

# The Future of European Contract Law: on Diversity and the Temptation of Elegance

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## **The Future of European Contract Law: on Diversity and the Temptation of Elegance**

Discussion paper, to be presented at the conference Towards a European Ius Commune in Legal Education and Research, held at the occasion of the 20<sup>th</sup> Anniversary of the Maastricht Faculty of Law, 25-26 October 2001

Jan Smits  
Professor of European Private Law  
Maastricht University  
P.O. Box 616  
NL-6200 MD Maastricht  
[jm.smits@pr.unimaas.nl](mailto:jm.smits@pr.unimaas.nl)

### *Abstract*

This paper considers the future of contract law in Europe. With the recent publication of the European Commission's Communication on European Contract Law, the debate on the feasibility and contents of a unified European contract law will probably broaden from a merely academic debate to a political one. The main tenet of this paper is that a proper political perspective on the future of European contract law cannot consist of a 'generalizing approach' such as the formulation and enactment of principles of European contract law. The future of contract law in Europe lies in recognizing tendencies of *divergence* in the law of contract, rather than in enacting general abstractions. This plea for a fragmented European contract law is preceded by a sketch of the historical development toward a general law of contract.

## 1. Introduction

Most recently, the European Commission has published a Communication on European Contract Law.<sup>1</sup> This document can be seen as the starting point of a new era in the discussion on a uniform law of contract for Europe. Up till now, this discussion was to a large extent characterized by its academic character: whether a uniform contract law for Europe should be possible and what its contents should be, has been debated in the scholarly literature of the last decade. These questions did, however, not become important issues for European politics or even for legal practice. Thus, the calls by the European Parliament of 1989<sup>2</sup> and 1994<sup>3</sup> that work on a European Civil Code should begin, were not answered by the Commission or 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,<sup>4</sup> ‘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.<sup>5</sup> Now, the 2001 communication – that can be seen as the implementation of the Tampere conclusions – invites all interested parties to give their opinion on the future of contract law in Europe. These parties include 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.

This turn in the debate does not imply that the role of academia has become less important. To the contrary. Now more than ever should academics be critical of the path the European Commission will embark upon. Only then, a necessary counterweight to a too far-stretched belief in the feasibility of uniform law in the field of contract can be provided. This paper tries to provide such counterweight by stressing that the present ‘generalizing approach’ toward European contract law (this is the approach that seeks to formulate ‘principles’ of private law with a view to have national legal systems replaced by these) is not the right way to establish a common law for Europe. Instead, diverging tendencies should be stressed. A plea for such *divergence* can be found in section 3 of this paper. To understand what this plea for divergence is all about, a small historical survey of the development of contract law over the last few centuries is however necessary as well. Only with this survey, the idea behind the generalizing approach of contract law is to be understood properly. Thus, in section 2, a survey of *convergence* in European contract law over the last centuries is given. This sketch is preceded by an account of the present generalising approach toward European contract law.

## 2. Generalization in Contract Law: Present Approach and Historical Development

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<sup>1</sup> Communication from the Commission to the Council and the European Parliament on European Contract Law, COM (2001) 398 final. Also see [http://europa.eu.int/comm/consumers/policy/developments/contract\\_law/cont\\_law\\_02\\_en.pdf](http://europa.eu.int/comm/consumers/policy/developments/contract_law/cont_law_02_en.pdf).

<sup>2</sup> OJ 1989 C 158/400.

<sup>3</sup> OJ 1994 C 205/518.

<sup>4</sup> The Tampere summit was held on 15 and 16 October 1999; SI (1999) 800. Also see [http://europa.eu.int/council/off/conclu/oct99\\_en.pdf](http://europa.eu.int/council/off/conclu/oct99_en.pdf).

<sup>5</sup> 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 Chr. Von Bar.

## 2.1 The Emergence of European Contract Law over the Last Decade

The debate on European contract law as we have seen it emerge over the last decade is driven by at least two separate forces. To my idea, the most important of these is the coming into being of an academic debate on the feasibility and possible contents of a European contract law.<sup>6</sup> Not only have we seen the publication of textbooks on European contract law<sup>7</sup> and the launch of several scholarly projects, such as the Casebooks for the Common Law of Europe project,<sup>8</sup> the Trento Common Core project<sup>9</sup> and the study group on a European Civil Code,<sup>10</sup> we have also been witness of the publication of various sets of principles of contract law.<sup>11</sup> In overlooking all these initiatives, it seems as if the desire of Zimmermann ‘to concentrate one’s attention, for once, (...) on proximity and similarities’<sup>12</sup> rather than on differences, is satisfied in much of the present day writing on comparative law. Although most of the time differences among the legal systems are still recognized, the desire in most of these projects is indeed to find commonalities and to look at differences as exceptions to common cores.

The other important factor is the ever greater use of directives as an instrument for the harmonization of contract law. Thus, since 1985 a whole range of directives has been issued. These directives concern in particular protection of consumers in the field of doorstep sale,<sup>13</sup> consumer credit,<sup>14</sup> package travel,<sup>15</sup> unfair contract terms,<sup>16</sup> distance contracts<sup>17</sup> and sale of goods<sup>18</sup> as well as regulation of self-employed commercial agents,<sup>19</sup> timeshare,<sup>20</sup> electronic

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<sup>6</sup> For an overview of this debate see, among many others, J. Smits, *The Making of European Private Law*, Antwerpen/Apeldoorn 2001 (forthcoming English translation of *Europees privaatrecht in wording*, 1999) and C. Schmid, The Emergence of a Transnational Legal Science in European Private Law, 10 *Oxford Journal of Legal Studies* (1999) 673.

