Principles of European Contract Law

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Prof.Dr. M.W. Hesselink

Dr. G.J.P. de Vries

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The Principles Of European Contract Law: Some Choices Made By The Lando Commission

Martijn W. Hesselink

Professor of Private Law at the University of Amsterdam. I partly wrote this paper as a visiting scholar at Boalt Hall, School of Law, UC Berkeley. I would like to thank Maurits Barendrecht, Hugh Beale, Arthur Hartkamp, Peter Morris, and Edgar du Perron for their valuable comments on earlier versions of this paper.

I. Introduction

A. Making Law is Making Choices

Contrary to the American situation, in Europe throughout the 20th century the mode of scholarship, education and practice in private law has been that of integrity and deductive reasoning. Whereas today most leading American scholars in the US are involved in law & society, law & politics (in particular Critical Legal Studies), and, especially, law & economics, after the successful revolt against formalism by American legal Realists like Holmes, Llewellyn, and Pound had paved their way, in Europe the dominant mode of legal reasoning is still largely based on the idea of the integrity of the law: scholars interpret and further elaborate the – presumably coherent – system of the law which is based on the code or, in England, Ireland and Scotland, on precedents.

However, since the emergence of the new discipline of European private law the European (academic) legal landscape, at least as far as private law is concerned, seems to be undergoing a radical change. It is interesting to see how the object and methodology of European legal scholarship is changing rapidly from emphasis on formal deductive reasoning to a more substantive approach. The first example of this development is the success of the functional approach to the law. Scholars involved in European private law tend to concentrate their comparative research more on functional equivalents than on conceptual, dogmatic differences. The most eminent example is Hein Kötz' *European Contract Law*.[1] The functional approach was also adopted by the European legislator. The legislative instrument of EU Directives is based on the idea of functional equivalents: the EU is concerned with a certain substantive result and it is left to the national legislators to decide in which form they prefer to implement it. Secondly, those involved in the European private law debate emphasise the importance of

1 Kötz 1997.

law in context, especially the importance of the law's relation to culture,[2] and the fact that there is more to law than just formal rules: what matters as well is the way they are applied, by whom, against what institutional background et cetera.[3] Still others propose to base the preparation of a common European private law on economic analysis.[4] Finally, there are scholars who emphasise the political dimension of the enterprise and claim that a European civil code should be sufficiently social.[5] What we are facing could be called, with only slight rhetorical exaggeration, a European revolt against formalism.

This development from form to substance is not surprising. Without the secure framework of the national code or precedents to hold on to, one can only see integrity when one looks backward, as some neo-pandectist suggest.[6] Or indeed upward, but today only a few people have a firm belief in natural law; most of us seem to have lost faith. Who looks forward only sees choices to be made.[7] [8]

2 See especially Pierre Legrand (Legrand 1996, Legrand 1997, Legrand 1999-1, Legrand 1999-2).

3 See Rodolfo Sacco's theory of 'legal formants' (Sacco 1991), which, together with Rudolph Schlesinger's Common Core project (Schlesinger 1968), has provided the methodological basis for the Trento Common Core of Private Law in Europe project (see Bussani/Mattei 1998 and www.jus.unitn.it/dsg/common-core).

4 See especially Ugo Mattei's comparative law & economics (Mattei 1994, Mattei 1997, Mattei 1998-1, Mattei 1999), followed by Jan Smits (Smits 1998, Smits 1999).

5 See Wilhelmsson 1995. See also the papers presented at the Amsterdam seminar on *Critical Legal Theory and European Private Law* which will be published this year in a special issue of the *European Review of Private Law*: Kennedy 2001, Legrand 2001, Maris 2001, Mattei/Robilant 2001, McKendrick 2001, Wilhelmsson 2001 and Hesselink 2001-2.

6 See especially Zimmermann (e.g. Zimmermann 1998). For (sometimes very fierce) criticism see Caroni 1994 , Mattei 1998-2, Hesselink 1999.

7 See on the need to make choices when determining rules of contract law and on the fact that the principle of party autonomy is of no assistance in making such choices – except with regard to rules on the limits of freedom of contract –, because it is by definition neutral with regard to the content of (default and mandatory) 'back ground rules', Craswell 1989.

8 It is important to note that all these choices are made twice. First, on an abstract level, by the legislator, then, when the abstract rule must be applied in a specific case, usually by the court. Frequently an effort is made by the legislator to limit the court's freedom or need to choose, by drafting very sharp rules. To some extent this practice is based on an illusion since it follows from the character of a system of abstract rules as a basis for decision in a concrete case that the courts will always have to concretise, supplement and correct these rules in order to deal with problems of indeterminacy, gaps, and contradiction. Sometimes, on the contrary, the legislator explicitly gives the courts a margin of choice by deliberately drafting a vague rule or by referring to an open textured standard. See Hesselink 1998, Hesselink 1999.

Therefore most scholars involved in European private law agree that choices will have to be made and many see it as their task not only to present the various positions in a neutral, objective 'scientific' mode, but also to show more *engagement* and to actually propose and defend their own choices.
In December 1999, after nearly twenty years of preparation, the Lando Commission presented its Principles of European Contract Law (PECL).[9] This was a major event in the development of European private law. In this paper I will discuss some of the main choices made by the Lando Commission when drafting its principles.

B. **Plan of Discussion**

What choices have the Lando Commission made? Here I will concentrate on choices with regard to the purpose of the PECL (II), the authors and working method (III), the format and style (IV), the subject matter (V), politics (VI), culture (VII), economics (VIII), and. progress *v.* tradition (IX). Finally, I will make some concluding remarks (X). Clearly, there are some overlapping grounds among most of my themes (as usually happens with rational distinctions), but they nevertheless seem to be sufficiently distinctive to justify separate discussion.

9 A first part had been published in 1995 (Lando/Beale 1995).

II. **Purpose**

With regard to the purpose of the PECL the Commission on European Contract Law did not make a choice for just one purpose. They rather opted for a number of purposes at the same time. They clearly wanted the PECL to be as widely used as possible.
In their Introduction the Commission on European Contract Law formulate five 'benefits' that can be derived from the PECL, and five 'purposes' for which they are designed.[10] Moreover, in art. 1:101 (Application of the Principles), the first article of the PECL, under the Section 'Scope of Principles', six situations are envisaged in which they can be used. Although these 'benefits', 'purposes' and 'uses' are not completely identical they do overlap to a great extent.
As a matter of fact, one can distil from them three aspirations of the Lando Commission. First, to state the common core of the contract laws of Europe (A). Second, to contribute to a future unification of contract law in Europe (B). Third, to provide a set of rules that can be applied as law in Europe as from today (C). A fourth, and in my view highly important, purpose of the Principles of European Contract Law is not mentioned as such among the Commission's aspirations: they may provide us with a common European language for discussions on contract law (D).

A. **Restatement of the Common Core**

In their Introduction and in other places the Commission on European Contract Law emphasise that the PECL should be regarded as a statement of the common core of contract law in Europe.[11] Both from their format and from their content it is clear that the PECL have been inspired by the American Restatements of the Law and Uniform Commercial Code (UCC),[12] and by the UNIDROIT Principles. The American experience

10 PECL, Introduction, p. xxi.
11 PECL, Introduction, p. xxii.
12 PECL, Introduction, p. xxvi.

with restatements and with the UCC may help us to appreciate the Lando Commission's aim to provide a restatement of the common core of contract law in Europe.

1. *The American Restatements of the Law*

The American common law has never been codified.[13] However, the United States have adopted their own unique method for making the common law more coherent and accessible: the Restatements of the Law. The Restatements are published by the American Law Institute (ALI), a private organisation which was founded in 1923 with the help of the Carnegie Corporation and the Rockefeller Foundation. Today the ALI has nearly three thousand members, including the most distinguished judges, practitioners and scholars. The object of the ALI is 'to promote the clarification and simplification of the law and its better adaptation to social needs, to secure better administration of justice, and to encourage and carry on scholarly and scientific legal work.'[14] The first Restatement which the ALI published was the Restatement of Contracts (1932). Since then, Restatements have been published relating to many fields of the law including Agency, Conflict of Laws, Property, Torts, Trusts. In 1952 the ALI started the drafting of the Restatements (Second), most of which were completed half way through the 1980s. Currently, the Restatements (Third) are being drafted.[15] It is important to note that Restatements are not law in a formal sense. The courts are not bound by them. The Restatements do not

13 Codes are not completely alien to the American legal system: most States have a Penal Code and a Code of Civil Procedure. There was also a codification debate in the 19th century, but, apart from California and Louisiana that have enacted civil codes, private law has never been codified. There was a fierce debate between David Dudley Field, who was impressed by Napoleon's civil code and had made a draft for this purpose, and James C. Carter, who was influenced by the German Historical School, and who feared that a code would prevent natural evolution. Field's Civil Code was rejected by most States including New York (on several occasions). However, it was not a complete failure since it was adopted in some Western States including California. See Friedman 1985, p. 403ff; Horwitz 1977, p. 265, and Horwitz 1992, p. 117 ff.

14 Certificate of Incorporation, reproduced in: The American Law Institute Annual Reports, 77th annual meeting 1999, p. 57.

15 The ALI was also involved in various codifications, studies and other projects, including the Uniform Commercial Code. See below.

have a formal but only a substantive authority which heavily depends on the reputation of the ALI and of the specific Reporter.[16]

Interestingly, establishing unity among the States of the Union is neither mentioned as one of the objects of the ALI nor as one of the purposes of the Restatements. In his Introduction to the Restatement of Contracts (First), W.D. Lewis, the Director of the ALI, said: 'The vast and ever increasing volume of the decisions of the courts establishing new rules or precedents, and the numerous instances in which the decisions are irreconcilable has resulted in ever increasing uncertainty in the law. The American Law Institute was formed in the belief that in order to clarify and simplify the law and to render it more certain, the first step must be the preparation of an orderly restatement of the common law, including in that term not only the law developed solely by judicial decision but also the law which has grown from the application by the courts of generally and long adopted statutes.' Thus the ALI was mainly concerned with uncertainty with regard to the law as a result of an unmanageable number of cases and with contradictions among precedents, and not primarily with inconsistency between the various American jurisdictions.

The first restatements, which were characterised by classical legal thought and inspired by Hohfeld and others in their analytical attempt to create a coherent system of rules, a uniform terminology, and to eliminate contradictions,[17] met with some severe criticism.[18] The black letter rules were thought to be too abstract and therefore of little relevance in deciding cases. Moreover, because of their abstraction the black letter rules were said to be too detached from the cases they were said to be based on, and the link between the restatements and the authorities they were supposed to be based on was generally held to be insufficiently documented. Another point of criticism, which came from the then emerging Realist movement, was that the restatements would never create certainty and coherence – which was, as said, the main purpose of the ALI – because the real law is made by men and is therefore inherently uncertain and it changes all the

16 See W.D. Lewis, p. xi: 'The function of the courts is to decide the controversies brought before them. The function of the Institute is to state clearly and precisely in the light of the decisions the principles and rules of the common law.
The sections of the Restatement express the result of careful analysis of the subject and a thorough examination and discussion of pertinent cases – often very numerous and sometimes conflicting. The accuracy of the statements of law made rests on the authority of the Institute. They may be regarded both as the product of expert opinion and as the expression of the law by the legal profession.'

17 See Friedman 1985, p. 676: 'perhaps the high-water mark of conceptual jurisprudence'.

18 See White 1997, and Hyland 1998, both with further references.

time. Many authors were critical because, in their view, the focus on coherence had led to artificial closure and had killed off fruitful debates. Finally, the first restatements were criticised because they did not bring the announced improvement of the law; they merely restated the law as it was. One of the harshest critics was Charles E. Clark, the then dean of the Yale School of Law, and Adviser to the ALI on Property.[19] He said.[20] 'I see my own group so often turn in impatience if not disgust from the attempt to force a black letter sentence do what it can never do - state pages of history and policy and honest study and deliberation - and long for freedom of expression which scholars should have.' See also Yntema:[21] 'The decision to restate the law as it is, rather than to put forth a candid effort to improve the law by critical formulation, as originally designed; the omission of the treatises; the imperfect provision for incisive independent criticism of tentative restatements as the condition *sine qua non* of their submission for approval: these are phenomena which are difficult to explain except upon the supposition that the policy of securing the public acceptance of the restatement has affected its content and perhaps even partially diverted the fundamental purpose.' See finally (and more recently) Lawrence Friedman:[22] 'They took fields of living law, scalded their flesh, drained off their blood, and reduced them to bones. The bones were arrangements of principles and rules (the black-letter law), followed by a somewhat barren commentary.' The criticism was taken into account by the ALI and they soon started the preparation of a second Restatement.[23] In the Restatement (Second) there is a clear shift in emphasis from the black-letter rule to the comments, which are much more extensive than before. The Restatements (Second) do not attempt to put an end to the debate, but rather try to state which positions

19 Another fervent critic of the Restatements was Ehrenzweig 1969, p. 345: 'dieses unglücklichster Weise die bedeutsamste Schwäche europäischer Kodifikationen, nämlich ihre Starre, mit der des common law, nämliche seine Systemlosigkeit, verbindet und damit gleichzeitig auf die Stärken beider, Systematik einerseits und Beweglichkeit andererseits, verzichtet.'

20 Clark 1933, p. 646.

21 Yntema 1936, p. 468.

22 Friedman 1985, p. 676. He continues: 'The restatements were, basically, virginally clean of any notion that rules had social and economic consequences. The arrangements of subject matter were, on the whole, strictly logical; the aim was to show order and unmask disorder. (Courts that were out of line could cite the restatement and return to the mainstream of common-law growth.) The chief draftsmen (...) expended their enormous talents on an enterprise which, today, seems singularly fruitless, at least to those legal scholars who adhere to later streams of legal thought. Incredibly, the work of restating (and rerestating) is still going on.'

23 Hyland 1998, p. 63; White 1997, p. 46.

are taken and leave it for the courts to decide. As a result there is also a shift in interest from the black-letter rule to the comment. The new restatements are also much less rigidly formulated. The black-letter rules frequently confine themselves to listing a number of aspects that should be taken into account when resolving the conflict. The Restatements (Third), however, which are currently being drafted seem to be characterised by an attempt to attain fine-tuned detailed momentary compromises between all the interests at stake and between the interest groups affected by the issue. The result is a less elegant draft characterised by lengthy technocratic wording.[24] Although, as said, this was not the initial aim, the restatements certainly have also had a unifying effect on adjudication, teaching and academic debate. At the very least they have provided a common framework for debate. Compare Hyland:[25] 'In sum, the dichotomous structure of the common law convinced the drafters of the Restatement (second) and the UCC to prefer a dialogic form for its systemisation. Both are flexible and open-textured. Neither truly resolves the difficult questions - in fact, they seem to suggest that no final resolution will ever be achieved, Their goal is rather to provide the long term discussion with a convenient framework.'

2. *The Restatements of Contracts*

As for contract law, the first Restatement of Contracts was published in 1932. The Reporter was Samuel Williston, Arthur L. Corbin serving as a Special Reporter on Remedies. Although this Restatement was also met by some sharp criticism right after its publication (see above), it did become a success, both because it was generally held to clarify the law (it was cited in contract cases in virtually all American states), and because it contributed to a more uniform contract law in the United States.[26] The Restatement (Second) of Contracts was drafted between 1962 and 1979 and was published in 1981. The general reporter was first Robert Braucher and then E. Allan Farnsworth. The Restatement (Second) of Contracts was also clearly influenced by American Legal Realism. It is much less conceptual, more functional and more open to dialogue. Also many provisions of the UCC, that were published in the meantime, have been taken into account. The Restatement (Second) has had considerable success as well, but has not been accepted by all the courts. Some courts, in some cases, continue to rely on

24 See Hyland 1998, p. 65. He does not seem to be very impressed by it, and rather favours the second style.

25 Hyland 1998, p. 64.

26 Burton/Eisenberg 1999, p. 2.

the Restatement (First).[27] Compare Melvin A. Eisenberg: 'The restatements may be most helpful when there is no clear law on the point or when there is reason to believe that the courts might change the law. In the latter respect, the Restatement (Second) serves as a conventional statement of "the modern view" of the law, even when it differs from the formal law in a particular jurisdiction. It has considerable "persuasive authority".'

3. *The Uniform Commercial Code*

Another source of inspiration for the Lando Commission has been the Uniform Commercial Code.[28] One of its purposes was to create unity among the various States of America.[29] It was drafted by the National Conference of Commissioners on Uniform State Laws and the ALI[30] between 1942 and 1954, under Chief Reporter Karl Llewellyn. Llewellyn was one of the leading figures in the American Legal Realist movement and his anti-formalist, functional approach is easy to recognise, e.g. in its structure: no abstract concepts and general parts, but articles on Negotiable Instruments, Bulk Sales, Secured Transactions et cetera. See also UCC § 1-102 (1): 'This Act shall be liberally construed and applied to promote its underlying purposes and policies.'[31] The underlying purposes and policies of the act are to simplify, clarify, and modernise the law governing commercial transactions; to permit continued expansion of commercial practice through custom, usage, and agreement of the parties; and to make uniform the law among the various jurisdictions.[32] The style of the UCC is very similar to the second wave of restatements (or rather the other way around).

27 Burton/Eisenberg 1999, p. 3. See on the relationship between the Restatement (First) and the Restatement (Second), Herbert Wechsler, the then director of the ALI: 'The Reporters, their Advisers and the Institute approached the text of the first Restatement with the respect and tenderness that are appropriate in dealing with a classic. As the work proceeded, it uncovered relatively little need for major revision, in the sense of changing the positions taken on important issues, although the Uniform Commercial Code inspired a number of significant additions. (…) It does not denigrate the 1932 volumes to say that the revisions and additions here presented greatly augment their quality. This is, indeed, very close to a new work.' (Foreword, in 1 Restatement (Second) of Contracts (1981), p. viii)

28 See PECL, Introduction, p. xxvi.

29 Burton/Eisenberg 1999, p. 4.

30 The Commissioners are appointed by the governors of each state.

31 U.C.C. § 1-102 (1) seems to have inspired art. 1:106 PECL, which, however, is less liberal.

32 See for scepticism Friedman 1985, pp. 675-676, on the UCC: 'It took a heavy effort to sell it to the legislators, who had no idea they needed a code.' 'It was, in a way, curiously old fashioned.' 'The Code was a product of a time that now seems as quaint and old-fashioned as the era of high-button shoes.'

Compare Hyland:[33] 'the Code itself, especially the Sales article, which has proved to be one of the great achievements of American codification, rarely provides a specific answer to any question.' In contrast to the restatements the UCC is law in a formal sense. It consists of 11 'Articles', which each consist of several 'Sections'. Each Section is followed by a Comment. Although these Comments formally are not part of the law, courts often give considerable importance to them.[34] Article 2, on Sales, which has clearly inspired the Lando Commission, has been adopted in 49 American States. The UCC is under continual revision by the Permanent Editorial Board for the Uniform Commercial Code. At this moment art. 2 (Sales) is under revision.

4. *UNIDROIT Principles*

By far the most important source of inspiration have clearly been the UNIDROIT Principles of International Commercial Contracts (UP) which were published in 1994. The PECL look very similar to the UP in all respects[35] and the Lando Commission has followed the UP (often literally) on many points.[36] This is not surprising because there has been an important overlap between the commissions that prepared the two sets of Principles and they have worked contemporaneously most of the time.[37] It should be noted, however, that the Working Group that drafted the UP themselves of course were not working in splendid isolation. They were inspired by the Vienna Sales Convention,[38] the UNIDROIT draft on validity of sales contracts,[39] the Restatement (Second) of Contracts,[40] and the UCC.[41]

33 Hyland 1998, p. 64.

34 Burton/Eisenberg 1999, p. 4.

35 An important point of difference, however, is that only the PECL contain Notes. See further below.

36 On other points the drafters of the UP followed the Lando commission, especially with regard to non-performance and remedies. Compare Bonell 1997, p. 87, and Hondius 2000.

37 Professors Joachim Bonell, Ulrich Drobnig, Arthur Hartkamp, Ole Lando and Denis Tallon were members of both Commissions.

38 See UP, Introduction, p. viii.

39 *Projet de loi pour l'unification de certaines règles en matière de validité des contrats de vente internationale d'objets mobiliers corporels*, *R.D.U.* 1973, p. 60.

40 It is important to note that E. Allan Farnsworth, as said the Reporter of the Restatement (Second) of Contracts, was also the Chairman of the Editorial Committee for the UNIDROIT Principles.

