunately not widely available, the reactions to the European Commission’s Communication on European Contract Law\(^ {21} \) are telling. It is well-known that the European Commission issued this Communication to monitor the feelings of business (and other interested parties) regarding more uniformity in contract law. The general feeling seemed to be that legal certainty was found to be much more important than the ability to choose a law that is supposedly of a better quality than present day national legal systems. It may be that there is at present sometimes uncertainty about the contents of a foreign law, but if the PECL were to be applied, this uncertainty would be even greater.\(^ {22} \) It is after all not certain how a court will deal with the various principles. This is in particular so since many of these principles are rather vague and open-ended. They are in need of an extensive case law that is, at least for the moment, lacking. All this confirms that, as long as there is so much uncertainty about the way in which the PECL will be applied by a court, parties will not choose them as their applicable law as these principles do not enhance legal certainty in the contractual relationship.\(^ {23} \)

The question to what extent an express adoption by the contracting parties of the PECL will lead to harmonised law therefore deserves a nuanced answer. On the one hand, it is certainly important to regard the PECL as providing optional rules for contracting parties. On the other hand, it depends on (national) conflict law whether it is possible at all to choose for the PECL. And even if it is possible, the question remains whether at this moment in time the PECL provide enough legal certainty compared to full-developed national legal systems. In


\(^ {22} \) Informally, I consulted several practicing lawyers involved in arbitration proceedings, who all told me they would not make a choice of law for the PECL, but would prefer a choice for a national legal system, even if this would be a system they knew little about (but still had the opportunity to involve lawyers of that country if worse came to worse).

\(^ {23} \) On the experiences with the (as to contents and purpose) similar Unidroit Principles of International Commercial Contracts, see M.J. Bonell, The Unidroit Principles in Practice: The Experience of the First Two Years, ULR 1997, 34.
the 2001 Communication on European Contract Law, it is envisaged to create such an optional contract law next to national legal systems. Experience will show whether and when this optional model is chosen (see below, Par. 4).

2.2. A (Sometimes ‘Negative’) Source of Inspiration for Judiciary and Legislature

A second objective of the PECL is that they offer a model for legislators that have to draft a national code or an international convention as well as a tool for (arbitral) courts that have to interpret these. This function of a model for legislators is very similar to the function the Unidroit Principles have had as a model for recodification in Central and Eastern Europe (for example in drafting the new Civil Code of the Russian Federation), in China (the 1999 Uniform Contract Code of China) and in Israel and Indonesia. The revision of the German Civil Code in 2002 also benefited from the UP and the PECL. The PECL can play a similar role in other future recodification projects. A likely form that such influence can take, is that if a national legislator wants to deviate from the PECL, arguments need to be given why it does so. This function of the PECL as a ‘negative control mechanism’ may lead to an important ‘implicit’ influence: it makes the legislator more aware of why it chooses a certain rule, without this rule necessarily being the rule of the PECL.

Of more importance in daily practice is that the PECL can be a source of inspiration for (arbitral) courts (but also for lawyers pleading a case before these courts). The courts can interpret their own national law or provisions of international treaties (like those of the Vienna Convention on the International Sale of Goods) against the background of the PECL. Thus, in applying the good faith principle of art. 7 CISG, courts can refer to art. 1:201 PECL (or art. 1.7 UP). I would say that in particular the illustrations given may be of use to the courts. This ambition is enhanced by the fact that the PECL contain either the ‘common core’ of European legal systems or ‘progressive’ rules that should be upheld as an example of a proper legal development. The latter would be the case, for example, with art. 6:111 PECL, that offers a balanced provision on imprévision that, as such, does not exist in any European country.

It is quite likely that also the drawing of inspiration by national courts will take the form of a ‘negative control mechanism’. As an example of this, I may point to the Dutch rules on termination in case of non-performance of a contract. Despite explicit reference to the concept of fundamental non-performance in art. 7.3.1 UP (and to a lesser extent to art. 9:301 PECL) by counsel, the Dutch Hoge Raad has not been willing to accept that termination on basis of art. 6:265 BW is only possible in case there is such fundamental non-performance.

