Principles of European Law

Study Group on a European Civil Code

Benevolent Intervention in Another's Affairs (PEL Ben. Int.)

prepared by
Christian von Bar

OXFORD

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Benevolent Intervention in Another's Affairs
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Foreword

The Study Group on a European Civil Code has taken upon itself the task of drafting common European principles for the most important aspects of the law of obligations and for certain parts of the law of property in movables which are especially relevant for the functioning of the common market. It was founded in 1999 as a successor body to the Commission on European Contract Law, on whose work the Study Group is building.

The two groups pursue identical aims. However, the Study Group has a more far-reaching focus in terms of subject-matter and as an ultimate goal it aspires to a consolidated composite text of the material worked out by itself and the Commission on European Contract Law. Both groups have undertaken to ascertain and formulate European standards of 'patrimonial' law for the Member States of the European Union. The Commission on European Contract has already achieved this for the field of general contract law (*Lando and Beale* [eds.], Principles of European Contract Law, Parts I and II combined and revised, The Hague, 2000; *Lando/Clive/Prüm/Zimmermann* [eds.], Principles of European Contract Law Part III, The Hague, 2003). These Principles of European Contract Law (PECL) are being adopted by the Study Group on a European Civil Code with adjustments taking account of new developments and input from its research partners. The Study Group is dovetailing its principles with those of the PECL, extending their encapsulation of standards of patrimonial law in three directions: (i) by developing rules for specific types of contracts; (ii) by developing rules for extra-contractual obligations, i. e. the law of tort/delict, the law of unjustified enrichment, and the law of benevolent intervention in another's affairs (*negotiorum gestio*); and (iii) by developing rules for fundamental questions in the law on mobile assets – in particular transfer of ownership and security for credit.

Like the Commission on European Contract Law's Principles of European Contract Law, the results of the research conducted by the Study Group on a European Civil Code seek to advance the process of Europeanisation of private law. We have undertaken this endeavour on our own personal initiative and merely present the results of a pan-European research project. It is a study in comparative law in so far as we have always taken care to identify the legal position in the Member States of the European Union and to set out the results of this research in the introductions and notes. That of course does not mean that we have only been concerned with documenting the pool of shared legal values or that we simply adopted the majority position among the legal systems where common ground was missing. Rather we have consistently striven to draw up "sound and fitting" principles, that is to say, we have also recurrently developed proposals and concepts for the further development of private law in Europe.

The working methods of the Commission on European Contract Law and the Study Group on a European Civil Code are or were likewise quite similar. The Study Group, however, has had the benefit of Working (or Research) Teams – groups of younger legal scholars under the supervision of a senior member of the Group (a Team Leader) which undertook the basic comparative legal research, developed the drafts for discussion and

assembled the extensive material required for the notes. Furthermore, to each Working Team was allocated a consultative body – an Advisory Council. These bodies – deliberately kept small in the interests of efficiency – were formed from leading experts in the relevant field of law who are representative of the major European legal systems. The proposals drafted by the Working Teams and critically scrutinised and improved in a series of meetings by the respective Advisory Council were submitted for discussion on a revolving basis to the actual decision-making body of the Study Group on a European Civil Code, the Co-ordinating Group. Until June 2004 the Co-ordinating Group consisted of representatives from all the jurisdictions belonging to the EU immediately prior to its enlargement in Spring 2004 and in addition legal scholars from Estonia, Hungary, Norway, Poland, Slovenia and Switzerland. Representatives from the Czech Republic, Malta, Latvia, Lithuania and the Slovak Republic joined us after the June meeting 2004 in Warsaw. However, due to reasons of time and capacity, it was only occasionally possible to summarise in the notes the current legal position in the new Member States of the EU. We are keen to fill the outstanding gaps (of which we are only too painfully aware) at a later point in time.