41 See on the American influence Farnsworth 1997, and Gordley 1996.

5. *The PECL as a restatement*

It is clear that the American Restatements had a different objective from the PECL. The ALI presumed the unity of the common law but was concerned with its uncertainty as a result of an unmanageable number of cases and with its internal contradictions. What the law in the US was lacking, according to the ALI, was a systematic restatement in general rules of the law which had developed on a case to case basis. In Europe, however, the law of contract in all countries except England and Wales, Ireland and Scotland, is formulated as a coherent system of abstract rules in civil codes (though interpreted and further developed on a case to case basis). Therefore the concern in Europe is rather with reconciliation of the different abstract formulas and their traditions of interpretation. The Lando Commission is concerned with diversity among the various legal European systems and tries to create some unity. On the other hand, however, the Lando Commission also presumes the presence of a common core of European contract law, and has tried to restate it.

It is interesting to see that in the U.S. the first approach to the restatement endeavour did not work out. The strong emphasis on abstract black-letter rules in the Restatements (First) met with broad criticism. It seems likely that today in Europe such an approach would not work either. The days of strong formalism in Europe (*École de l'exégèse*, *Begriffsjurisprudenz, legisme*) are long gone, and, although Europe is still much more formalist than the US, it does not seem very likely that many European courts would 'apply' a European restatement in a rigid way when that would lead to a result which would be, in their view, patently unfair, particularly if they would regard the solution under their own national law as being fairer. Also, a restatement of such a kind would be likely to remain sterile since, as a result of the high degree of abstraction of black-letter rules, it would be of little use as a source of inspiration to national legislators, courts, teachers and scholars. However, the approach of the Restatement (Second) could be successful in Europe. A restatement which provides a framework for dialogue could be extremely helpful.[42] There does not seem to be anything against such a framework. It could even help to make our law 'better'. The PECL clearly look more like the Restatement (Second) than the Restatement (First). Especially, they contain extensive and highly informative Comments. On the other hand, however, they sometimes give more of an impression of closure (as opposed to being open to dialogue) than is the case with the Restatement (Second). They are therefore somewhat ambivalent.[43]

42 Compare also Barendrecht 2000 and Basedow 2000.

43 See also Hyland 1998, p. 60.

Whether the PECL will be successful as a European restatement of contracts will, of course, in the end depend entirely on how European lawyers are going to deal with them, on whether the parties, courts, legislators and the EU directives will quote them and be inspired by them. As said, the success of a restatement depends on its authority.[44]

B. The Basis for Unification

1. *The Need for the Unification of Contract Law in Europe*

Providing an authoritative statement of the law similar to the American Restatements is not the only purpose of the PECL. The Lando Commission also has other purposes in mind. Contrary to the drafters of the American Restatements the Lando Commission hopes that its Principles will one day be enacted as law in a formal sense, preferably as a European Code of Contracts.[45]

The Lando Commission makes a clear choice with regard to the need for uniform rules of contract law in Europe. Why do we need uniformity? The Lando Commission tells us explicitly. First, uniform law would facilitate cross-border trade within Europe:[46] '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.' More specifically, in the view of the Lando Commission, a uniform European contract law would help to strengthen the Single European Market:[47] '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.'

The Commission does not say anything as to the possible benefits that could (and may now) be derived from 'those differences in national laws which are inimical to the efficient conduct of cross-border business within Europe', both specifically and more in general. It is, of course, possible that those differences in the law are differences that people care about.

44 For a parallel see the European Charter of Fundamental Rights, promulgated in December 2000 in Nice, which, in spite of its unclear formal status, may be regarded as binding in substance by European institutions. See Rodotà 2001.

45 PECL, Introduction, p. xxiii.

46 PECL, Introduction, p. xxi.

47 PECL, Introduction, p. xxi.

Admittedly, general contract law is not likely to provoke strong patriotic feelings among most European citizens, but some English tradesmen might prefer the tougher English rule on 'frustration of contract' to art. 6:111 PECL ('Change of Circumstances'), whereas a Scandinavian consumer might prefer a more general test of the fairness of all contract terms than art. 4:109 PECL ('Excessive Benefit or Unfair Advantage') would allow. In other words, many Europeans may regard their law on some points not merely as different from that of other European countries but also as better. Moreover, we might derive a benefit from difference in another way. Mattei and other proponents of the theory of comparative law & economics tell us that international competition of legal rules and doctrines may lead to an improvement in the quality of each of our legal systems.[48] Finally, the need for unity of private law in Europe is strongly contested by Legrand. He derives his arguments from arguments that are put forward against European unification in general, most of which are concerned with the preservation of national culture. He argues that law is culture and that diversity is richness and that in this post-modern age we rather need legal pluralism.[49] I will come back to these objections in the following chapters.[50]

Another question is whether the unification of contract law should be limited to Europe. Certainly, there is a clear development towards further integration in Europe, in all sorts of ways. However, that is not the only, and possibly not even the most important, trend today. If uniform rules are needed in order to facilitate international trade, it is doubtful that such unification should stop at the European borders. Rather, there seems to be a trend towards globalisation of the economy, a trend that seems to be enhanced by the Internet and the related New Economy.[51] As a matter of fact, also in contract law until the publication of the PECL the unificatory trend seemed to be rather in the direction of sustaining those developments. In 1980 the United Nations Convention for the International Sale of Goods (CISG) was adopted. It has now been ratified by 58 countries all over the world.[52] And in 1994 the UP were published, which also have a global scope. One could ask whether we really need European Principles, especially since they

48 See Mattei 1998-1. There are also risks of a race to the bottom, which would make the most liberal rule survive. See for the United States, Friedman 1985, p. 410.

49 Legrand 1999-1. See also Smits 1998 and Smits 1999-1, p. 46.

50 See Chapters VI Politics, VII Culture and VIII Economics.

51 See Teubner 1997, Twining 2000, Rodotà 2001.

52 See UNCITRAL Status of Conventions and Model Laws, update 17 January 2001 (see www.uncitral.org).

seem to differ so little from the UP.[53] On the other hand, however, the risk for the PECL to compromise trends towards global unity seems to be rather limited. First, because there is no formal conflict since neither of them is law in a formal sense. Secondly, because they are very similar to both the UP and CISG.

There is another problem with regard to the Lando Commission's claim of a need for unification. It seems to be in contradiction with their claim that the PECL 'represent the common core of the European systems'. There is some tension between, on the one hand, the strong assertion that unification is needed because diversity is an obstacles to trade, and, on the other, the equally strong claim that the PECL represent the common core of European contract law. Is there great diversity or overwhelming unity? To the extent that the PECL are a reliable restatement of the common core of European contract law, they actually form a strong statement against unification efforts for the simple reason that unity already exists. Conversely, if there are important differences between the European systems of contract law, how was it possible for the Lando Commission to find a common core? Compare Yntema on the American restatements:[54] 'This much is certain, that the notion of improving the law by restating it as it is, is unsatisfactory. (...) Where there is diversity in the law, how can it be stated in a single rule? Where there is uniformity, what is the need for restatement?' To some extent, of course, both claims can be reconciled: the Lando Commission's largely implicit[55] but very plausible[56] assumption seems to be that the commonalties and differences are different in kind (commonalties in substance and differences in form) and that one is more important than the other.

2. *The PECL as a Foundation for European Legislation*

Like many others, the Lando Commission is clearly concerned with the impressionistic way in which the European Union is harmonising private law, especially contract law.[57] Frequently the European Commission seems to possess a very narrow-minded view (the view of its Brussels Directorate-General) and does not seem to care about the broader picture, i.e. the rest

53 See on the differences Hartkamp 1994, Bonell 1997, p. 85 ff. It is interesting to note that the UP have found their way into many a book on cases and materials for contracts courses in the US, e.g. Burton/Eisenberg 1999.

54 Yntema 1936, p. 468.

55 See however, PECL, Introduction: 'systems often reach the same solution in different ways.'

56 See further below.

57 P. xxii.

of the national legal system into which the directive must be implemented. The implementation of directives on unfair terms,[58] consumer guarantees,[59] and, most recently, on late payment of money debts,[60] have raised some very difficult systematic questions in various legal systems in Europe.[61] Moreover, directives sometimes seem to contradict one another. Therefore, another purpose (the first) of the PECL mentioned by the Lando Commission is to provide a foundation for European legislation, in order to assure a more orderly development of the law.

3. *A European Code of Contracts?*

However, the PECL are not only meant to assist the institutions of the European Union in drafting directives et cetera. The PECL are also explicitly meant to provide a basis for a future European civil code: 'One objective of the Principles of European Contract Law is to serve as a basis for any future European Code of Contracts'.[62] This may explain why in its deliberations the Lando Commission paid most attention to the formulation of the black-letter rules.[63]

On this point there is a clear difference between the PECL and the American Restatements of the Law. The Restatements have never been meant to provide a basis for a code. However, it is not immediately clear what the benefit would be of adoption as a code as compared to its status as a restatement, particularly if the code would only consist of the black-letter rules. As said before, much of the substantive value of the PECL lies in the Comments. And it is not all that clear whether the adoption of only the black-letter rules of the PECL as a European Code of Contracts without any harmonisation of regulations concerning specific contracts, with-

58 1993/13/EEC.

59 1999/44/EC.

60 2000/35/EC.

61 On the other hand, the need for the implementation of directives may also sometimes be beneficial to the system. In Germany, for example, there are plans to use the implementation of the directives on consumer guarantees and on late payment of money debts to establish some order in the very complicated system of remedies for non-performance. See the *Diskussionsentwurf eines Schuldrechtsmoderniserungsgesetzes* issued by the *Bundesministerium der Justiz* on August 4th, 2000. A similar operation was attempted in France when the directive on product liability had to be implemented but unfortunately failed due to a strong producer's lobby. See Ghestin 1998.

62 See PECL, p. xxiii. Explicit reference is made to the European Parliament Resolutions calling for the preparation of a European Code of Private Law, one in 1989 (Resolution of 26 May 1989, OJEC No. C 158/401 of 26 June 1989) and the other in 1994 (Resolution of 6 May 1994, OJEC No. C 205 (519) of 25 July 1994).

63 P. xv.

out a common law of civil procedure, and without a common jurisdiction that would guarantee uniform interpretation, would lead to a significant degree of uniformity in Europe. However, if it was decided to enact such a European code of general contract law, the PECL would obviously provide an eminent basis for such a purpose.

C. **Applicable Law Today**

1. *Incorporation*

The PECL are not only meant to serve as a basis for future law. They are also intended to be used by contracting parties in Europe today. Of course, the incorporation of the PECL by the parties into their contract is one possibility.[64] In principle parties are free to declare the PECL to be part of their contract (freedom of contract). This may be useful to parties who wish to have a neutral set of contract clauses without time-consuming negotiations and delicate drafting exercises. For example the famous Channel-tunnel contract, that now refers to the law common to France and England, could have adopted the PECL as part of their contract.[65]

2. *Choice of law*

However, a choice of law in favour of the PECL, as art. 1:101 (2) also suggests, seems to be more problematic. It is not at all certain that in many European legal systems conflict rules would allow parties to make a choice of law in favour of the PECL.[66] The argument in favour is obvious: the PECL are truly European and therefore probably better adapted to international situations.[67] However, the argument against is equally obvious: the PECL are not 'law' in a formal sense. They have not been enacted by any public authority, nor are they democratically justified in any other way (e.g. consultation of those interested, et cetera). They *are* no more the law than, say, Kötz's book 'European Contract Law'.[68] Nevertheless, several European authors have argued that a choice of law in favour of the PECL should be possible.[69] However, these authors have been met with criticism.[70]

64 Art. 1:101 (2).
65 See Lando 1998, Hondius 2000.
66 The same problem arises with regard to the UP.
67 This argument is even stronger for the UP, that are exclusively intended for international (commercial) contracts.
68 Kötz 1997. Indeed the American Restatements never seem to have aspired to be the object of a choice of law.
69 See Hartkamp 1995, Lando 1996, Boele-Woelki 1995, Boele-Woelki 1996.
70 Very sceptical is Kessedjian 1995..

3. *Formulation of the Lex Mercatoria*

Another purpose mentioned by the Lando Commission is that the PECL may be applied when an international contract states that the arbitrators are to resolve their dispute on the basis of the Lex Mercatoria.[71] The PECL may then be regarded as a restatement of the Lex Mercatoria.[72]

When contracting parties instruct arbitrators to apply the Lex Mercatoria, a problem might arise with regard to the choice between the PECL and the UP. The PECL claim that they are 'a modern European Lex Mercatoria'. However, they also claim that they contain rules of general contract law, not only for international commercial contracts, but also for national and consumer contracts. The UP, on the other hand, claim to be the Lex Mercatoria for international commercial contracts.[73] And there is also the Central project, led by Berger, which is specifically meant to provide guidelines for arbitrators.[74] However, in practice the difficulties will not be as great as they seem: as said, the UP and the PECL are very similar.[75]

D. **A Common Language**

One of the most important benefits of the European private law movement has been that academic debate on private law has rapidly become international. In my view the most important achievement of the Lando Commission is that it has provided us with a common language for that debate.

Probably the most important function of the PECL will be that they provide us with a common European language for discussions on contract law.[76] This common language provides us with a clear, efficient and sufficiently neutral framework for a fruitful European discussion on contract

71 The *Lex Mercatoria* is not recognised in all countries. See De Ly 1989 and Osman 1992.

72 Art. 1:101 (3).

73 See UP, Preamble (p. 10), and Bonell 1997.

74 Central 2000 and www.uni-muenster.de/Jura.iwr/central/english/central.html.

75 See also Bonell 1997, p. 87 ff.

76 See p. xxv: 'Those attempting to unify European contract law, particularly within the Community, need above all uniform principles and a uniform terminology.' Strangely enough one other, and in my view very important, possible function of the PECL is not mentioned by the drafters: education. First, of course, they can be extremely useful in optional courses on 'European Contract Law' as we have seen in many Dutch universities for some years now. But, secondly, in my view the PECL provide excellent material for teaching the ordinary (mandatory) contract law course in a less positivist, more problem-oriented way. And it is obvious that if all over Europe in contract law courses attention would be paid to the PECL this would contribute enormously to unification. See further Kötz 1992, Hesselink 1999, p. 17, and Basedow 2000.

law.[77] It helps us to formulate the various conflicts.[78] And it is highly accessible and thus allows everyone to participate in the debates.

This common language is not meant to replace the national languages. It simply helps us when we want to talk about the commonalties and differences between our systems. Many commonalties in substance are hidden by differences in terminology (Babel) and, vice versa, many differences in substance are hidden by common terms (false friends). The use of a common language may make communication easier.[79] For the first time in recent history we now have in Europe a sort of meta-language for debates on contract law. This may reduce to some extent – but not completely! – the Babylonian conversations between scholars and practitioners from different European jurisdictions.[80]

Of course this language is by no means completely neutral. The choice of concepts et cetera made by the Lando Commission implies cultural, political and other choices. I will return to this later.

Although the PECL's language is limited to Europe, it will not isolate Europeans from the rest of the world since it is very similar (though not identical) to CISG and the UNIDROIT Principles.

77 See on taxonomy: Mattei 1997-1.

78 See also Barendrecht 2000 'giving the problem a name'. It should not be understood too much as an answer to those conflicts. See Hyland 1998, p. 65-67: 'What the American experience teaches is that differences disappear very slowly if at all. If they are suppressed in one domain, they resurface elsewhere. The only question is how best to take advantage of them.'

79 On the other hand the use of a third language may also complicate matters.

80 And the world. See Gordley 2000: 'If we break our last ties with the traditional English common law, the number of [legal] families will be reduced to one. I have argued that we must do so simply in the interest of coherent thinking and sensible outcome. If we do, however, we may also discover that coherence and good sense have little to do with national boundaries. We will have moved toward a world in which jurists everywhere recognize that the fundamental problems are the same, and can talk to each other about them in the same vocabulary.'

III. Authors and Working Method

A. Authors

Who drafted the Principles of European Contract Law? The PECL were prepared by the Commission on European Contract Law, and edited by Ole Lando and Hugh Beale. The Commission on European Contract Law consists of members from each country of the European Union, including from Scotland. With the expansion of the Union the number of members of the Commission has increased over the years.[81]

Who asked this Commission to draft the PECL? The answer is in fact: nobody. In 1974 Professor Ole Lando concluded that the EEC Convention on the Law Applicable to Contractual and Non-Contractual Obligations would be insufficient: 'They would never establish the legal uniformity necessary for an integrated European market.'[82] Although funds were provided by the European Commission,[83] the Commission never asked them to draft Principles of European Contract Law. Therefore the Lando Commission cannot be said to represent the European Union in any official way. Nor do its members formally represent their countries. Their countries are not bound by them and they are not bound by directives or guidelines from their respective governments. To be clear: the Lando Commission do not claim that they represent anybody. On the contrary, they emphasise the fact that they have worked with great independence.

The members of the Commission on European Contract Law are virtually all university professors. However, several of them are also practising lawyers.[84] How were the members selected? The Preface to the PECL does not explicitly mention anything with regard to the selection of Commission

81 The Commission only has members from the current EU Member States. Therefore the laws of prospective new members have not been explicitly taken into account.

82 PECL, Preface, p.xi.

83 The EC paid most of the expenses up to 1994. Other funds were provided by some 15 private and public sponsors. See PECL, Preface, p. xv.

84 PECL, Preface, p. xiii.

members, but it is clear that they were selected by co-option. Although the Commission consists of specialists of the highest international esteem, the Commission is not democratically legitimised in any formal way. For most of the purposes for which the PECL are intended (see above) this is not a problem whatsoever, but for some (especially the model for a European Code) it may be questionable from a political perspective.[85] On the other hand, even if the PECL were to be the basis for a European code of contract law, from the perspective of most European countries it is not at all extraordinary for a code to be drafted mainly by scholars. Especially in Germany there is a long-standing tradition of this from the drafting of the BGB until the recent proposals for a *Schuldrechtreform.*[86] And in the Netherlands Meijers and most of his successors who drafted the 1992 Civil Code were academics.[87] Also in Great Britain many statutes and law reforms are prepared by the Law Commissions, which also (but not exclusively) include academics.[88] And in France many pieces of private law legislation, like family law (Carbonnier), traffic liability (Tunc) and product liability (Ghestin) have been prepared by academics. The main difference seems to have been that the members of the Commission on European Contract Law were not formally appointed by their governments to do the drafting.[89]

Many of America's prominent law professors, judges, and attorneys are members of the ALI, and, more or less actively, are involved in the drafting and final adoption of the Restatements. This, of course, helps considerably in broadening the support for the restatements. The PECL have not undergone such an elaborate drafting process where literally thousands of people have been involved. They were drafted by some 20 professors. This could of course lead to indifference or scepticism or even hostility on the part of those academics who were not involved in the drafting. In order to broaden support for the project it would be desirable if a European Law Institute, similar to the ALI and UNIDROIT, were to be established, and the EU should invest in this.[90] Such an institute could provide the infra-

85 Compare White 1997, p. 1, on the ALI: 'an organization of elite lawyers and judges'.

86 Among the members of the *Kommission zur Überarbeitung des Schuldrechts* who presented its proposals in 1992 were Professors Hein Kötz, Dieter Medicus, and Peter Schlechtriem, The recent proposals to reform the law of obligations (on which further below) is largely based on the findings of that committee (see Abschlußbericht 1992).

87 W.Snijders, however, was a senior judge.

88 E.g. at this moment Professor Hugh Beale, a prominent former member of the Lando Commission.

89 See for some very formalist criticism Kessedjian 1995.

90 See Snijders 1997, Hesselink 1999.

structure for the successor of the Lando Commission, the Von Bar group, which is currently working on the European Civil Code project. It could also guarantee the continuity of the project (similar to Restatements Second and Third).

Of course, all this could not be expected from the Lando Commission. The publication of the PECL is a major achievement. However, it should also be openly recognised that it is essentially an academic achievement, albeit, I repeat, a collective achievement by some of Europe's most renowned experts in the field. The PECL are the private academic work of a group of the most outstanding European scholars with an undisputed reputation in general contract law, most of them with an inclination towards comparative law.

B. **Working Method**

The working method adopted by the Lando Commission is described clearly in the Preface: First, a Reporter drafts Articles and Comments on a certain subject which he presents to the drafting Group. That group prepares the text for submission to the whole Commission. After the Commission has accepted the texts they are sent to the Editing Group which takes special care of the terminology and presentation of the texts.[91] It is important to note that the Commission left it to the Drafting Group and the Editing Group to finalise the Comments,[92] apparently considering the black-letter Principles to be the most important part of their work. The Notes to each article were written by its Reporter on the basis of information provided by the Commission Members.[93]

As said above, the American Restatements are also drafted by a private organisation, the American Law Institute. However, there is a major difference between the way the PECL were drafted and the way in which in the US the Restatements of the Law and the UCC are drafted. The drafts for the Restatements and for the UCC are explicitly exposed to interest groups. Moreover, representatives from all parties concerned with a certain branch of the law are involved (in great numbers) in the debates concerning the drafts during the Annual Meeting of the ALI.

The Commission does not say why it has not exposed its draft to explicit

91 Preface p. xv. Especially the Editing Group ensured that the terminology which was used could be readily translated into French and other languages.