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25 Parts I and II, xxii, xxiv, Comment D to art. 1:101 (at 96-97); Part III, xv. Also see Option 2 of the Communication on European Contract Law, o.c., no. 52 ff.
29 Also see Parts I and II, Comment F to art. 1:101 (at 97).
Although the text of the Dutch provision certainly leaves space for this interpretation, the Dutch Supreme Court upholds the view of the legislator, as laid down in the explanatory memorandum to the Dutch Civil Code of 1992, that fundamental non-performance is not a requirement. This probably means that the creditor under Dutch law is allowed to terminate a contract more readily than is the case in other legal systems. It is thus, again, the rejection of the PECL rule that is important. This does not mean that there is no influence of the PECL on the national legal system, it only means that such influence may be a negative one.

2.3. A Foundation and an Infrastructure for European Legislation

A third objective of the PECL is that it can serve as a tool for the institutions of the EC itself when they draft or interpret European legislation and for national courts and lawyers when they apply this legislation. This function of the PECL as a ‘foundation’ and as an ‘infrastructure’ is linked to the consciousness that harmonisation through directives has inherent disadvantages. One of these is that directives only cover specific topics and can thus only lead to a fragmentary harmonised law. Another disadvantage is that the present directives are not consistent among themselves: even the definitions of what a consumer is, sometimes differ. These problems could be overcome by providing a framework for directives. This framework can subsequently be used as a basis for legislative activities of the EC.

A necessary prerequisite for the fulfilment of this objective is of course that in drafting new directives the PECL are taken into account and that the PECL in turn incorporate the already existing directives. The latter is, however, not the case. In Parts I-III of the PECL, reference is made to only three directives (out of more than 20 that are related to contract law). In particular the Directive on unfair terms in consumer contracts influenced art. 4:110 (1) PECL, that uses almost identical wording as art. 3 of the Directive. It is however striking that this article, unlike the directive, is also applicable to non-consumer contracts. Thus, the judicial intervention in case of unfair terms goes much further in the PECL than in the directive. No wonder that the European Commission therefore suggests to remedy the present piecemeal approach by fundamentally reflecting on the need for a new more coherent instrument in the field of contract law.

On the other hand, the PECL have until now not been taken into account in making new directives. As the PECL are intended to have value for contracts in general, one would expect them to be taken into account in drafting directives in the field of contract law. This is not the case. The Directive on sale of consumer goods, for example, creates a hierarchy of actions for the consumer in case of non-conformity. The consumer should first try to enforce its right to performance (ie repair and replacement) and only in a second stage is he allowed to claim price reduction or termination of the contract. However, according to art. 8:101 PECL

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32 Parts I and II, xxii ff. and art. 1:101 (1) PECL.
34 See for this problem (and other problems) the Action Plan on a more coherent European Contract Law, o.c., no. 14 ff.
35 Directives on product liability (85/374), self-employed commercial agents (86/653) and unfair terms in consumer contracts (93/13).
36 ‘A party may avoid a term which has not been individually negotiated if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of that party (…)’.
38 Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees.
(a provision that was already published in 1995, long before the directive was issued), the creditor has a free choice of action. It will be difficult for the PECL to fulfil the role of a framework if specific rules of directives are so divergent. Unless one would replace the present directives by one or several new instruments, the third objective is difficult to attain.

In its Action Plan on a more coherent European Contract Law of 2003, the European Commission suggests to create a ‘common frame of reference’. Although this is not made explicitly clear, it seems very likely that such a frame of reference will, at least in part, look very much like the PECL. Staudenmayer, who chaired the group that drafted the Action plan, writes that the sources for the frame of reference will be ‘the national legal orders, where via comparative legal-research the common denominators could be found and best solutions for common problems be put forward’. This is exactly what the PECL offer already.

2.4. A Basis for a European Code of Contracts
According to the drafters, the fourth and final goal of the PECL is that they serve as a basis for a ‘future European Code of Contracts’. Although it may be the case that not all drafters of the PECL agree to this goal, Lando himself certainly does embrace this ambitious objective, corresponding to Option 4 of the Communication on European Contract Law. It is the most interesting objective from a viewpoint of the PECL as an instrument for harmonisation. It is also a goal that is of an entirely different nature than the three other objectives. As the above functions can only lead to a slow, informal and still fragmentary harmonisation of contract law because it is left to contracting parties, the judiciary or the legislature to decide what use will be made of the PECL, the introduction of the PECL as a true contract code is different. It depends on the applicability and purpose of such a code what it leads to. Is it a code that should be chosen by the parties to make it applicable? Is it possible to exclude it? Does it replace national systems? Does it provide only general rules or also rules for specific contracts? Is it only applicable to business-to-business contracts? These are all questions the PECL themselves do not answer. They will be discussed in Par. 3 and 4.

