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# INFLUENCE OF EUROPEAN INITIATIVES IN NATIONAL COURTS THE CASE OF THE SPANISH SUPREME COURT

*Yolanda Bergel Sainz de Baranda*<sup>1</sup>

## I Influence of European initiatives in national courts<sup>2</sup>

The different non-binding initiatives promoted by several working groups to modernize the Law of obligations and contract Law in Europe, have had strong influence in the EU countries.

In this paper we are going to focus on three of those initiatives; The Principles of European Contract Law<sup>3</sup> (hereinafter, “PECL”), the Principles of European Tort Law<sup>4</sup> (hereinafter, “PETL”), and the Draft Common Frame of Reference<sup>5</sup> (hereinafter, “DCFR”). We are aware of the importance of other initiatives to harmonize private Law in Europe which important effect cannot be discarded (e.g. Principles of European Insurance Law), but we shall center our attention in these three texts due to their broader scope and the key role that they play in this harmonization.

Scholars have often commented about the influence of such non-binding texts on national legislators and on arbitration<sup>6</sup>, but little has been said about their influence in the judiciary. It is true that the impact in legislation has been considerable, as national laws have been amended or are in their way to be amended taking into account all these European soft-law initiatives. We shall just mention, for example, their impact in the reform of the German BGB or of the modern Dutch Law<sup>7</sup>, and in the future modernization of the French<sup>8</sup> and

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<sup>2</sup> This paper is the result of my participation in the International Spring Conference organized by the Swedish Network for European Legal Studies that took place in Stockholm on April 22 and 23, 2013.

<sup>3</sup> Commission on European Contract Law (Lando Commission), Principles of European Contract Law Parts I and II, 1999, Part III, 2002. [http://frontpage.cbs.dk/law/commission\\_on\\_european\\_contract\\_law/](http://frontpage.cbs.dk/law/commission_on_european_contract_law/)

<sup>4</sup> European Group on Tort Law, European Principles of Tort Law, 2005 and 2009. <http://www.egtl.org/>

<sup>5</sup> Study Group for a European Civil Code, outline edition 2009. <http://www.sgecc.net/>

<sup>6</sup> However, the influence of these European initiatives in arbitration proceedings is smaller than on national courts. Other initiatives, such as the UNIDROIT Principles, have been more influential in arbitration. It has been pointed out that this is probably due to their scope; the UNIDROIT Principles being applicable to international commercial contracts; the liberty that the parties have in arbitration proceedings and the fact that arbitrators tend to use comparative Law in their decisions and are not bound by the application of a particular national Law (Perales, P., “Principios de UNIDROIT y PDCE en el arbitraje internacional”, in *Principios de Derecho Contractual Europeo y Principios de UNIDROIT sobre Contratos Comerciales Internacionales*, ed. Dykinson, Madrid (2009), p. 163.

<sup>7</sup> See, for ex., Busch, D. Hondius, E.H., Van Kooten, H.J. Schelhaas, H.N Schrama W.M. (eds.), *The Principles of European Contract Law and Dutch Law. A Commentary*, Ars Aequi Libri/Kluwer Law International, Nijmegen/The Hague/London/Boston (2002); and, Hondius, E., *The influence of the PECL in Dutch Law* (2003); and, with regard to their influence in the judiciary, Busch, D., “The Principles of European Contract Law before the Supreme Court of the Netherlands. On the influence of the PECL in Dutch Legal Practice”, *ZEuP*, (3/2008), pp. 549 to 562.

<sup>8</sup> There are several projects and works going on in France, the intention of which is to reform the Law of contracts. Among them, the Project of reform of the Law of obligations and statute of limitations, directed by professor Catalá of 2005 (the “Avant-projet Catalá”); the Proposal for the reform of the Law of contract of the Académie des Sciences Morales et Politiques led by professor Terré of 2008, and the group of the Cour de Cassation to work on the Avant-projet Catalá led by Pierre Sargos of 2007, stand out.

Spanish<sup>9</sup> Civil Codes<sup>10</sup>. But apart from the influence on law-making, we cannot discard the enormous effect of these non-binding texts in national courts. The power to achieve harmonization lies not only with national legislators, but also with the national courts. And we might even say that the harmonization of European private Law through the judiciary can be a better way to harmonize, as it is slower, less radical and more adapted to the legal traditions and necessities of the different European countries.

We are not going to consider in this work whether harmonization is good or not and to what extent, which is something questioned these days. We are going to assert in which way these texts have touched the European Legal System and how they have influenced the judiciary, in particular the Spanish Supreme Court<sup>11</sup>. We are aware of the impact of these texts in other jurisdictions; the soon and intense influence of the DCFR in the Swedish Supreme Court is notorious<sup>12</sup>, but we shall focus on the Spanish High Court because it has been extremely active in receiving, studying, assuming and using these European texts.

The texts did not really foresee the influence that they were going to have in the judiciary. Article 1:101 (4) PECL only states that: “these Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so”<sup>13</sup>. The PETL where even more timid. In the Goals and Objectives of the PETL, after pointing out the differences in the foundations of Tort Law in the European Legal systems, it is said that the PETL “have an important academic as well as practical value”. The DCFR is more explicit. Among its Purposes (Purpose 8), it considers itself a “possible source of inspiration” for national legislators and for the judiciary, continuing the trend started by the PECL. And so, “it will have repercussions for reform projects within the European Union at both national and Community Law levels, and beyond the EU. If the content of the DCFR is convincing, it may contribute to harmonious and informal Europeanisation of private Law”.