92 See PECL, Introduction, p. xv.

93 See PECL, Introduction, p. xv.

lobbying.[94] It could be argued that there is no need to do so because the PECL deal with general contract law which is a fairly neutral part of the law, and the matters which the Commission had to deal with were highly technical issues which could best be left to specialists.[95] However, the most likely reason seems to be that sufficient funds were simply not available to organise such an endeavour in a serious way. Contrary to the ALI, which, as said above, is a highly professional organisation with thousands of members, the Lando was rather a Commission of idealist volunteers.[96]

C. **Presumptio Similitudinis**

The Commission rather looked for similarities than for differences between the systems. They adopted the *presumptio similitudinis* as the basis for their working method. This method was previously successfully applied by Hein Kötz in his *European Contract Law:*[97] the book mainly concentrates on the common core; the local peculiarities can be found in the footnotes. Similarly, the Lando Commission has concentrated on commonalties rather than on divergences. However, the differences are not hidden altogether: they are spelled out in the comparative Notes.

Some scholars are very critical of this method.[98] They maintain that it is 'unscientific'. A true comparative lawyer should look for differences rather than for common factors. However, in the light of their objectives the Lando Commission's choice is perfectly understandable. As said above, the main purposes the PECL should serve are the following: to serve as a restatement of the common core of European contract law; to provide a basis for future unification of contract law in Europe; to be applied as law from now on in certain specific situations; and to provide a common language. For all these purposes it makes perfectly good sense to concentrate on the similarities rather than on the differences between the various European systems of contract law. If one wishes to draft a set of rules which can be said to be based to some extent on all these systems, and if one wishes to encourage further European integration this method is likely to be the most

94 The PECL were discussed, in view of their comprehensiveness, with practising lawyers from six Member States. See PECL, Introduction, p. xxvi.

95 Whether that position would be tenable will be discussed below.

96 See Lando's preface (p. xvi): '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.' See on the need for a European Law Institute which could provide the infrastructure for the European Civil Code Project, above.

97 Kötz 1997. See also Zweigert/Kötz 1998, p. 40.

98 See especially Legrand 2001.

effective. Clearly, the method of *presumptio similitudinis* is far from being politically neutral. It is typically adopted by idealists who believe in a uniform private law for Europe. It would never be used by adversaries of European integration. But, of course, the alternative method which emphasises differences is not politically neutral either. Apart from a few naive scholars who regard the method as 'objective' or 'scientific', it is mainly employed by those who have other ideals and political aims. They want to preserve local particularities because they regard them as an important part of the national cultural heritage. And, clearly, they will not only attack the method but also the purposes envisaged by the Lando Commission.

It should be noted, however, that the members of the Commission did not limit themselves to establishing the common core. They went further. They wanted to build something new, mainly (but not only)[99] based on the foundation provided by the national European legal systems. The Commission state: 'The method adopted may be compared with the American Restatement of Contract, the second edition of which was published in 1981. However, the task is different. The restatement is broadly intended as a formulation of existing law, since in almost all states the law of contract is based on the common law. In the Union, which is characterised by the existence of a number of divergent legal systems, general principles applicable across the Union as a whole must be established by a more creative process whose purpose is to identify, so far as possible, the common core of contract law of all the Member States of the Union and on the basis of this common core to create a workable system.'

Apart from whether there is here any true difference in principle with the Restatements (it rather seems to be one of degree), it seems appropriate that the Commission explicitly stated that they intended to create something new since this will avoid the risk of the PECL being scrutinised by dedicated positivist 'legal scientists' who wish to reproach the Commission for the fact that the PECL are not an accurate or objective or true statement of the common core. However, as a result, the PECL, at first sight, seem to suffer from ambiguity.[100] On the one hand, they pretend to present the common principles, the common core. They make a strong statement of communality. On the other hand, they pretend to be progressive and tell us that they have not seen it as their task to make interpolations or comprises. They actually acknowledge that some of the provisions in the PECL reflect ideas

99 Some rules emanate from outside the EU (UCC, Restatements), and some from no system at all!

100 This ambiguity is not the same as the one discussed above.

which have 'not yet' (!) materialised in the law of any State.[101] Probably this ambiguity has something to do with the position of the Lando Commission. On the one hand, the members are academics who want to demonstrate how much the present contract laws of Europe actually have in common, while, on the other, they are also would-be European legislators who want to show us what a good European Contract Code could look like. However, on second thoughts, this ambiguity should not be regarded as problematic. Instead of investigating to what extent the PECL really represent the common *core* they can best be seen as the common *view* (there are no dissents) on general contract law of some of the most eminent scholars in the field from all across Europe. This in itself is a very strong and relevant statement. I do not think that the Commission should or can (or indeed does) pretend the PECL to be anything more than this.

101 See PECL, Introduction, p. xxvi.

IV. Format and Style

A. Format

The format chosen by the Lando Commission is that of Principles. At first sight to some legal theorists the term 'principles' may be somewhat misleading. Far from being principles as Ronald Dworkin has used them in order to sustain his claim of the law's integrity,[102] the black-letter text of Principles of European Contract Law looks very much like rules, similar to those that can be found in many of the civil codes in Europe and, across the ocean, for example in the Uniform Commercial Code.[103] Indeed, similar to the Restatements the black-letter text is often referred to as 'black-letter *rules*' and the Lando Commission itself frequently refers to 'the rule' in one article or the other. Why are the PECL called 'principles'? The members of the Commission never explicitly say so but it seems likely that they were attracted by the connotation of 'basic', 'fundamental', 'general', et cetera.[104] Moreover, they may have been reluctant to speak of rules for fear of being labelled as self-proclaimed European legislators. Finally, of course, the direct source of inspiration were clearly the UNIDROIT Principles.

The Principles are accompanied by Comments and Notes. Since some of the Articles are (necessarily) rather abstract,[105] the Comments provide a very important source of information. The Comments ensure that lawyers from the various European traditions have a clear idea of what the Lando Commission means by the abstract formulas contained in the Articles. They are an invaluable product of collective, international scholarship, which may also, together with a casebook, provide excellent materials for teaching the law of contract in Europe. For that reason it is of particular importance that Ole Lando has made sure that a student's edition would be

102 See especially, Dworkin 1986.

103 See above.

104 This, of course, does ring a bell as regards Dworkin's integrity and other (crypto-) natural law theories.

105 See on abstraction below, V,A.

available. (Frankly, for optimal dissemination it would have been better if the whole document had been made freely available on the Internet.)[106]
In my view, the format is very appropriate for all the purposes the PECL are meant to serve.[107] Because of the Comments, which contain many very helpful Illustrations, the PECL are much less abstract and provide much more information and certainty than a classical code. In that sense the adoption of the PECL as a European Code of Contracts would mean important progress for many legal systems. On the other hand, for the same reason, it would be an inexcusable mistake to cut off the Comments and Notes and to adopt only the black-letter articles as a European code.

B. **Style**

1. *Accessible*

The PECL are written in an elegant style. Fortunately, the Lando Commission has neither adopted the very learned, dogmatic style of *Professorenrecht*, full of concepts and abstractions, such as e.g. the German, Greek, Portuguese and Dutch civil codes (although, as said, the members of the Lando Commission are all professors!), nor the extremely detailed and bureaucratic style of most English statutes. Obviously, this very fortunate result was not attained by chance. It was rather an explicit objective of the Lando Commission: 'Every effort has been made to draft short and general rules which will be easily understood not only by lawyers but also by their clients.'[108] And this effort has been very successfully accomplished by the Editing Group.

2. *Open*

The style is also rather open. The PECL explicitly leave a great deal of discretion to the courts. There is no explicit attempt at 'closure': 'The rules are supple, leaving judges considerable latitude. Moreover, the rules may point in opposite directions. It will then be for the judge to choose which is most appropriate in the circumstances of the case and which to disregard.'[109] As a restatement the PECL are also meant to stimulate debate (both between the

106 On p. iv it is stated: 'Permission is given by the copyrightowner for unlimited reproduction for non-commercial purposes only of the pages containing the texts of the articles.' On the risk of separating the Articles from the Comment, see below. See now the UNIDROIT Principles at http://www.unidroit.org/english/principles/contents.htm.

107 On these purposes see above, II.

108 PECL, Introduction, p. xxvi.

109 PECL, Introduction, p. xxxiv.

contracting parties and in the legal community). As we saw above, the American experience has shown that for a restatement too much closure in rigid black-letter rules is not the appropriate style. Indeed, the style of the PECL is rather discursive. Sometimes they do little more than provide the relevant elements for debate. Often they merely mention a set of factors which should be taken into account. See, for example, art. 4:107 (3) (Fraud): 'In determining whether good faith and fair dealing required that a party disclose particular information, regard should be had to all the circumstances, including: (a) whether the party had special expertise; (b) the cost to it of acquiring the relevant information; (c) whether the other party could reasonably acquire the information for itself; and (d) the apparent importance of the information to the other party.'[110] More specifically, the PECL make extensive use of open standards like 'good faith and fair dealing', 'reasonableness' et cetera.

There is a persistent view that commercial practice needs hard and fast rules whereas in a non-commercial sphere (especially consumer contracts) more general standards and open-textured rules are preferable. The underlying ideas seem to be that commerce needs certainty more than individual fairness: it is more important to know exactly what the law is than that the resolution of each specific case is fair to both parties; professional parties conclude the same types of contracts all the time and all they want is to be able to calculate their risk and set their prices on the basis of what they know to be the law. This is what many scholars say about commercial practice.[111] If this is true, then the PECL are not as well adapted to commercial contracts as the Lando claims.

However, this view does not seem to be unequivocally confirmed, to say the least, by commercial practice.[112] Many important international commercial contracts contain very vague 'hardship clauses', which often do not say much more than that in case of 'hardship' both parties will be under a duty

110 Another typical example is art. 5:102 (Relevant Circumstances), on interpretation: 'In interpreting the contract, regard shall be had, in particular, to: (a) the circumstances in which it was concluded, including the preliminary negotiations; (b) the conduct of the parties, even subsequent to the conclusion of the contract; (c) the nature and purpose of the contract; (d) the interpretation which has already been given to similar clauses by the parties and the practices they have established between themselves; (e) the meaning commonly given to terms and expressions in the branch of activity concerned and the interpretation similar clauses may already have received; (f) usages; and (g) good faith and fair dealing.'

111 According to Kennedy 1976, p. 1704, with references, this line of thought goes back to Max Weber. See recently in the Netherlands Brunner 1992 and Tjittes 1997.

112 In the same sense Mendel 2000, p. 230 ff.

to renegotiate the contract in good faith. Moreover, some of the most important commercial contracts instruct the arbitrators to apply the 'lex mercatoria', 'general principles of the law', et cetera. And quite frequently arbitrators find as the most important content of the lex mercatoria the general duty of good faith.[113] Interestingly, the concept of good faith was first introduced in American law in the Uniform Commercial Code.[114] And, more generally, the UCC is full of very broad standards. The reason for this is that the drafters thought that such standards would be more suited to commercial practice.[115] Other interesting examples include the UNIDROIT Principles of International Commercial Contracts, which cannot be said to be a set of hard and fast rules, and Klaus-Peter Berger's Central Project, which compiles a list of (now 70) principles which are said to be generally accepted in commercial practice, most of which are very broad.[116]

3. *Flexible*

Finally, the style is meant to create maximum flexibility. Therefore the drafters have refrained from excessive detail and specificity in order not to inhibit future development.[117] In addition, Article 1:106 provides a liberal rule on interpretation and supplementation of the PECL. See the Comment:[118] 'The 'liberal' interpretation has a static and a dynamic aspect. The first envisages situations which may occur today but which have been overlooked or omitted, the second situations which we cannot imagine today, as the authors of the French civil code could not imagine an industrialized society.'

C. **Language**

1. *Choice of language*

The PECL were published in English. This was an obvious choice since today English is not only the undisputed world language, it has also become the European *lingua franca* among lawyers, both practising lawyers

113 See e.g. the famous Norsolor case (C.C.I. 26 October 1979, no 3131); Nassar 1995, Osman 1992; Central 2000 (where good faith is listed as the Lex Mercatoria's principle no. 1).

114 See § 1-203 *UCC*. In addition, more than 50 other provisions make reference to the concept of good faith.

115 See Twining 1973, p. 336: 'Llewellyn believed that tight drafting will often be at least as likely to defeat commercial expectations as to provide a basis for them.'

116 See Berger 1996 and Berger 1997.

117 P. xxvii. Compare UP, Introduction, p. viii: 'the UNIDROIT Principles are sufficiently flexible to take account of the constantly changing circumstances brought about by the technological and economic developments affecting cross-border trade practice.'

118 Art. 1:106, Comment C.

(mainly due to the economic power of the London and New York based law firms) and academics (virtually all European private law projects use English as their working language).[119]
A French translation of the first part of the PECL was published soon after the English version.[120] And no doubt there will also be a French translation of this edition.[121] Are translations into other European languages necessary? There is no doubt that such translations would considerably enhance their circulation, and, as a result, the familiarity of European lawyers with them, and, eventually, the realisation of their goals. The potential risk of a loss of uniformity as a result of inadequate translation, seems to be of minor importance, since the substantive ideas contained in the PECL are far more important than the precise way in which they are formulated. However, if there are going to be translations it is crucial that they should contain not only the black-letter rule but also the Comments (with Illustrations).[122]
Nevertheless, it seems likely that international academic debate and international practice will mainly use the English version. Thus, eventually the English version may well become the one which is used most frequently. Would that be a dangerous development? It does not seem so. Even the most ardent French preservationist will have to admit that today there is not a great risk that the British will want to dominate Europe. Moreover, it should be emphasised that the terminology used in the PECL is not the terminology of English law. It is rather a new legal language.[123]

2. *Some terminological choices*

It is clear that the Lando Commission had to make many choices also with regard to terminology. Some of the most significant include the following. The PECL use[124] 'good faith *and fair dealing*', like the Restatement

119 See on the important purpose of the PECL as a 'common language', above, II,D.
120 *Les principes du droit européen du contrat, L'exécution, l'inexécution et ses suites. Version française*, La documentation française, Paris 1997, translated and edited by Isabelle de Lamberterie, Georges Rouhette and Denis Tallon.
121 This edition already contains the French translation of the black-letter text.
122 A German translation of only the black letter articles was published in *Zeitschrift für europäisches Privatrecht* 1995, p. 864, , and an Italian one, edited by Professor Guido Alpa in *Rivista Critica del Diritto Privato* 2000, 3.
123 See p. xxv: 'In fact no single legal system has been made the starting point from which the Principles and the terminology which they employ are derived.' This seems to be true. Here again there is a clear parallel with the UP (Introduction, p. viii): 'As to their formal presentation, The UNIDROIT principles deliberately seek to avoid the use of terminology peculiar to any given legal system.'
124 Emphasis added.

(Second) of Contracts and like the UP, not 'good faith', like many European systems and the EC Directive on Unfair Terms;[125] 'termination', not 'rescission' like many English judges[126] or 'avoidance' like the CISG;[127] 'avoidance', like the UP, not 'to annul' which is frequently used in international academic debate;[128] 'debtor' and 'creditor', like many European systems, but unlike English law which uses these terms only as regards mon-etary debts, and unlike the UP, which use 'obligor' and 'obligee';[129] 'non-performance', like the UP, but unlike the CISG ('breach');[130] 'specific performance', like in England and not 'implement' like in Scotland;[131] 'recovery',[132] and not 'restitution', like in England and in the UP.[133]

Some interesting French translations of the articles include: *dol* (not *fraude*) for 'fraud'; *contrainte* (not *violence*) for 'threat'; *droit de suspendre l'exécution* (not: *exception d'inexécution*) for 'right to withhold performance';[134] and *moyens* for 'remedies'.

125 Art. 3, Council directive 93/13/ECC on Unfair Terms in Consumer Contracts, 5 April 1993, OJ no. l095, p. 29, 1993/04/21.

126 Which is confusing in England because the same concept is also used in case of misrepresentation, i.e. both for termination *ex nunc* and *ex tunc*. See Lord Wilberforce and Lord Diplock in *Photo Production Ltd.* v *Securicor Transport Ltd*. [1980] AC 827 (p. 844 and p. 851 respectively). See on the debate Treitel 1999, p. 702.

127 Artt. 49 and 64 CISG.

128 N.B.: in CISG, as said, 'avoidance' is what the PECL call 'termination'.

129 In most of the drafts (and in the published Part I) the PECL also used 'obligor' and 'obligee' but these terms were substituted in the final draft, a very fortunate choice. CISG, of course, uses 'buyer' and 'seller'.

130 See on the general concept of non-performance below, VII,C.

131 MacQueen/Thompson 2000, p. 221 ff.

132 Artt. 9:307-9:309 PECL.

133 Art. 7.3.6 UP.

134 Art. 9:201 PECL. Compare CISG: 'suspend performance'. But see the Title of Section 9.2 (Withholding Performance): *Exception d'inexécution*.

V. Subject Matter

A. Abstraction

The law relating to contracts could be in theory, and is in practice in the various European legal systems, stated on various levels and in various modes of abstraction. The Lando Commission has opted for general contract law. Other alternatives include:

1. *Legal acts (Rechtsgeschäfte)*

In the systems of the German legal family (Germany, Greece, Portugal (*negócio jurídico*), the Netherlands (*rechtshandeling*)) contracts are regarded as just one type of *Rechtsgeschäft*. This concept has had some success in legal doctrine in Italy, but it was not introduced into the new 1942 civil code.[135] In France the concept has been even less successful[136] and in English law it is not known at all. It is a very abstract concept, which is to be found in the most general (i.e. abstract) parts of the code, in Germany in Book 1 (General Part), in Greece in Book 1 (General Principles), in Portugal in Book 1 (General Part), and in the Netherlands in Book 3 (General Part of Patrimonial Law) and is applicable, for example, to such different acts as the formation of a contract, the recognition of a child and the acceptance of an inheritance. It was developed in the hay days of *Begriffsjurisprudenz* and it is very strongly related to the 19th century idea of party autonomy.[137]

The concept now seems outdated. As said, it was not included in the Italian Civil Code. The Hungarian, Russian and other Eastern European codes do not use it, and it is neither included in the UP,[138] nor in the Scottish plans for a civil code[139] or the English proposals for a commercial code. And al-

135 See Bianca 1992, p. 3, with references.

136 But see Flour/Aubert 1994.

137 See Flume 1992, esp. pp. 28 ff.

138 Neither is it to be found in the American Restatements (First) and (Second) of Contracts or in the U.C.C.

139 See MacQueen 2000.

though, as said, it is included in the 1992 Dutch code it should be kept in mind that the first drafts for that code date from the 1950s.[140] Moreover, today in legal doctrine and in legal education in most European countries emphasis seems to be more on the law of obligations (with contract as one source of obligations) and on the law of contract.

The Lando Commission was right in choosing not to draft Principles of European Legal Acts. The concept is too abstract: even for those who are not completely convinced by post-modernism,[141] this degree of rational, systematic abstraction goes too far, especially as far as the law is concerned (as opposed to textbooks). It is also too closely related to the 19th century conception of party autonomy for it to be acceptable as a central concept in the law of the 21st century.[142] And, finally, it is too closely related to only the German legal family, whereas it is completely unknown in English law.[143]

2. *Law of obligations, liability law, death of contract*

In most European legal systems lawyers think in terms of the law of obligations and are familiar with general rules on obligations.[144] Systematically, in these countries contracts are regarded primarily as one of the sources of obligations. The concept of 'obligation' has been central in the legal systems on the Continent since Roman law[145] and it lies at the heart of all European codes and at the universities in most civil law countries courses and textbooks are based on it. This is different in the legal systems of England, Ireland and Scotland, where emphasis is more on 'contracts', 'torts' and, more recently, on 'restitution',[146] and in Scandinavian countries, where sales law and general contract law are the central concepts.[147]

The Lando Commission has not opted for Principles of European Obligations. They do not explain why. Therefore we can only hazard a guess. The most obvious reason seems to be that drafting Principles of European Contract Law was a sufficiently ambitious endeavour. Another

140 See Meijers 1954, p. 117. The first drafts reflect a clear preference for abstractions which was typical of Meijers, the author of the first drafts. See Smits 1998, p. 17.

141 See on abstraction Hesselink 1999-1, p. 406 f, and on modernism and abstraction Smits 1998, p. 16 ff.

142 See on this below, VI,A.

143 See Markesinis/Lorenz/Danneman 1997and my review (Hesselink 1999).

144 This is also true for the systems of the Germanic legal family, which also contain a general law of obligations.

145 See Zimmermann 1996.

146 See, however, Samuel/Rinkes 1992, Birks 1997 and Burrows 2000.

147 See for Sweden Hultmark 2000, p. 273.

plausible reason might be that in the law of contracts a great deal of work had already been done (ULIS, CISG, Restatements First and Second, UP). Finally, they may have regarded the PECL as just a first step. Eventually, within the ECC project where the PECL will be the general contract law, it may be decided to adopt general rules on obligations. Many of the rules contained in the PECL may be easily transformed into rules of obligations. As a matter of fact, during the drafting of many rules (especially those relating to liability in damages) their possible application to types of liability other than contractual has been taken into account.