2.5. Yet Another Objective: the PECL as a Reference Point for Legal Science and Legal Education
Although not mentioned by the drafters of the PECL, there is still a fifth objective of drafting principles. I regard this objective even as the most important one. It is the importance of principles for legal science and legal education. Principles create a common language through which European scholars can communicate and European students can be educated. In this sense, they are the tertium comparationis with which national legal systems can be compared.

It is possible to criticise this function. Legrand has raised the important question why this reference point should consist of uniform principles, while diversity could be one as well. In facing the differences among Europe’s legal systems, why should it be that in particular the similarities are picked out and the differences left aside? Drafting principles is after all the finding of similarities on basis of the functionalist method and the praesumptio similitudinis.

39 Action Plan, o.c.
41 Parts I and II, xxiii; idem in Part III, x.
43 Also see the Action Plan, COM (2003) 68 final, in which it is suggested to further reflect on the opportuneness of non-sector specific measures, meaning an optional instrument.
44 Also see M.W. Hesselink, Principles of European Contract Law, o.c., 25.
Legrand takes the opposite view: things that look the same are really different. He thus proclaims a ‘principium individuationis’. To me, the solution lies in the middle. What can be put forward against the argument of Legrand is that it is impossible to see differences without having a measure by which one can discover what the differences are. How could one for example establish that there are in Europe different rules on revocation of an offer if one does not have an (at least implicit) reference point by which one can compare the different rules? This reference point may well consist in European principles, as long as one does not regard these as necessarily reflecting one specific national law. Even more, I do not think it is possible at all to consider European principles reflecting a national legal system (see Par. 3). But this does not mean they cannot fulfil a useful role as a reference point: for the first time since the reception of Roman law, there is a common text that academics can turn to.

3. A Closer Look at ‘European Principles’: an Analysis of Existing Law or New ‘Soft Law’?

3.1 Introduction
In order to establish the role of the PECL in the harmonisation process, it is useful to have a closer look at what it is exactly to draft ‘European principles’. The most important question in this respect is whether such principles can be considered as similar to principles in a national legal system. The answer to this question is important because if they are not, this means that European principles cannot fulfil the same role in Europe as national principles can within a national legal system, which has in turn consequences for the role of principles in the harmonisation process.

3.2 What are the Functions of Principles in National Law? A Theoretical Inquiry
There is no doubt that in national legal systems principles have an important role to play. An important function is that principles make the law more intelligible because they give structure to the more specific rules (following from statute and judicial decisions). Another function of principles is that they are a source of new law: it is through deduction and abstraction that principles are derived from rules and can subsequently be applied to new types of situations. These two functions of systematisation on the one hand and further developing the law on the other are in continental Europe intrinsically linked to each other since the 17th century. In the Natural Law School, the principia were put at the very basis of civil law through such abstraction and deduction. Legal science was meant to uncover principles as eternal axioms and legal practice could subsequently apply these. In English law, principles have begun to fulfil a similar function since the 19th century.

The question is whether European principles can fulfil, for Europe, the two functions principles fulfil for national legal systems. Before this question can be answered, it is useful to discuss the exact difference between rules and principles. For the sake of my argument, I only need to refer to this difference in the context of the second function of principles, thus principles as guidelines for deciding cases. The prevailing opinion is that, unlike rules, principles have a dimension of weight or importance: they can never be fully realised, but

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47 See for these two functions for example Karl Larenz, Methodenlehre der Rechtswissenschaft, 6. Aufl., Berlin etc. 1991, 168.
only gradually. In other words: principles have to be weighed against each other because often they are contradictory. This weighing is especially important in ‘hard cases’. This is the view held by Ronald Dworkin,\textsuperscript{50} but it is also the prevailing view in most European legal systems.\textsuperscript{51} In Dworkin’s view, this means that the distinction between rules and principles is a logical one. Rules are applicable in an all-or-nothing fashion: they apply to a case or not. If they do apply, they provide the answer, if they do not they are useless for deciding the case. In this situation, it is on the basis of (conflicting) principles that the case needs to be solved.

