How the Principles of European Contract Law (PECL) Were Prepared

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Working groups which are set up by existing organizations tend to follow the procedures for their decision-taking which have been established by these organizations. When a new group, not linked to any organization, is formed to pursue a certain objective, it will sometimes make its own procedures. This was the case when the Commission on European Contract Law (CECL) was established with the purpose of preparing the Principles of European Contract Law (PECL), general rules of contract law in the European Communities.

A. The Members of the Commissions on European Contract Law (CECL)

The project was new, the goal controversial and many of those who were asked to become Members of the CECL were sceptical at the prospect of working for nothing in a venture with an uncertain future. It took almost two years from 1980 till 1982 to get the team together. All EU countries were represented, and each major legal systems, i.e. the English, French, German, and Italian, had two Members. Most of them were academics, and all of them were independent, not acting for governments or political or economic organisations. They were, if not experts, certainly well-read in contract law. Most of them were familiar with the system and structure of foreign laws, and all of them were open minded persons, who were ready to accept that their own legal system did not in every respect provide the best solution to a problem.

The work began in 1982. The First Part of the Principles, which was prepared by the First Commission, was published in 1995; the book prepared by the Second Commission, which also included a revision of the First Part, and which therefore comprised Parts I and II,[1] appeared in 2000. The Final Part III, which was prepared by the Third Commission, came out in 2003.[2] Most of the Members worked in all three Commissions. When Members died or retired from the CECL

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1 O. Lando & H. Beale (Eds.), Principles of European Contract Law, Part I + II (2002). Hereinafter PECL I & II.

2 O. Lando, E. Clive, A. Prüm & R. Zimmermann (Eds.), Principles af European Contract Law: Part III (2003). Hereinafter PECL III.

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new Members were found, and when the EU was enlarged Members from the new countries joined CECL. In the beginning in 1982 there were 15 and in the end 23 Members.

B. How Did CECL Proceed?

I. Reporters, Drafting Groups and Plenary

For each subject a Reporter was appointed, for example to draft the chapter on formation of the contract or the chapter on validity. The Reporter's task was to prepare a draft of articles and comments. In the first Commission there were four, in the second Commission five and in the third there were eight Reporters, two of them working together on one chapter.

Before they start drafting, some groups conduct a thorough comparative research of the national laws on the subject. The CECL did not do that. The Reporter had to do the research needed. His draft was examined by a Drafting Group which in the first two Commissions consisted of the Reporters. In the third Commission four Members examined the Reporter's draft with the Reporter. The Drafting Group often made substantial amendments. They would either draft revised texts or ask the Reporter to draft a new text. The amended draft went to the Plenary of all Members, which also made amendments and suggestions for amendments both on substance and formulation. In the first two Commissions the course from Reporter to Drafting Group and to Plenary was repeated twice, so that there were three readings. In the third Commission there were only two readings. When the work was about to be finalized, an Editing Group was formed for language revision and to ensure consistency in the use of concepts, something that proved very useful

The work was time consuming, as it was new for the Members who had to learn by trial and error. In spite of the fact that most of the Members had some knowledge of foreign law, they only gradually came to understand each others' 'legal mentality'.

The Commission met with intervals of four months to almost one year and normally convened each time for five working days. The Drafting Groups met more frequently for two or three days at a time. The intervals between the meetings of the Plenary were needed for the Reporters and the Drafting Groups to do their work, but the long intervals were a drawback. Members forgot what had been discussed and decided in the previous meetings. However, the Minutes of the meetings of the Plenary helped to avoid that issues which had been decided at earlier meetings were brought up again.

No chairman was needed for the meetings of the Drafting Group. The meetings of the Commission were chaired by different Members. We appreciated consensus and did much to achieve it. If consensus could not be achieved, a vote was taken. The different legal background of the Members could cause disagreement, but there was not so much difference of opinion about the substance of the rules as one could have expected. The Members frequently tried to visualize how

concrete cases would be solved in their country and found that the national contract laws generally differed more in the formulations and techniques than in the result, and the Members often agreed on how the rules should be. The lesson taken was that contract law is more a question of ethics and economics that are common to all Europeans,[3] than a question of national cultural attitudes. Only on a few occasions did the differences of opinion reflect such attitudes. One of the controversies occurred when the British and Irish Members wished to give the objective interpretation of contracts a paramount role. In this they were in fact followed by several civilian lawyers. However, a close majority gave prevalence to a subjective interpretation, and this approach was then laid down in PECL Article 5:101 (1) and (2) which were placed before the rule on objective interpretation in Article 5:101 (3).