Neither has the Lando Commission opted for 'liability law'. In some legal systems there is a tendency to concentrate mainly on liability and to move towards a 'liability law'. This is so in France[148] and the Netherlands, where the University of Tilburg has a 'Centre for Liability Law'.[149] This tendency is inspired by the idea that in many cases it does (or should) not matter whether liability is contractual or delictual.[150] This seems to be particularly true in case of accidents and other cases of physical harm and damage to property, where indeed it should not make any difference whether parties have a contractual or similar relationship (*Sonderverbindung*) or not, but for 'pure economic loss' some legal systems (especially German and English law) make a distinction.[151]

The notion of a general 'liability law' is related to the idea of 'the death of contract' which was proclaimed by Grant Gilmore in 1974.[152] (See also the German theories of *gesetzliches Schutzverhältnis* (Canaris) and *dritte Spur).*[153] But today in most legal systems contract law seems alive and well. One of the reasons seems to be that there is more to contract law than just the 'law of accidents' or 'injury law' or even 'liability law'. This is particularly true for long-term contracts where even in case of conflict liability is frequently not the main issue since, because of their mutual dependence, parties are more interested in how they should continue their relationship.[154] Therefore under the PECL, as in most European legal systems, liability in damages is just one of the remedies for non-performance. Another reason is that most people still believe that it makes a difference for the existence and extent of

148 See especially Viney 1995. See also Le Tourneau/Cadiet 1996.

149 See also Barendrecht 2000.

150 See the structure of the Dutch 1992 Civil Code, which provides general rules for liability in damages (Section 6.1.10), from whichever source (contract, tort, *negotiorum gestio*, unjust enrichment or other).

151 Compare Von Bar 1996, and Hesselink 1999-1, p. 220 ff, with further references.

152 Gilmore 1974.

153 Rejected for the Netherlands by Hesselink 1999, p. 210 ff and Hartkamp 2000, no. 48b.

154 See Macneil 1987 and Macaulay 1963.

rights and obligations between parties whether or not such rights and obligations were intended by the parties or not, particularly in the case of 'negotiated contracts'. This view seems to have been embraced by the Lando Commission as well. Therefore, also in the view of the Lando Commission contract is alive and kicking.

3. *Specific contracts*

Another alternative would have been only to make rules for all (or some) known types of specific contracts. The obvious advantage of such an approach would be that the rules would be much less abstract. And, clearly, such specific rules would much better fit the specific type of contract concluded by the parties. But the drawbacks of such an approach are equally evident. First, as a result of freedom of contract the work on such principles would never be finished because people invent new types of contracts every day in order to best serve their particular interests.[155] Secondly, such separate sets of rules for each type of contract would inevitably be very repetitive, because many of the rules would be the same for all (or most) types of contract. These seem to be the main reasons why since the acceptance of consensual contracts in Roman law such an approach has been gradually abandoned and why today all European legal systems contain general rules of contract law (and/or the law of legal acts and/or the law of obligations).[156] On the other hand, it is clear that having *only* the general law of contract leaves a lot of specific questions unanswered. That is why within the framework of the European Civil Code project principles of specific contracts (sales, services, long-term contracts) are being prepared.

4. *Commercial and consumer contracts*

Some legal systems distinguish between commercial and civil law. In the first wave of codifications most continental European legal systems adopted both a civil code and a commercial code. However, since the first half of the 20th century the significance of this distinction has significantly decreased. And some countries, notably Italy (1942) and the Netherlands (1992), officially abolished the distinction on the occasion of implementation of their new civil codes.[157]

155 See Loos 2000.

156 In Scandinavian systems the Contract Act only covers a limited number of issues. See for Sweden Hultmark 2000, p. 274.

157 In the Netherlands the distinctions between *kooplieden* and other persons, and between *daden van koophandel* and other acts was abolished as early as in 1934. See Klomp 1998, p. 165 and Klomp 2000, p. 60.

However, interestingly, during the last decades of the 20th century a counter-development started to occur as a result of the birth of 'consumer law'. Thus a new distinction arose, between general civil law, which was thought to be largely based on party autonomy, and specific consumer law, which exceptionally was more protective.[158] In the course of the 1980s and '90s in many European countries consumer law developed into an important branch of the law (not least as a result of the many European directives), with a great deal of autonomy. In France all consumer regulations have even been brought together in the *Code de la Consommation*. This development was enhanced by the way in which European Union bureaucracy in Brussels is organised. Different Directorates-General are responsible for the Common Market and for Consumer Protection, which has significantly increased the tendency to make separate rules for consumers and commercial parties.

There are many international examples of the new dichotomy: the UCC, CISG and UP are only intended for commercial contracts; in England plans are made for a commercial code whereas, as said, France has adopted a consumer code. However, there are also counter-examples: the American Restatements (First) and (Second) of Contracts are intended for all contracts, and in Europe many countries have tried to integrate consumer law into their civil codes as far as possible, thus trying to maintain the integrity of civil law. A clear example is the 1992 Dutch civil code.

The Lando Commission has expressly opted for unitary contract law. This seems to be the right choice for many reasons. First, the distinction between consumer contracts and commercial contracts is very problematic. Smits argues that each has its own distinct logic:[159] commercial contracts are concluded with a view to making profits whereas 'domestic contracts' (concluded by consumers, et cetera) would not have this purpose. This position does not seem to be tenable. First, this distinction ignores the importance of a major group of contracts, the mixed contracts, i.e. the ones concluded between a consumer and a professional. There are very few purely domestic contracts, and there is even less litigation on such contracts. In many systems many domestic agreements are even considered to be outside the scope of the law.[160] But more importantly: every party who concludes a contract usually does so because she believes it will make her better off. More specifically, most consumers will buy their goods and services where it is most favourable in terms of price, service et cetera, whereas most sell-

158 See Tjittes 1994.

159 Smits 1998. In favour of such schizophrenia is also the 'Groningen school': See e.g. Brunner 1992 and, especially, Tjittes 1994, Tjittes 1997, and Tjittes 2000.

160 See Gordley 2001.

ers and service providers are doing their best to make a profit. Compare Mattei:[161] 'Since there is no such thing as a separate market for consumers (demand) and a separate market for producers (supply), contract law has to face the problem of how to merge supply and demand into a single market. The creation of two different bodies of law at odds with each other would ignore this reality, and, as a result, reduce the chance of building efficient private law institutions for modern Europe.' Secondly, by (re)introducing 'schizophrenic contract law', as Mattei has called it,[162] the definition and proof of status (consumer or professional) becomes all important, whereas it seems much more efficient to concentrate on contract rather than on status.

However, for one of the purposes the Lando Commission has in mind for its PECL (maybe it is even its final goal), in admittedly rather opportunistic terms, it might have been preferable to opt either for a consumer code or for a commercial code since, precisely because of the way Brussels' bureaucracy is organised, the adoption of a Consumer Code (institutional basis and political aim: consumer protection) or a Commercial Code (institutional basis and political aim: common market) seems to be much easier to achieve;[163] the concept of general 'contract law' may be somewhat too abstract from a European institutional and political perspective.

Interestingly, the PECL are very similar to the UP which are intended exclusively for commercial contracts.[164] If commercial law and consumer law have their own respective logic, does this mean that the PECL have applied business logic to consumers (or the other way around)?.[165] Or are the rules so abstract that the real choices will have to be made when the rules are applied? Or do the PECL provide evidence against the necessity of this dichotomy?[166]

5. *National and international*

Whereas the UP are only meant for international contracts, the PECL are explicitly intended to apply also to internal contracts:[167] 'But while the

161 Mattei 1999, p. 538

162 Mattei 1999.

163 Compare what Staudenmayer, a senior civil servant at the European Commission, said in Utrecht in December 1999 (See Hesselink, *AA Katern 74*).

164 See above, II, A.

165 In their Preface and Introduction the PECL frequently refer to business. See e.g. p. xxv ('international business community').

166 See on the political relevance of this distinction below, VI, A, on the relevance of the distinction for the style of drafting (closed rules or open standards) above, II, A.

167 P. xxv.

Principles will be found particularly useful in international trade transactions within Europe, they are not confined to such transactions and may be applied equally to purely domestic transactions.' A distinction between national and international contracts was proposed by Drobnig: he suggested unifying only the law of international contracts.[168] However, this suggestion was rejected by most other scholars as being impracticable and as being a source of new discrimination which would obstruct the proper functioning of the common market.

6. Some consequences

The Lando Commission has chosen for general contract law. For the purpose of creating a common language the choice of general contract law is probably the most suitable. Rules of general contract law may, however, be less appropriate for some of the other purposes. For a code, a choice of law, or incorporation into a contract some more specific rules are usually (also) needed. In the ECC project work has started now on 'nominate contracts', especially sales, services, long-term contracts, insurance, monetary loans and personal guarantees.[169] Among these rules there will probably be some specific rules on e.g. consumer sales and commercial sales respectively.

Also, from a (left-wing) political perspective, as a result of the absence of (usually mandatory) protective rules for consumers, employees, tenants and other weaker parties, which are usually to be found in the part on specific rules of contract law, the PECL may look rather individualist (as opposed to social) and sterile (the important rules are simply not there).[170]

Another consequence of the Lando Commission's choice for general contract law is of a more institutional kind. General rules of contract law are necessarily rather abstract and abstract rules in practice leave many of the real choices to the discretion of the courts.[171]

168 Drobnig 1996 and Drobnig 1997.

169 A team based in Amsterdam, Tilburg, and Utrecht is preparing the draft rules on sales, services and long-term commercial contracts. In Hamburg a team is working on personal guaranties. Recently in Luxembourg/Paris a team has started to work on monetary loans. And in Hamburg an associated team is currently drafting principles of insurance contracts in collaboration with a group led by Professor Reichert-Facilides.

170 See on this further below, VI, B.

171 Compare Yntema 1936, p. 468: 'European codes, which confide excessive discretion to the courts on account of the generality of their prescriptions'.

B. Functional Approach

The Commission on European Contract Law has adopted the 'functional approach'.[172] This means that it has dealt with (more or less) all matters which are relevant for contracts even though some of these matters could be, and in many systems actually are, dogmatically regarded as part of another or a broader field of law, based on a different type or degree of abstraction (see above). First, the PECL deal with some matters that are regarded in many jurisdictions as matters of tort law. See, for example, Section 2.3 (articles 2:301 and 2:302) on pre-contractual liability[173] and art. 4:117 on damages in case of (possible) avoidance for mistake et cetera. The PECL also include rules on matters that are regarded in some countries as part of the law of *Rechtsgeschäft* (see above), for example many issues of formation (Chapter 2) and validity (Chapter 4).[174] In addition, the PECL contain many examples of subjects that in most European countries are regarded as part of the general law of obligations. See, for example, the rules on Performance and Non-Performance (Chapters 7, 8 and 9).[175] Moreover, the PECL deal with some issues that in many systems are regarded as part of the law of restitution. The most prominent examples are articles 4:115 and 9:307-9:309 on recovery after avoidance or termination of a contract which has already been (partially) performed.[176] Finally, the PECL contain some rules, especially some remedies, which in some jurisdictions are only available with regard to some specific contract, particularly sales (example: art. 9:401 on price reduction).[177]

The Commission could have made different, more radical functional choices. Some will find the functional choice of contracts still too dogmatic and would have preferred the functional choice of liability law.[178] However, as said, there is more to contract law than liability, and it is likely that the choice of contract law will be the one which is most easily accepted by (and thus: functional to) both legal doctrine and practice.[179]

172 P. xxv.

173 See for example France, Belgium, and Italy. See Hesselink 1999-1, p. 80, Hesselink 2001-1, and Hondius 1991, pp. 11-12, all with further references.

174 See notably Germany (artt. 116 ff BGB), Portugal (artt. 240 ff Código civil) and the Netherlands (artt. 3:32 ff BW).

175 See for example Italy (artt. 1176 ff c.c.), the Netherlands (artt. 6:27 ff. and 6:74 ff B.W.).

176 Compare artt. 7.3.6 UP and 81 (2) CISG.

177 See for example France (art. 1644 Cc), Germany (art. 462 BGB) and Italy (1492). See also art. 3 (2) Directive 1999/44/EC on consumer guarantees.

178 This approach seems to be favoured by Barendrecht 2000, p. 2.

179 See on taxonomy Mattei 1997-1.

C. Subjects Covered

Most of the subjects relating to general contract which codes, contracts courses and commentaries in Europe deal with today are covered by the PECL. The choice of subjects and their presentation are very similar to the UP. However, contrary to the UP the PECL also deal with the difficult subject of the authority of agents (Chapter 3).[180]

A few classical subjects of contract are still missing, but the Lando Commission is currently working on them:[181] 'Additional chapters will deal with the effects of illegality and immorality, compound interest, conditions, extensive 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.'

The structure of the PECL is quite straightforward. It consists of 131 articles which are divided into 9 chapters, four of which are sub-divided into two or more sections. The structure looks very similar to the UP, but in Europe there does not seem to be a Code with such a plain structure. This is clearly one of the 'progressive' aspects of the PECL.[182] The PECL are much more straightforward than, for example, the recent (1992) Dutch civil code, where one has to 'collect' the law relating to a consumer sales contract from 6 different degrees and types of abstraction.

Nevertheless the PECL still provide a rather 'learned' view of contract law. Their structure reveals that they were drafted by academics. Barendrecht has suggested a different, more inductive approach.[183] In his view a codifier should start by identifying which problems require specific rules and draft specific rules for those problems. Would the result have been very different from the PECL? It probably would. In the alternative approach the Principles would probably have been less abstract (no general contract law), and concerning some specific issues (e.g. offer and acceptance (Section 2.2)) there would probably have been less detailed rules whereas concerning other subjects (e.g. measure of damage (9:502)) the rules would probably have been more detailed.

180 The rules are based on, and very similar to, the UNIDROIT Convention on Agency in International Sale of Goods. See Busch 1998; Hartkamp 1999.

181 PECL, Preface xiv.

182 On progress see further below, IX.

183 See Barendrecht 2000, p. 16.

VI. **Politics**

A. **Law & Politics**

1. *Conflict*

Contract law is meant to resolve conflicts between parties to contracts. These parties have conflicting interests and invoke conflicting arguments in favour of their respective positions.[184] Each system of general contract law has balanced those interests in its own way. The way the balance is struck depends on many factors. One is the type of contract most frequently involved in the cases that have come before the courts, or the type of cases the legislator had in mind when stating the law.[185] General contract law differs if it has been developed in labour or in construction cases, in negotiated or non-negotiated contract cases and in long-term (e.g. franchise) or discrete (e.g. sales) contract cases. Another factor is the types of parties that were involved in most cases in which general contract law was developed. It makes a difference whether in most cases both parties were large multinational companies which were each assisted by a whole team of specialised lawyers, or whether in most cases one party was a consumer, or the state. It may also make a difference at which point in time the most important part of contract law developed, a long time ago or relatively recently. Finally, and probably most importantly, it makes a difference who developed contract law and what their views were. Lawmakers with different views make different choices. Therefore all coherent theories of contract law that have attempted to consider contract law as the expression of just one underlying idea and which have tried to explain contract law in its entirety in terms of that particular idea (including the one that proclaimed the death of contract) have failed.[186] And there is not much hope for new theories.

184 See generally Jhering 1874 and Nieuwenhuis 1992.
185 See Kötz 2000, Kötz 1998, p. 20; Hesselink 1999-1, p. 419.
186 In the same sense Craswell 1989 and Smits 1998.

2. Autonomy (Individualism) v Solidarity (Altruism)

One of the basic conflicts underlying contract law is the conflict between autonomy and solidarity. Or, as it is often put, the conflict between the right to be free and the obligation of solidarity (but it could also be stated in the opposite way: the obligation to let free and the right to solidarity). Many conflicts concerning contracts may ultimately be reduced to that conflict.[187] This was first argued with great force by Duncan Kennedy.[188] It is clear that there is here an analogy with the traditional political opposition, that most European countries (and many others) have known throughout the 20th century, between liberalism and socialism or the right and left.[189] These political currents reflect different views concerning the economy and the role of the law within it. One is usually associated with a free market, the other with state intervention (regulation), one with mere allocation the other with redistribution. More broadly speaking, the idea of party autonomy (individualism) is usually historically connected to Enlightenment, philosophically to rationalism (Kant), socially to the 18th and 19th century dominance of citizens, economically to classical capitalism (*laissez-faire*), and politically to liberalism ('the right'). Basic ideas include 'free will', 'certainty', 'self-reliance' and 'competition'.[190] Typical legal dogmas are 'freedom of contract', 'absolute property' and 'fault liability'. On the other hand, the idea of solidarity (altruism) is usually historically associated with Industrialisation, philosophically to Marxism, socially to the late 19th and early 20th century attack on capitalism and emancipation movements (working class, women, cultural minorities, consumers), economically to the welfare state (regulation), and politically to socialism ('the left'). Basic idea's include 'protection', 'fairness', 'sacrifice and sharing', and 'regulation'.[191] Typical legal dogmas are 'the duty of good faith', 'abuse of right' and 'strict liability'.

Whether this distinction will continue to have a prominent role in the 21st century is uncertain. It is clear that in many European countries the political conflict is much less poignantly present today than it was during the

187 I do not pretend that all contract law can be explained in terms of this dichotomy, nor do I pretend that this is the only important conflict underlying contract law, that this dichotomy is all there is to contract law. Quite the opposite. Above I said that contract law can best be regarded as a relatively incoherent result of balancing of a great variety of conflicts.

188 See Kennedy 1976. This chapter owes a great deal to his analysis in both that classical article and in his recent book (Kennedy 1997).

189 Of course, in countries with a proportionate electoral system there were many other parties as well, including, typically, a Christian-Democratic party in the centre.

190 See Kennedy 1976, pp. 1713 ff.

191 See Kennedy 1976, pp. 1717ff.

Cold War. And maybe today's political spectrum can best be characterised by the attempt to overcome this dichotomy. But, on the other hand, it is striking to see that the political movements ('Third Way',[192] *'l'Ulivo'*) or models ('Polder Model') that pretend to have overcome the classical distinction define themselves exactly in terms of the old distinction; they claim to be a compromise between the two extremes.[193]

3. *A Matter of Choice*

Left versus right, freedom versus equality, individual versus the state, market versus regulation, individual versus collective, egotism versus altruism. I do not claim that these distinctions either completely or necessarily overlap, but I do think that they have been sufficiently connected and recognisable in Europe over the last century. In each European system balances have been reached between these extremes, in each field of the law including contract. I also think that the more a legal system tends to opt in all the choices just mentioned for the first alternative the more most people will regard it as left wing, whereas systems that tend to opt for the latter will be regarded more as right wing. Where did the Lando Commission strike the balance?.[194]

4. *Comparative Law & Politics*

Interestingly, with regard to political preferences there may sometimes be more harmony within one political family across the European borders than within a legal family of conceptually and historically related European legal systems. The question then arises for European citizens (as it arises more generally within the European Union) whether they feel, for example more 'right' or more 'French' (the clash between culture and politics).

5. *No Integrity*

Before embarking upon a political evaluation of the PECL, a few preliminary remarks should be made. First, there is nothing natural, logical or necessary about one way or another of balancing autonomy and solidarity. There is a policy (or political) choice to be made here on which different people have different views (law is politics). Assertions that contract is real-

192 See for a philosophy of the third way Dworkin, 2000.

193 Maybe in some countries like the Netherlands the underlying conflict is merely hidden under compromise but will re-emerge in days of less (or even more) economic prosperity when real choices will again have to be made.

194 The general part of contract law is often thought to be 'politically neutral', technical. This is forcefully contested by Duncan Kennedy. See his forthcoming article (Kennedy 2001).

ly only (or mainly) based on freedom, will, promise et cetera are based on a rhetoric that calls for deconstruction.[195] I do not think that in any European country today a set of general contract law rules would be accepted that were exclusively based on either freedom of contract or contractual solidarity. Therefore a balance must be found. There are different political views in all countries on where the balance should lie.[196]

Secondly, for a legislator there are only two ways to avoid striking the balance in the conflict at some specific point. One is by drafting a very vague or open-textured or abstract rules, that leaves the actual choice to the courts. The other is by providing no rule at all, and thus leaving the matter completely to the courts to decide (or to the negotiating parties). However, it should be noted that in most cases choosing not to make specific rules is also a choice in the conflict, because where there is no specific derogating rule (e.g. relief in case of a change of circumstances), the general rule (e.g. the binding force of contract) will apply.