How should the weighing of principles take place? The best-known account of this process is the one by Ronald Dworkin. Dworkin makes clear that the idea of ‘community’ precedes anything like justice or fairness: only if it is established what is fair in a ‘particular political group’, we are able to say whether specific rules or principles can be considered as fair.\textsuperscript{52} To this end, Dworkin distinguishes three types of community. One of these types is the community of principle. In this model, people in a certain community accept that they are governed by common principles. This is different from the models in which people feel themselves bound to rules that are reached as a political compromise (a ‘rulebook’-model) and also different from the model in which members of the community treat their association as only a de facto accident of history and geography.\textsuperscript{53}

What is important to us, is that in the model of principle, members of society accept that their rights and duties are not exhausted by the decisions of their political institutions (as is the case in the rulebook-model), but that they can rely on principles underlying those rules. In the model of principle ‘each citizen respects the principles of fairness and justice instinct in the standing political arrangement of his particular community, which may be different from those of other communities, whether or not he thinks these are the best principles from a utopian standpoint’.\textsuperscript{54} This is ‘law as integrity’: we should think of the law as a coherent set of principles about justice and fairness. This political community requires a ‘shared understanding’.\textsuperscript{55} Dworkin’s view of course provokes the question what exactly is the relationship between the PECL and the community for which the PECL are supposed to be of value. This is important because Dworkin suggests that as long as there is no ‘shared understanding’ of the community, it is not possible to rely on principles within this community.

3.3 A Characterisation of the PECL: the Echo of Universalism

If one wants to characterise the PECL, it is important to repeat that they contain two types of provisions.\textsuperscript{56} Some of the provisions are supposed to restate the common core of contract law in Europe. Art. 2:201 (1) on what is an offer for example restates what presumably all 26 legal systems\textsuperscript{57} have in common. Other articles, like art. 6:111 on imprévision provide us with a ‘progressive’ development from that common core.\textsuperscript{58}

\textsuperscript{50} Ronald Dworkin, Taking Rights Seriously, Cambridge Mass. 1977, 26. To Dworkin, the conflict between competing principles can best be solved by Hercules, the judge of ‘superhuman skill, learning, patience and acumen’ (p. 105).

\textsuperscript{51} See for Germany, where doctrine was in this respect influenced in particular by Josef Esser, Robert Alexy and Walter Wilburg: Axel Flessner, Juristische Methode und europäisches Privatrecht, JZ 2002, 14, at 18. Also see C.-W. Canaris, Systemdenken und Systembegriff in der Jurisprudenz, 2. Aufl., Berlin 1983, 57.

\textsuperscript{52} Ronald Dworkin, Law’s Empire, London 1986, 208.

\textsuperscript{53} Law’s Empire, o.c., 209.

\textsuperscript{54} Law’s Empire, o.c., 213.

\textsuperscript{55} Law’s Empire, o.c., 211.

\textsuperscript{56} Also see Sergio Câmara Lapuente, The Hypothetical ‘European Civil Code’: Why, How, When?, ERA-Forum (Special Issue European Contract Law) 2-2002, 89, at 92 ff., who distinguishes four different approaches to drafting principles.

\textsuperscript{57} This is: the law of 16 legal systems at the time of drafting. The figure of 26 refers to 25 Member States, of which the United Kingdom has two distinct legal systems, namely English law and Scots law.

\textsuperscript{58} Cf. Parts I and II, xxiv.
It is clear that the second type of provisions is not a proper description of present-day private law in Europe. But also regarding the first ‘common core’ type of provisions, one can raise the question whether they properly describe national contract laws. I have defended elsewhere that these provisions are typical reflections of a ‘generalising’ approach: details of national legal systems are left out as much as possible in order to provide for a consistent and smooth ‘European legal system’. On the one hand, this is quite logical because it makes these principles more attractive, but on the other hand this implies that the principles do not give much information on what the European position actually is. They only provide a ‘common denominator’. In order to make more clear what I mean, I refer to an example I have given before.