As we have mentioned, the Spanish Supreme Court has been open to the incorporation of these texts to its judgments. And not just open but deeply affected by them. For different purposes, these European initiatives have been quoted by the Spanish Supreme Court many times. Figures talk. It all started with a very active assumption of the PECL that continues today. In 2008, the Spanish Supreme Court mentioned the PECL 2 times, another 2 in 2009, 1 in 2010, 1 in 2011 and 7 times in 2012. Lower Courts have followed, quoting the PECL at least 260 times between 2006 and 2012<sup>14</sup>. It continued with the deep impact of the PETL

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<sup>9</sup> Spanish Proposal for the modification of the Law of obligations and contract Law (hereinafter, the “Spanish Proposal”) by the General Commission of Codification, Ministry of Justice, 2009.

<sup>10</sup> The Spanish Civil Code shall be also referred to in this paper by its abbreviation, C.c.

<sup>11</sup> Spanish Supreme Court judgments shall be referred to by the abbreviation “STS”.

<sup>12</sup> For example, the first judgment quoting the DCFR on November 3, 2009 (commented by Grochowski, M., “The practical potential of the DCFR judgment of the Swedish Supreme Court of 3 November 2009, Case T 3-08”, ECLR (2013); 9 (1), 96-104).

<sup>13</sup> The Preamble of the UNIDROIT Principles, in their 2004 version, is bolder. It provides that the UNIDROIT Principles may be “used to interpret or supplement domestic law”. Explaining how such use shall be made, the Preamble states that when “in applying a particular domestic law, courts and arbitral tribunals may be faced with doubts as to the proper solution to be adopted under that law, either because different alternatives are available or because there seem to be no specific solutions at all”, the Principles should be a “source of inspiration”. And by doing this, “the domestic law in question would be interpreted in accordance with internationally accepted standards...”

<sup>14</sup> Incredible figure, although we have to admit that most of the times lower courts refer to them by quoting what the Supreme Court has said about a particular matter. However, this is not always true, and lower courts sometimes use the European texts at their own initiative.

which were mentioned 4 times by the Spanish Supreme Court in 2010, 1 time in 2011 and 2 in 2012. Lower Courts have mentioned the PETL at least 79 times between 2006 and 2012. Finally, the DCFR had an immediate influence on the Spanish Supreme Court. It was mentioned no less than 10 times in 2010, 2 in 2011 and 3 in 2012. Lower Courts have quoted the DCFR at least 19 times between 2010 and 2012.

We wouldn't be fair if we didn't point out that these initiatives that we are considering have had other companions in the mind of the Spanish Supreme Court. The United Nations Convention on Contracts for the International Sale of Goods (hereinafter, the "CISG") which is part of the Spanish Legal System since August 1, 1991<sup>15</sup> and the UNIDROIT Principles of International Commercial Contracts<sup>16</sup> (hereinafter, "UNIDROIT Principles") have also been an important tool in the hands of the judiciary for the modernization of the Spanish Law of contract and of obligations<sup>17</sup>. In fact the UNIDROIT Principles and the CISG had a strong influence in the PECL. In many judgments we can see articles of these two texts quoted alongside the corresponding article dealing with the same subject in the European initiatives that we here refer to.

All that said, three are the basic questions that we have the intention to answer in the rest of this paper. Which is the purpose of the Spanish Supreme Court when using the European non-binding initiatives? With regard to which matters has it used them? And, the most important question for the necessary legal support of the decisions, which is the legal basis used for it?

## II Purpose pursued and subject matters influenced by the European initiatives

### A Principles of European Contract Law

The Spanish Supreme Court has made reference to the PECL with three different purposes: (i) to confirm legal principles or rules of the Spanish Legal System; (ii) to confirm previous interpretations or previous principles set by the Spanish Courts; and, (iii) to interpret national Law in accordance with the PECL, arriving to solutions very close to those provided for in the PECL, but adapted to the particularities of the Spanish Legal System.

With this three different aims, the Supreme Court has touched the following matters:

- To confirm legal principles or rules: good faith and fair dealing (1:201)<sup>18</sup>; excuse due to an impediment (8:108)<sup>19</sup>; right to damages and measure of damages (9:501, 9:502, 9:505)<sup>20</sup>
- To confirm interpretations or principles set by the Spanish courts: sufficient agreement and determination of price (2:103/6:104)<sup>21</sup>; legal interpretation of silence when duty to

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<sup>15</sup> The adhesion instrument is dated July 17, 1990, but was not published in the Spanish Official Bulletin until January 30, 1991 (BOE nº 26; rect. BOE November 22, 1996, nº 282).

<sup>16</sup> UNIDROIT (ed.), Rome, 1994 and 2004. [www.unidroit.org](http://www.unidroit.org).

<sup>17</sup> In this regard, see, Perales, P., "La aplicación jurisprudencial en España de la Convención de Viena de 1980 sobre compraventa internacional, los principios UNIDROIT y los Principios del Derecho Contractual Europeo: de la mera referencia a la integración de lagunas", *La Ley*, año XXVIII, nº. 6725 (2007).

The web page [www.uc3m.es/cisg](http://www.uc3m.es/cisg) contains a list and a summary of all decisions of Spanish Courts and other Spanish speaking countries mentioning CISG.

<sup>18</sup> SSTS 6080/2006, July 4; and 4977/2006, July 11.

<sup>19</sup> STS 822/2012, January 18.

<sup>20</sup> STS 532/2012, July 30.

<sup>21</sup> STS 362/2011, June 7.

disclose (2:204 and 4:107)<sup>22</sup>; primacy of common intention of the parties in interpretation of contracts (5:501)<sup>23</sup>; preliminary acts relevant for interpretation of contracts (5:502 [a])<sup>24</sup>; change of circumstances (6:111)<sup>25</sup>; requirements for the termination of contracts (8:103, 9:303)<sup>26</sup>; right to withhold performance (9:201)<sup>27</sup>; possibility of extra-judicial termination (9:303)<sup>28</sup>; effects of termination (9:305 to 9:308)<sup>29</sup>; future loss which is reasonably likely to occur (9:501 (2)[b])<sup>30</sup>; right to damages and extension (9:503)<sup>31</sup>; presumption of solidarity of obligations (10:102)<sup>32</sup>.