Finally, it should be noted that, exactly because of the various factors that play a role in the development of the law (there are probably many others), the system of contract law in a country is never, and can never be, the consistent expression of one specific balance in just one of the many conflicts that underlie it, say 70% freedom of contract and 30% solidarity. No legal system is consistently to be found in one specific place on the line between the two poles.[197] To give an example, French law has a tough rule on *imprévision* (*pacta sunt servanda*: autonomy) but also has extensive 'implied' duties to inform (*obligation d'information*)[198] and to protect (*obligation de sécurité*)[199] the other party (*forçage du contrat*: solidarity). Similarly, in most countries both 'commercial' and 'consumer' contract law are based on both notions.[200] In the Netherlands some authors have recently argued for two distinct bodies of contract law, one for tradesmen and one for consumers.[201] The strongest separation thesis is proposed by Jan Smits.[202] He maintains that the law of commercial contracts and the law of consumer contracts have a completely different logic.[203] Smits bases his theory on post-modern-

195 Which is not the same as destruction.
196 See recently in favour of more freedom of contract in the Netherlands Hartlief 1999.
197 See Kennedy 2001.
198 See Hesselink 1999-1. pp. 262 ff, with many examples.
199 See Hesselink 1991-1, pp. 191ff, with many examples.
200 See also above.
201 See Brunner 1992, Tjittes 1997 and Tjittes 2000.
202 Smits 1998 and repeated in Smits 2000.
203 The logic of trade is to maximise profit and the logic of 'house and garden' contract is to obtain a specific result.

ist philosophy and on the related theory of legal pluralism. It is very surprising that Smits should invoke post-modernism for introducing (or rather reintroducing) what is of course a very modernist abstraction: the whole world of people entering into contracts can be divided into two distinct groups, each with their own exclusive logic. As I explained above, general contract law is best understood as being based on a whole variety of different logics. (That is pluralism!) But this philosophical argument cannot in itself completely disqualify the separation thesis. The weakness of the theory rather lies in its assumption of these two different logics. Is commercial practice a jungle that needs a tough freedom of contract logic? There are many examples that rather show the opposite. First, the doctrine of unforeseen circumstances, which is usually regarded as an example of solidarity in contract. In virtually all countries this doctrine was accepted in purely commercial cases.[204] In the Netherlands the pre-contractual duty to inform, another classical example of a more social contract law, was developed in commercial cases,[205] just like the doctrine against formalist, literal interpretation,[206] and liability for breaking-off negotiations.[207] Another example is provided by the theory of relational contracts, which emerged in commercial settings (distribution, franchise, agency, joint-ventures).[208] And the doctrines of good faith and unconscionability were first introduced into the law of the United States in the Uniform Commercial Code.[209] More recent examples include the UNIDROIT Principles of International Commercial Contracts which contain many very 'social rules', e.g. art. 3.10 (gross disparity).[210]

204 See Hesselink 1999-1, pp. 319 ff, with examples from many European jurisdictions.

205 HR, 15 November 1957, *NJ* 1958, 67, note Rutten (Baris/Riezenkamp), HR, 21 January 1966 , *NJ* 1966, 183 (Booy/Wisman).

206 HR, 13 March 1981, *NJ* 1981, note Brunner, 635, *AA* 1981, p. 355, note Van Schilfgaarde (Ermes/Haviltex).

207 HR, 18 June 1982, *NJ* 1983, 723, note Brunner, *AA* 32 (1983), 758, note Van Schilfgaarde (Plas/Valburg), HR, 23 October 1987, *NJ* 1988, 1017, note Brunner (VSH/Shell), HR, 14 June 1996, *NJ* 1997,481, note HJ Snijders (De Ruiterij/Ruiters).

208 See especially Macneil (e.g. Macneil 1974, Macneil 1978, Macneil 1987).

209 See especially § 1-203 UCC*:* 'Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.' In addition, more than 50 other sections in the UCC refer to the concept of good faith.

210 See also the many examples of duties to co-operate et cetera accepted in international arbitration. See Nassar 1995.

B. Autonomy v. Solidarity

Which political choices has the Lando Commission made with regard to the conflict between autonomy and solidarity? Of course, the most obvious examples of this are to be found among the rules that determine the enforceability of promises and the scope of an obligation. However, it is clear that, upon final analysis, most of contract law deals with these questions. One could even define contract law as the law that determines to what extent promises are binding. Therefore most questions of contract can be analysed in terms of autonomy versus solidarity.

1. *General Contract Law*

Of course, the choice made by the Lando Commission to concentrate on the general part of contract law, thus leaving aside most statutory regulations which give protection to employees, tenants, consumers and other presumably weaker parties, gives an impression of a greater freedom of contract than actually exists with regard to many important contracts in most European systems.[211] Or, to put it in more explicitly political terms: from a left-wing perspective most of the important law (most of the political achievements in the 20th century) is missing in the PECL. Therefore, for a left-wing politician the PECL as a first European Code may seem rather poor and old-fashioned; and she would probably be rather more impressed by a Labour Code or a Housing Code or a Consumer Code.

The Commission says that it does not deal with such specific types of contract because policy questions were involved.[212] But is this not also true for the general part of contract law? As demonstrated by the American Legal Realist and the Critical Legal Studies Movements and as we will see in the following, also with regard to issues of general contract law between equal parties et cetera, policy/political choices will have to be made.[213] These choices may not be very politically controversial, but choices nevertheless have to be made.

2. *Freedom of contract*

Unlike most civil codes in Europe the PECL dedicate a specific article to 'freedom of contract', which is placed right at the beginning of the PECL (art. 1:102). It starts as follows: 'Parties are free to enter into a contract and

211 See for similar criticism with regard to the Restatement (First) of contract, Clark 1933, p. 658, and Yntema, p. 466.

212 P. xxv.

213 See on the political stakes in 'merely technical' issues of contract law Kennedy 2001.

to determine its contents'. However, this general statement is immediately qualified, after the comma, by the following phrase 'subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles'. Thus, under the PECL the mechanism is the following: freedom in principle, subject to exceptions provided by mandatory law and good faith.

Where freedom of contract forms, like in most legal systems, the point of departure (parallels: free market, absolute property, fault liability), the solidarity rules are to be found in the limitation and regulation of that freedom, often in mandatory rules. Many of these rules are made in order to impose solidarity with (i.e. to protect) a specific type of party which is presumed to be weaker, because of its status and its typical position in the type of contractual relationship she is involved in. The most classical examples are to be found in the mandatory rules of labour law, landlord and tenant law, and consumer law. Of course, for those types of contracts the most relevant part of contract law is not general contract law. Especially in the heavily regulated fields of contract law, where there is not much freedom of contract remaining, general contract law is of little relevance.

Many scholars favour a more radically social 'general contract law'.[214] And indeed the emphasis given by the Lando Commission to freedom of contract seems somewhat out of place. First, because it gives the wrong impression: in most European systems with regard to many contracts there is not as much freedom of contract as the Principles suggest. Secondly, because it gives just one side of the picture. From a political perspective it would probably have been more balanced to place freedom of contract (autonomy) and the duty to co-operate (solidarity) side by side in the same article, in order to emphasise that European contract law is based on both these (conflicting) ideas.

3. *Good Faith and Fair Dealing*

The PECL represent the international triumph of the principle of good faith: they contain innumerable references to 'good faith and fair dealing', both in Articles and in Comments, far more than any civil code in Europe. What will be the role of good faith in article 1:201 and others?

In many European legal systems the good faith principle has developed over the last century into a means by which the courts have imposed solidarity (altruism) in limitation of autonomy, both within contract law and outside. Indeed, the duty of good faith is frequently defined as the duty to

214 Wilhelmsson 1995, Lurger 1998, Alpa 1996, p. 89 ff. See also Vranken 2000.

take the other party's interests into account.[215] Many of the typical applications of good faith (*Fallgruppen*) which were developed by legal doctrine translate aspects of a duty to take the other party's interests into account (altruism):[216] duty of care, duty of loyalty, duty to co-operate, duty to inform, *venire contra factum proprium non valet* (similar to estoppel), proportionality. At first sight, therefore, it seems that good faith is the intrinsically altruist concept that imposes solidarity and counterbalances party autonomy.

However, in my view, good faith, as it developed in European legal systems like the German and the Dutch, should not (or should no longer) be regarded as a separate normative concept.[217] It is best conceived as a means to compensate for a formalist approach towards rules and rights.[218] Similar to the way, under Roman law, the primitive formalist approach towards the *legis actiones* (*ius civile*) was compensated by the law developed by the magistrates (*ius honorarium*) , and to the way, in England, the initial formalism of Common Law (forms of action) was balanced by the Lord Chancellor's Equity, on the Continent good faith became the tool which the courts had found to counterbalance the consequences of a formalist approach towards the new phenomenon of codes.[219] In contract law most of the anti-formalism judicial activism was aimed at limiting the absolute (i.e. formal) application of the rule *pacta sunt servanda*, which, of course, is closely related to party autonomy. Therefore, today in Europe most of the 'content of the good faith norm' consists of social, altruist norms. However, this could be different if the norms in the code with regard to which a party tries to adopt a formalist approach were social norms. Under a more social system of contract law anti-formalism might also be directed against parts of the law that are based more on solidarity, such as a rule that protects con-

215 See e.g. Bianca 1992, no. 224; Hartkamp 2001, no. 300; Stathopoulos 1995, no. 51; Soergel/Teichmann 1990, § 242, no. 4. See further Hesselink 1999-1, p. 44.

216 See Hesselink 1999-1, pp. 58 ff.

217 See Hesselink 1998-2, Hesselink 1999-1, Hesselink 1999-3, Hesselink 2000. See earlier Staudinger/J Schmidt 1995.

218 See on form and substance in private law Kennedy 1976 and Kennedy 1997.

219 Hesselink 1999, passim, especially pp. 429 ff. As a consequence, to the extent that a formalist approach towards the civil code (and towards rules in general) is given up good faith will no longer be needed as a counterbalance. Historical parallels: the merger between *ius civile* and *ius honorarium* and the gradual integration of common law and equity as a result of the Judicature Acts of 1873 and 1875.

tracting parties (consumers and others) against surprising standard terms.[220] But most of the norms in the European codes were based on 19th century liberalism (freedom of contract, absolute property rights et cetera) and the formalist attitude towards those rules was attacked with the weapon of good faith.

It seems likely that under the PECL good faith will continue to be used as a tool against a formalist approach to rules of contract law and contractual rights and obligations. To the extent that the PECL will be approached in a formal way, good faith will continue to be needed as a limit to party autonomy and as a gateway for solidarity rules. To the extent that the PECL are less individualist than the 19th century codes and more social (which they definitely are), we will start to see some more 'party autonomy' inspired exceptions to 'social' rules as part of the 'content of the good faith norm'.[221]

4. *Duty to Co-Operate*

Article 1:202 proclaims a duty for the parties to co-operate. At first sight this article seems to be the recognition by the Lando Commission of the importance of the other basic idea underlying today's European contract law: solidarity. However, as seems to follow from the Comment, the Lando Commission rather seems to understand it in a more limited and technical sense. Under the PECL the duty to co-operate is especially meant to play the role that is fulfilled in many civil law systems by the doctrine of *mora creditoris.*[222] However, in contrast with the latter doctrine under the PECL the duty to co-operate is a real, enforceable 'obligation'. Failure to co-operate may constitute 'non-performance'(art. 1:301), which means that in principle the other party has recourse to the remedies given in Chapter 9.[223] A duty to co-operate is recognised, on the basis of good faith, in many European legal systems.[224] It was developed in France by the great René Demogue who said: 'Les contractants forment une sorte de microcosme; c'est une petite société où chacun doit travailler pour un but commun qui est la somme des buts individuels poursuivis par chacun, absolument

220 See, as a recent Dutch example, HR, 1 October 1999, *RvdW* 1999, 136 (Geurtzen/Kampstaal) where the concept of good faith was used to limit the (protective) statutory rule that standard terms may be avoided if they have not been made available for consultation (art. 6: 233svbb BW).

221 See Hesselink 1998.

222 Art. 1:202, Comment A. See Hesselink 1999-1, p. 244ff.

223 See artt. 8:101 in connection with art. 1:301. See also Art. 8:101, Comment A.

224 For example France, Germany, and Italy. See Hesselink 1999-1, p. 238ff, with references.

comme dans la société civile ou commerciale.'.[225] Today, in many European systems it plays an important, though admittedly rather indeterminate role.[226] Although article 1:202 PECL is intended by the Lando Commission to have a more limited function, if the PECL were to be enacted as a European Code of Contracts, it might nevertheless develop as the main anchor-point under the European code for the further development of social contract law. It seems perfectly suitable as a basis for social rules that courts might wish to develop.

5. *Excessive Benefit or Unfair Advantage*

With regard to the kind of cases art. 4:109 is meant to deal with, one extreme position (freedom of contract) would be: the contract is binding upon the parties since consensus was reached. This is what seems to have been the rule in many European countries in the 19th century before doctrines like undue influence, *misbruik van omstandigheden* et cetera were developed. A more moderate version of this approach would aim to restore the (imaginary) 'initial position'. It would concentrate on the contract the parties would presumably have concluded if the weaker party was an ordinary party. An advantage of this approach is that it provides incentives for creating an equal bargaining situation.[227] A disadvantage is that it leads to fictions. Who knows what the parties would have done? (would the seller have accepted the market price? et cetera).

The other extreme (contractual solidarity) would be: the state imposes the price included in any contract. In more moderate versions it would be held that courts should only enforce contracts with fair prices. The law could either indicate a certain absolute or presumptive balance between the price actually paid and the market price, or leave it to the courts to decide in every individual case. Scandinavian countries (most explicitly) and German and Austrian law (in some cases) seem to rely on a version of the latter

225 Demogue 1931, no. 3. However, Carbonnier 1993, no. 113, warned that one should not exaggerate: 'L'outrance peut perdre une idée juste. On s'étonnera qu'à une époque où le mariage s'était peut-être trop transformé en contrat, d'aucuns aient rêvé de transformer tout contrat en mariage.'

226 See Vranken 1997, p. 22, Vranken 2000, Hesselink 1994, Hesselink 1999-1, pp. 238 ff. See also the central role of co-operation in Macneil's relational contract theory (Macneil 1974, Macneil 1987).

227 See below, on law & economics.

approach, and French law in the case of some contracts (*lésion*).[228] An advantage of this approach is that it is straightforward. The difficulty lies in deciding what a fair price is, i.e. where the balance should lie between the price the parties agreed upon and the market price.

To put it in other words, in cases like this an individualist is more likely to favour the approach of procedural fairness, which is more respectful of party autonomy (although in a rather fictitious way: it is said to provide incentives, but incentives for what?; to reach a fair price or just to inform?), whereas an altruist would rather favour a substantive fairness approach, which acknowledges that some people under certain circumstances even make the wrong choices when they are provided with all the relevant information.

The PECL have reached a compromise (third way): a combination (or rather cumulation) of procedural and substantive unfairness. Neither of them suffices in isolation.[229] At first sight, that seems a rather harsh rule. However, as it seems, in most cases it should be relatively easy to prove one of weaknesses or needs indicated in art. 4:109.[230] Then everything will depend on the court's appreciation of excessiveness. It seems likely that, if the PECL were to be enacted as a European Code of Contracts, at least in the beginning, different courts could decide differently according to their traditions et cetera. In order to create more legal certainty the PECL could have indicated in the Comments what proportion is presumed to be excessive, as indeed the UP did in their Comment on the rule concerning unforeseen circumstances (hardship).[231]

228 In the Nordic countries on the basis of § 36 Contract Act any clause in any contract may in principle be policed in view of substantive unfairness. See Wilhelmsson 1998, p. 259, Nielsen 1997, no. 128, Hultmark 2000, p. 278, and below. Under German (§ 138 (2) BGB), Austrian (§ 879 ABGB) and Greek (arts. 178 and 179 civil code) law contracts with a gross disparity between the obligations are considered to be against good morals. Under French and Belgian law (artt. 1674-1685 Cc) a sale of immoveable property may be rescinded in case of *lésion* (price less than 5/12th of the value).

229 Art. 4:109, Comment B. A similar approach was earlier adopted in Italy (art. 1448 cc) and in Portugal (art. 282 c.c.).

230 See (1)(a): '[the party] was dependent on or had a relationship of trust with the other party, was in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking bargaining skill'.

231 An alteration amounting to 50% or more of the cost or the value of the performance is likely to amount to a "fundamental" alteration, which may allow relief. See art. 6.2.2., Comment 2.

6. *Unfair terms*

Standard terms are a classical instance where the principle of freedom of contract came under attack. With regard to such terms the individualist conception of contract as consensus was obviously highly fictitious. When signing a contract which contains a set of standard terms or refers to them a party usually gives its consent without fully knowing the content and implications of these terms, either because she has not read them or because she does not understand them. Moreover, even if she does understand them she is frequently left with no alternative because the other party (typically an economically more powerful one) is not prepared to contract on terms other than these whereas all the other actors in the industry use similar conditions. In the course of the 20th century in all European legal systems the question arose of how to deal with standard terms.

In an extremely individualist view all such contracts would simply be valid and enforceable: the general conditions were freely accepted when the contract was signed; each party should take care of her own interests when signing a contract. This view has been abandoned in all European countries. Less extreme versions of the individualist approach concentrate on bringing the general terms to the attention of the other party. If that party accepts these conditions after having read them and understood them they should then be binding upon her. This approach was adopted by the 1942 Italian civil code, the first code to deal with the problem.[232] It provided protection by trying to restore the 'initial position' of true consent: it declared a number of onerous standard terms to be void unless the other party explicitly agreed to them in writing. In most other systems it took a long time for the legislator to intervene. In the meantime the courts tried to solve the problem on a case by case basis. They often did so with the help of the concept of good faith: in specific cases they declared the invocation of a specific clause in standard terms as being contrary to good faith, thus upholding the formal validity of the clause (no interference with freedom of contract). Later, a more straightforward check of the content of such clauses was adopted (*Inhaltskontrolle*).[233] In most systems the legislator intervened during the 1970's.[234] After the German example (*AGBG*) most of these statutes mainly focus on checking the content of standard terms, thus openly limiting the freedom of contract. They even contain black lists of clauses

232 Art. 1341 cc. Since 1996 see also artt. 1469 bis ff which implement the EC Directive on unfair terms in consumer contracts.

233 See in Germany *BGH*, 29 October 1956, *BGHZ* 22, 90.

234 For example in Germany (1976), in England (1977), and in France (1978). See Hesselink 1999-1, pp. 97 ff., with further references.

that are deemed to be voidable in general conditions in consumer contracts. In 1993 a European directive on unfair terms in consumer contracts was adopted.[235] This directive has now been implemented into most European legal systems.

Just like most European statutes and the EC Directive, art. 4:110 also aims to directly police the content of standard terms (substantive fairness) rather than limiting itself to procedural fairness: a party may avoid a standard term if the term causes a significant imbalance in the parties' rights and obligations. However, the *Inhaltskontrolle* is limited in two significant ways. First, art. 4:110 only deals with unfair terms 'which have not been negotiated'. Thus for clauses that have been individually negotiated freedom of contract and self-reliance continue to prevail. Secondly, section 2 excludes application to terms which define the main subject matter and to the price, thus rejecting the *iustum pretium* theory. These two limitations are also to be found in the EC Directive and was also present in most European legal systems before the implementation of the directive. Moreover, most European legal systems also reject the adoption of the *iustum pretium* theory as such.[236] However, in the Scandinavian countries protection extends further.[237] In the Nordic countries the checking of contract clauses is not limited to standard terms. See art. 36 Contract Act:[238] '(1) An agreement may be amended or set aside, in whole or in part, if its enforcement would be unreasonable or contrary to principles of fair conduct. The same applies to other legal transactions. (2) In applying subsection 1 of this provision, consideration shall be given to the circumstances at the time of the conclusion of the agreement, the content of the agreement, and later developments.' On the basis of this article even the price may be controlled.[239]

In another respect, however, protection (and therefore: limitation of freedom of contract) under the PECL goes further than that provided by the directive. Art. 4:110 extends the scope of application of the general clause of the EC Directive to contracts between private persons and to commercial contracts.[240] Even the directive's black list of clauses that are deemed to be unfair, although not directly applicable, is quoted in the Comment as a possible source of inspiration for judges and arbitrators.[241]

235 Council Directive 93/13.
236 See Kötz 1997, p. 130 ff.
237 See Wilhelmsson 2001.
238 See Nielsen 1997, nos. 128 ff and 382 ff.
239 See Wilhelmsson 2001 and PECL, art. 4:110, Notes, 4 (p. 271).
240 Art. 4:110, Comment A.
241 Art. 4:110, Comment B. See on *reflexwerking* in the Netherlands Hartkamp 2001, no. 368.