<sup>7</sup> Notably H. Kötz, *Gemeineuropäisches Vertragsrecht* Bd. I, Tübingen 1996 (translated as *European Contract Law* Vol. I, Oxford 1997); B. Markesinis, W. Lorenz and G. Dannemann, *The Law of Contracts and Restitution: a Comparative Introduction*, Oxford 1997; cf. A. Hartkamp et al (eds.), *Towards a European Civil Code*, 2nd ed., Nijmegen 1998.

<sup>8</sup> The volume on contract law is set to be published in 2001. See for the project W. van Gerven, Casebooks for the common law of Europe; presentation of the project, 4 *ERPL* (1996) 67.

<sup>9</sup> On which M. Bussani/U. Mattei (eds.), *Making European Law*, Trento 2000. Two volumes, both on contract law, have now been published: R. Zimmermann/S. Whittaker (eds.), *Good Faith in European Contract Law*, Cambridge 2000 and J. Gordley (ed.), *The Enforceability of Promises in European Contract Law*, Cambridge 2001.

<sup>10</sup> On which C. Von Bar, Le Groupe d’Études sur un Code Civil Européen, *RIDC* 2001, 127. Also see the Vienna Tilburg project on principles of European tort law, on which J. Spier/O. Haazen, The European Group on Tort Law (‘Tilburg Group’) and the European Principles of Tort Law, 7 *ZEuP* (1999) 469.

<sup>11</sup> *Unidroit Principles of International Commercial Contracts*, Rome 1994; O. Lando/H. Beale (eds.), *Principles of European Contract Law*, Parts I and II, Combined and Revised, The Hague 2000; G. Gandolfi (ed.), *Code européen des contrats*, Milano 2001.

<sup>12</sup> R. Zimmermann, *The Law of Obligations*, Cape Town 1990, xi. Cf. Zweigert/Kötz, *An Introduction to Comparative Law*, 3rd ed., Oxford 1998, 40 who also argue for a *praesumptio similitudinis* in doing comparative law research.

<sup>13</sup> Directive to protect the consumer in respect of contracts negotiated away from business premises (85/577; *OJ* 1985 L 372/31).

<sup>14</sup> Directive for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (87/102; *OJ* 1987 L 42/48).

<sup>15</sup> Directive on package travel, package holidays and package tours (90/314; *OJ* 1990 L 158/59).

<sup>16</sup> Directive on unfair terms in consumer contracts (93/13; *OJ* 1993 L 95/29).

<sup>17</sup> Directive on the protection of consumers in respect of distance contracts (97/7; *OJ* 1997 L 144/19).

<sup>18</sup> Directive on certain aspects of the sale of consumer goods and associated guarantees (1999/44; *OJ* 1999 L 171/12).

<sup>19</sup> Directive on the co-ordination of the laws of the Member States relating to self-employed commercial agents (86/653; *OJ* 1986 L 382/17).

commerce<sup>21</sup> and combating late payment in commercial transactions.<sup>22</sup> An ever greater part of contract law is thus governed by European legislation.

For the purpose of this paper, it is important to have a closer look at the Principles of European Contract Law (PECL) in particular. It does not come as a surprise that the PECL have had a favourable reception in (at least) academic circles. For the two main factors that have driven the development of contract law in Europe leave a vacuum. On the one hand, there is the academic debate as such, in which similarities and differences between the various European legal systems are discussed – though without much impact on legal practice. On the other hand, there is the very real impact of European directives on national legal systems. One can maintain that the most successful part of present day European contract law is made up of these directives – they have led to a true harmonization, be it of an often non-consistent,<sup>23</sup> sometimes disturbing<sup>24</sup> and definitely fragmentary<sup>25</sup> nature. In between the two, there is a vacuum that can be filled up by principles. These are based on comparative law research, but have definite practical aspirations. According to the drafters of the Principles of European Contract Law (PECL), the principles can – among other functions – provide a ‘general contract law infrastructure’ for European directives.<sup>26</sup> In doing so, the PECL build a bridge between comparative scholarship and practice, in which the European directives have to be applied.

But there still is another reason for the favourable reception of the PECL. Laying down the law in general principles seems to fulfil the desire of many jurists and lawyers to present the law in a concise and elegant way. Vis-à-vis the chaotic mass of comparative law materials – sixteen European legal systems,<sup>27</sup> all with their own structure, legal culture, terminology, detailed statutory rules and case law – any attempt to distil general principles is welcomed. This is in particular true for one type of provisions of the PECL: those that try to lay down the common core of Europe’s national legal systems (the greater part of the PECL’s provisions). Other articles provide us with a ‘progressive’ development from that common core – giving these provisions a different character, namely much more the drafters’ view of what the future law in Europe *should* be, instead of trying to restate the *present* law.<sup>28</sup>

This approach of distilling principles from one or more legal systems can be characterized as a generalizing approach. It tries to leave out as many details as possible in order to describe the law in a consistent, smooth and elegant way. Other examples of this approach include the work of the study group on a European Civil Code. Within this group, it is also tried to distill common denominators from the various legal systems.<sup>29</sup> In the European Commission’s

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<sup>20</sup> 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 timeshare basis (94/47; *OJ* 1994 L 280/83).

<sup>21</sup> Directive on certain legal aspects of information society service, in particular electronic commerce, in the Internal market (2000/31; *OJ* 2000 L 178/1).

<sup>22</sup> Directive on combating late payment in commercial transactions (2000/35; *OJ* 2000 L 200/35). All the above directives have been reproduced in Dutch in J. van Erp/J. Smits (eds.), *Bronnen Europees privaatrecht*, Den Haag 2001.

<sup>23</sup> Also recognized in the Commission’s Communication on European Contract Law, 15, 16.

<sup>24</sup> See in particular G. Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 *MLR* (1998), 11 (on the disturbing effect of the Unfair Terms directive on English law).