It is well known that the various European systems differ as to whether a liability for precontractual negotiations should exist. Generally speaking, civil law countries do recognise such a liability, be it under different conditions and with different remedies available in each individual country. English law, however, abstains from accepting a general principle to negotiate in good faith (although it may be willing to accept precontractual liability by virtue of an implied contract or negligence). Art. 2:301 PECL gives the following rule:

’(1) A party is free to negotiate and is not liable for failure to reach an agreement.
(2) However, a party which has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party.
(3) It is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party’.

It is beyond doubt that this provision in a certain sense states the European common core. Both the civil law and the common law position are definitely stated correctly in section (1). Section (2) is however a real trade-off between the two legal traditions. On the one hand, the civil law is satisfied by the rule that conduct contrary to good faith may lead to liability, even before there is a contract (although it does leave open when exactly this is the case – a question answered differently in each civil law country). On the other hand, English law is stated correctly as well in the sense that if good faith and fair dealing do not require English contracting parties to negotiate in a certain way – which is the case – liability will simply not arise under this provision. But this means that the article does not grasp civil law or common law systems. There is much more to these systems than just the commonality stated here. It is a thin description as opposed to a thick one, as is also the case with many other provisions of the PECL. I have quoted Friedmann before where he writes that to reduce the law in this way is as if one ‘took fields of living law, scalded off their flesh, drained off their blood, and reduced them to bones’.

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60 Even though Ole Lando admits that the most important sources of inspiration were the French and German civil codes and English law. See O. Lando, Comparative Law and Lawmaking, Tulane Law Review 75 (2001), 1026.
63 Walford v. Miles [1992] 1 All ER 453.
64 This terminology is borrowed from C. Geertz, Thick Description: Toward an Interpretive Theory of Culture, in: The Interpretation of Cultures, New York 1973, 3.
The above implies that the goal of drafting principles is not so much to give information on what the law in national legal systems actually is. The goal is much more to design new rules that do not exist as such in any European legal system, but that do reflect what the drafters think of as an ideal European law. The PECL are thus not an analysis or a map\textsuperscript{66} of existing law, they are intrinsically programmatic in nature: they are designed to form the future European contract law, not to describe the present.\textsuperscript{67}

But looking for an ideal law means that national variations have to be left out. In their introduction to Part III of the PECL, it says that ‘every effort has been made to draft short and general rules’ and the temptation was resisted ‘to seek to cover every particular eventuality, which would have led to excessive detail and specificity’.\textsuperscript{68} This is confirmed by the drafters of the Unidroit Principles of International and Commercial Contracts. They state that ‘the objective of the Unidroit Principles is to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied’.\textsuperscript{69} In other words: these principles are cut loose from any cultural environment in prescribing how the law should be.

The PECL and other sets of principles thus remind us of the so-called ‘Universalist' approach in comparative law. In 1905, Edouard Lambert\textsuperscript{70} described the purpose of comparative law as

‘to discover the common fund of institutions and conceptions beneath the apparent statutory diversity, to collect maxims common to these legal systems, and thereby constantly to encroach on the domain of particularism. The unifying force attributed to comparative law (…) results in the progressive effacement of the accidental diversity that prevails among legal systems located in countries of similar development and economic condition (…).’

In this view, that was very popular at the famous 1900 Paris conference on comparative law, the aim of comparative law was to find an objective international ‘legal science’ that was to derive from the various domestic laws an ideal law that could be applied in all countries. Diversity was looked at as an accident that had come about for whatever reason and that should be left behind.\textsuperscript{71} Drafting uniform principles for Europe seems to be a return to this Universalism.\textsuperscript{72}

3.4 What does this mean for the Functioning of European Principles?

It is now time to turn back to the two functions principles have in national law (see above, Par. 3.2). The first is the scholarly function of systematisation. This is also where European principles have an important role to play. I refer to the function of principles as a common language (above, Par. 2.5).

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\textsuperscript{67} Cf. Part III, xvi: ‘The search has been for the most appropriate rules for the future (…)’. In this respect, the drafting of principles differs from other projects on European private law. Cf. Mauro Bussani, ‘Integrative’ Comparative Law Enterprises and the Inner Stratification of Legal Systems, ERPL 2000, 85, at 90.

\textsuperscript{68} Part III, xvii.

\textsuperscript{69} Unidroit Principles, viii.


