Some Critical Remarks on the Use of the Principles of European Contract Law

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Summary

The Lando Commission has published the final version of the Principles of European Contract Law (PECL) in 2000. Smits admits that such principles are valuable particularly for creating a common legal language in Europe. However, he warns not to overestimate their function as a source of inspiration for the national legislator or for national judges or for the parties' choice of law. Just codifying principles is not enough as a basis for a future European Code of Contracts. Where the drafters of the PECL tried to find an abstract principle that can bridge the differences between the English law and civil law, the future European legislator, as Smits points out in two examples, cannot avoid making hard choices, if he wants to create uniformity not only in the statutory text, but also in the application.

Zusammenfassung

Die Lando Kommission veröffentlichte 2000 den vollständigen Text ihrer Grundsätze für ein Europäisches Vertragsrecht. Smits hält diese Grundsätze für einen wertvollen Beitrag, um eine gemeinwirtschaftliche Rechtsterminologie zu entwickeln. Aber auch wenn die Grundsätze als Anregung für die nationalen Gesetzgeber oder
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1. Introduction

It is beyond doubt that private law in Europe has become more uniform over the last decade. This is caused in particular by the ever-greater use that is made of European directives in the field of contract law. As is well known, arts. 2 and 3 of the EC Treaty envisage the coming into being of a common European market by the approximation of the laws of the Member States to the extent required for the functioning of this market. Next to this purpose, consumer protection is explicitly stated as another objective of the EC. Thus, it does not come as a surprise that we now have a whole lot of directives that aim at harmonizing important parts of contract law.

The protection of consumers in the field of doorstep sale, consumer credit, package travel, unfair contract terms, distance contracts and sale of goods as well as regulation of self-employed commercial agents, time-share, electronic commerce and combating late payment in commercial transactions are now governed by European legislation.

The interest of the EC in European private law does not stop here. Already in 1989 and 1994, the European Parliament made a call to begin work on a European Civil Code. These calls were not answered by the Commission of the Council for a long time. It was only with the Tampere European Council of 1999 that times began to change. In the Presidency Conclusions of that Council, an overall study on the need to approximate Member State’s legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings was summoned. Independent of that, the European Parliament commissioned a study on a European civil code that was published in 1999. In 2001, a Communication on European Contract Law – that can be seen as the implementation of the Tampere conclusions – was published. It invites all interested parties to give their opinion on the future of contract law in Europe. These parties include:

1 Directive to protect the consumer in respect of contracts negotiated away from business premises (85/577; OJ 1985 L 372/31).
5 Directive on the protection of consumers in respect of distance contracts (97/7; OJ 1997 L 144/19).
8 Directive on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a time-sharing basis (90/47; OJ 1994 L 269/83).
11 OJ 1989 C 158/400.
13 The Tampere summit was held on 15 and 16 October 1999; SI (1999) 800. Also see http://europa.eu.int/scipriv/concl/conc99_en.pdf.
14 Study of EU private-law systems in relation to discrimination and the creation of a European civil code, European Parliament, JURI 103 EN (October 1999). This study was directed by Chv. Von Bar.
consumers, businesses, professional organizations, public administrations and the academic world. This will probably lead to a political debate on the desirability of and the way to establish a uniform contract law for Europe. If one looks at the reactions on the Commission's website, one is struck by the great diversity of reactions. One of the most far reaching responses was given by the European Parliament, that has adopted an action plan to finally reach the establishment of a common body of rules on contract law in the European Union.

Next to this 'centralist' part of European private law, there is the ever-increasing interest of academics in European private law. The belief that a common law for Europe may be possible, has led many scholars of comparative law to engage in activities leading toward the finding of a common core of the European legal systems. Alongside textbooks like the one of Körte, several academic projects have been launched over the last few years such as the Trento Common Core project, the Casebooks for the Common Law of Europe project and the Study Group on a European Civil Code. This article is devoted to yet another academic initiative, namely the drafting of 'principles' of European contract law. This method has received a lot of attention over the last few years; this calls for a further investigation. Although by now three sets of principles of contract law have been published, I will focus on the Principles of European Contract Law (PECL). In section 2, I will critically discuss what are, according to the drafters, the objectives of the PECL. In section 3, I will go into some of the principles themselves to illustrate my main thesis that the benefits of using principles should not be overestimated.

