Principles of European Contract Law

Parts I and II

Prepared by
The Commission on European Contract Law

Edited by
Ole Lando and Hugh Beale

KLUWER LAW INTERNATIONAL

PRINCIPLES OF EUROPEAN CONTRACT LAW

PARTS I AND II

Combined and Revised

Prepared by
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Chairman: Professor Ole Lando

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Preface

How it started

In 1974 a symposium was held at the Copenhagen Business School. The subject was the EEC Draft Convention on the Law Applicable to Contractual and Noncontractual Obligations. At a dinner in Tivoli Gardens after the symposium I sat next to Dr Winfried Hauschild who was Head of Division in the Directorate General for the Internal Market of the Commission of the European Communities, and who assisted the working group of experts which prepared the Draft Convention. We agreed that the proposed choice of law rules would be insufficient. They would never establish the legal uniformity necessary for an integrated European market. Uniform substantive law rules were needed. Dr Hauschild said: "We need a European Code of Obligations".

In 1976 another symposium was held in the newly established European University Institute near Florence. Its subject was New Perspectives of a Common Law of Europe. I was asked to present a paper and found here an opportunity to argue for what I then called a European Uniform Commercial Code.

In the years that followed efforts were made to find qualified people from all the EC Member States who were interested in preparing what now became the Principles of European Contract Law and to get the necessary funds. This took some time.

Members and meetings

First Commission

With the help of Dr Hauschild and his Directorate General, meetings were held in Brussels in December 1980 and November 1981 with lawyers from the EC Member States most of whom were later to become Members of the Commission on European Contract Law. The purpose of the first meetings was to prepare the future work. We were short of funds, and if it had not been for the Legal Services of the Commission of the European Communities and its Director General, Dr Claus Ehlermann, we would not have been able to continue. We got the funds necessary to

cover the travel expenses of the Members, and the discussions of the principles started at the third meeting which was held in Hamburg in November 1982. At this and at the following five meetings (Paris, June 1983; Rome, November 1983; Thessaloniki, May 1984; Brussels, February 1985; and Copenhagen, October 1985) the participating Members of the Commission were:
Professor Brigitte Berlioz-Houin, Université de Paris IX,
Professor Massimo Bianca, Università degli Studi di Roma,
Professor M.J. Bonell, Università Cattolica del Sacro Cuore, Milano; later Universita degli Studi di Roma,
Professor Ulrich Drobnig, Director at the Max Planck Institut für ausländisches und internationales Privatrecht, Hamburg,
Maître André Elvinger, Luxembourg,
Professor Dimitri Evrigenis, Centre of International and European Economic Law, Thessaloniki,
Professor Roy M. Goode, Queen Mary College, University of London; later, St John's College, Oxford University,
Professor Guy Horsmans, Université Catholique de Louvain, Louvain-la-Neuve,
Professor Roger Houin, Paris,
Professor Ole Lando, Copenhagen Business School,
Professor Bryan McMahon, University College, Cork,
Professor Denis Tallon, Université de Paris II, Director of Institut de Droit Comparé de Paris,
Deputy Director J.A. Wade, T.M.C. Asser Institute, The Hague,
Dr Frans J.A. van der Velden, University of Utrecht, and
Professor William A. Wilson, University of Edinburgh.

By January 1, 1986, Spain and Portugal had become Members of the European Communities. From the ninth meeting in London in October 1986 Professor de Magelães Collaço, University of Lisbon and Professor Alberto Bercovitz, Autonomous University of Madrid participated as members of the Commission.

We had the misfortune of losing Professor Roger Houin and Professor Dimitri Evrigenis who both died in 1986. Due to pressing work at her University, Professor Brigitte Berlioz-Houin was unable to participate in further meetings.