<sup>25</sup> O. Remien, *Über den Stil des europäischen Privatrechts*, 60 *RabelsZ* (1996), 8: ‘a few Brussels bricks here and there’. In general on the use of directives: P.-C. Müller-Graff, *EC Directives as a Means of Private Law Unification*, in: Hartkamp et al (eds.), *Towards a European Civil Code*, 2nd. ed., The Hague 1998.

<sup>26</sup> Lando/Beale (eds.), xxii.

<sup>27</sup> Those of the 15 European Member States, of which the United Kingdom has two legal systems, namely English law and Scots law.

<sup>28</sup> For the distinction between the two, see Lando/Beale (eds.), xxiv.

<sup>29</sup> Cf. Chr. Von Bar, *Konturen des Deliktsrechtskonzeptes der Study Group on a European Civil Code – Ein Werkstattbericht*, *ZEuP* 2001, 515. Also see <http://www.ecc.kub.nl>.

Communication on European Contract Law, one of the options for future EC initiatives in contract law is to replace existing national law by a set of principles or an other set of rules.

To get a good insight into this in importance ever increasing approach, it is necessary to sketch the origins of this generalizing approach toward contract law. Thus is done in a small historical excursion.

## 2.2 Historical Background of the Present Approach (National Legal Systems)

### A. Orthodox Contract Doctrine: a General and Consistent Contract Law<sup>30</sup>

The generalizing approach toward the law of contract – that is the approach that describes contract law as a consistent whole and as founded on general principles – is the prevailing view in Europe's national legal systems. In present day contract law systems of the European countries, it is hardly debated that there is a general set of rules and principles that is applicable to all contracts and that is consistent in structure and outlook. The way I see it, this 'general part of the law of contract' exists of a combination of structure and principles. Contract law is structured according to the chronology of the contract itself: it contains rules on consecutively formation, contents (including interpretation) and (non-)performance. This structure is adhered to for all types of contracts, including those where formation exists in a simple handing over of the good (as in real contracts) or where the contents of the contract is to a large extent made up of mandatory law. Apart from this structure, contract law is usually looked at as governed by three general principles: freedom of contract, binding force and absence of formalities (consensualism).<sup>31</sup> Again, these principles are presented as underlying all types of contracts. They are also presented as a consistent whole: every contract with *this* desired contents is in principle binding for the parties because the will thereto has been freely formed.

This idea of a consistent general part of contract law is the best identifiable in the continental Civil Codes and in civil law textbooks. It has found its apotheosis in the German Bürgerliches Gesetzbuch of 1900 with its 'General Part' of Book I and its classification of legal acts and contracts. This structure has been taken over by various other codes. Thus, the layered structure of the Dutch Burgerlijk Wetboek of 1992 implies that the more general provisions on legal acts of Book 3 precede the more specific provisions on contracts in Book 6, Title 5 and the even more specific provisions on special contracts in Book 7. The provisions on legal act and contract together make up for the general part of contract law that is applicable if it is not departed from in more specific provisions.

Also in textbooks (and thus in legal education), contract law is usually treated as a whole of general and specific rules, the premise being that a consistent and uniform *general* law of contract is at the basis of every specific contract type. Thus, many continental textbooks discuss 'the contract' as a general concept next to 'the general principles' of contract.<sup>32</sup> But this unified structure of contract law also exists in the common law.<sup>33</sup> Also the few 'European' textbooks adhere to this approach.

The reasons for this way of discussing contract law seem to be self-evident. If for example the defects of consent were only regulated for the sales contract, it would mean that uncertainty exists as to their applicability by way of analogy to other contracts or to other legal

<sup>30</sup> The following is a summary of J. Smits, *Eenheid en verscheidenheid in het contractenrecht*, 27 *R & R* (1998) 10.

<sup>31</sup> Cf. Asser-Hartkamp II, no. 34 ff.; see below for references to other textbooks.

<sup>32</sup> J. Ghestin, *Traité de Droit Civil, La Formation du Contrat*, 3. ed., Paris 1993; F. Terré/P. Simler/Y. Lequette, *Droit civil: les obligations*, 7<sup>e</sup> éd., Paris 1999, no. 16 ff; Esser/Schmidt, *Schuldrecht, Bd. I: Allgemeiner Teil, Teilband 1*, 8. Aufl., Heidelberg 1995; K. Larenz, *Lehrbuch des Schuldrechts, Bd. 1, Allgemeiner Teil*, 14. Aufl. München 1987; Asser-Hartkamp II, no. 8 ff and no. 77 (cf. no 1: 'We will therefore discuss in this book the rules applicable to all contracts').

<sup>33</sup> Cf., e.g., G. Treitel, *The Law of Contract*, 10th ed., London 1999.

acts. Apart from efficiency (only the diverging provisions need to be regulated for the special contract), a reason for the legislator to create a general part of contract law is this evasion of uncertainty and the creation of transparency.<sup>34</sup> In legal doctrine it is (apart from simply adhering to the code's structure) in particular the wish to offer a structure as logical as possible.

How has this general and consistent doctrine come about? Wightman has stated that 'Contract is unusual in having an integrated structure which fits all the various topics together as aspects of the same thing'.<sup>35</sup> That calls for a further investigation.