- To interpret national Law: refusal of early performance (7:103)<sup>33</sup>; fundamental breach (8:103 [c])<sup>34</sup>; compensation of debts by court decision (13:102)<sup>35</sup>.

It exceeds the purpose of this paper to comment about all the matters with regard to which the Supreme Court has referred to the PECL. Of all these, we would highlight those with greatest importance in the modernization of the Spanish Law of obligations<sup>36</sup>. On the first hand, the question of whether there is sufficient agreement for the conclusion of a contract and how should the price be determined (2:103/6:104). Article 1.445 C.c. provides that “by the contract of sale one of the parties binds himself to deliver a specific thing and the other to pay for it a price certain, in money or something representing money”. The wording of this article has been criticized for several reasons. One of them is that in practice the initial determination of the price in the contract is not necessary. In this regard, the decision of the Supreme Court of June 7, 2011 concerning the determination of the price of fuel in long-term contracts, provides that the indeterminacy of some of the elements of the contract is not an impediment for its perfection, as long as there is consent with regard to elements which are sufficient for the contract to be performed. And of this, the Supreme Court understands that arts. 2:101 and 2:103 PECL (a contract is concluded if the parties intend to be bound and they reach sufficient agreement. And, there is sufficient agreement if the terms have been sufficiently defined so that the contract can be enforced) are “illustrative”. With regard to the determination of the price, the Court refers to arts. 6:104 (determination of price), 6:105 (unilateral determination by a party), 6:106 (determination by a third person), and 6:107 (reference to a non-existent factor) of the PECL<sup>37</sup>.

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<sup>22</sup> STS 242/2012, April 24.

<sup>23</sup> STS 285/2012, May 8.

<sup>24</sup> STS 285/2012, May 8.

<sup>25</sup> SSTS 822/2012, January 18, and 820/2013, January 17.

<sup>26</sup> SSTS 305/2012, May 16; 485/2012, July 18; STS 532/2012, July 30; and, 526/2012, September 5.

<sup>27</sup> STS 30/2013, February 12.

<sup>28</sup> STS 485/2012, July 18.

<sup>29</sup> STS 532/2012, July 30.

<sup>30</sup> STS 799/2009, December 16.

<sup>31</sup> STS 532/2012, July 30.

<sup>32</sup> SSTS 7351/2005, October 31; and 4977/2006, July 11.

<sup>33</sup> STS 924/2006, September 27.

<sup>34</sup> SSTS 705/2005, October 10; 305/2012, May 16; STS 532/2012, July 30.

<sup>35</sup> STS 321/2007, January 5, that has had great influence in posterior judgments (e.g. STS 805/2009, December 10).

<sup>36</sup> With regard to the modernization of the Law of obligations by the Spanish Supreme Court see, Roca Trías, E. and Fernandez Gregorachi, B., “The Modern Law of Obligations in the Spanish High Court”, ERCL, (1/2009), pp. 45 to 59; Díez-Picazo, L., “Tribunal Supremo y Principios Europeos”, *Noticias de la Unión Europea*, 305, Junio (2010), 79 to 85; Vendrell, C., “The application of the Principles of European Contract Law by Spanish Courts”, ZEuP, (3/2008), pp. 534 to 548; and, Perales, P., op. cit.

<sup>37</sup> The Court completes this illustration of the interpretation with a reference to art. 1.277 of the Spanish Proposal for the modification of the Law of obligations and contract Law that provides: “The perfection of the contract is not impeded by the fact that the parties have not expressed the price nor the way in which it should be

On the second hand, it is interesting to point out that the Supreme Court has mentioned art. 9:303 PECL that provides: “a party’s right to terminate the contract is to be exercised by notice to the other party”. This possibility of extra-judicial termination of contracts is not foreseen in Spanish Law and has been historically thought to be against art. 1.256 C.c., according to which, the validity and performance of contracts cannot be left to the will of one of the parties. However, the Supreme Court, has lately affirmed that the right to terminate contracts can be exercised not only by starting judicial proceedings, but also a declaration properly addressed to the other party, without prejudice for the Courts to examine its validity if challenged. In this regard, the STS of July 18, 2012 is very interesting because it refers to previous Supreme Court decisions stating this possibility, and also makes a comparative Law study of the matter, quoting French and Italian Law, the PECL and the Spanish Proposal that provides in this same way in arts. 1.199 and 1.482<sup>38</sup>.

Another subject of interest is the joint and several character of obligations (10:102 PECL). The Spanish Civil Code sets in art. 1.137, the general rule that obligations have to be presumed to be joint but not several. For many years, the Spanish Supreme Court has interpreted art. 1.137 C.c. in order to understand that such general rule should not be applicable in certain (if not most of) cases. The Supreme Court has said that solidarity is the rule in non-contractual liability, commercial obligations, and in most cases of consumers Law, where the presumption of solidarity protects better the weak party in front of the producers and providers of goods and services. Furthermore, the Court has established that solidarity can be inferred from the contract when it can be understood that the parties wanted the obligation to be joint and several<sup>39</sup>. With little ground for this view of art. 1.137 C.c. to be found in Spanish Law, the Court has seen a helping hand in art. 10:102 PECL.