7. *Implied terms*

Chapters 6 on 'Contents and Effects' and Chapter 7 on 'Performance' look very classical, and are very much based on party autonomy. Especially the way the PECL deal with 'implied terms' is somewhat disappointing. The PECL do not explicitly take into account all the 'implied terms' that courts in Europe have developed during the course of the 20th century, especially on the basis of good faith,[242] and that have radically changed contractual relationships and the rights and obligations of the parties to a contract.[243] Art. 6:102 (Implied Terms) only mentions possible sources of implied terms. But, as Oliver Wendell Holmes said,[244] 'you always can imply a term in a contract'. The Lando Commission has made no attempt to state when a term should be implied or what its content should be. The only heteronomous obligations they explicitly mention are the duty of good faith and fair dealing (art. 1:201) and the duty to co-operate (art. 1:202), but, as said, these duties are too vague.

Also the choice of the term 'implied term' is itself unfortunate because it makes one think of an implicit agreement by the parties (intent, autonomy). The PECL even mention as the first source of implied obligations the intention of the parties.[245] This means: the unexpressed intention of the parties.[246] In reality, however, these are obligations that parties would often not have contemplated, and if they had one of them (the one who is now accused of non-performance) would probably not have agreed to such an obligation.[247] In France some of these obligations cannot even be excluded or limited in the contract.[248] And in all systems, exclusion is often effectively difficult

242 See for hundreds of examples from many European jurisdictions Hesselink 1999-1, pp. 173-273.

243 See on the importance of these obligations Snijders 1999, Vranken 2000, and Barendrecht 2000.

244 Holmes 1897.

245 Art. 6:102 (a).

246 The UP (art. 5.1) do not mention the parties' intention as a source of implied obligations.

247 See Malaurie/Aynès 1998, no. 632 ('le juge ajoute au contrat une obligation à laquelle les parties n'avaient pas songé, et peut-être même qu'elles avaient implicitement écartée'), Flour/Aubert 1994, no. 406 ('Dans les mots, les tribunaux feignent toujours de rechercher la volonté des parties. Dans la réalité, ils se fondent sur l'équité plus souvent qu'ils ne le disent: et ce, au mépris parfois de ce qui a été le plus probablement voulu.'), Treitel 1999, p. 191 ('In many cases of this kind, the same process can with equal plausibility be described either as (…) the imposition of a legal duty.').

248 Viney 1995, no. 186.

because these obligations are 'implied' by the courts after the fact. Compare in the Netherlands the so-called implied warranties.[249]

The wording of the article, the Comment on it, and the Survey of Chapters 1-9 suggest that art. 6:102 is only a 'gap-filling' device, which is elaborated in more specific rules on instances of failure to fix the price (art. 6:104), absence or disappearance of a factor of reference (art. 6:107) and quality of performance (art. 6:108). That is a very narrow view of the concept of implied terms, which does not reflect the achievements in European case law during the 20th century.[250] To put it in German terms: the PECL only deal with *ergänzende Vertragsauslegung*, not with *Nebenpflichten* (*Schutzpflichten*). However, in the course of the 20th century in hundreds of cases all over Europe a host of obligations have been developed by the courts. This is what Barendrecht has rightly called the 'living law of contract'.[251] It would be fictitious, and politically wrong, to regard the acceptance of these obligations by the courts as being based on party autonomy. As said, it is sometimes even impossible to exclude them effectively. In my view the Lando Commission should have tried to 'codify' this very important part of contract law. It could have relied on the achievements made by the courts and legal doctrine, especially in Germany, where sets of detailed obligations have been elaborated. At the very least they could have codified four types of basic obligations which have been accepted in many European -ate[254] and duties to inform.[255] Admittedly, the PECL did codify the duty to

249 HR, 9 October 1992, *NJ* 1994, 287, 289 (Steendijkpolder) (implied warranty by seller who stipulates that the buyer will build on the land sold to him, that the land is in all respects suitable as a building site), HR, 25 June 1993, *NJ* 1994, 291, note Brunner (implied warranty that a second hand car's milometer indicates the correct number of miles).

250 Compared to the PECL the UP place somewhat more emphasis on the importance of 'implied' obligations. Art. 5.1 (Express and implied obligations), the first article of chapter 5 (Content), states: 'The contractual obligations of the parties may be express or implied.' Also the term 'implied *obligations*' is more appropriate than 'implied terms' because it relates less to the fiction that these terms are part of the contract (autonomy, et cetera).

251 Barendrecht 2000-2.

252 *Schutzpflichten*, *obligations de sécurité*, *obblighi di protezione.* See Hesselink 1999-1, p. 186 ff with many examples from case law, and with further references.

253 *Leistungstreuepflichten*, *obligations de loyauté*, *obblighi di salvaguardia*. See Hesselink 1999-1, p. 225 ff with many examples from case law, and with further references

254 *Mitwirkungspflichten*, *obligations de coopération*, *obblighi di cooperazione*. See Hesselink 1999-1, p. 238ff with many examples from case law, and with further references.

255 *Aufklärungs- and Auskunftpflichten*, *Obligations d'information*, *obblighi d'informazione*. Duties to inform not only exist in the pre-contractual stage but also during performance. See Hesselink 1999-1, pp. 262, with many examples from case law, and with further references.

co-operate, but, as said, the examples in the Comment mainly cover traditional *mora creditoris situations.*[256]

8. *Change of circumstances*

The problem of changing circumstances provides a good illustration of the phenomenon that legal systems are not consistently more liberal or social. French contract law which, as we saw, contains many social rules and doctrines, refuses to assist a party who has found herself in serious trouble because of an unexpected change of circumstances. The law on this point was established in the 19th century (in a case which involved a contract concluded in 1567), and has remained unchanged since then: *pacta sunt servanda* and the court should not come to the rescue on account of the judges' sense of equity.[257] Today, all other European legal systems help a party in case performance of the contract unexpectedly becomes excessively onerous, although for some systems this has taken a long time (the Netherlands) and in others this help is rather limited (England).[258] In most jurisdictions the rules have been developed by the courts on a case to case basis, usually on the basis of the doctrine of good faith. Today, Italy, Greece and the Netherlands have codified rules.[259] Articles 6.2.1. UP and 6:111 PECL are the first to introduce the duty to negotiate, which is similar to the contractual provisions in many international commercial contracts (hardship clause-s).[260]

In the course of the 20th century, with regard to a change of circumstances, most European legal systems have moved from a very individualist rule to a more social one. The conflict is usually expressed, in less straightforward language, as the conflict between the principle *pacta sunt servanda* and the

256 The obligation is stated at the beginning. The UP have placed the equivalent (art. 5.3 UP) in the chapter on 'Content'.

257 *Civ.*, 6 March 1876, *D.* 1876, 1, 193, note Giboulot, *Les grands arrêts*, nr. 94. It should be noted that the legislator intervened by way of specific statutes after both World Wars. See further Hesselink 1999-1 p. 321 ff, with further references.

258 Art. 6:111 goes further than English law. See Comment, p. 325, which would allow relief in Suez cases where English courts refused to help (*Tsakiroglou & Co Ltd* v *Noblee Thorl GmbH* [1962] AC 93).

259 Artt. 1467 *codice civile*, 388 Greek civil code, 6:258 *BW*. In the Dutch case one cannot really speak of codification. Rather, the *Hoge Raad* abandoned its extreme position (established in HR, 8 January 1926, *NJ* 1926, 203 (Sarong case), 19 March 1926, *NJ* 1926, 441, note Scholten, HR, 2 January 1931, *NJ* 1931, 274 (Mark = Mark)) when it had become certain that the new code would include this new rule (HR, 27 April 1984, *NJ* 1984, 679, note Van der Grinten (Sipke Helder/NVB)).

260 See Hesselink 1999-1, p. 348.

principle of good faith, or, as the Lando Commission puts it,[261] the 'tension between two conflicting principles, *pacta sunt servanda* (agreements must be observed) and *rebus sic stantibus* (undertakings are based on the premise that circumstances remain as they are).' However, in the next sentence the language is more openly moralist (altruism): 'Article 6:111 stresses that normally *pacta sunt servanda* is the paramount principle; but that in certain extreme circumstances it would be considered inequitable for one party to insist on strict performance when that would be excessively onerous for the other.'

Some authors, relying on theories on relational contracts and extensive duties to co-operate,[262] and on law & economics, suggest that art. 6:111 may be too restrictive.[263] Parties should have incentives to renegotiate much earlier, not only in case performance becomes excessively onerous. In contracts which are characterised by great uncertainty concerning the future, on the one hand, and strong mutual dependence, on the other, parties should be under an obligation to renegotiate in order to deal with foreseen incidents. The UP actually seem to go further (and are clearer) than the PECL: the Comment says that an alteration amounting to 50% or more of the cost or the value of the performance is likely to amount to a "fundamental" alteration.[264] The PECL do not contain a similar rule, neither in the black-letter text nor in the Comments.

9. *Choice of remedy*

Under the heading 'Freedom to choose remedies' the 'Survey Chapters 1-9' proclaims:[265] 'When there has been a non-performance, the aggrieved party should be given the greatest possible freedom to choose its remedy to fit for its needs, subject only to the requirements of good faith and fair dealing already mentioned'. This statement of principle is a very strong statement of individualism,[266] although it is moderated to some extent by the reference to good faith. A more altruistic approach would require the innocent party to take the legitimate interests of the other party into account when choosing a remedy.

261 PECL, Survey Chapters 1-9, p. xxxvii.

262 See Macneil 1987.

263 Barendrecht 2000.

264 Comment 2 (p. 147). It should be noted that the UP are meant exclusively for commercial contracts.

265 P. xxxix.

266 It also follows from the wording of art. 8:101 (1) (Remedies available): '*Whenever* a party does not perform an obligation under the contract (…), the aggrieved party may resort to *any* of the remedies set out in Chapter 9.' Compare also Section (2).

The phrase 'the requirements of good faith and fair dealing already mentioned' refers to an earlier passage where three examples are given of the limitation of remedies by 'good faith and fair dealing': art. 9:201 PECL (a right to withhold performance only in as far as is reasonable), art. 9:505 (the right to damages limited to losses the creditor could not reasonable have avoided), and art. 9:301 PECL. The latter article limits the availability of the remedy of termination to cases of 'fundamental non-performance'. Fundamental non-performance is defined in art. 8:103.[267] Here the interest of the non-performing party is clearly taken into account. Much more so than in the Netherlands where the *Hoge Raad* maintains an extremely individualist position in this matter,[268] although there has been some fierce and justified opposition in legal doctrine.[269] These are important limitations to the free choice of remedies. And the PECL contain some further examples that show that 'the greatest possible freedom to choose a remedy' may be limited in practice ('by good faith').

Nevertheless, one wonders whether the Lando Commission should not have gone further. It could have adopted a general rule to the effect that the election of remedies is subject to principles of proportionality and subsidiarity, the former meaning that a specific remedy should not be available if the benefit the creditor would derive therefrom would be extremely disproportionate to the burden it would impose on the debtor, and the latter meaning that if each of a number of remedies would result in the bringing the creditor in the same position (in the specific circumstances of the case; not merely in the abstract!), then the creditor should opt for the remedy which (to his knowledge!) is less detrimental to the debtor.[270] Of course such a rule could be read into art. 1:201, but, as said above, this could be said of *any* rule. It would have been desirable if such a more specific rule could have established in Chapter 8.

267 Compare art. 7.3.1 UP. See Sefton-Green 2000.

268 See HR, 24 November 1995, *NJ* 1996, 160 (Tromp/Regency), HR, 22 October 1999, NJ 1999, 159, note Bloembergen, where the lower court interestingly had adopted a distinction very similar to the English distinction between conditions and warranties, and HR, 4 February 2000, *NJ* 2000, 562, note Vranken.

269 See Bakels 1993, p. 225 ff; Hartlief 1994, pp. 185, 204 ff. See further, with references, Hartkamp 2001, no. 516 and *Verbintenissenrecht*, art. 265 (Hartlief). In my view the Hoge Raad should, more in general, subject the choice of the remedy to proportionality and subsidiarity tests as described above. Such a test could be based on good faith (*redelijkheid en billijkheid*), although, in my view, such a formal foundation would not add a great deal.

270 In the Netherlands some authors have recently proposed to subject the exercise of the remedy of termination to these two principles. See Stolp 2000 with further references.

An additional argument is provided by the recent EU directive on consumer guarantees where the choice of remedy for the buyer is far from free.[271] On the contrary, the Directive provides for a hierarchy of remedies.[272]

10. Balance

On balance, also taking the other articles into account which cannot be discussed in detail here for reasons of limited space, I think that the PECL are rather more 'social' (to the left) than most of the European codes, although because of their abstraction very much will ultimately depend on how they will be applied by the courts (if they are going to be enacted as a European Code of Contracts). This is not to say that they are more social than the contract laws of most European jurisdictions. Much of the 'social' contract law can be found in 20th century case law and statutory regulations.

The basic structure of the PECL seems to be rather classical, in the sense that the general rule is autonomy, which is (frequently and extensively) supplemented and corrected by good faith related doctrines. One wonders whether the Lando Commission could not have gone further so as to take the development of contract law in the 20th century fully into account and to base its general contract rules more explicitly on both autonomy and solidarity. It is clear that many of the conflicts emanating from contracts will be between one party relying on autonomy and the other on solidarity. In that conflict a balance has to be struck. Under the PECL the former party still has a rhetorical (and evidentiary?) advantage over the other. Or is this the price we will have to pay if we want to keep the conservatives on board the European private law movement?

271 See art. 3, Directive 1999/44/EC on consumer guarantees.

272 See for criticism Smits 2000-2.

VII. Culture

A. Law as Culture

1. *Comparative Law & Culture*

There exist considerable differences in style between the various European legal systems.[273] These differences in style and in *mentalité* are regarded by some legal scholars as an important part of our culture.[274] And in their view these differences in legal culture should therefore be cherished. Other legal scholars, however, hold the opposite view. They regard national idiosyncrasies as provincialism.[275] In their view most differences between the various legal systems are merely a nuisance which, moreover, obstructs the proper functioning of the common market. The Lando Commission has made a clear choice for a new common European legal culture rather than for the mere preservation of local legal cultures.

2. *Cultural Ingredients of the PECL*

Obviously, the PECL are not culturally neutral; they have been inspired by the various European cultures. The Lando Commission does not try to hide this. On the contrary, it claims that its PECL are, among other things, a restatement of the contract laws from the various European legal cultures. However, it is excluded that the PECL should be inspired by each legal system to the same degree. It is evident that the Lando Commission had to

273 See Zweigert/Kötz 1998, p. 67 ff; Remien 1996.

274 See Collins 1995, Weir 1995, Legrand 1996, Legrand 1997, Legrand 1999-1, Legrand 1999-2, Legrand 2001.

275 See Mattei/Robilant 2001. The locus classicus is Jhering 1924, p. 15: 'legal science has degenerated into jurisprudence of states, limited them by political boundaries – a discouraging and unseemly posture for a science! But it is up to legal science itself to cast away these chains and to rediscover for all time that quality of universality which it long enjoyed: this it will do in the different form of comparative law. It will have a distinct method, a wider vision, a riper judgement, a less constrained manner of treating its material: the apparent loss will in reality prove a great gain, by raising law to a higher level of scientific activity.' (English translation taken from Zweigert/Kötz 1998, p. 44).

make (implicit or explicit) cultural choices. See the Introduction where it is stated:[276] 'The Principles are designed primarily for use in the Member States of the European Union. They have regard to the economic and social conditions prevailing in the Member States. The Commission on European Contract Law has therefore drawn in some measure on the legal systems of every Member State. This does not, of course, imply that every legal system has had equal influence on every issue considered. In fact no single legal system has been made the starting point from which the Principles and the terminology which they employ are derived. Nor have the draftsmen of the Principles seen it as their task to make interpolations or compromises between the existing national laws, except as is necessary in order to weld the Principles into a workable system.' In this chapter I will try to assess the cultural choices which the Lando Commission has made. Of course, it is impossible to determine precisely for each legal culture how much and in what way it is represented in the PECL. But, on the other hand, I think it is possible to say something in this respect.

3. *Legal Formants*

Cultures in Europe differ in many different ways. Such cultural differences may also determine important differences in the law in a broad sense of 'law as legal culture' (law in society). Even if the rules are very similar there may be great differences in (for example) the way disputes are resolved. However, such differences, interesting as they are, are difficult to describe and even more difficult to measure. They easily slip into cliché and prejudice. The interest private law scholars in Europe have taken in legal culture is only rather recen.[277] Moreover, with regard to the PECL today we do not have anything more than black-letter-rules, comments and illustrations; we cannot say anything concerning the way in which they will be applied, the context they are embedded in et cetera.[278] Therefore I will mainly (but not only) concentrate here on the cultural roots of legal rules and doctrines. I also will mainly limit myself to the difference between the Common Law and the Civil Law tradition which is generally held to be the most important cultural divide in Europe.

276 PECL, Introduction, p. xxv.

277 See e.g. Sacco 1991, Twining 1997.

278 This is also one of the reasons why Legrand and others object to a European Code: we do not know what it means because rules only have meaning in context. See Legrand 1997.

B. Common law v Civil Law

1. *Divergence*

The Common Law and Civil Law legal cultures are usually said to be fundamentally different in many respects.[279] For example, the way of legal reasoning: a Common Law lawyer is said typically to draw a direct comparison between two cases whereas a Civil Law lawyer would compare the cases indirectly, via an abstract rule. Moreover, a Civil Law lawyer is said typically to think in terms of rights whereas a Common Law lawyer would rather think in terms of remedies (causes of action): one only has a right if one has a remedy. Finally, the Civil Law is said to be a systematic whole (codes), whereas the Common Law is traditionally merely meant to resolve conflicts (precedents). More specifically with regard to contract law, the Common Law is said to be based on exchange (bargain theory) whereas the Civil Law is said to be based on consensus; therefore under Common Law the parties bargain at arm's length whereas under Civil Law they should bargain in good faith.

2. *Convergence*

It is not surprising that those who are against the unification of private law in Europe (especially against a Code) tend to emphasise these differences,[280] whereas those who are part of the European private law movement either claim that their opponents exaggerate,[281] or that today the differences are diminishing[282] or even that they never really existed at all (the important Civil Law influence on English law),[283] or that they are simply not very relevant (political, socio-economic and institutional similarities are more important).[284]

3. *Bridge*

The Lando Commission explicitly addresses the gap between Common Law and Civil Law. As a matter of fact, according to the Commission, one of the benefits to be derived from the PECL is that they may provide a

279 According to Legrand a Common Law lawyer and a Civil Law lawyer have fundamentally different views on what 'law' means. See on epistemology Legrand 1996.

280 Especially Legrand 1996 and Legrand 1997. See also Smits 1999, pp. 85 ff.

281 See Beale 1999, Beale 2000 and MacKendrick 2001.

282 See Markesinis 1994.

283 See Zimmermann 1998 and Gordley 1993.

284 See Mattei 1998-1, p. 69ff; Hesselink 2001-2.

bridge across the Channel:[285] '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 policies. (…) Differences of these kinds are inimical to the efficient functioning of the single 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.' Thus, rather than consistently adopting either the Common Law or the Civil Law approach, which would obviously have made the Principles unacceptable to the other side, the Lando Commission opted for the more difficult approach of trying to reconcile both cultures (and thus to create a new, common European legal culture!). However, obviously even when building a bridge many choices have to be made. What choices did the Lando Commission make?

4. *Common Law Influence*

In a number of issues the Commission clearly opted for the Common Law tradition. Generally, it should be reminded that the PECL were strongly influenced by the UP and that the UP, especially the part on non-performance and remedies, are very much based on - both directly and indirectly, via CISG - art. 2 UCC and the Restatement (2nd) of Contracts in the United States, a Common Law system.[286] Moreover, it should also be reminded that the PECL have 'contract law' as their object, which is the abstraction most familiar to Common Law lawyers (see e.g. most English textbooks and university courses and the American Restatements of Contracts), whereas in Civil Law systems the codes, textbooks and commentaries usually concentrate on 'the law of obligations'.[287] Finally, it should be reiterated that the idea of a restatement, which is one of the main objects of the PECL, and its format and style have been borrowed from the American (Common Law) tradition of Restatements.

As for specific rules and doctrines, probably the clearest Common Law influence is to be found in the PECL's elaborate set of rules on remedies for

285 Pp. xxii-xxiii.

286 See Farnsworth 1997, Gordley 1996, Bonell 1997, pp. 18, 65 and *passim*.

287 See above.

non-performance.[288] The emphasis on remedies clearly reflects the Common Law tradition. In his Preface Lando says:[289] '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.' Whereas this observation may sound obvious to most Common Law lawyers, many Civil Law scholars would typically regard formation, defects of consent (validity) and contents and effects as more important, and formation as the natural starting point.[290]

Another very clear example of Common Law influence is the use in the PECL of the concepts of 'implied and express terms'.[291] Although Civil Law courts probably imply more terms into contracts than the English courts do, they do this under different headings; the concept of 'implied terms' is clearly of English origin.