### B. Generalisation in Contract Law: a History of Modernism

It is well known that contract law as it existed in Roman times and as it was received in Europe, was characterized by many different types of contract.<sup>36</sup> Only when a contract could be accommodated within one of these categories, the creditor could enforce it. This implied that real contracts (such as bailment, gratuitous loan and pledge) stood next to consensual contracts (like sale, lease and partnership), oral contracts (*stipulatio*) and written contracts. Each and every contract type had its own rules; general rules did not exist, leave alone that there was a general principle that every contract (*pactum nudum*) was enforceable. In other words: until the 16th century or so, there was no general or consistent law of contract. The question whether the existing types of contract had anything in common simply did not rise.<sup>37</sup>

This diversity gradually disappeared after 1600. It is interesting to note that this occurred under the influence of general philosophical ideas. Preceded by Humanist influence of authors like Donellus (1527-1591) and Cujacius (1522-1590), it was in particular Descartes (1596-1650) who with his *Discours de la Méthode* (1637) made the great breakthrough toward a Modernist worldview. Descartes and his disciples did not only strive toward absolute certainty in the field of the natural sciences (compare Galilei and Newton) and political theory (Hobbes), but they wanted to systematize the whole world *more geometrico*. This implied that all irrelevant ('arbitrary') details would be eliminated from the period in which these existed: thus, universal principles could be set free from their context and be given a universal character.<sup>38</sup> Toulmin has called this the abstraction of problems from their specific situation in space and time<sup>39</sup> a typical characteristic of the theory centered philosophy of Modernism.<sup>40</sup> It was 'a quest for reason, unity and universality of values, laws and knowledge'.<sup>41</sup>

The law of contract was not untouched by this development. Since Spanish scholasticism and continued by Grotius (1583-1645) and Samuel Pufendorf (1632-1694), a general theory was planted underneath the specific contract types. In accordance with the mathematical method, an axiomatic system of natural law was developed with a claim to absolute validity. Van der Walt notes:<sup>42</sup>

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<sup>34</sup> These two reasons were explicitly mentioned in making the new Dutch Civil Code: see *Parlementaire Geschiedenis Boek 3*, Deventer 1981, 157-158 and *Boek 6*, 47.

<sup>35</sup> J. Wightman, *Contract: A Critical Commentary*, London 1996, 13.

<sup>36</sup> See, among others, R. Feenstra, *Pact and Contract in the Low Countries from the 16th to the 18th century*, in: J. Barton (ed.), *Towards a General Law of Contract*, Berlin 1990, 197 and in particular James Gordley, *Natural Law Origins of the Common Law of Contract*, in: idem, 367.

<sup>37</sup> Gordley, 372: 'The Romans had worked out these rules ad hoc without trying to explain why a given transaction should be binding on consent, on delivery, or through a formality'.

<sup>38</sup> S. Toulmin, *Cosmopolis: The Hidden Agenda of Modernity*, New York 1990, 31.

<sup>39</sup> Toulmin, 22.

<sup>40</sup> Toulmin, 11.

<sup>41</sup> C. van Peursen, *Na het postmodernisme*, 6th ed., Kampen 1995, 21 (original in Dutch).

<sup>42</sup> A. van der Walt, *Marginal notes on powerful(l) legends: Critical perspectives on property theory*, 58 *THRHR* (1995) 402.

‘Many theorists wanted to ensure that choices among competing rights are constrained by clear and unambiguous principles, so that judicial judgment could be separated from the uncertainties of political rhetoric and metaphysical theory. The lawyers of the Enlightenment were, in a word, looking for a legal science in which certainty was guaranteed through method. Ever since the Enlightenment this implied that the legal story (...) would have to be transformed from a religious fable into a scientific dissertation’.

Present day contract law can only be properly understood if it is realized that this quest for reason, unity and universality that began in the 16th century still continues. The ‘project’ of Enlightenment<sup>43</sup> still exists where there is a search for rational principles for the whole of the law of contract with a claim to permanent validity. It is then not even relevant *which* principles are derived at. That for example a principle like the general enforceability of contract was detached from the details that were regarded as irrelevant (thus: did not fit into the idea that each and every contract validly entered into should be enforceable), was understandable from a viewpoint of the development of commerce, but it was not essential to the Modernist method itself.

This scholarly worldview was perfected in the centuries that followed. Through the work of Thomasius (1655-1728), Wolff (1679-1754), Domat (1625-1696) and Pothier (1699-1772), private law was more and more presented as a deduction out of universal norms. But of course its apotheosis was in 19th century Germany. The legal method of the Pandectists became nearly the same as the method of mathematicians.<sup>44</sup> Thus, in Savigny’s *System*,<sup>45</sup> with the introduction of the legal relationship (‘Rechtsverhältnis’) and of the legal act (‘Rechtsgeschäft’) as new *genus*, the pyramid of concepts was extra underpinned by abstractions that legal practice did not need. Most of the national textbooks of the 20th century only elaborated this further. The separate types of contract, each of them governed by their own rules, have become a uniformly structured and consistent set of principles of contract law.

It should be stressed that the above development was not restricted to the European continent. Also in English law, the existing casuistry was eliminated, be it much later than in the civil law countries. Until Blackstone’s systematic *Commentaries on the Laws of England* (1765-1770), contract law lacked a structure. There was only a list of claims (actions) that was ‘something of a nightmare’<sup>46</sup> from an educational point of view. Classic Roman law and English law thus indeed breathed the same air.<sup>47</sup> It was only with the influence of the Analytical Jurisprudence of John Austin (1790-1859) that a general theory of contract law could come into being, in particular thanks to authors like Pollock and Anson.<sup>48</sup> Gordley is right to state that:<sup>49</sup>

‘These authors describe general contract law without trying to relate it to the law of sales, the law of leases, and so forth (...). (They) were unable to bridge the gap between their general principles of contract and the laws of particular contracts. Consequently, their efforts to develop systematic contract doctrine were concentrated on the general law of contracts which bulked ever larger in the treatises as time went on’.

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<sup>43</sup> Cf. J. Habermas, *Die Moderne – ein unvollendetes Projekt*, in: id., *Kleine Politische Schriften*, Frankfurt 1981, 444. Cf. A. MacIntyre, *Whose Justice? Which Rationality?*, London 1988, 254: ‘the overambitious rationalist metaphysical constructions...’.

<sup>44</sup> On Savigny’s mathematical method: see L. Winkel, *l’Histoire du droit, exemple d’une science interdisciplinaire*, *Sartonia* 1996, 133.

<sup>45</sup> F. von Savigny, *System des heutigen Römischen Rechts*, Berlin 1840-1849, e.g. Vol. I, 1840, 334 ff.