2. The Objectives of the PECL

Since 1980, the so-called Commission of European Contract Law has been working – with the financial support of the European Commission – on the formation of European Principles of Contract Law. After the first part of the PECL concerning general provisions, contents and (non-) performance of the contract, was published in 1995, a second part (with an up-dated version of part 1) appeared in 2000. The Principles contain 131 articles and each article is accompanied by comments and examples as well as comparative law information. The express aim of the drafters was to record the European lex mercatoria by making a compilation from the best the legal systems have to offer and even proposing solutions that are 'progressive' in comparison with the traditional national systems. The PECL thus aim at laying down the contract law of the Member States of the European Union. In the viewpoint of the Commission of European Contract Law, the PECL have four different objectives. 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.

2.1. Parties' Choice of law

According to the drafters, a first objective of the PECL is that they offer the contracting parties the possibility to have their contract governed by a set of neutral principles. They could thus expressly adopt the PECL as the conditions of their contract (for example by stating that 'This contract is subject to the Principles of European Contract Law'). Of course, the national mandatory law (that would for example be applicable according to the rules of private international law) then still remains in force. The question is whether this view of the drafters is attainable in legal practice. This is definitely the case in so far that the parties can adopt the provisions of the PECL as part of their contract in a national legal system. But can the parties also choose the PECL as their applicable law instead of choosing a national system? In case of a contract between contracting parties of various European countries, the EC Convention on the Law Applicable to Contractual Obligations 1980 is applicable. Art. 3 of this convention (implicitly) states that only a national legal system can be applicable. Various authors have however defended that a choice of law clause for the PECL should be possible. I join them, be it with the remark that it does not seem wise to make such a choice of law. At present, the way the PECL will be applied by na-
tional courts is very unclear; case law is still absent. This does not enhance legal certainty in the contractual relationship.

With regard to the Unidroit Principles of International Commercial Contracts (UP) of 1994 – a set of principles that is very comparable with the PECL as to contents – Bonelli describes the first experiences. In particular the UP, that intend to be of importance to parties from all over the world, are supposed to be declared applicable in case of a contract in a North-South or East-West relationship (thus in case of a contract between a party from an underdeveloped country and an economically and socially more developed one). Thus, by using a 'neutral set', the applicability of a legally unfavourable regime for the former type of parties can be avoided. The survey by Bonelli showed that 27% of the respondents had at some time between 1995 and 1997 declared the UP applicable, but of those 50% could be qualified as being a North-North relationship. For the time being, I expect that the PECL will be used in particular as a checklist and will not be declared directly applicable to the contract.

2.2. Model for national legislation

In the second place, it is foreseen that the PECL offer a model to legislators and a tool for (arbitral) courts that have to apply a national legal system. The function of a model for legislators can be illustrated by pointing again at the UP. These have been used as a model for parts of the new civil code of the Russian Federation, the new Chinese code of contracts and for codification projects in Israel and Indonesia. The PECL can play a similar role in other future recodification projects.

Of more importance for daily practice is that the PECL can be a source of inspiration for judges and arbitral courts (but also for lawyers). The courts can interpret their own national law or provisions of international treaties (like those of the Vienna Sales Convention) against the background of the PECL. Thus, in applying good faith in art. 7 CISG, courts can refer to art. 1:201 PECL (as they can refer to art. 1.7 UP). This ambition is enhanced by the fact that the PECL contain either the 'common core' of European legal systems or 'progressive' rules that were regarded by the drafters as being of such quality that they should be upheld to lawyers as examples of a good legal development. The latter would be the case with art. 6:111 PECL, that offers a balanced regulation of imprevision that as such does not exist in any European country.

As an example of this drawing of inspiration by national courts, I point to the Dutch rules on termination in case of non-performance of the contract. Up till now, the Dutch Hoge Raad has not been willing to accept that termination is only possible in case of a fundamental non-performance, thus allowing the creditor to terminate in many more cases than other legal systems do. Now that art. 9:301 PECL explicitly makes mention of this requirement of a fundamental non-performance, it is impossible that the Dutch Supreme Court will adopt it at some future stage as well.

2.3. Foundation for European Legislation

A third objective of the PECL is that they could serve as a tool for the institutions of the EC itself when they have to draft legislation and for national courts and lawyers when they have to apply this legislation. This function of the PECL as a foundation for European legislation is directly influenced by the realisation that harmonization through directives has inherent disadvantages. One of these is that harmonization through directives can only lead to a fragmentary uniform law. Another disadvantage is that the present directives are not consistent vis-à-vis each other: even definitions of consumer, etc. sometimes differ. These problems could be overcome by providing a framework for directives.