\textsuperscript{71} See the excellent description by James Gordley, The Universalist Heritage, in: Legrand & Munday (eds.), Comparative Legal Studies: Traditions and Transitions, o.c., 31 and Hyland, Comparative Law, o.c., 184.

\textsuperscript{72} See for fierce criticism on Universalism for example Hyland, o.c., 184 ff.
The other function relates to principles as a source of new law, in particular in hard cases. In this respect, there is an essential difference between principles as they function in national law and European principles like the PECL. Because the national principles are completely embedded in the national legal culture (and are derived from this), they are in fact law: they can be enforced in concrete cases because there is a national morality (‘shared understanding’) which tells the courts how to apply the principles. This is different with European principles. They require Dworkin’s ‘shared understanding’, a uniform European mentality to effectuate them. Without such ‘shared understanding’, principles will remain ‘soft law’ and cannot function in the same way as principles in national law. With regard to the weighing of conflicting principles in hard cases, for example, which principle will prevail cannot be answered without a shared ‘European’ understanding. As long as this common understanding does not exist, the weighing of principles will differ from one country to another.

In my view, the above means that European principles can only be relevant for the harmonisation process if it is left to national practice (Dworkin’s ‘community’ and Legrand’s ‘legal culture’) to decide whether it wants to make use of the principles. After all: it is in legal practice that the morality exists. The only way to find out about such ‘shared understanding’, is to leave it to legal practice whether it wants to make use of European principles.

This means that I agree with Pierre Legrand on the point that law is linked to the cultural environment from which the problems and solutions arise and that one cannot ignore this ‘cultural dimension’ of the law. Legrand rightly raises the question: ‘But how can a law be ‘good’ or ‘better’ in and of itself? Is it not the case that a law can only be more or less influential in a given environment? And how can the comparatist ever make it his business to operate a ‘ranking’ of different laws or experiences of law, promoting some and demoting others?’ But I do not agree with Legrand where this leads him to the conclusion that uniformity is therefore not desirable. It should only be left to (national) legal practice to decide when exactly this is the case. There is no other criterion to decide whether there is a need for uniformity in contract law than contract practice itself. So it may indeed be that the comparatist may not rank different laws, but legal practice certainly may.

The conclusion of this theoretical survey is that European principles can only contribute to a true harmonisation of law in so far as it is left to the community itself to decide when to apply the principles. If one considers the various practical functions of the PECL set out in Par. 2 above, there is no problem at all with the first three functions: whether the PECL will be chosen by the contracting parties, will serve as a source of inspiration for courts or legislators or will be used to draft or interpret European legislation, is left completely to legal practice and the national and European institutions. But also the application of the fourth function of the PECL, principles as a basis for a European Code of Contracts, should be left to legal practice. How this is possible will be discussed in the next Paragraph.

4. Application of the PECL as an Optional Model

4.1 General Considerations

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73 According to Senden, soft law refers to ‘rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects’. See Linda Senden, Soft Law in European Community Law, Nijmegen 2003, 104.


Given the above analysis of what exactly are ‘European principles’ – in short: black letter rules without any practice of application – I believe that the most promising contribution to harmonisation the PECL can make, is to consider the PECL as an optional model. Only then is it left to legal practice to decide what use it wants to make of the principles, thus transforming it from black letter soft law into real law. Of course, the PECL already fulfil this role of an optional model because of their first function (see Par. 2.1 above): they can be adopted by the parties in so far as national mandatory law (or the EC Convention on the Law Applicable to Contractual Obligations 1980) allows this.

This idea of an optional contract code was also adopted by the European Commission in its 2003 Action Plan. The Commission thinks of a contract code particularly adapted to cross-border contracts in the internal market. Parties should be able to refer to it as their applicable law (but should also be able to change it, except for the mandatory rule such as those protecting the consumer). The instrument would exist next to national contract laws, the premise being that parties choose for the new instrument if it suits their economic or legal needs better than the applicable national law. I agree with this viewpoint, but it also raises several questions.

The first question is what should be the degree of bindingness of the optional code. Should it be a code by way of a recommendation that needs to be explicitly chosen by the parties (by opting-in) or can it be a binding regulation that can be excluded if the parties do not want it to govern their contract (opting-out)? In my view, the former is to be preferred: this leaves the parties with maximum freedom to decide whether they want to apply the European code or not. Of course, what is a prerequisite for the proper functioning of an opting-in model is that all parties are informed of the existence of such a model.