<sup>46</sup> G. Samuel, *The Foundations of Legal Reasoning*, Antwerpen 1994, 72.

<sup>47</sup> F. Pringsheim, *The Inner Relationship Between English and Roman Law*, *Cambridge LJ* 1935, 347.

<sup>48</sup> *Principles of Contract at Law and in Equity*, 1876 and *Principles of the English Law of Contract and of Agency in its Relation to Contract*, 1879.

<sup>49</sup> Gordley, 446.



This does not mean that these details do not play a role in adjudicating concrete cases, but it does mean that they have been eliminated from the description of contract law at the national level. The general theory of contract thus serves three purposes: to know, teach and determine the positive law.<sup>50</sup> It is not only descriptive, but also prescriptive: it shows how the law should be and thus points the way for legal practice.

This process of generalization of contract law is still going on. It takes place in at least two different ways.

First, the concept of contract is broadened to other relationships. Where the general part of contract law was developed on the basis of the common characteristics of the then existing types of contract, this general theory is now more and more being applied to the 'relationships' of marriage and company. This is also pleaded for by the American 'contrarians'.<sup>51</sup> Within marriage, there should be more place for contracting about various things (arbitration, regulation of holidays or even length of the marriage).<sup>52</sup> According to them, the use of the 'neutral' contract law would make it possible to eliminate the favourable position of the man compared to the woman.<sup>53</sup> Thus, marriage is just another type of contract, governed by the general part of contract law. In the US, it has also been defended that a company should be looked at as a 'nexus for a set of contracting relations'<sup>54</sup> between shareholders, managers, employees and creditors. These would have a greater incentive to create efficient relationships if they can do so themselves if compared to the alternative of statutory intervention. The present statutory separation of property (of shareholders) and management (of managers) is regarded as too interventionist. To them, buying shares in a company is just another case of contracting.

Of more interest for the purpose of this paper is the second way in which the general part of contract law is still being broadened. While in previous times the generalization was from specific contracts to a general contract law *within one legal system*, with the drafting of principles of European contract law, an abstraction from national legal systems as such has begun to take place. The generalization has now begun to take place at the European level. This still is a quest for 'reason, unity and universality' and thus still expression of a theory centered contract law. Trying to draft principles of European Contract Law (or any other initiative aiming at distilling rules or principles from national legal systems) is part of this Modernist tradition.

This is not the place to criticize the idea of generalization in contract law as such. This has been done by Savaux, who has stated that the general law of contract is nothing but a 'droit commun des amphithéâtres et des livres.' According to Savaux, the general part offers 'une cohérence, des régularités que la simple réalité brute ne livre pas'.<sup>55</sup> Collins is of the same conviction for English law, telling us that 'students learn in their early years a misleading and almost irrelevant set of rules'.<sup>56</sup> The remainder of this paper is devoted to a more specific criticism of the use of principles as a way to describe European contract law.

### **3. A Critique of Generalization: Why the Use of Principles is not the Right Way Toward a New *Ius Commune***

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<sup>50</sup> See É. Savaux, *La théorie générale du contrat, mythe ou réalité?*, Paris 1997, 25 ff.

<sup>51</sup> R. Hillman, *The Richness of Contract Law*, Dordrecht 1997, 79 ff.

<sup>52</sup> Hillman, 86 ff.

<sup>53</sup> L. Weitzman, *The Marriage Contract*, New York 1981.

<sup>54</sup> W. Bratton, 'The "Nexus of Contracts" Corporation: A Critical Appraisal', 74 *Cornell LR* (1989) 407. Cf. F. Easterbrook and D. Fischel, *The Economic Structure of Corporate Law*, Cambridge Mass. 1991.

<sup>55</sup> Savaux, 9. Also see Smits, 27 *R & R* (1998) 10.

<sup>56</sup> The subject is of 'sublime irrelevance': H. Collins, *The Law of Contract*, 2nd ed., London 1993, xi.

Now that the method of drafting principles has been put into a historical perspective – it should be seen as a direct consequence of the quest for rationality and unity that began in the 16th century – it seems appropriate to ask whether this method is still the right one to build a future European *ius commune* with. This seems to be the prevailing view, held by Zimmermann<sup>57</sup> and many others. What is questioned in this paper, is whether this presentation of contract law in Europe as a general and consistent whole is not a surrender to ‘the temptation of elegance’ that Lord Goff has spoken of in his famous Maccabean lecture of 1983.<sup>58</sup> In this lecture, Goff questioned the use of systematization in the law: the more elegantly and concisely the law is formulated, the more convincing the rule is, but it then also becomes less effective. For, according to Goff, ‘the law has to reflect life in all its untidy complexity’.

In the following, several arguments against the use of principles in European contract law are presented. What all these arguments come down to, is that present day contract law in Europe is too divergent to have it unified by way of principles. Still, the various arguments are different in character.

### **3.1 First Diverging Tendency: the Abstract Character of Principles and the Importance of Recognizing Differences among Legal Systems**

My first objection against the use of principles is directed toward their too abstract character.<sup>59</sup> In a national legal system, one can ask whether the general part of contract law is not *too* general in view of the great variety of specific contracts. What do the international joint venture, the purchase of peanut butter in a supermarket, the building contract and the labour contract have in common? Their commonalities only exist at a very abstract level. The same is true of European principles. The drafting of these inherently forces us to leave out as many differences between the national legal systems as is reasonably possible with the consequence that they do not give us much information anymore on what the European position actually is.