Sometimes the disagreement turned on whether the Principles should reflect a 'liberal' or a 'social' justice. The credo of the 'liberals' is freedom of contract in a market economy. They wish economic agents to have freedom. Government regulation of commerce impedes the growth of the economy. For them it is more important that the cake is big than that it is equally distributed. The liberals maintain that too strict ethical standards would be a barrier to the trade, promote litigation and lower the profits, which are so important for investments. On the other hand the 'socially oriented ´ claim that too much freedom of contract allows the stronger to exploit the weaker. They oppose the 'market ideology' which, they claim, governs the Council and the Commission of the European Communities. They wish to support the weaker parties by a number of regulatory measures. The market economy must be regulated by an efficient enforcement of mandatory rules that protect the weak parties and ensure fairness.[4]

As far as I can judge none of the Members were wild liberals and the 'socially oriented' view was not pressed very hard by those who may have nourished it. The CECL took a middle course and provided rules which have been described as reflecting *un esprit collectif*.[5] This esprit is, for instance, manifested by the good faith principle, which the PECL "imposed with some vigour" as it was said.[6]

Drafting was often in dispute. There were, for instance, those who wished the articles to be detailed and those who preferred a succinct language. Those who wanted detail claimed that short articles give less guidance than the detailed ones, and that they call for more comments which the users might not read. Those who

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[3] This is the conclusion which Stefan Vogenauer draws from his very careful study of the interpretation of statutes in England and on the Continent, *see* S. Vogenauer Die Auslegung von Gesetzen in England und auf Dem Kontinent (2001).

[4] See on this view Study Group on Social Justice in European Private Law, *Social Justice in European Contract Law: A Manifesto*, 10(6) European Law Journal 653-674 (2004).

[5] D. Mazeaud, *A propos du droit virtuel des contrats: Reflexions sur les Principes d'Unidroit et de la Commission Lando*, *in* Mélanges Michel Cabrillac 205, 208 (1999). *See also* O. Lando, *Liberal, Social and 'Ethical' Justice in European Contract Law*, 43 Common Market Law Review 817-833 (2006).

[6] Mazeaud, *supra* note 5, at 208: "L'esprit collectif que les parties doivent respecter ... s'exprime dans l éxigence de bonne foi que (les Principes Européens) énoncent avec une certiane vigeur."

argue for conciseness maintained that succinct rules are richer in their implications and leave the courts freedom to develop the law in the course of times. In most cases conciseness was preferred.

The CECL soon realized that, whereas the Plenary could decide on the substance of the texts, it was too large to draft the language of the articles and comments. Therefore drafting was left to the Reporter and the Drafting Group. Sometimes an ad hoc drafting group, mostly consisting of the Reporter and a few other Members, was set up during the meeting of the Plenary. It would work during the lunch break and in the evening and then report back.

The CECL agreed to draft rules which were easily understood by the prospective users of the Principles, the practising lawyers and business people. The very abstract formulations of the German Civil Code were avoided.

Article 1:101 (1) provides that the Principles "are intended to be applied as general rules of contract law in the European Union." This could mean a code which shall bind the Member States, but it could also mean that the PECL were 'soft law' which legislators, courts and parties could adopt if they so wished, and this is the status of the PECL today. It should, however, be noted that the rules were drafted so that without many strokes of the pen they could be made into binding rules.[7]

C. Sources of Inspiration

I. Presentation and Structure

In several respects the American Restatements of the Law served as model for the way in which the PECL were presented. Like the Restatements the PECL provide articles accompanied by comments and notes. The comments explain the operation of each article and its interpretation. They give illustrations, very short cases, which show how a rule operates. Some illustrations are taken from real court decisions, others are invented.