Besides its permanent members, other participants in the Co-ordinating Group with voting rights included all the Team Leaders and – when the relevant material was up for discussion – the members of the Advisory Council concerned. The results of the deliberations during the week-long sitting of the Co-ordinating Group were incorporated into the text of the articles and the commentaries which returned to the agenda for the next meeting of the Co-ordinating Group (or the next but one depending on the work load of the the Group and the Team affected). Each part of the project was the subject of debate on manifold occasions, some stretching over many years. Where a unanimous opinion could not be achieved, majority votes were taken. As far as possible the Articles drafted in English were translated into the other languages either by members of the Team or third parties commissioned for the purpose. The number of languages into which the Articles could be translated admittedly varies considerably from volume to volume. That is in part a consequence of the fact that not all Working Teams were equipped with the same measure of financial support. We also had to resign ourselves to the absence of a perfectly uniform editorial style. Our editing guidelines provided a common basis for scholarly publication, but at the margin had to accommodate preferences of individual teams. However, this should not cause the reader any problems in comprehension.

Work on these Principles had begun long before the European Commission published its Communication on European Contract Law (in 2001), its Action Plan for a more coherent European contract law (in 2003), and its follow-up Communication "European Contract Law and the revision of the *acquis*: the way forward" (in 2004). (All of these documents concerning European contract law are available on the Commission's website: http://europe.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm). These documents for their part were published before we formed the Network of Excellence, together with other European research groups and institutions, which will collaborate in the preparation of an academic Common Frame of Reference with the support of funds from the European Community's Sixth Framework Programme. The texts laid before the public by the Study Group on a European Civil Code are therefore not necessarily identical with those which the Network of Excellence will propose to the European Commission for adoption in the

Common Frame of Reference. Rather they represent for the time being texts which the Study Group considers should serve as the starting point for the comprehensive process of discussion and consultation envisaged for the coming years. Whether that process will require any changes to our texts (and, if so, which changes) is something which will have to be weighed up carefully in a spirit of academic independence after a review of the arguments. The political domain can then determine at a later date which of our proposals, if any, it wishes to take up.

In order to leave no room for misunderstanding, it is important to stress that these Principles have been prepared by impartial and independent-minded scholars whose sole interest has been a devotion to the subject-matter. None of us have been rewarded for taking part or mandated to do so. None of us would want to give the impression that we claim any political legitimation for promoting harmonisation of the law. Our legitimation is confined to curiosity and an interest in Europe. In other words, the volumes in this series are to be understood exclusively as the results of scholarly legal research within large international teams. Like every other scholarly legal work, they restate the current law and introduce possible models for its further development; no less, but also no more. We are not a homogenous group whose every member is an advocate of the idea of a European Civil Code. We are, after all, only a *Study* Group. The question whether a European Civil Code is or is not desirable is a political one to which each member can only express an individual view.

Osnabrück, November 2005 *Christian v. Bar*

Our Sponsors

The project of the Study Group on a European Civil Code represents a research endeavour in legal science of extraordinary magnitude. Without the generous financial support of many organisations its realisation would not have been possible.

Our thanks go first of all to the *Deutsche Forschungsgemeinschaft (DFG)*, which has supplied the lion's share of the financing including the salaries of the Working Teams based in Germany and the direct travel costs for the meetings of the Coordinating Group and the numerous Advisory Councils. The work of the Dutch Working Teams was financed by the *Nederlandse Organisatie voor Wetenschappelijk Onderzoek (NWO)* and by the *Universiteit van Amsterdam*. Further personnel costs were met by the Flemish *Fonds voor Wetenschappelijk Onderzoek-Vlaanderen (FWO)*, the *Onassis-Foundation*, the Austrian *Fonds zur Förderung der wissenschaftlichen Forschung* and the *Fundação Calouste Gulbenkian*.