From the tenth meeting in Luxembourg in March 1987 and through the succeeding meetings (Madrid, November 1987; Lisbon, May 1988; Utrecht, December 1988; and Oxford, December 1990) the following new Members participated:
Professor Hugh Beale, University of Bristol, later University of Warwick,
Professor K. Kerameus, University of Athens,
Professor Georges Rouhette, Université d'Auvergne, Clermont Ferrand.

Second Commission, 1992-1996

In September 1992 the Second Commission on European Contract Law began its work. At its first six meetings (Ghent September 1992; Brussels, January 1993; Barcelona, July 1993; Osnabrück, December 1993; Utrecht, May 1994; and Palermo, December 1994) the participating Members were:

Professor Christian von Bar, University of Osnabrück,
Professor Hugh Beale, University of Warwick,
Professor Michael Joachim Bonell, University of Rome (La Sapienza),
Professor Michael Bridge, University of Nottingham,
Professor Carlo Castronovo, Università Cattolica del Sacra Cuore, Milan
Professor Isabel de Magelhães Collaço, University of Lisbon,
Professor Ulrich Drobnig, Director of the Max Planck Institut für ausländisches und internationales Privatrecht in Hamburg,
Maître Marc Elvinger, Luxembourg,
Professor Arthur Hartkamp, Advocate-General of the Hoge Raad der Nederlanden,
Professor Ewoud Hondius, University of Utrecht,
Professor Guy Horsmans, University of Louvain la Neuve,
Professer Konstantinos Kerameus, University of Athens,
Professor Ole Lando, Copenhagen Business School,
Professor Bryan McMahon, University of Galway,
Professor Georges Rouhette, University of the Auvergne,
Professor Pablo Salvador Coderch, Universitat Pompeu Fabra, Barcelona,
Professor Matthias E. Storme, University of Leuven, and
Professor Denis Tallon, Université de Paris II, Director of the Institut de Droit Comparé de Paris

In January 1995 Austria, Finland and Sweden became Members of the European Union. At the seventh meeting in September 1995 in Galway and at the eighth and last meeting in Stockholm in May 1996 Professor Willibald Posch, University of Graz, Professor Jan Ramberg, University of Stockholm and Professor Thomas Wilhelmsson, University of Helsinki joined as Members of the Commission, as did Professor Hector MacQueen, University of Edinburgh.

As it appears, most of the Members of the two Commissions have been academics. However, several of them are also practising lawyers.

Secretaries to the Commission

Dr Oliver Remien of the Max Planck Institut für ausländisches und internationales Privatrecht in Hamburg served as secretary of the First Commission from the third through the seventh meeting. Henning Klinkenberg of the Max Planck Institute served at the eigth meeting, and Dr Remien at the following six meetings. Professor Matthias E. Storme served as secretary of the Second Commission. The Commission is indebted to the secretaries for their valuable work. Their main task was to prepare the minutes of the meetings, a task which was performed with great competence and care.

For Part 1 Dr Michael Peglow and for the present edition Ms Bettina Picone-Maxion and Mr. Dirk Maxion produced the list of abbreviations, the bibliographies and the table of cases.

Parts 1 and 2 of the Principles

Part 1

Believing that, within the law of contracts, the rules on due performance and the remedies for non-performance were of paramount importance, the first Commission chose these subjects for the first phase of its work. *The Principles of European Contract Law, Part 1, Performance, Non Performance and Remedies, Prepared by the Commission on European Contract law* and edited by Hugh Beale and Ole Lando was published by Martinus Nijhoff Publishers, Dordrecht, in 1995. By 1997 it was sold out. A French edition of Part 1, *Les principes du droit europèen du contrat, L' exécution, l'inexécution et ses suites. Version francaise,* translated and edited by *Isabelle de Lamberterie, Georges Rouhette and Denis Tallon*, was published by *La documentation Francaise*, Paris, in 1997. As of March 1998 this version was still available. A German version of the articles of Part 1 has been published in *Zeitschrift für europäisches Privatrecht*, 1995, p. 864.