The Supreme Court has also referred to the PECL with regard to the matter of good faith and refusal of early performance. Art. 7:103 (1) PECL provides that a party may decline a tender of performance made before it is due except where acceptance of the tender would not unreasonably prejudice its interests. The case on which the Supreme Court referred to this article regards a contract concluded by a company, producer of plastics, and a company producing seats for cars; the latter buying the plastics from the former. On a certain date, the producer of seats communicated the plastics producer that a particular colour of plastic was going to be substituted by a different one, as demanded by the company making the cars. The problem arose because the plastic producer, in order to be prepared for new orders, had already made a big amount of plastic of the colour that was going to be abandoned. It therefore started a law suit against the seat-maker company asking for the price of that surplus. Art. 1.125 C.c. provides that when a certain day has been set for the performance of obligations, they can only be asked for when that day arrives; and 1.127 C.c. provides that the terms established in the obligations shall be presumed to be set for the benefit of both, debtor and creditor. However, the claimant denounced the breach of art. 1.258 C.c. which states that the contracts “not only oblige to their performance, but also to all the consequences thereof in conformity with good faith, the usages and the Law”. The Supreme Court decided in favour

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determined, as long as the will to conclude it is unequivocal and a generally set price can be understood as implicitly agreed”.

<sup>38</sup> Art. 1.199§2 of the Spanish Proposal reads: “The right to terminate the contract has to be exercised through the notification to the other party”. Art. 1.482§1 states: “In case of lack of conformity, the buyer can ask for performance, reduce the price or terminate the contract by his own declaration addressed to the seller”.

<sup>39</sup> For a clear explanation of the interpretation of art. 1.137 C.c. by the Supreme Court, see, Caffarena, J., Commentary to art. 1.137, *Comentario del Código Civil*, II, Ministry of Justice (1991) pp. 119, 120.

of the seat-maker company because the general rules (as it could clearly be deduced from art. 7:103 PECL) allowed the buyer to decline an offer of performance made before due date<sup>40</sup>.

And finally we shall highlight the reference made by the Spanish Supreme Court to the PECL with regard to the requirements for the termination of contracts and the concept of fundamental non-performance. This is probably the most important subject among those we are pointing out in particular, and it reflects the changes that Spanish Law is undergoing and shall suffer in the future<sup>41</sup> regarding the concept of non-performance. The Spanish Civil Code contains a concept of non-performance based in the fault or intention of the debtor and, when that non-performance takes place, only a rigid system of remedies is available. However, for the last few years, either by Law<sup>42</sup>, or by the interpretation that the Courts are making of article 1.124 C.c.<sup>43</sup> (with the invaluable help of scholars) a new concept of non-performance is being introduced, alongside a battery of remedies in the line of those foresee in the CSIG and the PECL. With this aim, the Spanish Supreme Court has, as we said, interpreted article 1.124 C.c. and established requirements for the breach of a contract to give rise to termination (bilateral obligation, relevant breach, performance of the party who asks for termination, principal obligation and expired). With regard to the concept of relevant breach or fundamental non-performance, the Supreme Court has stated that there is no need of a persistent will of non-performance in order to terminate a contract; the debtor's fault is no longer necessary for the non-performance that leads to termination. In this sense, the Court has said that it is sufficient if the purpose of the contract is frustrated or the non-performance impedes the satisfaction of the creditor's interests, or the aggrieved party had reasons to believe that the other party's future performance shall not take place (in the line of article 8:103 and 9:301 PECL).

A last remark to mention that there are some matters, particularly related to the modernization of private Law, the regulation of which in the PECL have surprisingly not been referred to by the Supreme Court yet. We are thinking basically on the question of prescription (art. 14:201

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<sup>40</sup> The Court expressly said: "Certainly the criteria of good faith in the performance of contractual obligations is a principle that integrate contracts in accordance with art. 1.258 C.c. (...). However, this criteria doesn't command the creditor the obligation to pay for whatever the debtor has produced in anticipation of future orders that have not been made yet; in this sense, the general rules allow the creditor to decline an offer of performance made before the agreed due date, as can be clearly deduced from article 7:103 (1) of the European Principles of Contract Law".

This decision is commented by Vendrell, C., opus cit. 540, and Roca Trías, E. and Fernandez Gregorachi, B., opus cit. pp. 57, 58.

<sup>41</sup> The Spanish Proposal for the modification of the Law of obligations and contract Law tries to bring the Spanish Law of contracts and obligations in the line of a possible future European Law of contracts. With that aim, it unifies the system of contractual liability by incorporating the concept of conformity. The lack of conformity of the thing with the contract constitutes a breach of the contract that entails to exercise a battery of remedies established in art. 1.482 (performance, reduction of the price, termination, and, in any event, if appropriate, compensation for damages).

<sup>42</sup> We have to highlight the importance of the incorporation of Directive 1999/44/CE by Law 23/2003 of Guarantees in the Sale of Consumers Goods, today integrated in the Rehashed Law of Consumers of November 16, 2007, in articles 114 to 127. In this regard, see, for e.g., Díez-Picazo, L., "Reforma de los Códigos y Derecho Europeo", *ADC*, Book LVI, IV, Oct-Dic. (2003) p. 1.575; and Morales Moreno, A.M., "Adaptación del Código Civil al Derecho Europeo: La compraventa", *ADC*, Book LVI, IV, Oct-Dic. (2003) p. 1.609.

<sup>43</sup> Article 1.124 C.c. provides: "The right to terminate an obligation is considered to be implied in reciprocal obligations, in case one of the parties does not perform what he was obliged to. The party prejudiced may choose between demanding performance of the obligation or its termination, with a compensation for damages in either case. He may also ask for termination even after choosing performance, when such performance becomes impossible (...)"



PECL sets a general period of three years). The Court is of course bound by the prescription periods established by the Spanish Law, but it is odd that it has not mentioned the trend in modern private laws towards the adoption of uniform periods of prescription, at least to put such a sensible question in perspective.

## **B Principles of European Tort Law**

The PETL have not been as successful as the PECL, probably because it is a more difficult area where to achieve harmonization, due to the differences between the European Legal Systems in this field. From the English Tort Law to the elaborated and systematic provisions of the German BGB, and the general clause systems, such as those existing in France and Spain. And this, without taking into account the different ways in which non-contractual liability has been interpreted by national Courts (e.g. creation in France of the strict liability rule for damages caused by things and for damages caused by persons under control).