In addition we have consistently been able to fall back on funds made available to the respective organisers of the week long sittings of the Coordinating Group by the relevant university or other sources within the country concerned. It is therefore with the deepest gratitude that I must also mention the *Consiglio nazionale forense* (Rome) and the *Istituto di diritto privato* of the *Università di Roma La Sapienza*, which co-financed the meeting in Rome (June 2000). The session in Salzburg (December 2000) was supported by the Austrian *Bundesministerium für Bildung, Wissenschaft und Kultur*, the *Universität Salzburg* and the *Institut für Rechtspolitik* of the *Universität Salzburg*. The discussions in Stockholm (June 2001) were assisted by the *Department of Law, Stockholm University*, the *Supreme Court Justice Edward Cassel's Foundation* and *Stiftelsen Juridisk Fakultetslitteratur (SJF)*. The meeting in Oxford (December 2001) had the support of *Shearman & Sterling*, the *Hulme Trust*, *Berwin Leighton Paisner* and the *Oxford University Press (OUP)*. The session in Valencia (June 2002) was made possible by the *Asociación Nacional de Registradores de la Propiedad, Mercantil y Bienes Muebles*, the *Universitat de València*, the *Ministerio Español de Ciencia y Tecnología*, the *Facultad de Derecho* of the *Universitat de València*, the *Departamento de Derecho Internacional*, *Departamento de Derecho Civil* and the *Departamento de Derecho Mercantil "Manuel Broseta Pont"* of the *Universitat de València*, the law firm *Cuatrecasas*, the *Generalitat Valenciana*, the *Corts Valencianes*, the *Diputación Provincial de Valencia*, the *Ayuntamiento de Valencia*, the *Colegio de Abogados de Valencia* and *Aranzadi Publishing Company*. The subsequent meeting in Oporto (December 2002) was substantially assisted by the *Universidade Católica Portuguesa – Centro Regional do Porto*. For the week long session in Helsinki (June 2003) we were able to rely on funds from *Suomen Kultuurirahasto* (Finnish Cultural Foundation), the *Niilo Helanderin Säätiö* (Niilo Helander Foundation), the *Suomalainen Lakimeisyhdistys* (Finnish Lawyers Association), the Ministry of Justice and the Ministry for Foreign Affairs, the *Nordea Bank*, *Roschier Holmberg* Attorneys Ltd., *Hannes Snellman* Attorneys Ltd., the *Department of Private Law* and the *Institute of International Commercial Law (KATTI) of Helsinki University*. The session in Leuven (December 2003) was supported by *Katholieke Universiteit Leuven, Faculteit Rechtsgeleerdheid*, and the *FWO*

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Preface to this volume

The following text on the law of (justified) benevolent intervention in another's affairs, hereby presented to the interested public, has been deliberated by the Co-ordinating Group of the Study Group on a European Civil Code during its week-long meetings in Utrecht (December 1999), Rome (June 2000), Stockholm (June 2001) and finally in Valencia (June 2002). (Whereas the meetings in Salzburg (December 2000) and Oxford (December 2001) were not dedicated to this matter). In preparation of the respective meetings thorough deliberations with the Advisory Council of the Working Team have taken place. This Working Team in turn has under my supervision composed the first draft of these Principles and has integrated the amendments which had been proposed by the different councils and in some instances had been decided by vote. On this basis I have drawn up the comparative introduction, the comments and the notes. The material for this work again had been provided by the Members of the Osnabrück Working Team. They have carried the main burden of this research endeavour; without their contribution this Book could not have been realized.

Perhaps it may not appear as the most fortunate choice that one of the first publications of the Study Group on a European Civil Code of all subjects is dedicated to the law of benevolent intervention in another's affairs (*negotiorum gestio*). For it concerns a subject matter which accounts for a comparatively small area of law and which in addition from a systematic viewpoint is not even recognised as a separate private law concept under the Common Law. However, the work on this project could be concluded earlier than that of others and it did not seem appropriate to artificially hold back the results until all other parts of the project similarly have reached a stage for publication.

Legislation, case law and doctrine have been stated as of January 2005. Shortly before publication this text was circulated to stakeholders under the CFR net exercise as part of the European Commission's contract law programme.

Osnabrück, November 2005 *Christian v. Bar*

Short Table of Contents

Table of Contents

Text of Articles

Principles of European Law on Benevolent Intervention in Another's Affairs