Since the first half of the 19th century English law has made a distinction between the terms of a contract according to their importance.[292] Breach of condition always allows the innocent party to terminate the contract, whereas in case of breach of warranty, the innocent party is never allowed to rescind. A term can be a condition because the parties or statute or the courts say so.[293] When this sharp distinction proved unsatisfactory the courts developed a third category of 'intermediate' or 'innominate terms'. The PECL do not make such a distinction between types of contractual terms. However, the rules on non-performance and remedies, although admittedly they are organised in a different way, seem to reflect much of the English case law (and debates) with regard to remedies and, on the whole, it seems to be more similar to the Common Law than to the Civil Law tradition. One example is Lord Diplock's definition of an innominate term:[294] 'There are many contractual undertakings of a more complex character which cannot be categorised as being "conditions" or "warranties", (...). Of such undertakings, all that can be predicated is that some breaches will, and others will not, give rise to an event which will deprive the party not in default of

288 See Beale 2000: an elaborate set of rules on 'defects of consent' is more typical of Civil (especially French) Law, elaborate rules on remedies are more typical of Common (especially English) Law.

289 P. xiv.

290 See e.g. Barendrecht 2000, p. 3: rules on interpretation, implied terms and good faith are probably the most important rules of contract law.

291 Art. 6:102 PECL.

292 See Treitel 1999, p. 731; Beale/Bishop/Furmston 1995, p. 495 ff; McKendrick 2000, p. 207.

293 See Treitel 1999, p. 732ff; Beale/Bishop/Furmston 1995, p. 497; McKendrick 2000, p. 208 ff.

294 *Hong Kong Fir Shipping Co Ltd* v *Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.

substantially the whole benefit which it was intended that he should obtain from the contract.' This definition was adopted as one of three situations in which non-performance is fundamental under the PECL[295] (and therefore gives the innocent party the right to terminate):[296] 'A non-performance of an obligation is fundamental to the contract if: (…) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result'.[297]

On the other hand, some typical Common Law doctrines have not been adopted by the PECL. The most prominent is probably the doctrine of consideration.[298] In art. 2:101 (1) the PECL explicitly say: 'a contract is concluded if: (a) the parties intend to be legally bound, and (b) they reach a sufficient agreement *without any further requirement*'.[299] The doctrine of consideration is frequently regarded as the basis of English contract law. However, not only is this view incorrect from a historical perspective (the bargain principle is actually quite recent), but the doctrine has also become rather problematic in many respects and, as a consequence, controversial as well. In practical terms the doctrine has lost most of its relevance because a deed is easily made and otherwise (nominal) consideration is easily found.[300]

The PECL contain no strong privity rule. For a long time the doctrine of privity of contract (which is related to the doctrine of consideration) provided a major difference between Common Law and Civil Law:[301] under English law a contract could not confer rights or obligations on a third party. However, recent law reform has relaxed the English privity rule considerably.[302] Today, under English law it is possible for two parties to stipulate an enforceable promise towards a third party in their contract. Therefore art. 6:110 (Stipulation in Favour of a Third Party)[303] can now be said to reflect also the Common Law. Apart from the 'Stipulation in Favour of a Third Party' (and Agency) there is little attention in the PECL to the problem of 'contract and third parties'.

295 Art. 8:103 (b) PECL. See also art. 25 CISG and art. 7.3.1 (2) (a) UP.

296 Art. 9:301 (1) PECL.

297 See on fundamental non-performance in French and English law Sefton-Green 2000.

298 It should be noted, however, that the similar civil law doctrine of *causa* was rejected by the Lando Commission in the same manner. See below.

299 Emphasis added. See also Comment (D): 'Nor is it necessary that a promisee undertakes to furnish or furnishes something of value in exchange for the promise (consideration).'

300 See McKendrick 2001.

301 See Du Perron 1998, Kötz 1998, Markesinis 1998.

302 See the Contracts (Rights of Third Parties) Act 1999.

303 Although the 'title' of the article has a typical Civil Law, especially French, sound.

5. *Civil Law Influence*

There are many typical examples of a Civil Law influence in the PECL. The most striking example is probably the omnipresence of the concept of good faith. The Lando Commission has clearly embraced the concept:[304] it is used on a very large scale, far more than in any civil code in Europe. Although clearly of Civil (Roman) Law origin, today, as a result of the EU Directive on Unfair Terms, the concept is no longer completely alien to English law.[305] As to specific rules, like all Civil Law systems[306] but unlike English law,[307] the PECL accept liability for negotiations contrary to good faith (art. 2:301). Moreover, under the PECL the parties may be under a pre-contractual duty to inform (art. 4:103 (1) (a) (ii) and art. 4:107).[308] A similar duty is accepted in most European legal systems, but has traditionally been rejected by English, Scots and Irish law.[309] As said, the Common Law has traditionally allowed parties to bargain 'at arm's length'. Art. 2:202 (3) PECL accepts the irrevocability of an offer when the offer explicitly says so, when it contains a time-limit for acceptance and in case of detrimental reliance by the offeree. This is in line with most Civil Law systems where an offer can be made irrevocable in many situations. In German and Belgian law irrevocability is even the main rule.[310] On the contrary, under English law a party cannot, in principle, make her offer irrevocable, for such an undertaking would lack consideration.[311] Under the PECL penalty clauses are enforceable (art. 9:509 PECL), but courts may reduce the penalty when it is grossly excessive.[312] This is completely in line with the Civil Law tradition,[313] but in Common Law systems penalty clauses are in principle not enforceable.[314] The 'right to withhold performance' is regarded by the PECL as a 'remedy

304 See for criticism, Hesselink 1999, *passim*, especially p. 437 ff, and Hesselink 1998. See further above, VI B.

305 See Teubner 1998 and Hesselink 1999, p. 418, with further references.

306 See Hesselink 2001-1 and Hesselink 1999-1, p. 67 ff., with further references.

307 The duty to conduct negotiations in good faith was explicitly rejected by the House of Lords in *Walford* v *Miles* [1992] 2 AC 128. See for Scotland MacQueen 1999 and MacQueen/Thomson 2000, p. 83 ff.

308 This duty is related to the general duty of good faith. See art. 4:107, Comment E.

309 See Musy 1999, p. 9 ff.

310 See § 145 BGB; Herbots 1995, no. 127.

311 Treitel 1995, p. 39. However, in (the Common Law system of) US law firm offers are sometimes irrevocable (for up to three months) under § 2-205 U.C.C.

312 Section (2).

313 See e.g. the recent Dutch civil code, artt. 6:91ff BW

314 See further below.

for non-performance' (9:201), whereas in Common Law systems it is not usually considered to be a remedy.[315]

In Civil Law systems the ordinary remedy in case of non-performance of a contract has traditionally been the claim for specific performance of the obligation. The right to specific performance is usually regarded as the essence of any obligation, whether of contractual or other origin.[316] In Common Law systems, on the contrary, the order for specific performance has traditionally been regarded as an exceptional remedy, which is only available, at the discretion of the court, when damages are not an adequate remedy.[317] In practice, this equitable remedy has mainly been granted in conflicts concerning rights in land. The Lando Commission chose against the traditional Common Law principle that damages are the normal remedy and that an order for specific performance will only be given in exceptional cases: 'The Principles take the approach that, unless non-performance is excused, compelling the non-performing party to perform should not be an exceptional remedy'.[318] However, it should be added that the availability of performance *in natura* is excluded by the PECL in a number of cases (see artt. 9:101 and 9:102 PECL). The result is usually regarded, quite rightly, as a satisfactory pragmatic compromise between both traditions.[319]

The distinctions in Chapter 3 (Authority of agents) between direct and indirect representation are familiar to many European systems, whereas the traditional Common Law distinction between disclosed and undisclosed principals was not endorsed by the Lando Commission.[320] Generally speaking, Chapter 4 (Validity) looks very civilian because of its 'defects of consent' (*vices de consentement*, *Willensmangel*) approach.[321] Chapter 5 (Interpretation) also seems closer to Civil Law. Art. 5:101 (1) states as a first general rule of interpretation that a contract is to be interpreted according to the common intention of the parties.[322] This is in line with the Civil Law

315 Of course, also in Civil Law systems the right to withhold performance is not an action but an exception. Compare on the history, foundation et cetera Hesselink 1999-1, p. 283 ff.

316 See Veldman 2000, with further references.

317 See Veldman 2000, with further references.

318 P. xxxix. See also Art. 9:102, Comment D.

319 In practical terms the UP seem more effective because they allow the court to impose a judicial penalty (art. 7.2.4), similar to *astreinte* and *dwangsom* (which may cumulate with damages, like the *dwangsom*).

320 See Busch 1998; Hartkamp 1999.

321 See also Art. 4:101, Comment (p. 227).

322 See art. 5:101 (1).

tradition,[323] but in contrast with the Common Law, where emphasis traditionally lies more on the objective meaning of the contract.[324] However, there is also some gradual convergence to be noticed here. On the one hand, most civil law systems seem to have moved towards a somewhat more objective method of interpretation (*normative Auslegung* in Germany, *il significato normale* in Italy, and the *Haviltex criterium* in the Netherlands),[325] whereas, on the other hand, the House of Lord (in a controversial decision) has recently abandoned the 'golden rule' of literal interpretation in favour of an approach which concentrates on the interpretation that a reasonable person with full knowledge of the factual background of the contract would give.[326] This latter test in nearly identical to the subsidiary test in art. 5:101 (3).[327]

323 Compare e.g. art. 1156 French and Belgian *Cc,* and art. 1362 Italian *c.c.*

324 See Cozens-Hardy MR's formulation of the 'golden rule' in *Lovell & Christmas Ltd* v *Wall* (1911) 104 LT 85: 'it is the duty of the court, which is presumed to understand the English language, to construe the document according to the ordinary grammatical meaning of the words used therein, and without reference to anything which has previously passed between the parties'.

325 See further Hesselink 1999-1, pp. 143-160.

326 *Investors Compensation Scheme Ltd* v *West Bromwich Building Society (No.1)* [1998] 1 W.L.R. 896; [1998] 1 All E.R. 98. See Lord Hoffmann (Lord Goff concurring): 'I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in Prenn v. Simmonds [1971] 1 W.L.R. 1381, 1384-1386 and Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen [1976] 1 W.L.R. 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarised as follows: (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man. (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them. (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The

However, there are also are many typical examples from the Civil Law tradition which have not been followed by the Lando Commission. To mention a few, the PECL are not a (draft) civil code, they are not based on the concepts of a general law of obligations or on *Rechtsgeschäft*,[328] they do not require a valid *causa* for the validity of the contract,[329] they do not contain the German concepts of *positive Vertragsverletzung* and *Vertrag mit Schutzwirkung für Dritte*,[330] and they do not contain specific rules on the distinction between *obligations de moyens* and *obligations de résultat* which is known in many Civil Law systems.[331]

6. *Balance*

Although there are important examples of the presence and absence of some very characteristic aspects of both major legal traditions and although the Lando Commission has found some very interesting compromises and new solutions, it is submitted that, on the whole, the PECL seem to be

meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] 2 W.L.R. 945). (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in The Antaios Compania Neviera S.A. v. Salen Rederierna A.B. 19851 A.C. 191, 201: "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."' In *Prenn* v *Simmons* Lord Wilberforce had said: '[English law is not] left behind in some island of literal interpretation (…) the time has long passed when agreements were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations'.

327 Art. 5:101 (3): 'If an intention cannot be established according to (1) and (2), the contract is to be interpreted according to the meaning that reasonable persons of the same kind as the parties would give in the same circumstances.'

328 See above, V A.

329 Art. 2:101 (1) PECL.

330 See Hesselink 1999-1, pp. 189 ff., and 275 ff. respectively, both with further references.

331 This distinction, which was first proposed by Demogue, has been adopted in France, Belgium, Italy, Spain and the Netherlands. See also art. 5.4 UP (Duty to achieve a specific result / Duty of best efforts). However, see the Comment on art. 6:102 (Implied Terms), which (under D) endorses the distinction (pp. 303-304).

somewhat closer to the Civil Law tradition than to Common Law. In terms of numbers this seems to be only fair: in Europe there are far more Civil Law than Common Law systems (13-2 plus one mixed system) and many more European citizens belong to the Civil Law tradition than to the Common Law. Frankly, the PECL probably adopted many more Common Law inspired rules and cultural compromises than simple numerical considerations would justify.

However, for cultural preservationists this may not be enough. The point raised by those who argue against a European civil code is that the cultural dominance of the numerically, economically and politically stronger risks to annihilation of a certain legal tradition in Europe, a legal tradition which incidentally on a world scale is far from marginal (e.g. the United States, Canada, Australia, Hong Kong). Is this too high a price to pay for European unity? The question seems only a variant of the more general question of English participation in Europe.

According to Legrand the adoption of a European Civil Code would never lead to real unity, because such a code would be interpreted differently in countries with different legal cultures.[332] This may be true in the beginning. It is possible that if the PECL were to be enacted as a European Code of Contract Law, in case of 'disappointing contracts'[333] Civil Law courts would in the beginning resolve conflicts rather more frequently on the basis of doctrines which are to be found in the chapter on Validity, whereas English, Irish and Scots plaintiffs (and courts) would be more likely to rely on doctrines which are to be found in the chapters on Non-Performance and Remedies. Courts from different traditions may even reach different results in substance.[334] However, as soon as a common European legal culture will have started to emerge (European academic debate, education, common textbooks et cetera), and especially if there will be one European supreme court to preside over uniform application,[335] this diversity will probably soon diminish.

332 Legrand 1997.

333 See Nieuwenhuis 1995.

334 Although the PECL urge the courts to break with their national traditions. See e.g. art. 9:102, Comment D: 'Under these Principles the aggrieved party has a substantive right to demand and to enforce a non-monetary obligation. Granting an order for performance thus is not in the discretion of the court; the court is bound to grant the remedy, unless the exceptions of paragraph (2) and (3) apply. National courts should grant performance even in cases where they are not accustomed to do so under their national law.'

335 Compare Howarth 1998.

C. Other Cultural Choices

Some rules in the PECL were clearly inspired by one specific legal system. The concept of 'excessive onerosity' in art. 6:111, for example, was clearly borrowed from Italian law (*eccessiva onerosità*).[336] Art. 2:107 (Promises Binding without Acceptance) seems to be based on the Nordic *löftesprinci-pen,*[337] whereas art. 2:210 (Professional's Written Conformation) seems to have been taken from German Commercial law.[338] The concept of excused non performance was clearly inspired by the French tradition (= *force majeure*). Art. 4:103 (Fundamental mistake as to facts or law) is very similar to the Dutch art. 6:228 BW, but actually both articles are based, like some other rules on validity,[339] on a 1973 UNIDROIT draft model law.[340] Moreover, as said, many rules are similar (sometimes identical) to the UP and, to a lesser extent, to the CISG.

Some other rules clearly imply a choice against a specific legal system, in the sense that if that system were to be replaced by a European code based on the PECL this would imply a radical change in that specific jurisdiction. For example, the PECL have adopted a unitary concept of non-performance. It includes both defective performance, late performance and the total failure to do anything at all.[341] Thus the Lando Commission has rejected the German concept of *positive Vertragsverletzung.*[342] The unitary concept of non-performance also includes both non-excused and excused non-performance, thus deviating from the English concept of 'breach' which does not

336 Art. 1467 *c.c.* The concept has had great international success. It was also introduced in the Greek code (art. 388; see Stathopoulos 1995, no. 293) and in many Latin-American codes (see Van Plateringen 2001).

337 See, for Denmark, Nielsen 1997, 238, and, for Sweden, Hultmark 2000, p. 275. See also Sacco 1998.

338 See Canaris 1995, p. 339 ff.

339 See e.g. 4:105 (Adaptation of Contract), which is based on art. 15, which has also inspired 3.13 *UP*, and art. 6:230 lid 1 Dutch *BW*, and which was itself inspired by art. 1432 Italian *cc*. See further Hesselink 1999-1, p. 106 ff

340 *Projet de loi pour l'unification de certaines règles en matière de validité des contrats de vente internationale d'objets mobiliers corporels (UNIDROIT).*

341 The definition of non-performance is not provided, as in the UP, in the chapter on 'Non-Performance and Remedies in General', but in the first chapter, on General Provisions. See art. 1:301 (Meaning of Terms): 'in these Principles, except where the context otherwise requires: (…) (4) "non-performance" denotes any failure to perform an obligation under the contract, whether or not excused, and includes delayed performance, defective performance and failure to co-operate in order to give full effect to the contract'. See P. xxxvii.

342 Recently, in Germany a law reform was proposed which would bring German law very much into line with (CISG and) the PECL. See supra.

include excused non-performance.[343] Moreover, as said, the English distinction between breaches of condition, warranty and intermediate terms was not adopted as such by the PECL. Finally, the PECL do not contain any special rules on 'hidden defects' in sales.[344] Another example is provided by art. 4:104: 'inaccuracy in communication' is to be treated as a mistake, which is contrary to the Dutch tradition where *oneigenlijke dwaling* is regarded as a problem of formation and not of defect of consent (validity).[345] Moreover, as said, the PECL do not allow for the *Inhaltskontrolle* of all contract clauses, as is the case in Scandinavian countries (art. 36 Contract Act).

Finally, the Lando Commission has made no cultural choice (as yet) with regard to illegality and immorality. See art. 4:101 (Matters not Covered) and the Comment:[346] 'Because of the great variety among the legal systems of Member States as to which contracts are regarded as unenforceable on these grounds, and the very different consequences which follow from this categorisation, further investigation is needed to determine whether it is feasible to draft European Principles on these subjects .' The Commission is currently working on this.[347]

343 Under English law liability is strict; non-performance is only 'excused' in the very limited cases of frustration.

344 These rules stem from Roman law and are to be found in sales law in most European codes. However, the Dutch 1992 BW abolished them. See, however, the remedy price reduction (artt. 9:401 ff PECL) which is very similar to the *actio quanti minoris* and will obtain, under the PECL, general application in the whole of contract law (i.e. not just in sales). See also the recent Directive 1999/44/EC on consumer guarantees, art. 3 (2).

345 In the Netherlands there is no contract, unless the other party was justified in relying (see Hartkamp 2001, no. 97 ff); under the PECL the contract is avoidable. The latter solution is preferable, because it is more nuanced.

346 Art. 4:101 PECL, Comment (p. 227).

347 See Lando, Preface, p. xiv, and above.

VIII. Economics

The Lando Commission has also made economic choices. Different rules of contract law may have different economic effects. Private law is an important part of the institutional framework in which our economy operates. And choices made by lawmakers may have important economic consequences. This is why, since the last few decades, economists, especially in the Unites States, have taken great interest in the economic analysis of the law.[348] After a brief introduction to law & economics (A) I will discuss mandatory rules (B), default rules (C) and some examples of efficient solutions in the PECL (D).

A. Law & Economics

1. *Economic Analysis of Contract Law*

The economic analysis of contract law is based on the assumption that contracts are an important economic institution, because they allow the exchange of goods and services, which, in turn, allows an efficient allocation of these goods and services. Contract law is an equally important institution. The main purpose of contract law, according to legal economists, is to facilitate efficient exchange and to repair market failures.

2. *Efficiency*

Suppose A owns a bicycle that he values at 50 Euro and B values the same bicycle at 100 Euro. If they decide to exchange the bike against a specific price between 50 and 100 Euro, say 75 Euro, not only are both parties better off, but also society as a whole (wealth maximisation), assuming that no third parties are harmed (no externalities). Legal economists call a transac-

348 Law & Economics has been less successful in Europe, probably because legal scholarship in Europe is still largely dogmatic (it has not had the benefit of the Legal Realist revolution; it largely aims to derive right answers to legal questions from a presumably coherent system) and because the Law & Economics movement is associated with right-wing economic policy. See on law & economics in Europe Mattei 1998-1, p. 69 ff.

tion efficient when it makes at least one person better off and nobody worse off (Pareto efficiency) or, in a more sophisticated version, if the winners could fully compensate the losers and still be better off (Kaldor-Hicks efficiency, cost-benefit analysis).[349] The (utilitarian) assumption on which the economic theory of contract law is based is that efficiency is good, and that therefore the main function of contract law should be to facilitate efficient exchange by making efficient contracts enforceable and by encouraging parties (incentives) to conclude efficient transactions.[350]

3. *Market Failures*

Clearly, legal economists have great confidence in the operation of the market, and in freedom of contract, which is essential to a well-functioning market. However, they also recognise that freedom of contract sometimes exists only in a nominal sense, e.g. because a party does not posses enough information to evaluate properly whether a certain transaction will make her better off, or because a party is under pressure to conclude a contract which she knows will not make her better off. Scholars in law & economics regard such problems, from an economic perspective, as market failures. Therefore, although the basic assumption in the economic theory of contract law is that it should make people's promises enforceable, thus helping them to make their commitments credible, in the case of market failures enforceability may have to be limited. Thus, in the economic theory of contract law, another function of contract law is to correct market failures.[351]

4. *Criticism*

According to its proponents, law & economics can provide a 'neutral' and 'scientific' basis to the law.[352] However, the result of economic analysis very much depends on what economic theory one starts with.[353] Clearly, the prevalent economic theory of contract law (and indeed the prevalent economic theory of law in general) is based on a series of assumptions that, plausible as they may be to many or even most of us, are neither inevitable nor irrefutable. Different choices are possible. Indeed, the economic analysis of law has been contested by several legal theorists and other legal scholars, some-

349 A situation is fully efficient (optimal) if no change is possible which would make someone better off without making someone else worse off (in their own estimations) (Pareto optimum), or if aggregate benefits outweigh aggregate costs (Kaldor-Hicks optimum).