A necessary prerequisite for the fulfilment of this objective is of course that in drafting directives the PECL are taken into account and that the PECL also incorporate the already existing directives. This however is not the case. In the PECL, reference is made only to the directive on self-employed commercial agents and to the one on unfair terms in consumer contracts.

The latter has particularly influenced art. 4:110 (1) PECL that states in almost identical wording as art. 3 of the directive that: '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 (...).'

It is however striking that this article, contrary to 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.

The other way around, the PECL have until now not been taken into account in making new directives. As an example, I mention the directive on sale of consumer goods and associated guarantees. This directive creates a hierarchy of actions of the consumer in case of non-conformity. The consumer should first try to enforce his right to performance (repair and replacement that is) and only in a second stage, is he able to claim price reduction or termination of the contract. However, according to art. 8:101 PECL (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. Thus, the third objective has up till now not really been effective.

2.4. Basis for a future European Code of Contracts

The fourth and final goal of the PECL is that, according to the drafters, they can serve as a basis for a future European Code of Contracts. I would say this goal is of an entirely different nature than the three others. The above functions can only lead to a slow, informal and still
fragmentary harmonization of contract law. Introduction of the PECL by way of a true Contract Code would however be different: it has the ambition to replace national legal systems by one set of imposed principles for the whole of Europe. In legal doctrine, it is debated whether such kind of uniformity is at all desired, if so by what method this uniformity should be created and, if it would have to be by enacting a European Civil Code, whether the EC Treaty provides any competence to do so.

Here, I intend to pay some attention to the second question. Presupposed that there should be more uniformity in European contract law than there is right now – something that I am convinced of as well – it can be questioned whether the drafting and enacting of principles is the right way to proceed to this new ius commune. Various arguments plead against this.

In the first place, it seems no longer adequate to describe contract law by using general principles for the whole of this area of the law. For the presently harmonized private law has led to a diverse law of contract, different for various types of contract and for specifically covered areas. Thus, special rules govern the formation of the contract of consumer credit and of the travel contract, the contents of the consumer contract and certain remedies in case of consumer sale. Drafting principles meant to have value for all contracts is not in conformity with this already existing diversity.

In the second place, I doubt that European principles can play the role being fulfilled at present by national legal systems. If these are replaced by the PECL, national practical wisdom on how to adjudicate cases will disappear. For principles are inherently abstract and therefore of little value for legal practice. I will come back to this in section 3.

2.5. Legal Science and Education

Does this mean that I am against the formulation of principles in contract law? Certainly not. The three short term functions are useful. And there is even a fifth objective of the PECL that I regard to be even the most important function, although the drafters make no mention of it. It is the importance of the PECL for legal science and education. To my idea, the PECL are particularly important in this respect: they create a common language through which European scholars (and lawyers) can communicate. Thus, they are the tertium comparationis with which all national systems can be compared.

3. The Contents: The PECL and Civil Law and Common Law

In this section, I will elaborate some of the more general points mentioned above by discussing the contents of two provisions of the PECL. Generally speaking, if one looks at the PECL, most rules are not very surprising as to contents. Apparently, to state the common core of Europe’s legal systems comes down to looking for obvious similarities. That there is freedom to contract (art. 1:102), that consensus in needed for formation (art. 2:101) and that in case of non-performance the contract can be terminated (art. 9:301) is evident. Only in a few cases, the drafters have made explicit choices from conflicting rules, in particular where English law and civil law differed. Although English contract law is mostly identical to continental law, there are some striking differences. I mention the requirement of consideration for formation of a valid contract in English law, the absence of a general principle to act in good faith, the revocability of an offer, the specific English view of mistake/misrepresentation, interpretation and force majeure and the subsidiarity of the action for specific performance. The drafters had to try to come to a solution acceptable for both legal families. I discuss here some provisions from which it is clear what the compromise is.

3.1. Precontractual liability

A good example is art. 2:301 PECL on precontractual liability. The article states:

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.