Having said that, we also have to say that in Spain the PETL have had quite an impact<sup>44</sup>, and the role of professor Martín-Casals<sup>45</sup> in this success is remarkable. This impact is understandable taking into account that the Spanish Civil Code contains very few articles regarding non-contractual liability<sup>46</sup> and that it has been for the Courts to interpret them and develop (not to say create) a system of non-contractual liability. Therefore, the interpretation of the articles of the Civil Code has for many years produced a great amount of jurisprudence. From 2007 onwards, this jurisprudence has constantly referred to the PETL with regard to different matters<sup>47</sup> and with different purposes (but mainly, as we say, to confirm previous Supreme Court interpretations of the C.c.):

- To confirm legal principles and interpretation of the Civil Code by the Spanish courts: difference between causation in fact and causation in law (3:101/3:201)<sup>48</sup>; causation in law (closeness between damaging activity and its consequence/purpose of the rule [3:201 (a) and (c)]<sup>49</sup>; liability for auxiliaries and their need to act within the course and

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<sup>44</sup> The following web page contains a summary in Spanish and English of the judgments of Spanish Courts quoting the PETL from 2005 to 2011:

[http://www.uc3m.es/portal/page/portal/dpto\\_dcho\\_privado/area\\_dcho\\_civil/home/research/research\\_groups/petl](http://www.uc3m.es/portal/page/portal/dpto_dcho_privado/area_dcho_civil/home/research/research_groups/petl)

<sup>45</sup> Professor Martín Casals participated in the elaboration of the PETL, has translated them into Spanish and has published many studies that have made the PETL known to Spanish Courts and scholars.

<sup>46</sup> Only 9 articles. Art. 1.902 C.c. contains a general clause, whereas arts. 1.903 and 1.904 contain rules regarding liability for others. Arts 1.905 and 1.906 C.c. regulate liability for damages caused by animals, and arts. 1.907 to 1.910 very briefly refer to particular cases (e.g. explosion of devices, excessive smokes, fall of trees, emanations from sewers, construction defects, etc).

<sup>47</sup> Lower Courts have also referred to other matters. For example: and, proof of damage (estimation 2:105 PETL) SAP Barcelona 583/2009, November 18; damage caused by multiple activities [3:103(1) PETL] SAP Granada 70/2010, February 12; general rule of fault liability (4:101 PETL) STSJ Galicia 280/2010, December 14; concept of abnormally dangerous activity (5:501 PETL) SAP Zaragoza 436/2010, September 30, and SAP Zaragoza125/2011, March 17; purpose of damages (10:101 PETL) SAP Barcelona 445/2008, September 10 and SAP Ciudad Real 210/2008, October 24; restoration in kind (10:104 PETL) SAP Barcelona 445/2008, September 10; and measure of damage (10:203) SSAP Barcelona 138/2010, March 12; 645/210, December 9; and 447/2010, July 13. All these latter cases concern damages in vehicles. The Court took note of art. 10:203 PETL to find that if the cost of reparation exceeds the value of the vehicle, the compensation shall be the value of the vehicle at the time of the accident, adjusting slightly higher because of expenses and bother. The victim can only recover the higher cost if it is reasonable to do so.

<sup>48</sup> STS 102/2009, March 2.

<sup>49</sup> STS 102/2009, March 2.

scope of functions (6:102)<sup>50</sup>; recoverable pecuniary damage (10:201)<sup>51</sup>; concept of personal injury (10:202)<sup>52</sup>; concept of non-pecuniary damage (10:301)<sup>53</sup>.

- To interpret national Law: required standard of conduct (relation of proximity or special reliance/dangerousness of the activity [4:102.1])<sup>54</sup>.

As it has been pointed out, sometimes the Supreme Court has not used the PETL correctly<sup>55</sup>, but in many occasions it has used them to enrich previous Supreme Court decisions and even to provide new interpretations of the Law, more in accordance with the new trends at European level.

Of this latter purpose, the best example is the reference made to art. 4:102.1 of the PETL which is also the provision that has influenced the most and not only the Spanish Supreme Court but also lower courts<sup>56</sup>. The Spanish Code does not contain non-contractual liability rules related to the required standard of conduct. Therefore, the rules established for contractual liability in art. 1.104 C.c. are taken into account. Such art. 1.104 C.c. only provides for the circumstances of the particular case, person, time and place as criteria to decide whether the required standard of care has been met. On the contrary, art. 4:102.1 PETL sets various criteria<sup>57</sup> to determine if the required standard of conduct has been met. The Supreme Court has found inspiration in this art. 4:102.1 PETL to revise its previous trend towards the raising of the standard of the diligence required<sup>58</sup>. From a first decision in

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<sup>50</sup> SSTS 1446/2007, March 6; 1091/2007, October 10; and 269/2010, May 14.

<sup>51</sup> STS 383/2011, June 8.

<sup>52</sup> SSTS 366/2010, June 15; 786/2010, November 22; and 383/2011, June 8.

<sup>53</sup> STS 366/2010, November 3. Interesting because, surprisingly, it is not from the First (Civil) Chamber of the Supreme Court, but from the Military Chamber. The case was about a member of the military who was sanctioned by a higher official for a petty offense. The sanction was set aside by the lower Courts but the sanctioned member of the army was asking for compensation for his non-pecuniary damages. This compensation was not granted by the Supreme Court because it was thought that the damage had already been compensated by the setting aside of the sanction. The Court found inspiration in the concept of non-pecuniary damage in art. 10:301 PETL as a psychological or spiritual distress, not including aspects of the material damage.