The Present Second Part and future work

This Volume contains new principles and rules on formation of contracts, authority of agents to bind their principal, the validity of contracts, interpretation and contents and effects. Futhermore, it contains a revised edition of the general provisions and the rules on performance, non-performance and remedies for non-performance which were provided in Part 1.

Even this volume does not provide a complete statement of the general principles of contract law. The Commission is continuing its work. Additional chapters will deal with the effects of illegality and immorality, compound interest, conditions, extinctive prescription of claims and with topics which cover both contractual and non-contractual obligations such as assignment of claims, assumption of debts, plurality of debtors and creditors, and set-off.

How we worked

The drafting of the articles, comments and notes was the task of a Reporter. The Reporters of the First Commission were:
Professor Hugh Beale (from 1987)
Professor Ulrich Drobnig
Professor Roy Goode,
Professor Ole Lando, and
Professor Denis Tallon.

In the second Commission the task was divided between:
Professor Hugh Beale,
Professor Ulrich Drobnig,
Professor Ewoud Hondius,

Professor Ole Lando, and
Professor Denis Tallon

Each Reporter presented his draft with comments to the other Reporters in a Drafting Group, which met to prepare the texts to be submitted to the Commission. At its meetings the Commission approved the texts, changed them or sent them back for further consideration by the Reporter and the Drafting Group.

An Editing Group worked to improve the terminology and the presentation of the texts.

In the First Commission the Members of this group were:
Professor Bryan McMahon,
Professor de Magelhães Collaço,
Professor Georges Rouhette, who acted as chairman, and
Professor William Wilson.

In the Second Commission the Members were:
Professor Michael Bridge
Professor Hector Mac Queen
Professor Georges Rouhette, who acted as chairman, and
Professor Carlo Castronovo.

At its last meeting in 1990 the First Commission adopted the Articles of Part 1, and at its last meeting in 1996 the Second Commission approved the Articles of Part 2 and the amendments of Part 1, each time leaving it to the Drafting Group and the Editing Group to finalize the Comments.

The notes to the Articles, which bring a survey of the relevant law of the Member States, have been written by the Reporters on the basis of information received by the Members of the Commissions. Additional information on Irish law has been provided by Mr Eoin O'Dell, Trinity College, Dublin and Ms Nicola Murphy of University College, Galway; and on Spanish law by Professor Fernando Martinez Sanz, Universidad Jaime I, Castellon. The final editing of the notes was done by Professors Hugh Beale and Ole Lando.

The sponsors

Until the end of 1994 the Commission of the European Community, and notably its Legal Service, provided most of the funds necessary for carrying out our work. Before and after that time contributions have been received from the *Stiftverband der deutschen Wissenschaft*; ARAG Insurance Co, Germany; Baker & McKenzie, Solicitors, London; Edge & Ellison, Solicitors, Birmingham; The Lord Chancellor's Department, London; *Foreningen til unge Handelsmænds Uddannelse,* Copenhagen; *Haniel Stiftung*, Germany; Masons, Solicitors, London; the *Max Planck Institut für ausländisches und internationales Privatrecht,* Hamburg; the French *Centre National de le Recherche Scientifique (Institut de Recherche Comparée sur les Institutions et le Droit)*; the Law Department of the Copenhagen Business School; the University of Warwick; St John's College, Oxford; and Queen Mary and Westfield College, London.

The *Università degli Studi di Roma*, the Centre of International and Economic Law, Thessaloniki, the Belgian *Centre Interuniversitaire de Droit Comparé*, the University of Utrecht together with the Netherlands Ministry of Justice, the German Leibnitz Foundation through a grant administered by Professor von Bar, the Government of Catalonia, the University of Palermo, and the University of Stockholm paid a substantial part of the expenses of the meetings in Rome, Thessaloniki, Brussels, Utrecht, Osnabrück, Barcelona, Palermo and Stockholm respectively. In almost every place we met, the local universities made meeting rooms, photocopying machines and secretarial assistance available to us without charge.