I question whether this principle does justice to the fundamental differences that exist between the civil law and the common law approach to contract. In 1992, the English House of Lords refused to accept a general duty to negotiate in good faith. That is consistent with the English approach to contract law, in which the freedom of the contracting parties is given pride of place. Civil law countries on the other hand emphasise the duty to take into account, not only one’s own interests, but also to a certain amount those of the other party. Each civil law system has elaborated this duty differently. It is difficult to lay down both approaches in one article and I do not think art. 2:301 PECL succeeds in doing so. The principle of s. 1 is accepted by all legal systems; the same is true for s. 3, be it that the foundation for allowing a claim for damages in case of such behaviour need not be sought in an autonomous precontractual liability: in most systems, it would simply amount to a tort. Only s. 2 appears to imply a choice for the civil law now that it speaks of

34 Cf. Pierre Legrand, Against a European Civil Code, 60 MLR (1997) 44.
35 For an overview of these methods, see Smits, The Making of European Private Law, Chapter 1 and 2.
38 Directive 87/102.
41 Directive 1999/44.
good faith, but since in English law violation of good faith will not lead to liability, it can also accommodate this provision. Thus, the provision is a compromise with little meaning. In my view, the value of art. 2:301 is therefore that it is a benchmark with which one can compare the national legal systems: they are a language for discussion.

3.2. Specific Performance

Another example of an in my view not so fortunate (for a too abstract) provision is art. 9:102 PECL on specific performance. This provision states:

1. The aggrieved party is entitled to specific performance of an obligation other than one to pay money, including the remedying of a defective performance.
2. Specific performance cannot, however, be obtained where:
   a) performance would be unlawful or impossible; or
   b) performance would cause the debtor unreasonable effort or expense; or
   c) the performance consists in the provision of services or work of a personal character or depends upon a personal relationship; or
   d) the aggrieved party may reasonably obtain performance from another source. (...)"

In English law, claiming performance is only possible if damages are no adequate action and performance therefore does 'more perfect and complete justice'. This is of course totally different in the civil law: it follows from the principle of pacta sunt servanda that performance is the primary action; it is only excluded in case performance is not possible or requires a too personal effort of the debtor. Art. 9:102 PECL tries to find a compromise between these two systems by adopting the civil law principle in s. 1 and subsequently allowing so many exceptions to it that the common law approach is actually taken over. For the rules sub a-c are accepted by both legal traditions, whereas the case sub d is typical common law: the creditor has no right to performance if he can reasonably obtain performance elsewhere. It is striking that the civil law and the common law reach opposite results by using the same argument: it is common law reasoning to state that it is in such a case very well possible for the creditor to buy new goods (and should therefore be satisfied with damages). In the civil law way of reasoning however, it is then said to be easy for the debtor to obtain similar goods and deliver those to the creditor.

I find both art. 2:301 and 9:102 PECL characteristic of the principles approach: the principle is so abstract that all legal systems can live with it, having for a consequence that uniformity is not created by it. Up till now, the contract law systems of the Eastern and Central European countries have not been taken into account in drafting these principles, but I would be surprised if this would make any difference: their content probably stays the same. In this respect, the PECL do not take deeper differences between legal systems ('legal culture') into account; these differences cannot be eliminated by using a uniform text.

4. Final Remarks

In the above, I hope to have shown that drafting and using principles of European private law can be a fruitful exercise, but that their use should not be overestimated. A future European contract law will have to take many more sources into account than just principles. I think not only of European directives (and regulations) and the case law of the European Court of Justice, but also of the European national contract law systems that one way or another will still have to play a role in a future European contract law (if it were only because the national highest courts will remain the competent courts to deal with contract law).\textsuperscript{43} Codifying principles would not do justice to this diversity of sources.

\textsuperscript{43} For an alternative view of how a European private law can come about with maintaining all these sources, see J. Smir, A European Private Law as a Mixed Legal System, 5 Maastricht Journal of European and Comparative Law (1998) 328.

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L'Europeanisation, une Entreprise positive pour une bonne Globalisation
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Summary

Weyts discusses the influence of "Europeanisation" on civil law notaries. For Weyts, the Latin notary is a cornerstone of confidence and security in an ever changing world of globalisation. The "Europeanisation" of the countries of middle and Eastern Europe after the end of communism brought Latin notaries to another 16 European countries. Then Weyts mentions the EU-directives which play a role in notarial practice. Even if these directives are far from being perfect, Weyts nonetheless foresees a merger of the best of the common law and civil law traditions in Europe under way.

Sommaire

Weyts souligne l'importance de l'européanisation pour le notariat. Selon Weyts, le notaire est une personne de confiance qui garantit la sécurité dans un monde en globalisation accéléré. Pour cette raison, 16 États de l'Europe centrale et de l'Europe de l'Est ont introduit (de nouveau) le notariat latin après la chute du mur. Weyts fait un tour d'horizon des directives et règlements de l'UE qui ont une certaine importance pour le notariat. En général, il considère que pour l'Europe le Common Law et la tradition juridique du Continent sont en train de s'uniformiser, même s'il critique quelques actes juridiques.