<sup>54</sup> SSTS 831/2007, July 17; and 144/2009, November 21, 2008. It is very interesting that the Supreme Court has taken into account art. 10:202 PETL in considering if compensation for future medical costs for the damage should be allowed. The Court thinks that medical costs brought on by the accident, since they have the purpose of restoring health and are intended to assure the victim a minimum quality of life, can be compensated as monetary losses.

<sup>55</sup> For example, it has referred to “required standard of conduct in supervision” (wording in art. 6:101 PETL; fault liability of the person in charge of minors or mentally disabled persons, with reversal of the burden of proof) with regard to liability for auxiliaries and their need to act within the scope of their functions, regulated as a vicarious liability in art. 6:102 PETL. Also, lower Courts, in cases of uncertain causation for which art. 3:103 (1) PETL provides for proportional liability, have found inspiration to establish “necessarily” a joint and several liability.

In this regard, see, Martín-Casals, M., “The impact of the Principles of European Tort Law (PETL) in Spanish Case Law, 1 *JETL* (2010) pp. 308, 309, 321, 325.

<sup>56</sup> We have counted at least 35 decisions of lower Courts between 2007 and 2011 quoting art. 4:102.1 PETL.

<sup>57</sup> As Professor Martín Casals has pointed out, some of them were already used by the Spanish Supreme Court (the dangerousness of the activity; the expertise to be expected; the foreseeability of the damage), whereas others are more related to common law countries (relation of proximity or special reliance between those involved). See, Martín-Casals, M., *op. cit.* p. 319.

<sup>58</sup> Under Spanish Law the general rule is still that there is no liability without fault (art. 1.902 C.c.). However, the Spanish Supreme Court had interpreted the Civil Code with the intention to benefit the person who suffers the damage. With that purpose, it has reversed the burden of proof (it shall be for the agent to prove his diligence) and raised the standard of diligence required (only extreme diligence shall exonerate from liability). See, Bergel, Y., *Handbook on Spanish Civil Patrimonial Law*, ed. Tecnos, (2011) pp. 185, 186. Lately, a new trend is noticed in the decisions of the Supreme Court, going back to the general principle of fault liability and

2007<sup>59</sup>, the Supreme Court has been more restrictive in the recognition of the existence of fault, rejecting<sup>60</sup> the existence of liability in cases of damages occurred due to “ordinary life risks”. In case of an ordinary life risk the victim must assume the damage.

### C Draft Common Frame of Reference

Very soon after being published the DCFR has had a big effect in Spain. Scholars are commenting it and analyzing Spanish Law in the light of the DCFR, and the Supreme Court very soon started to quote it in its decisions. The role of the Supreme Court Judge Encarna Roca Trías, who was part of the Co-ordinating Group within the Study Group that prepared the DCFR<sup>61</sup>, has been of great importance to this effect. Taking into account the influence of the PECL in Spanish Courts, as we have seen in 2.1 above, it is not surprising that the DCFR has also had quite an effect (the DCFR incorporates a revised version of the PECL in its second and third Books).

Having said that, it is true that the PECL have not lost their importance for the Spanish judiciary after the publication of the draft. If, as we have seen, the DCFR received much attention by the Spanish Supreme Court immediately after its publication<sup>62</sup> (mentioned 4 times in 2010<sup>63</sup>, year in which it only referred one time to the PECL), its effect has diminished afterwards (it was quoted 3 times in 2012, whereas the PECL were mentioned 7 times in that year). This is probably because Spanish Judges are still more familiar with the PECL and more comfortable referring to them than to the provisions of the DCFR<sup>64</sup>. Also, as

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putting aside the reversal of the burden of proof which shall only play in certain particular cases (e.g. extraordinary risk).

<sup>59</sup> The facts where that a couple went to a friend’s house for dinner. Upon arrival, the visitor lady, who knew the house, went straight to see her friend who was in the kitchen. On her way to the kitchen she step in the corridor (with a low light) on a toy which was left there by one of her friend’s children. She felt and suffered damages. She sued her friends (and of course their insurance company). The Supreme Court found that the care required of hosts who are parents of a small child cannot cover any danger, however remote, and that playing with toys at home is not an abnormally dangerous activity, so there was no reversal of the burden of proof. This case is commented by Salvador Coderch, P. and Ramos González, S., “Relaciones de complacencia y deberes para con los invitados”, *InDret* (2/2008) 286 to 289; and, Martín Casals, M., op. cit. P. 310.

From this judgment, fault and liability have been excluded in cases of distractions of the victim, normal obstacles or activities, trips, slips, falls, etc. (e.g. finger caught in the door of a bar by another client (SAP Cantabria 84/2010, February 4); fall in shower with no-slip floor (SAP Lérida 202/2010, May 13); hand mashed by a hydraulic door in good working order (SAP Pontevedra 905/2010, December 10); injured toe upon hitting it with the entrance of a bank door (SAP Asturias 419/2010, December 10); fall from a lorry scale due to the distraction of the victim (SAP Castellón 71/2011, March 4), etc.

<sup>60</sup> Art. 4:102.1 has also been quoted to decide that the required standard of conduct was not met and therefore liability existed [e.g. negligence in the maintenance of a building (SAP Granada 17/2011, January, 21); lack of due care upon not warning of an obstacle in an area of transit (SAP Pontevedra 314/2011, June 8); fall caused by a not signaled top that protruded from the pavement (SAP Madrid 486/2011, October 4); absence of necessary precautions in carrying works on a ditch (SAP A Coruña 293/2011, November 4)].

<sup>61</sup> Encarna Roca Trías was also involved in the translation into Spanish of the Principles of European Contract Law alongside professors Díez-Picazo, L. and Morales Moreno, A.M., chairman and member respectively of the General Commission of Codification that prepared the Spanish Proposal for the modification of the Law of obligations and contract Law. The translation of the PECL was published by Civitas in 2002.

