

# A principled approach to European contract law?

## Citation for published version (APA):

Smits, J. M. (2000). A principled approach to European contract law? *Maastricht Journal of European and Comparative Law*, 7, 221-223.

## Document status and date:

Published: 01/01/2000

## Document Version:

Publisher's PDF, also known as Version of record

## Please check the document version of this publication:

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
- The final author version and the galley proof are versions of the publication after peer review.
- The final published version features the final layout of the paper including the volume, issue and page numbers.

[Link to publication](#)

## General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal.

If the publication is distributed under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license above, please follow below link for the End User Agreement:

[www.umlib.nl/taverne-license](http://www.umlib.nl/taverne-license)

## Take down policy

If you believe that this document breaches copyright please contact us at:

[repository@maastrichtuniversity.nl](mailto:repository@maastrichtuniversity.nl)

providing details and we will investigate your claim.

Editorial, published in *Maastricht Journal of European and Comparative Law* 7 (2000), p. 221-223.

## A Principled Approach to European Contract Law?

Jan Smits

Recently, the final version of Parts I and II of the Principles of European Contract Law<sup>1</sup> was published. This event is rightly praised as an important step in the development of a common law for Europe. To have – as we do now at the beginning of the 21<sup>st</sup> Century – a text on which eminent scholars from all member-states of the European Union could agree, is a good starting point for further discussion on the future contents and shape of a European Contract Law. I feel that it is in this idea of a *common text* with which the various national legal orders can be compared and from which inspiration can be drawn, that the great value of the Principles lies.

The drafters of the Principles have a more ambitious view of their own project. According to the Introduction, at least one of the main functions of the Principles is to serve as a 'precursor' for a future European Code of Contracts.<sup>2</sup> The moment that a proper basis for the enactment of such a Code can be found in some European treaty (and I would say that *if* one wants to adopt a European Code for the whole of the law of contract, it should be done by introducing a entirely new treaty so that each and every member state can decide for itself whether it will adopt it), the Principles could serve as a starting point for the contents of this Code. There are however at least<sup>3</sup> two good reasons why this specific ambition, shifting the ambit of the Principles from the pure academic to the political, should be questioned. Why do I feel that this 'principled approach' to European Contract Law (or European Private Law in general) may not be successful?

The first reason is of a rather practical nature. The most important contribution to harmonisation of contract law in Europe up till now lies in the implementation of European Directives. These Directives are mostly concerned with consumer protection in very particular areas of contract law

---

<sup>1</sup> Ole Lando/Hugh Beale (eds.), *Principles of European Contract Law, Parts I and II Combined and Revised*, (Kluwer Law International, 2000).

<sup>2</sup> Ole Lando/Hugh Beale (eds.), *Principles of European Contract Law, Parts I and II Combined and Revised*, xxiii.

<sup>3</sup> See for a more detailed account – mostly discussing other objections – Jan M. Smits, *The Good Samaritan in European Private Law; on the Perils of Principles without a Programme and a Programme for the Future* (Kluwer, 2000).

(package travel, unfair terms, particular remedies of the buyer of consumer goods, etc.). This gradually leads to something that is systematically entirely different from national contract law as we know it. German, French, Dutch and even English contract law are now more or less supposed to be governed by general principles: common rules governing the formation of contract, the remedies of the contracting parties etc., *regardless* the type of contract involved. The Europeanisation of these national legal systems through Directives leads to the contrary: not a *uniform*, but a *diverse* contract law, in which for example important remedies in case of breach of consumer contracts for the sale of movable goods<sup>4</sup> are governed by different rules than these same remedies in case of other contracts (commercial contracts or consumer contracts *not* for the sale of movables). Likewise, the rules governing unfair terms in consumer contracts<sup>5</sup> are different from the ones governing unfair terms in other types of contracts, as there will be in the near future specific rules on the payment of debts for commercial transactions,<sup>6</sup> not covering consumer transactions. It is highly surprising that the Principles of European Contract Law do not take this *fragmented* approach into account and try to cover *all* contracts in a very generalised way, reminiscent of the national private law systems as they used to exist in the 19<sup>th</sup> and 20<sup>th</sup> century.

The second reason why the imposition of principles may not be the best way of proceeding toward a European Contract Law is of a more theoretical nature, but with important practical consequences. Today's Europe is immensely diverse. The legal systems of the fifteen European member-states many times differ to a great extent as to what is regarded as 'fair' and even as to what is regarded to be the proper function of law. I need not elaborate here on the famous point, made by Pierre Legrand, that in particular the civil law and the common law are unbridgeable in mentality and outlook. But also *within* the member-states, the concepts of fairness and law many times differ. I only need to mention that as a result of immigration of large groups of foreigners over the last decades, there are now within the European Union many different ethno-cultural groups with their own views of what is fair. This does not only apply to Family Law, but also to the Law of Contract: there *is* an Islamic view of when contracts should be binding (just as there is a common law- and a civil law view). Fairness nowadays is a pluralistic concept, or as Michael Walzer has put it: 'There is no single set of primary or basic goods conceivable across all moral and material worlds – or, any such set would have to be conceived in terms so abstract that they would be of

---

<sup>4</sup> Directive 1999/44 on Sale of Consumer Goods and Associated Guarantees.

<sup>5</sup> Directive 1993/13 on Unfair Terms in Consumer Contracts.

<sup>6</sup> Proposal for a European Parliament and Council Directive combating late payment in commercial transactions, COM(1998) 126.

little use in thinking about particular distributions'.<sup>7</sup> The making of *general* principles, destined to govern all these different sets, is not in line with this cultural diversity. This has for a practical consequence that a future European Contract Law has to take these differences into account. The imposing of principles cannot contribute to this goal since principles are inherently unable to represent diversity, unless they are indeed – as Walzer puts it – 'abstract.'

Both points lead me to the conclusion that a 'principled approach' to European Contract Law is not as useful as the Commission on European Contract Law believes it to be. There is great use in *drafting* principles for scholarly purposes, but looking at them as a precursor for an *imposed* law, is not in line with the needs of today's Europe. The English Privy Council has recently adopted a different approach, not one of promoting *uniformity* but of celebrating *diversity*. The Privy Council was driven to this by the belief that one uniform 'British' law could never take into account the diversity of socio-economic constellations within the English Commonwealth. Therefore, in the New Zealand case of *Invercargill City Council v. Hamlin*,<sup>8</sup> the Privy Council denied that there was only *one* common law. It accepted that the common law may differ, dependent on the 'general patterns of socio-economic behaviour'. Lord Lloyd of Berwick even held that 'the ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root, is not a weakness, but one of its great strengths'.<sup>9</sup> It led the court to apply a concept of *negligence* in New Zealand that is essentially different from the one in English law.

Would this approach of the Privy Council not be much more in line with the needs of the European Union as well? In any event, we should be aware of the dangers of looking at general principles as a precursor for a European Civil Code and celebrate diversity as a strength of a future common law for Europe.

---

<sup>7</sup> Michael Walzer, *Spheres of Justice: a Defense of Pluralism and Equality* (Basic Books, 1983), 8.

<sup>8</sup> *Invercargill City Council v. Hamlin*, [1996] 2 W.L.R. 367, [1996] A.C. 264.

<sup>9</sup> *Invercargill City Council v. Hamlin*, [1996] 2 W.L.R. 367, 376.