We are most grateful to all these sponsors for their generous contributions. However, the most important support was provided by my colleagues, the members of the two Commissions, who without being paid for it gave their time and efforts for the cause.

Holte, February 1999
Ole Lando

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SECRATARIES TO THE COMMISSIONS:

Oliver Remien (First Commission)
Matthias E. Storme (Second Commission)

Introduction

1. The need for uniform rules

The Principles of European Contract are the product of work carried out by the Commission on European Contract Law, a body of lawyers drawn from all the member States of the European Union, under the chairmanship of Professor Ole Lando. They are a response to a need for a Union-wide infrastructure of contract law to consolidate the rapidly expanding volume of Community law regulating specific types of contract. There are many benefits to be derived from a formulation of principles of contract law within Europe.

A) *The Facilitation of Cross-Border Trade Within Europe*

Both within and outside Europe there is a growing recognition of the need for measures of harmonisation to eliminate those differences in national laws which are inimical to the efficient conduct of cross-border business within Europe. Such harmonisation measures confer particular benefits on contracting parties carrying on business in different States, enabling them to contract with reference to a set of rules which apply uniformly over the territories of the various States, which are detached from any particular legal system, which are available in languages of which at least one is likely to be known to the parties, and which over time will become much more familiar to those who use them than the individual national laws of the various foreign countries in which they transact business.

B) *The Strengthening of the Single European Market*

The harmonisation of principles of contract law is of especial importance to the proper functioning of the Single European Market, the very essence of which is a broadly unitary approach to law and regulation that surmounts the obstacles to trade and the distortions of the market resulting from differences in the national laws of Member States affecting trade within Europe.

C) *The Creation of an Infrastructure for Community Laws Governing Contracts*

The lawmakers of the European Community are increasingly active in the field of contracts. Directives have been issued affecting contracts relating to insurance, employment, commercial agency, consumer credit, consumer safety, doorstep sales and unfair terms in consumer contracts, to mention but a few, and the list is steadily growing. Yet there is no general contract law infrastructure to support these specific Community measures. There are at present considerable disparities between the laws of the Member States governing contracts, including such major matters as formation, formal and essential validity, substantive effects, remedies for non-performance and the conditions under which performance is excused. There is not even a common terminology. Hence the Principles are designed not merely to reduce the adverse effects of differences in national laws within the Single European Market but also to provide a foundation of contract law within the Community upon which more specific harmonisation measures can be constructed. Without such a body of Community-wide principles of contract law the effect of many of the measures being taken towards European legal integration in relation to consumer and commercial transactions is likely to be weakened significantly.

D) *The Provision of Guidelines for National Courts and Legislatures*

The Principles are intended to reflect the common core of solutions to problems of contract law. Some of these have proved increasingly troublesome for national courts and legislators. The Principles are also intended to be progressive. On many issues covered by national law they may be found to offer a more satisfactory answer than that which is reached by traditional legal thinking. For example, their provisions relating to the assurance of performance and to the grant of relief where a change of circumstances renders performance of the contract excessively onerous deal in a balanced way with recurrent difficulties on which most national laws are silent. The Principles are thus available for the assistance of European courts and legislatures concerned to ensure the fruitful development of contract law on a Union-wide basis. Even beyond the borders of the European Union, the Principles may serve as an inspiration for the Central and Eastern European legislators who are in the course of reforming their laws of contract to meet the needs of a market economy.