<sup>62</sup> STS 870/2009, January 20, already quoted the presumption of solidarity of obligations in the DCFR (III-4:103[2]) to reinforce the rules providing for solidarity in the Spanish Consumers Law; and STS 366/2009, May 25, mentions the DCFR with regard to the preference for the interpretation of contracts which gives its terms effect (II-8:106) alongside the Spanish Civil Code provision (art. 1.284) and the PECL (art. 5:106) in that sense.

<sup>63</sup> In 2009 and 2010 always by Judge Roca Trías.

<sup>64</sup> A translation of the DCFR into Spanish is being made and it is expected to be published soon. Many studies have been made of its different provisions (many published by *InDret* ([www.indret.com](http://www.indret.com)), but a whole translation

lower Courts study and quote Supreme Court decisions in their judgments, it might be that in a near future we start having more lower Court's decisions mentioning the DCFR<sup>65</sup>.

These are the matters regarding to which the Spanish Supreme Court has referred to the DCFR:

- To show how a matter is regulated in modern legal systems or the differences between the European systems: preference for interpretation which gives terms effect (Art. II-106)<sup>66</sup>, revocation of donations for gross ingratitude (Art. IV.H-4:201)<sup>67</sup>; unjust enrichment (Art. VII-7:102)<sup>68</sup>.
- To confirm interpretations or principles set by the Spanish courts: good faith and acts according to previous conduct (Art. I-1:103.2)<sup>69</sup>; double effect of termination of contracts (end of obligations [Art. III-3:509] and restitution of benefits [Art. III-3:510])<sup>70</sup>; and solidarity of obligations (Art. III-4:103)<sup>71</sup>.

With regard to the subjects of the DCFR mentioned in these decisions we have to say that we find many more judgments where the Supreme Court quotes it without much need to do it. We mean that, in most of these decisions, the provisions of the DCFR do not add much to the legal reasoning, but just help the Court to “decorate” them. For instance, with regard to the legal nature of the unjust enrichment, the Supreme Court mentions the DCFR to show the difficulty of its legal nature taking into account that “it has different meanings in the European legal Systems, being the regulation in the proposal contained in the DCFR good proof of it”<sup>72</sup>. With regard to the possibility to revoke donations for gross ingratitude of the donee, it quotes art. IV.H.-4:201 just to add to the Spanish regulation thereof, because the real question in the judgment lied somewhere else<sup>73</sup>.

Probably the most interesting question why reference to the DCFR was made is the one dealt with in the judgment of December 3, 2010. The facts were that a company and two people acting as solidary surety had contracted with a bank a line of credit. On the expiry date, in

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is not yet available in Spanish. The most complete study is probably the commentary to Books II and IV by Vaquer, A., Bosch, E., and Sanchez, M., *Derecho Europeo de los contratos. Libros II y IV del Marco Común de Referencia*, 2 volumes, ed. Atelier (2012).

<sup>65</sup> In 2011 and 2012 the DCFR started to appear in lower Court decisions (e.g. AP Málaga, 198/2011, April 14 (III-4:103); AP Tarragona 75/2012, February 28 (I-1:103[2]; AP Ourense 140/2012, March 23 (III-3:509/3:510); and AP Murcia 213/2012, April 20 (III-3:510[5]).

<sup>66</sup> STS 366/2009, May 25.

<sup>67</sup> STS 261/2010, May 13.

<sup>68</sup> STS 306/2011, May 6.

<sup>69</sup> SSTS 769/2010, December 3.

<sup>70</sup> SSTS 380/2010, June 22.

<sup>71</sup> SSTS 597/2010, October 8; and 198/2011, April 14, both to do with the rule of solidarity in consumer protection cases (joint and several liability of the travel agency and the organizer in the first one; joint and several liability of the seller and of the manufacturer of air conditioning devices, on the second).

<sup>72</sup> STS 306/2011, May 6.

<sup>73</sup> The case was about an assignment of property and a donation (with the form of a sale) by a couple to their daughter with an alimentary obligation on the part of the daughter. The father died violently and it was the mother who was condemned for the death of her husband after being accused by her daughter. The mother sued her daughter asking for the contracts of assignment and donation to be declared null for simulation and the donation to be revoked for ingratitude of the donee. Art. 648.2 C.c. provides that: “when the donee attributes the donor with a crime giving rise to official proceedings or public accusation, even though he proves such crime, unless the crime was committed against the donee himself, his spouse or the children under his authority”. The Supreme Court mentioned the DCFR to show how this cause of revocation of donations has been more openly regulated in modern systems. As the particular accusation of the daughter had been annulled for being a close relative, the key issue of the decision was how should the term “attribution” of a crime in art. 648.2 C.c. be interpreted.

1993, the principal of the credit was not paid and so the bank closed the account with a resulting credit in his favour. Between 1993 and 2005 the bank and the clients were involved in different extrajudicial proceedings regarding the said credit because the debtor was insolvent. In 2005 the bank started proceedings to recover the amount due as the client had come to a better financial situation. Lower Courts had declared the principal due, but said that the action to ask for the interest of the credit had expired. The bank went to the Supreme Court claiming the breach of art. 7 C.c. (“all rights have to be exercised in accordance with good faith”). The Supreme Court understood that the bank acted properly and quoted the doctrine of scholars<sup>74</sup> and art. I-1:103 DCFR (Good faith and fair dealing)<sup>75</sup>, to declare that, what art. 7 C.c. sanctions, is a contradictory conduct of the creditor which has made the other party confident in the appearance created by such conduct. Something that did not exist in the case.

### III Legal Basis

So far, we have seen with regard to which matters the Courts have used these European initiatives, and we have seen the purpose for doing so. The aim of the Courts is clearly to modernize the Spanish Law of obligations and the Law of contract, and to confirm previous interpretations of the Supreme Court in order to show that they adapt to the new legal trends. We now have to consider which is the legal basis to achieve these goals along this road.