A second question is who should be able to choose for the optional model. Should these be the contracting parties or could it also be the European Member States? In my view, this depends on the type of provisions that we are dealing with. In so far as provisions concern choices the contracting parties should be able to make (say: default law), it should be left to them to decide whether they want to adopt these rules or the national rules. They know what suits their interests best. But in so far as provisions are part of the optional model that traditionally are not at the discretion of the contracting parties (say: mandatory law), this is different. This means that a large part of Part III of the PECL can only be chosen by the Member States as they concern rules that are mandatory in national law, like those on assignment or prescription. I will elaborate on this in Par. 4.2.

A third question is therefore what should be the exact contents of the optional code. Should it be a set of provisions on contract law in general or also on specific contracts? Should it provide rules for international contracts or also for domestic ones? It is a commonplace to say that the more suited the rules will be for the relationship in question, the more likely it is that they will be chosen. In fact, the PECL seem to be too general for this purpose. Their character of common denominators makes them too abstract to create much legal certainty among contracting parties. It is then more likely they will continue to choose

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76 Action Plan on a more coherent European Contract Law, o.c., no. 90 ff. Also see the Communication on European Contract Law, o.c., no. 16 ff.
77 See Smits, Toward a Multi-Layered Contract Law for Europe, in: Grundmann & Stuyck (eds.), An Academic Green Paper on European Contract Law, o.c., 387 at 396. Also see the other contributions to Part IV of this volume.
for a national system. I have defended elsewhere\textsuperscript{80} that an alternative would be to make several sets of contract rules, designed specifically for different relationships. One set could be drafted for consumer contracts (also incorporating the EC Directives) and another for international commercial contracts.

4.2 Making Choices: An Example of where Member States are Competent

If anything should have become evident from the above, it is that contracting parties should have maximum freedom in deciding which rules they want to adopt for their contract. On the other hand, Member States should be able to choose for rules of a mandatory nature. Only in this way, it is left to the ‘community’ to decide which rules serve their interests best: in case of a contract, this community exists of the parties, while society at large has to decide about the mandatory rules. But in both cases, it is essential that these choices are made \textit{within} that community and not by some centralist European institution.

I will now give an example of how the prevailing national norms can differ from the often too open-ended principles and why therefore only the combination of national morality and general principles can be fruitful. This example is about prescription, a subject covered in Part III of the PECL. According to art. 14.301 PECL, the running of the period of prescription is suspended as long as the creditor does not know of, and could not reasonably know of the identity of the debtor or the facts giving rise to the claim. This is a reasonable rule, in particular in view of the relatively short general prescription period of three years that the PECL adopt (art. 14:201).\textsuperscript{81} The creditor should not lose his claim if he does not discover within such a short period who the debtor is or what are the exact facts. But the PECL also contain a maximum period of prescription: according to art. 14:307 PECL, this period is ten years or, in case of claims for personal injury, thirty years starting from the time when the debtor has to effect performance or (in case of a claim for damages) from the time of the act which gives rise to the claim (cf. art. 14:203). Thus, the drafters have established a definitive long stop: after 30 years, any possibility to claim is gone, even if the creditor did not know about the identity of the debtor or about the exact facts.\textsuperscript{82}

Could such a rule become a European rule in the harmonisation process described in the above? This must be seriously doubted. Let me explain this by contrasting the PECL approach with Dutch law. In Dutch law, the prescription period in case of a contract differs depending on the type of claim. The claim for performance has a prescription period of five years starting from the moment the claim could be enforced, independent of whether the claim was known to the creditor or not (art. 3:307 BW). At the coming into being of the Dutch Civil Code, it was explicitly discussed whether this prescription period should not start later if the creditor does not know about the claim or about who is the debtor. This was however rejected:\textsuperscript{83} it is to the creditor to ensure that that he knows about the end of the prescription period. If he does not, it would be inappropriate to create uncertainty for the debtor (who should be able to rely on the prescription period) unless there is fraud of the debtor. I think this is indeed a right approach in case of the claim for performance, where the creditor after all does know about the debtor and the fact there was non-performance.\textsuperscript{84}

This is different in case of a claim for damages (regardless whether this is a claim for breach of contract or in tort). Here, the prescription period is five years after the creditor knows about the claim and about the person liable, but – as in art. 14:307 PECL – with a long


\textsuperscript{81} Cf. Comment B to art. 14:301 (at 175).