The notes, which give an account of the rules of the legal systems of the EU Member States, were supplied by the Members of CECL and edited by the Reporters and by the editors. They contained statutory provisions, case law and literature. Literature was mentioned which gave an account of the law as it was applied by the courts. Professorial doctrine of mainly academic interest was generally not reported in the notes. Each note covered first those legal systems, from which the rules in the article were taken, or which provided rules very close to those of the article and among these systems there were also non-EU laws. At the end of the note those systems of laws were mentioned which were farthest removed from the article.

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[7] This also applies to the Unidroit Principles of International Commercial Contracts 2004 published by UNIDROIT in Rome in 2004 which are only intended to be soft law.

II. Substance

Like The American Restatement of the Law of Second Contracts 2d,[8] PECL I & II begin with some general rules and then proceed chronologically. Formation of contracts is followed by the authority of agents, then come validity, interpretation, contents and performance and finally, non-performance (breach) of contract and remedies for non-performance.

After having prepared PECL I & II the Commission wished to add subjects, some of which cover obligations in general, i.e. contract, tort, unjust enrichment and benevolent intervention in another's affairs. PECL III provides rules on plurality of creditors and debtors, assignment of claims, substitution of a new debtor and transfer of contract, set-off, prescription, illegality and conditions. Except for transfer of contract, illegality and conditions, the rules of this part cover obligations in general.

In the USA almost all state laws originate from the English common law. The Restatements may therefore to some extent 'restate' the Common Law of the United States. The states of the European Union do not have a truly common law, and no single legal system was made the basis of the Principles. The Commission paid attention to all the systems of the Member States and used among other sources the *International Encyclopaedia of Comparative Law*[9] and the chapters on contracts in Zweigert and Kötz, *Introduction to Comparative Law.*[10] The legal systems outside of the Communities were also considered, among them the US law, its Uniform Commercial Code and Restatement on the Law Second, Contracts 2d. Some of the Principles reflect ideas which have not yet materialised in the law of any state.

The CECL worked in the same period as the Working Group which prepared the Unidroit Principles of International Commercial Contracts (UPICC). Five of the CECL-Members[11] were also Members of the Group of 17 that prepared the first edition of UPICC,[12] which appeared in 1994 and so were three of the 17 Members that made the second edition, which was published in 2004.[13] The UPICC and the PECL show great similarities. Their terms and structures are similar, and about two-thirds of the provisions of the Unidroit Principles are identical in wording or in substance to those of PECL. As for the rules on formation of the contract and the obligations of the parties including non-performance (breach) and remedies for breach, the two instruments borrowed many of their provisions from the UN

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8 As adopted and promulgated by the American Law Institute, St, Paul, Minnesota, 1981.

9 International Encyclopedia of Comparative Law published under the auspices of The International Association of Legal Science. Consulted were notably the published chapters of Volume VII. Contracts in General, Chief editor Arthur von Mehren and of Volume VIII. Specific Contracts, Chief editor Jacob Ziegel.

10 K. Zweigert & H. Kötz, Introduction to Comparative Law, 2nd ed. (1984) and 3rd ed. (1998).

11 Four of the five were also Reporters in the Unidroit Group.

12 UNIDROIT, Principles of International Commercial Contracts (1994).

13 UNIDROIT, Unidroit Principles of International Commercial Contracts 2004 (2004).

Convention on Contracts for the International Sale of Goods (CISG). Together the three form a 'troika' of rules which has had and probably will have great influence all over the world.[14]

In order to learn the attitude of the prospective users Part I of the Principles was discussed at meetings with lawyers in Belgium, England, France, Germany, Portugal and Spain. In most of these countries the idea of having common rules was favourably received. We did not expect those who participated in these meetings to have undertaken a careful study of the Principles, but we did receive some criticism. The English lawyers found that the Principles had a too strong resemblance to the civil law of the European Continent, notably the French Civil Code. The French lawyers said that the Principles were too similar to the English common law.

The Commission also made an analysis of the extent to which the rules in Part I of the Principles were applicable to the more important commercial contracts for the provision of goods and services of various kinds and the transfer of rights (licence agreements, etc.). Although the Principles could not provide the appropriate solution to all the issues, which every of these specific contracts raises, the Commission found them applicable to the great majority of these issues.