All these European initiatives (PECL, PETL and DCFR) are non-binding texts which cannot be applied by Courts because they are not part of national Law. In Spain, for rules to become part of the Spanish Legal System, they have to follow a publication procedure. Only rules published in the Official Bulletin are binding rules applicable by the judiciary.

Therefore, Spanish Courts cannot apply these European initiatives as *ratio decidendi* in their decisions. This entails that Courts can only use the European initiatives as an inspiration and as a helping instrument in the application of Spanish Law.

The legal base for Courts to use these initiatives in their decisions is article 1.6 of the Spanish Civil Code. It states that “case law complements the Legal System with the doctrine repeatedly established by the Supreme Court when interpreting and applying the Law, the usages and the general principles of Law”. Therefore, case law is not a source of Law in Spain (as it is in Sweden). Judges and Courts have the inexcusable obligation to solve the cases attending to the established system of sources of Law (art. 1.7 C.c). The decisions of the Courts only complete the Legal System through the interpretation of the Law.

The Courts have to be very careful when using the provisions of these European initiatives. Their application and the use made of them rely on the discretion of the Court. In a country like Spain, where the system of sources of Law is limited and strict, the use of these initiatives in Court decisions has to be well grounded; that is, they have to be used alongside other legal

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<sup>74</sup> “According to scholars, good faith entails that a right cannot be exercised when its holder has not only not worried for a long time to exercise it, but also when with his attitude he has given his adversary ground to think that the right shall not be exercised”.

<sup>75</sup> I-1:103 (1) The expression “good faith and fair dealing” refers to a standard of conduct characterised by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question.

(2) It is, in particular, contrary to good faith and fair dealing for a party to act inconsistently with that party’s prior statements or conduct when the other party has reasonably relied on them to that other party’s detriment.

grounds or other reasons. The danger of using them in a different way is that the judgment can be said to be arbitrary and against the system of sources of Law.

The Courts cannot incorporate the European initiatives to the Legal System through their judgments, but they can use them to interpret the Law in a modern way, with a modern perspective. This is allowed and encouraged by article 3.1 C.c. It provides that, “the legal rules shall be interpreted according to the meaning of their wording, in relation to the context, historical and legislative precedents, and the social reality of the time in which they have to be applied, attending basically to the spirit and the goal thereof<sup>76</sup>”.

The Supreme Court has expressed his view on these initiatives several times, in special with regard to the PECL. In a judgment of October 31, 2006, referring to the CISG and the PECL it said that “the criteria stated in an international disposition of a conventional character which is part of our legal system (*CISG*), also reflected in a document that legally formulates the principles (...) common to the different legal systems(*PECL*), in as far as they reflect and try to order, with the purpose of elaborating uniform rules, the practice followed in relations that exceed the national scope, should serve to integrate art. 1.124 C.c. following the mandate to interpret it in accordance with the social reality of the moment in which it is applied”. In a 2009 judgment: “the common origin of the rules in the European Principles of Contract Law allow their use for the interpretation of the existing legal rules on our Civil Code” (Spanish Supreme Court Decision, December 17, 2009). And recently, in 2012, it has said: “no matter if they (*PECL*) are not positive Law rules, they have an undeniable doctrinal value” (Spanish Supreme Court, July 30, 2012)

We understand that the Supreme Court has been very smart in the use of these European initiatives for its purposes. It has sometimes used them to confirm legal principles or previous interpretations of the Supreme Court with regard to a certain matter. Sometimes in order to show how a particular question is regulated in modern legal systems or to show how the regulation differs from one system to another. And, when it has used them with the purpose of modernizing Spanish Law, it has completed national Law by interpreting it in a way that *de facto* arrives to a solution that coincides with the solution given in the European initiatives. The Supreme Court has made a very clever use of the possibility granted to him by article 3 C.c. The Spanish Supreme Court finds that it is his duty, in accordance with article 3 C.c. to interpret the Law by using these European initiatives, which are an example of the modern reality of Law.

#### IV Conclusion

The European initiatives are no longer an academic instrument. This “soft Law” is “softly” entering and inspiring the national Legal Systems<sup>77</sup>. They have entered the practice through the inspiration of the legislators in the update of the national Laws of contract and of obligations and, what has concerned us in this paper, through the practice of the judiciary.

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<sup>76</sup> Our translation and our underlining.

<sup>77</sup> Of course not all European Legal Systems are “touched” in the same way and with the same intensity, but we have mentioned examples of great importance such as the case of Germany, The Netherlands, France and Spain. The different levels of influence probably depend on the difference of the Legal System concerned and on the self-respect of the judiciary of the different European countries.

The Spanish Supreme Court has used the European initiatives with regard to lots of, and the most different matters. Sometimes to rely on their prestige to add to its decisions<sup>78</sup>; sometimes as a firm legal resource to decide cases alongside Spanish sources of Law or previous Court interpretations; and, sometimes, in order to interpret the law of contract and the law of obligations to adapt it to a new social, economic and political structure.

These days it is discussed how far we should go into the harmonization of European Private Law. We think that the use of the European initiatives by national Courts in order to interpret national Laws in accordance to these initiatives is a proper way to achieve harmonization. This shall entail an “informal” harmonization of European Private Law, but one which takes into account the cultural and social particularities of the different legal systems. Maybe a smaller, but longer-lasting harmonization. At least for the time being.

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<sup>78</sup> Professor Díez Picazo understands that this is (and should be) the only purpose of the Supreme Court when quoting the PECL (Díez-Picazo, L., “Tribunal Supremo y principios europeos”, *Noticias de la Unión Europea*, n° 305, June (2010) pp. 79 to 85.