\textsuperscript{82} See, however, Comment C to art. 14:307: raising the defence of prescription is subjected to good faith.

\textsuperscript{83} Parlementaire Geschiedenis Invoering Nieuw Burgerlijk Wetboek, Boek 3, Deventer 1992, 1412.

\textsuperscript{84} Cf. Comment B to art. 14:301 (at 175).
stop of (in the Dutch case) 20 years after the causing of the damage (art. 3:310 BW). Similar rules apply to the claim for termination (art. 3:311 BW). So, although the period is different, the system of prescription in Dutch law is quite similar to the PECL in so far as the claim for damages is concerned.

The important thing now is that Dutch case law of the last decade has made several inroads to these rules, in particular in cases of personal injury.\textsuperscript{85} What this case law comes down to, is that the long stop of art. 3:310 BW can be set aside in cases in which application of this provision would lead to manifestly unjust results.

Regarding the long stop, several cases were decided by the Dutch Supreme Court that dealt with employees that were exposed to asbestos. The diseases caused by this exposure (in particular mesothelioma) often have an incubation period of more than 30 years, which is longer than the long prescription period of art. 3:310 BW. Although it was explicitly discussed in the explanatory memorandum to the Dutch Civil Code that a long incubation period was no reason to deviate from art. 3:310 BW, the Dutch Supreme Court decided otherwise.\textsuperscript{86} It ruled that although the prescription period is absolute in principle for reasons of legal certainty, the long-stop can be set aside in exceptional circumstances. This is for example possible if it is uncertain whether the victim has in fact contracted a certain disease and the results of this disease only become manifest after the passing of the prescription period. The basis on which the prescription period can be set aside is art. 6:2 s. 2 BW, a broad provision stating that a (statutory) rule does not apply if this would, in the circumstances of the case, be unacceptable according to good faith (reasonableness and fairness). The Supreme Court was in this respect also led by a draft statute (that has become law in 2004\textsuperscript{87}) stating that a claim for compensation of personal damage has a prescription period of five years following the day at which the victim knows about the damage and the person liable. This means that the long stop is set aside in cases of personal injury: only the quite flexible short-stop is then left. This means that in Dutch law, the legal certainty for the debtor that is usually associated with the institute of prescription is not that certain.

What this case law makes clear is that in a specific national context, choices may have to be made that are fundamentally different from choices in other legal systems or from the choice made in the PECL. In the above Dutch case, the weighing of the principle of legal certainty for the debtor and the principle of protection of ‘good faith’ of the creditor was done in a completely different way than in the PECL. This is what I call ‘national morality’ and what Dworkin refers to as ‘shared understanding’: the way in which conflicting principles are to be weighed, is something a community knows best. In the case of mandatory rules on prescription, this community probably still is the national one.

5. A \textit{Caveat} instead of a Conclusion

The above should have made clear that harmonisation of law is always a matter of both a common text and a common practice. The main thesis expressed in this contribution is that only legal practice itself can decide how to weigh conflicting principles. Choices about which principle should prevail over another cannot be made at the European level, but only at the level of national legal systems. This implies that a nuanced answer is in place regarding the question to what extent the Principles of European Contract Law can contribute to the harmonisation of contract law in Europe. They can in so far as it is left to contracting parties or (in case of mandatory rules) to European member states to decide whether they want to

\textsuperscript{86} Hoge Raad 28 April 2000, NJ 2000, 430 (Van Hese/Schelde); Hoge Raad 20 October 2000, NJ 2001, 268 (Soolsma/Hertel).
\textsuperscript{87} Stb. 2003, 495. This new section 5 of art. 3:310 BW was introduced on 1 February 2004.
take over the principles. But they will certainly not contribute to harmonisation where they are imposed upon contracting parties or member states. The *caveat* therefore is that one should be reluctant in associating the drafting of principles automatically with harmonisation of law: it takes principles *and* a shared understanding of how to deal with these in case of conflict before any true harmonisation can take place.