E) *The Construction of a Bridge between the Civil Law and the Common Law*

One of the most intractable problems of European legal integration is the reconciliation of the civil law and the common law families. It is, of course, true that there are significant differences even between one civil law system and another; it is also true that in many cases common problems will be solved in much the same way by the various legal systems, to whichever legal family they may belong. But there remain major differences between civil law and common law systems in relation to

legal structure and reasoning, terminology, fundamental concepts and classifications and legal policy. Two examples from the field covered by the Principles suffice to make the point. The first is that in civil law systems there is a general and pervasive principle of good faith; in the European common law systems there is no such general principle. They have a requirement of good faith only in limited situations and have a series of specific rules achieving some of the same results as might be required by good faith but without referring to that concept. The second is that the civil law considers it legitimate for a contract to contain penalty clauses designed to deter a party from breaking the contract; the common law regards the imposition of penalties (as opposed to liquidated damages by way of compensation for anticipated loss) as improper and unenforceable. Differences of these kinds are inimical to the efficient functioning of the Single European Market. One of the major benefits offered by the Principles is to provide a bridge between the civil law and the common law by providing rules designed to reconcile their differing legal philosophies.

2. The purposes for which the principles are designed

It will be apparent from the foregoing that the Principles of European Contract Law are intended to be of service in a number of ways to a wide range on institutions, enterprises and individuals.

A) *A Foundation for European Legislation*

The Principles provide a necessary legal foundation for measures taken and to be taken in the future by the organs of the European Union. The Principles will assist both the organs of the Community in drafting measures and courts, arbitrators and legal advisers in applying Community measures.

In 1989 the European Parliament passed a Resolution requesting that a start be made on the preparatory work for drawing up a European Code of Private Law. The preamble to the Resolution states that

> "...unification can be carried out in branches of private law which are highly important for the development of a Single Market, such as contract law..." (Resolution of 26 May 1989, OJEC No. C 158/401 of 26 June 1989.

This request was repeated in 1994 (Resolution of 6 May 1994, OJEC No. C 205 (519) of 25 July 1994.)

One objective of the Principles of European Contract Law is to serve as a basis for any future European Code of Contracts. They could form the first step in the work.

B) *Express Adoption by the Parties*

The Principles will be useful for parties who are living or carrying on business in different States and who wish their contractual relations to be governed by a set of neutral rules not based on any one national legal system but drawing on the best solutions offered by the laws of jurisdictions within (and sometimes outside) Europe.

They can declare that the contract is to be governed by the Principles of European Contract Law.

C) *A Modern Formulation of a Lex Mercatoria*

Parties to international contracts who want their agreement to be governed by internationally accepted principles, or who are unable to agree on a reference to a national legal system, have the option to adopt the *lex mercatoria* to govern their contract. It not infrequently happens that they opt for arbitration according to, if not the *lex mercatoria* by name, "general principles of law", "internationally accepted principles" or some other such phrase. Where is the arbitrator who has to deal with such a contract to find those principles? He may feel that he knows what is customarily accepted, or he may feel able to make a common sense judgment, but neither is a reliable way of deciding the case. If there is a statement of internationally accepted principles, the arbitrator's life will be much easier and the uncertainty engendered by adopting such a phrase will be reduced. One of the immediate aims of the Principles is to provide such a statement that is acceptable within Europe and which can be applied directly by arbitrators in the type of case envisaged - in effect a modern European *lex mercatoria*.

D) *A Model for Judicial and Legislative Development of Contract Law*

The Principles offer help to courts and arbitrators called upon to decide issues which are not adequately governed by the national law or other system of rules applicable. The court or arbitrator may adopt the solution provided by the Principles knowing that it represents the common core of the European systems, or a progressive development from that common core. Equally the solutions of the Principles may be adopted by legislators reforming their contract law. The Commission hopes in particular that the Principles will be of service to those charged with reform of contract law in the newly-emerged democracies of Central Europe.

E) *A Basis for Harmonisation*

Ultimately the Member States of the European Union may wish to harmonise their contract law. The Principles can serve as a model on which harmonisation work may be based.

Thus the Principles have both immediate and longer-term objectives. They are available for immediate use by parties making contracts, by courts and arbitrators in deciding contract disputes and by legislators in drafting contract rules whether at the European or the national level. Their longer-term objective is to help bring about the harmonisation of general contract law within the European Union.