This can be illustrated by Article 2:301 PECL on negotiations contrary to good faith. It is well known that the various European systems differ as to the question whether such liability should exist. Generally speaking, in the civil law countries such liability is recognized, be it under different conditions and with allowing different remedies in each individual country. English law however abstains from accepting a general principle to negotiate in good faith (although it may be willing to accept a precontractual liability by virtue of an implied contract or negligence).<sup>60</sup> In Article 2:301 PECL, the following common denominator is provided:

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

It is beyond doubt that this provision in a sense states the European common core. Both the civil law and the common law position are definitely stated correctly in section (1). Section (2) is

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<sup>57</sup> R. Zimmermann, *The Civil Law in European Codes*, in: D. Carey Miller/R. Zimmermann (eds.), *The Civilian Tradition and Scots Law*, Berlin 1997, 278.

<sup>58</sup> R. Goff, *The Search for Principle*, Maccabean Lecture in Jurisprudence, in: *Proceedings of the British Academy*, Vol. LXIX (1983), 169, 174 (reprinted in: W. Swadling and G. Jones (eds.), *The Search for Principle*, Oxford 1999, 313).

<sup>59</sup> The following is partly based on J. Smits, *The Good Samaritan in European Private Law*, Deventer 2000.

<sup>60</sup> For details, see R. Zimmermann/S. Whittaker (eds.), *Good Faith in European Contract Law*, Cambridge 2000.

however a real trade-off between the two legal traditions. On the one hand, the civil law is satisfied by the rule that conduct contrary to good faith may lead to liability, even *before* there is a contract (although it does leave open when this is exactly the case – a question that is answered differently in each civil law country). On the other hand English law is stated correctly as well in the sense that if good faith and fair dealing does not require English contracting parties to negotiate in a certain way, liability will simply not arise under this provision. Thus, the article probably does neither grasp the civil law nor the common law mentality. There is much more to these systems than just the commonality stated here. It is a *thin* description as opposed to a *thick* one,<sup>61</sup> as is also the case with many other provisions of the PECL.

This analysis of the PECL can be supported by philosophical insights. Presenting law through principles is what Clifford Geertz has called a ‘skeletonization of fact’: moral dilemmas are reduced to abstractions. Legrand rightly quotes Friedman where he says that to reduce the law in this way is very much like the work of the old system builders (of Modernist times, indeed) that ‘took fields of living law, scalded off their flesh, drained off their blood, and reduced them to bones’.<sup>62</sup> Many details (that actually amount to national *practical wisdom*) are thus left out in an exercise that is primarily concerned with looking for *consensus*: making common principles is inherently a quest for the common denominator. This approach seems to have become the prevailing one of some leading comparatists. The well-known textbook of Zweigert and Kötz indeed departs from this ‘*praesumptio similitudinis*’: in their functional approach, the comparatist can only be satisfied if his research leads to the conclusion that the systems he has compared reach the same or similar practical results.<sup>63</sup> From a pure scholarly point of view, there is nothing wrong with this because it may help us to better understand the law. But if these principles or ‘similar results’ are subsequently used in a *political* way and prescribed to national communities (where they replace national legal systems), the warning of Paul Feyerabend becomes of paramount importance.<sup>64</sup>

‘A society that is based on a set of well-defined and restrictive rules, so that being human becomes synonymous with obeying these rules, forces the dissenter into a no-man’s-land of no rules at all and thus robs him of his reason and his humanity (...). Remove the principles, admit the possibility of many different forms of life’.

The principles approach is thus directed toward the finding of an intermediate position. It may very well not be the *best possible rule* that prevails, but the rule on which consensus can be reached, indeed leaving out the ‘flesh and blood’ of national legal systems.<sup>65</sup>

Here, it is important to note that the present indeterminacy of national contract law at the level of rules (the too general character of contract law) does not prevent the national courts from doing justice on the basis of the value judgments (the ‘national morality’) that underpin each national private law system. These judgments should – in the end – be decisive for the outcomes that the courts reach. And in national legal systems, they probably *are* decisive, because of the simple fact that the courts are aware of their own national culture (if you like: morality, *Volksgeist* or *mentalité*) in which the rules are embedded. That these judgments often do not come to the surface on the level of the black letter law, does in this respect not pose a true danger for the parties’ interests (although it *is* a danger from a viewpoint of a transparent and consistent national private law). This is different however if the private law rules are cut loose from their

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<sup>61</sup> G. Ryle, as quoted in C. Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in: *The Interpretation of Cultures*, New York 1973, 3.

<sup>62</sup> Friedman, cited in P. Legrand, *Against a European Civil Code*, 60 *MLR* (1997), 59.

<sup>63</sup> Zweigert/Kötz, 40.

<sup>64</sup> P. Feyerabend, *Against Method*, 3rd. ed., London 1993, 162-163.

<sup>65</sup> R. Hyland, *Comparative Law*, in: Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, Cambridge Mass. 1996, 190 calls this ‘reductionism.’

national cultural embedment and presented as European principles that are presented as being able to replace national systems. Such a venture can only be undertaken if the distilling of common denominators goes hand in hand with the development of a uniform European mentality.<sup>66</sup>

To sum up: replacing national legal systems with European principles will not lead to unification, but will most probably have the opposite effect. National experience in adjudicating cases will be destroyed, leaving national legal practice with no other alternative but to apply abstract norms in a European legal culture that it probably does not know and that possibly not exists. This can only have adverse effects on legal certainty and legal unity in Europe. Thus, there will only be a unification at the abstract level (providing us with a 'thin description'), not in practice itself.

### 3.2 Second Diverging Tendency: the Influence of Directives on National Contract Law

A second objection against the use of Principles as a means of creating a European *ius commune*, is of a much more practical nature. It takes as a starting point the harmonized law that is already there by way of European directives. Undoubtedly, this part of European private law is the most successful in the sense that here a true harmonization has taken place.<sup>67</sup> This harmonization leads away from the generalizing approach because contract law is ever less governed by general principles and ever more subdivided into separate parts, each having their own rules.<sup>68</sup>

This gradually leads to something that is systematically entirely different from national contract law as we know it. As we have seen in section 2, German, French, Dutch and English contract law are now more or less supposed to be governed by general principles: common rules govern the formation of contracts, govern the remedies of the contracting parties, govern the way of interpretation 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>69</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>70</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>71</sup> not covering consumer transactions. One could also point at the formation of distance contracts<sup>72</sup> or at the time of formation of contracts by electronic means,<sup>73</sup> both regulated in a different way than other contracts. This tendency toward divergence is reinforced by the fact that it is the European Court of Justice that has the final word on the interpretation of these directives.