D. Terminology

There is today no other world language, which has the same spread as English, and the CECL used English as the main language of its negotiations and its texts. However, in the Plenary Members who so preferred spoke French and the French Reporters made their drafts in French. A French version of the text of the articles was published alongside the English text.[15]

However, as the English legal terms were coined by judges who were individualists, the common law terminology is less consistent than, for instance, the German which has been carefully elaborated by legal scholars and legislators. In addition, several of the English terms which were linked to the common law could not be applied to an international instrument. There was a need to establish a special terminology.

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[14] The rules in PECL on the agent's power to bind his principals are inspired by German law. The provisions on validity mostly reflect the continental systems but they do not differ substantially from the common law rules. As for interpretation the nearest model was the French and Italian civil codes. The rules on plurality of debtors and creditors are mostly of continental origin. Those on assignment of claims and substitution of new debtor are partly rulers which are common to the Member States partly rules which do not reflect any one single system. The provisions on set-off have some similarity with the German and with the Nordic rules which have been developed by the doctrine and the courts. The rules on prescription have some resemblance with the rules of the continental systems but the great simplification provided is new.

[15] G. Rouhette (Ed.), avec le concours de Isabelle de Lamberterie, Denis Tallon et Claude Witz, Principes du droit Européen du contract (2003), is a French edition and comprises Parts I, II, and III. It was published in 2005 by the Société de legislation comparé in Paris. *See also* the website of the Commission on European Contract Law http://web.cbs.dk/departments/law/staff/ol/commission_on_ecl/index.html.

The meaning of some of the terms is explained in Chapter 1 Section 3 on Terminology . For instance, we would not use the English term 'breach of contract' because in the common law 'breach' is only applied when the aggrieved party has the remedy of damages. A term was needed, which could be used also when the aggrieved party could not claim damages, but could reduce his own performance or terminate the contract. So non-performance was preferred, see Article 1:301 (4). The Unidroit Working Group opted for the same expression.

The English use various terms for the fact that a party puts an end to a contract because of breach of contract by the other party. One author talks of "discharge for breach"[16] another uses both "discharge and termination",[17] one "rescission"[18] and yet another one "termination".[19] CISG uses the term avoidance. The CECL chose to speak of avoidance when a party "nullifies his consent", because of duress, mistake, fraud or undue influence So termination for non-performance was chosen.[20] Ending of the contract meant that a party puts an end to a valid long term contract in other cases than because of the other party's non-performance. In Article 6:109 it is, for instance, provided that a contract of an indefinite period may be ended by either party by giving notice of reasonable length. UPICC uses the same language. A contract which is illegal because it is contrary to the principles recognized by the Member States of the EU or because it infringes mandatory rules of national law may have no effect or may be rendered ineffective, see Article 15:101-15:103.

The English language has no words equivalent to what the Germans call *Willenserklärung* and *Rechtsgeschäft*. Notice was used to cover concepts which come close to the German ones, see Article 1:303. Statement was also used; art 6:101 speaks of statements giving rise to contractual obligations.

Those who accepted to become Members of CECL wanted to contribute to the harmonisation of contract law in Europe. That, in my view, was a noble motive. Another may have been academic curiosity. It was a good opportunity to get to know the laws of other countries. *Samuel Johnson* is quoted for having said:[21]

> A generous and elevated mind is distinguished by nothing more certainly than an eminent degree of curiosity; nor is that curiosity ever more agreeably or usefully employed, than in examining the laws and customs of foreign nations.

Those who undertook to prepare the PECL were indeed generous and elevated minds.

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16 E. McKendrick *in* Chitty on Contracts, Vol. I, 25-001, 28th ed. (1999).
17 M.P. Furmston, Cheshire, Fifoot and Furmston's Law of Contract, 24th ed. 2001, at 599.
18 G.H. Treitel, The Law of Contract 759 (2003).
19 R. Goode, Commercial Laws 111-123 (2004).
20 G.H. Treitel, Remedies for Breach of Contract 319 (1988).
21 G.B.N. Hill & L.F. Powell (Eds.), Boswell's Life of Johnson I (1934), at 89; here quoted from Preface to the Third Edition of Zweigert & Kötz, Introduction to Comparative Law (1998), at V.