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 generalized way, reminiscent of the national private law systems as they have existed for several centuries. Even most of the directives that were issued before the publication of the PECL have not been taken into account by the drafters. The directive on sale of consumer goods as it has to be implemented

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<sup>66</sup> Cf. P. Legrand, *Against a European Civil Code*, 60 *MLR* (1997), 60: 'What point, then, is a unitary text of reference in the absence of a unitary rationality and morality to underwrite and effectuate it?'

<sup>67</sup> Be it with its own disadvantages. Cf. Smits, *The Making of European Private Law*, Chapter 1.

<sup>68</sup> Cf. J. Smits, Editorial: A Principled Approach to European Contract Law?, 7 *MJ* (2000), 221.

<sup>69</sup> Directive 1999/44 on sale of consumer goods and associated guarantees.

<sup>70</sup> Directive 1993/13 on unfair terms in consumer contracts.

<sup>71</sup> Directive 2000/35 on combating late payment in commercial transactions.

<sup>72</sup> Directive 97/7 on the protection of consumers in respect of distance contracts. According to art. 6 of this directive, a consumer can still withdraw from the contract within 7 working days after delivery of the good.

<sup>73</sup> Directive 2000/31 on electronic commerce.

by 1 January 2002, providing a detailed set of rules specifically for consumer sale of movables (including a hierarchy of actions), of course gives a much more accurate picture of what a European contract law looks like than the PECL (that still adopt the principle (*sic!*) of free choice of action in art. 8:101).<sup>74</sup> The other way around, it seems that in drafting directives, the system and terminology of the PECL are not taken into account either.

### 3.3 Third Diverging Tendency: Consumer Contract Law and Business Contract Law. The Double Structure of the Law of Contract

A third argument that carries us away from the general approach of drafting general principles for a European Contract Law, exists of the recognition that over time two sorts of contract law have come to exist in the various national legal systems. These are on the one hand a consumer contract law and on the other a specific law of contract for professional parties.

Apart from the influence of European directives on contract law (mostly in the field of consumer protection), in the national legal systems a separate consumer contract law has come to exist as well. This was put into place by specific statutes (in particular in the field of general conditions – like the German AGBG, the French art. L 132-1 ff. of the Code de la Consommation and the English Unfair Contract Terms Act – and consumer sale), but also by the national courts that tend to protect individual consumers to a much greater extent than they protect professional parties in interpreting contract terms, applying good faith, etc.

The emergence of a specific consumer contract law as distinguished from a business contract law does not come as a surprise. Already in 1952, Kessler has pointed to the ambiguous character of contract law:<sup>75</sup> on the one hand it guarantees that parties are able to contract in freedom by attributing binding force to contracts validly entered into. On the other hand, it also regulates this freedom by not allowing *every* contract to be enforceable. This *double structure* of autonomy and intervention could also be phrased as one of economic rationality (efficiency) on the one hand and social rationality (distributive justice) on the other.<sup>76</sup>

Thus, part of contract law is governed by the morality of trade.<sup>77</sup> If parties contract in order to make profit, this has considerable influence on their contractual relationship. In trade, one usually does not contract in order to obtain a specific good, but is contract a means to a goal, the making of profit. If the debtor does not perform, it is only a case of bad luck: the loss should be foreseen and is usually covered by insurance.<sup>78</sup> If parties search for this economic rationality by making a commercial contract, the law should adjust to their wish. Thus, interpretation of contract terms should take place as literally as possible and the role of good faith should be restricted. Nineteenth century contract law was developed for this type of contracts.<sup>79</sup>

This morality of trade is to be distinguished from the morality of the welfare state. There, making profit is not the goal of contracting, but it is to arrange for ‘living, working, life and health’.<sup>80</sup> If the professional party does not act in conformity with the contract, the well-being of the individual may be threatened. Here, the law *has* to be paternalistic to serve its function. This

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<sup>74</sup> Although the action for price reduction and the concept of fundamental non-performance have been laid down in both the PECL (art. 9:401 and 8:103 jo. 9:301) and the directive.

<sup>75</sup> F. Kessler, Freiheit und Zwang in nordamerikanischen Vertragsrecht, in: *Festschrift für Martin Wolff*, Tübingen 1952, 67 ff.

<sup>76</sup> Cf. Chr. Joerges, *The Europeanization of Private Law as a Rationalization Process and as a Contest of Disciplines* [EUI Working Paper Law No. 94/5], 15.

<sup>77</sup> Wightman, 96 ff distinguishes in this respect between ‘personal’ and ‘commercial’ contract.

<sup>78</sup> Cf. Wightman, 97.

<sup>79</sup> Cf. however H. Collins, Formalism and Efficiency: Designing European Commercial Contract Law, 8 *ERPL* (2000) 211.

<sup>80</sup> ‘Wonen, werken, leven en gezondheid’: see J. Vranken, *Mededelings-, informatie- en onderzoeksplichten in het verbintenissenrecht*, Zwolle 1989, nr. 27.

new type of contract law is still in its infancy and should be further developed. For both moralities distinguished here, deserve to have their own contract law. What does a contract with which one wants to make profit have in common with one to ensure enjoying the comfort of having a house to live in or having a medical insurance? What has marriage in common with buying shares in a company?

If a European private law would consist of principles as envisaged by the Commission on European Contract Law, this double structure of contract law would not come to the surface. The PECL are intended to have value for any type of contract, regardless who the parties are.<sup>81</sup> Again, this type of generalization conceals the conflict between the two types of contract law. This may be done deliberately in order to give the principles universal value, or, in the words of Epstein about the people that contract law gives rules for:<sup>82</sup>

‘These people are colorless, odorless, and timeless, of no known nationality, age, race or sex. These people are self-conscious abstractions known to be false as representations of people in the world, and useful precisely because they are so detached from any grubby set of particulars (...). There is a cold, practical logic behind this remorseless search for abstractions. (...) This massive oversimplification of the social universe treats all persons as though they are as fungible as the letters of the alphabet, and thus ignores or rejects every effort to force the common law to take into account the difference between an individual worker of limited means and a huge industrial corporation.’

But even if done deliberately, the effect of it in the European context is doubtful. As I have stated already in section 3.1, I do understand why, within one national legal system, courts are able to work with these abstractions: because they know about the national mentality underlying it. They know in their national context when the morality of the market becomes more important than the morality of the welfare state. This is the case because the double structure of efficiency and distributive justice has led to a specific national fragile equilibrium that is in accordance with the socio-economic constellation of the country involved. This common socio-economic constellation is missing in Europe, which probably makes principles too abstract to build a European private law with.<sup>83</sup>

### **3.4 Fourth Diverging Tendency: the Diversity of Sources of European Private Law**

Another tendency that rather leads to divergence than to unity in contract law, has to do with the sources that European private law is made up of. These sources are of a very diverse character. Apart from European directives (and possibly regulations in the years to come), European contract law is made up of national rules on contract law, international conventions, case law of the ECJ and even of the ECHR, and a whole lot of other, more informal sources like commercial customary law, standardized general conditions, arbitral awards and standardized rules of professional organizations like the International Chamber of Commerce. This variety of sources is not represented adequately by laying down the present state of the law in static principles – even if these are ‘designed to provide maximum flexibility and thus to accommodate future developments’, as the drafters state.<sup>84</sup> Looking at principles as able to replace Europe’s national legal systems is adhering to the view that principles are the best way to describe the law. This

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<sup>81</sup> This is different with the Unidroit Principles of International Commercial Contracts of 1994, although their contents is virtually identical to the PECL.

<sup>82</sup> R. Epstein, *Simple Rules for a Complex World*, Cambridge Mass. 1995, 73-74.

<sup>83</sup> Here, I agree with Teubner, 11, who suggests that the dividing lines in the law of Europe should not be the national frontiers, but the production regimes.

<sup>84</sup> Lando/Beale (eds.), xxvii.

may be true for some European systems, but definitely not for all. It is in any event not true for English law.

This diversity of sources implies (at least as long as there is no centralist imposition of principles upon the European Member States) that the provisions of the PECL may not be regarded by lawyers as the best provisions to adjudicate cases with or by jurists to describe the state of the law with. Indeed, most of the articles of the PECL lay down the classic concepts of contract law. They do not pay much attention to solutions for more recent problems in the contract law of the national legal systems. I think, for example, of cases where contractual provisions are applied to the relationship between a contracting party and a third party, as in the case of ‘drittfinanzierte Erwerbsgeschäfte’<sup>85</sup> and in the case of profiting by third parties from non-performance or invoking contractual defences against third parties. I also think of problems related to the *Vorvertrag* (and related concepts in other legal systems) and of the legal consequences of a contract as envisaged in art. 6 of the directive on distance contracts during the period the consumer can still withdraw from it. Here, the PECL could indeed play a prominent role in showing the way toward just decisions – but they do not.

### 3.5 Fifth Diverging Tendency: Multiculturalism

A final reason why the imposition of principles may not be the best way of proceeding toward a European Contract Law is again of a more theoretical nature, but with important practical consequences. Here, I can only hint at it. It is that today’s Europe is not only diverse as to the different legal systems that are part of it, but that also *within* the Member States, the concepts of fairness and law many times differ. I am referring to the fact 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 and why this is so (just as there is a common law- and a civil law view). Fairness nowadays is a pluralistic concept, or as Michael Walzer puts it:<sup>86</sup>

‘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 little use in thinking about particular distributions’.

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.’

## 4. The Temptation of Elegance or a Celebration of Diversity?

The objections against the use of principles in European private law as formulated in the above can be summarised by referring to Lord Goff. To make principles for European contract law *and* to have the ambition to have these replace the national legal systems is indeed to give way to the

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<sup>85</sup> P. Heermann, *Drittfinanzierte Erwerbsgeschäfte*, Tübingen 1998. Many legal systems face similar problems with this concept.

<sup>86</sup> M. Walzer, *Spheres of Justice: a Defense of Pluralism and Equality*, 1983, 8.

‘temptation of elegance.’ Principles do not reflect the difficult and complex law in an adequate way. Or, to quote Goff again:<sup>87</sup>

‘(...) it is better to have a feast of contrasting sources, festering with ideas, than a single hygienic package, wrapped in polythene, insulated (...) from differences in analysis and on points of detail (...)’.

The above is not to deny that with the PECL, an important step in the development of a common law for Europe has been taken. 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. 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 PECL lies.<sup>88</sup> To have a more ambitious view of a principles project – as the drafters of the PECL have because, according to them, at least one of the main functions of their principles is to serve as a ‘precursor’ for a future European Code of Contracts<sup>89</sup> – is a too far-stretched ambition. 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. Instead, we should celebrate diversity in a future common law for Europe.

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<sup>87</sup> Goff, 174.

<sup>88</sup> On this point of the common language, also see M. Hesselink, *The Principles of European Contract Law: Some Choices Made By The Lando Commission*, Deventer 2001, 25.

<sup>89</sup> Lando/Beale (eds.), *Principles of European Contract Law*, xxiii.