350 See Cooter/Ulen 2000, p 177 ff; Posner 1998, p. 101 ff; Kronman/Posner 1979, p. 1 ff; Beale/Bishop/Furmston 1995, p. 71 ff; Mattei 1999, p. 538 ff.

351 See Cooter/Ulen 2000, p. 204 ff.

352 Cooter/Ulen 2000 p. 3, and Posner 1989, p. 5. Compare Mattei 1997, p. 21

353 Compare Groenewegen 2000.

times very strongly.[354] They reject the economic theory of law because it is based on an economic view (liberal-capitalist)[355] which they do not share, because it depends on unrealistic abstractions (man as a rational wealth maximiser) and because it disregards (or treats as 'irrational') important values (e.g. altruistic and distributional values). Others take a more moderate view. They regard the economic analysis of the law as a useful tool which provides an insight into the way rules of contract law may affect the behaviour of the contracting parties, although they are aware that it begs a number of important questions.[356]

B. **Mandatory Rules**

1. *Is the Unification of General Contract Law Efficient?*

The main argument that is usually proposed in favour of unification of private law in Europe is an economic argument. The diversity between systems of private law, and especially of contract law, is said to be an obstacle to the proper functioning of the Common Market.[357] The Lando Commission has explicitly endorsed this argument. It was one of the main reasons for drafting the PECL.[358]

However, there is also an economic argument against a European Civil Code, a European Code of Contracts and other types of unity imposed by the state. This argument of comparative law & economics suggests that competition enhances economic activity and innovation, and therefore economic growth. In that view rather than imposing (code) or suggesting (encouraging restatement) unity the European authorities should encourage competition between law firms who draft different kinds of model contracts (most of the PECL are default rules), and between national legislatures and judiciaries which adopt codes and statutes.[359]

354 See e.g. Dworkin 1980; Leff 1974; Kennedy/Michelman 1980; Freeman 1994, p. 374 ff, all with further references.

355 On the relationship between the law & economics movement and the New Institutionalists, see Posner 1995, pp. 426 ff.

356 Beale/Bishop/Furmston 1995, p. 676.

357 See e.g. Basedow 1998.

358 P. xxi.

359 See Mattei 1998-1. See also Smits 1998, Smits 1999 and Smits 2000.

2. *Unification of Mandatory Rules*

However, there are some rules that parties cannot contract around.[360] These mandatory rules are not subject to the same competition. This leads to the suggestion that it is not the general rules of non-mandatory contract law that should be harmonised or unified but rather regulation, i.e. the mandatory rules of general contract law and especially those of special contract law. Those seem to be the true impediments to the Common Market, not the non-mandatory rules of general contract law.[361] With regard to the latter, from an economic perspective, at best transparency is needed. This could be obtained by the kind of comparative law Legrand favours,[362] i.e. the approach which tries to discover where the real differences lie.[363] In other words: the opposite of the approach based on the *presumptio similitudinis* which is the dominant mode of comparative law in Europe today.[364] The PECL virtually only 'unify' default rules.[365] This does not mean that the Lando Commission intends all or most contracts only to be governed by default rules. Obviously, it intended that there should be mandatory rules for the protection of, e.g., employees, tenants, commercial agents, consumer buyers et cetera. These rules are simply not contained in the PECL and, if the PECL were to be enacted as a code, in the European Contract Code. This means, presumably, that until the European Civil Code project is completed,[366] such rules would have to continue to be taken from the various national legal systems, which vary considerably.[367] Therefore the differences in mandatory rules would presumably continue to exist. Also the absence of adequate information on the extent to which systems differ, which is said to be an important trade impediment,[368] will

360 See generally on the distinction between default rules and mandatory rules Hesselink 1999-1, p. 184 ff.

361 See on the economic importance of the right balance between mandatory and default rules Mattei 1999 p. 546 ('Striking [the right balance] between default rules and mandatory rules in contract law is certainly a key aspect of any system of private law seeking to create the institutional framework for an efficient market.'), and p. 548 ('efficiency requires 1) as small a number of mandatory rules as possible and 2) the general applicability of the ones that are considered unavoidable.').

362 See Legrand 1999-1, Legrand 1999-2, Legrand 2001.

363 Closest to this approach is the Trento Common Core Project.

364 See above.

365 See art. 1:102 (2). Six provisions are mandatory: art. 1:201, 2:105(2)(3), 6:105, 4:118, 8:109, 9:509(2). See PECL, Introduction, pp. xxix.

366 See above.

367 See 1:103 (Mandatory Law).

368 Basedow 1998.

remain in the case of mandatory rules since most scholars concentrate on general European contract law, which mainly contains default rules.
The PECL dedicate a specific provision to mandatory rules: art. 1:103 (Mandatory Law). However, this article seems to deal with a different problem from the one discussed here. Although it says very generally that when the parties choose to have their contract governed by the PECL[369] national mandatory rules are not applicable, unless they are of the type which is applicable irrespective of the law governing the contract,[370] it would seem that this article is only meant to deal with rules of general contract law that a choice for the PECL would deviate from; it does not seem to – and indeed should not – mean that a choice of law for the PECL (general contract law) would imply a waiver of protection from special contract law (e.g. the protection of commercial agents).

C. **Default Rules**

1. *Efficient Default Rules*

Parties can often save transaction costs by (deliberately) leaving gaps in their contracts. If these gaps are filled on the basis of efficient default rules this creates a surplus. Compare Cooter and Ulen:[371] 'Default rules save transaction costs in direct proportion to their efficiency.' Therefore from an economic perspective it is important that default rules should be efficient. The PECL virtually only consist of default rules. Are they efficient?

2. *Hypothetical Bargain*

Default rules are generally held to be efficient when they coincide with the result that parties would reach after bargaining in a world without transaction costs, i.e. with what the parties would have wanted (*ex ante*).[372] Compare Ayres and Gertner: 'The "would have wanted" approach to gap filling is a natural outgrowth of the transaction cost explanation of contractual incompleteness. Lawmakers can minimise the costs of contracting by choosing the default that most parties would have wanted. If there are transaction costs of explicitly contracting on a contingency, the parties may prefer to leave the contract incomplete. Indeed, as transaction costs increase,

369 See on this purpose of the PECL above, II.

370 Compare the *règles d'application immédiate* in art. 7 Rome Convention. See art. 1:103 PECL, Comment (p. 101).

371 Cooter/Ulen 2000, p. 204.

372 See Posner 1998, p. 434; Cooter/Ulen 2000, p. 202; Kronman/Posner 1979, p. 4; Beale/Bishop/Furmston 1995, p. 75. Ayres/Gertner 1989 have a more nuanced view. See below.

so does the parties' willingness to accept a default that is not exactly what they would have contracted for.'[373] Thus to the extent that the PECL reflect what parties would otherwise agree to, they reduce, as default rules, transaction costs.[374]

2. *Penalty Defaults*

Ayres and Gertner have shown that sometimes it is more efficient to provide a default rule that parties would not have wanted (neither the parties to a particular contract nor the majority of parties to such contracts). That is the case when it would be more efficient if parties, before concluding the contract, revealed information to the courts (which have to establish a default rule *ex post*) or to the other party (who has to determine an efficient degree of precaution *ex ante*). Ayres and Gertner argue that sometimes prohibitive transaction costs are not the cause of a gap in a contract but rather a method of strategic bargaining in which a party chooses not to unveil relevant information that would lead to the conclusion of an efficient contract. In such a case the most efficient default rule may be a 'penalty default', a rule that encourages parties to contract around the default rule and thus to encourage them to reveal relevant information to each other.[375]

3. *Foreseeability*

A clear example of a penalty default in the PECL is the rule on foreseeability (art. 9:503). A party can, as it were, by its reliance on the performance of the contract, increase its expectation interest. Beyond some point it would be inefficient to compensate all this reliance. In most legal systems liability is limited by the doctrine of foreseeability: there is no liability for damage caused to the creditor which the debtor could not reasonably foresee because she could not reasonably expect this excessive investment in reliance on the promise. In Common Law this doctrine was adopted in the famous case *Hadley* v. *Baxendale.*[376] A miller had agreed with a carrier that the latter would bring his broken shaft to Greenwich where it would be repaired. There was a delay, during which the miller could not work because he had no spare shaft. He claimed the loss of profit as consequential damages. However, on appeal, his claim was rejected because this damage was unforeseeable for the carrier who did not and could not know that the miller had no spare shaft. Ayres and Gertner mention the foreseeability rule

373 Ayres/Gertner 1989, p. 93.
374 See Mattei 1999, p. 542.
375 Ayres/Gertner 1989.
376 (1854) 9 Ex. 341.

as an example of a 'penalty default rule': it provides an incentive to the well-informed party to reveal relevant information which allows the other party to contract around the default and to reach an efficient solution by shifting the risk to the more efficient risk barer (least cost avoider) (in *Hadley* probably the carrier), obviously at a higher price.[377]

4. *Other Examples*

The *contra proferentem* rule, adopted by the Lando Commission in art. 5:103, may also be regarded as a 'penalty default rule': it is not based on the presumption that the interpretation least favourable to the drafter best reflects what the parties (would) have wanted. It is rather meant to provide an incentive to those who draft contracts to formulate their clauses more accurately.[378]

Another example is the problem of indefinite offers.[379] The enforcement of indefinite offers drives out inefficient indefinite offers: parties are encouraged to make only very precise offers and not to create erroneous reliance; otherwise they may be bound by a contract they did not want (but the other party thought they wanted). The PECL enforce an offer if 'it contains sufficiently definite terms to form a contract' (2:201 (1) (b)).[380] This rule, which incidentally is rather indeterminate itself, does seem to intended as a penalty default.

In the same line of thought the Dutch Plas/Valburg doctrine (liability for the expectation interest when breaking off negotiations after having induced reliance on the imminent conclusion of the contract) may be regarded as a penalty default which is meant to deter negotiating parties from inducing inefficient reliance (incentive to make explicit 'subject to contract' et cetera statements).[381] On the other hand, extensive liability for breaking off negotiations may have a 'chilling effect' on negotiating parties,[382] who do not even start negotiations for fear of liability, which may be inefficient (less contracts concluded). This may explain why under the PECL only the reliance interest may be recovered (2:301).[383]

377 Ayres/Gertner 1989, p. 101.
378 See Ayres/Gertner 1989, p. 105.
379 Ayres/Gertner 1989, p. 105.
380 See also the related artt. 2:101 (Conditions for the conclusion of a Contract), Section (1) and 2:103 (Sufficient Agreement), Section (1).
381 See on this doctrine above, VI B.
382 See Farnsworth 1987.
383 See art. 2:301, Comment C.

D. Efficient Solutions

In most cases the Lando Commission seems to have adopted efficient solutions. Here are a few examples:

1. *Informal*

The PECL contain hardly any formalities. A reduction in formalities reduces transaction costs, which is efficient.[384]

2. *Self-Help*

The Lando Commission seems to have clearly opted to diminish litigation costs. The PECL encourage 'self-help' by minimising the need for formal steps. An explicit economic argument (in terms of incentives) may be found in the 'Survey Chapters 1-9':[385] 'Remedies such as withholding performance and termination give the obligor a strong incentive to perform. Thus, if the contract is terminated the obligor may lose all that it has invested in preparing to perform. The more easily the remedy can be operated by the obligee, the more effective it is likely to be to induce the obligor to perform.' Especially court interference is unnecessary.[386] Thus, unlike in many European legal systems, under the PECL a contract may be avoided for mistake, fraud, threats et cetera, or terminated for non-performance, without any court intervention (artt. 4:112 and 9:303 (1) respectively). Moreover, the PECL encourage the parties to adapt the contract in case of mistake (4:105) or change of circumstances (6:111(2)) rather than to rely on the court's intervention.

3. *Enforceability of Promises*

The economic theory of contract law rejects the bargain principle (doctrine of consideration) and wants firm offers and gratuitous promises to be enforceable because that maximises people's well-being. Compare Cooter and Ulen:[387] 'Enforceability apparently makes two people better off, as measured by their own desires, without making anyone worse off. Whenever a change in the law makes someone better off without making anyone worse off, "Pareto efficiency" requires changing the law.' The Lando Commission apparently came to the same conclusion. Therefore it made firm offers enforceable (art. 2:202 (3)), and did not adopt the consideration requirement (art. 2:101(1)).

384 See Mattei 1999 p. 541.
385 P. xxxix.
386 P. xxxix.
387 See Cooter/Ulen 2000, p. 184.

4. *Efficient breach*

In some cases the availability of the remedy of specific performance may lead to inefficiency. A court order for specific performance is inefficient when the cost of performance to the debtor is higher than the benefit of the performance to the creditor. In such a case breach plus compensation would be the most efficient solution.[388] Although the PECL do not explicitly say so, in practice they may come very close to allowing efficient breach in most cases: whereas art. 9:102 (2) (b) may only apply to extreme cases,[389] the exception under (d) seems to open the possibility for efficient breach in most cases: 'Specific performance cannot, however, be obtained where: (…) (d) the aggrieved party may reasonably obtain performance from another source.'[390] Most continental European legal systems do not have such a rule.

388 See Cooter/Ulen 2000, p. 238 ff.

389 9:102 (2) (b): 'Specific performance cannot, however, be obtained where: (…) (b) performance would cause the debtor unreasonable effort or expenses.'

390 See Veldman 2001.

IX. **Progress v Tradition**

A. **Modern Solutions**

1. *Tradition and progress*

Contract law in Europe has a long tradition. Many of the concepts used by the systems of contract law in European countries today date back to the Middle Ages or even to the days of the Roman Empire. Several concepts of Roman law have made it to the European codes,[391] and in England, where contract law has not been codified, many of the central concepts have a very long history.[392]

At the beginning of the new Millennium two opposite views could be taken by those who wish to create (the basis) for a common law of contract for Europe. One would be to cherish the common traditions we have and to build our new European law on the foundation of the *ius commune* as it was known in most of Europe before the national codifications. This view is taken by Zimmermann and other neo-pandectist scholars.[393] However, this view has met with fierce opposition of various kinds. First, it is submitted that there was never actually a *ius commune.*[394] Secondly, it is argued that this view seems to regard both the national codifications and the subsequent national developments as historical mistakes, whereas most European citizens will regard the introduction of labour law, strict product liability et cetera as important achievements of the 20th century.[395] Finally, this view is rejected as very conceptualist, as *Begriffsjurisprudenz* in the Savignian tradition.

In the opposite view the conceptual basis of European legal systems is outdated. The concepts date from Roman law, and the ideological pillars (freedom of contract, liability for fault, and absolute property) belong to the

391 See Zimmermann 1996.
392 See Baker 1988, Milsom 1981.
393 Zimmermann 1998.
394 See Caroni 1994.
395 See Hesselink 1999-1, p. 15.

19th century. They neither fit the present day political (see above) and economic (see above) views nor our present day complex and highly organised society (communication, transport, insurance, et cetera). Therefore we should leave our codes et cetera behind us and start afresh, especially with brand new concepts, and a new format.[396]
What choice did the Lando Commission make? It has explicitly stated that the PECL can be regarded as 'progressive'.[397] Here are a few aspects of the PECL that could be characterised as 'progressive', in the sense that they are new compared to most systems and may represent or precurse the 'modern trend'.

2. *Principles Instead of a Code*

The Lando Commission has deliberately chosen for a new format compared to the classical code that Continental European legal systems are familiar with. It has opted for 'Principles' which are presented as Articles, Comments (with Illustrations) and Notes.[398] Thus they are an important source of information for contracting parties, courts, legislators, and academics This choice represents an important shift from formal to substantive concerns.

3. *Informal*

The PECL are informal in many ways. First, the PECL do not require any formality for the conclusion of a contract.[399] Art. 2:101 (2) explicitly states this. Also notices are given in an informal way. See art. 1:303 (1): 'Any notice may be given by any means, whether in writing or otherwise, appropriate to the circumstances.'[400] And, as said above, under the PECL a contract may also be terminated and avoided in a very informal way: 'the Principles endeavour to encourage "self-help" by minimising the need for formal steps.'

396 See Mattei 1998-2, Barendrecht 2000, and, for France, Atias 1999.

397 The Commission on European Contract Law speaks of 'progressive' (p. xxii.), 'a more satisfactory answer' (p. xxii.), 'a workable system' (p. xxvi) as if they were unproblematic concepts, as if they could be established objectively. However, American realism and the CLS movement have shown us that they are clearly not: law is politics. See further above.

398 See further above, IV.

399 But this is only the 'general part' of contract law. Specific rules on consumer contracts or on sureties (personal guarantees) may contain form requirements.

400 See also Section (6): 'In this Article, "notice" includes the communication of a promise, statement, offer, acceptance, demand, request or other declaration.' See for avoidance art. 4:112 (Notice of Avoidance).

4. *Favor Contractus*

Under the PECL there will be fewer cases of the complete invalidity of a contract than under most European legal systems. The *favor contractus* seems to have been a basic guideline for the drafters of the PECL. This also reflects a modern trend.[401] Examples include: initial impossibility of performance does not make the contract void (avoidance for mistake is possible) (art. 4:102):[402] if a party is entitled to avoid a contract for mistake the other party can prevent avoidance by proposing to perform the contract as the mistaken party understood it (adaptation of contract) (4:105);[403] if a ground for avoidance affects only particular terms of a contract, in principle the contract may only be partially avoided (partial avoidance) (4:116).[404] Artt. 6:104-6:108 provide solutions for gaps in contracts which help to avoid the contract becoming invalid (void) for uncertainty. Penalty clauses are not void, but can be reduced by the courts when they are 'grossly excessive' (9:509).

5. *Not 'All or Nothing'*

Remedies are not available in an 'all or nothing' manner. The PECL rather allow for intermediate solutions. This also seems to reflect a modern trend.[405] Examples include the possibility of partial avoidance, mentioned above, and adaptation of the contract when performance of the contract becomes excessively onerous because of a change of circumstances (article 6:111). See also art. 8:101 (Remedies available): 'A party may not resort to any of the remedies set out in Chapter *to the extent that* its own act caused the other party's non performance.'[406]

6. *Flexible Time-Limits*

Under the PECL time-limits are flexible. See for example art. 2:206 (2), on time limits for acceptance: 'a reasonable time', and art. 4:113, on time-limits for avoidance: 'Notice of avoidance must be given within a reasonable time'.

401 Compare the 1992 Dutch civil code (see Hartkamp 1990, no. 21, Vranken 1988) and the UP (see Bonell 1997, p. 117).

402 Contrast e.g. 306 BGB, 1346 Italian c.c., 290 Portuguese Código civil.

403 A similar rule is known in Italy (art. 1432 *c.c.*), the Netherlands (art. 6:230 *BW*), and the UP (art. 3.13 UP).

404 Such a provision is new to many codes (see, however, art. 139 BGB and art. 3:41 Dutch BW).

405 Compare Boom e.a. 1997.

406 Emphasis added.

7. *Other examples*

Termination does not have a retroactive effect. This solution also seems to be in line with the modern trend.[407] The reverse solution, adopted by the legal systems of the French tradition, may lead to many restitutionary problems in case of partially performed contracts. Moreover, in the definition of 'writing' explicit reference is made to e-mails: '"written" statements include communications made by telegram, telex, fax and e-mail and other means of communication capable of providing a readable record of the statement on both sides'(art. 1:301 (6)).[408] Finally, the Comments contain many examples of modern contracts (e.g. franchise, software design), and of modern contracting situations.

B. **Innovations**

Compared to many legal systems, especially to their codes, the Principles contain several innovations: some solutions have not been adopted in any of the systems as yet, as the Lando Commission explicitly states.[409] New to all or most legal systems (or their codes) are the following rules: Art. 2:107 declares that promises are binding without acceptance. Under art. 2:201 (3) a public advertisement is presumed to be an offer. Unlike most codes, the PECL take into account that in practice agreement is frequently reached although there is no distinguishable succession of offer and acceptance (art. 2:211). Art 2:209 (conflicting general conditions) introduces a creative solution to the problem of conflicting general conditions: the knock-out rule.[410] The rule in art. 2:210 (a professional's written confirmation) is new to most legal systems.[411] Many systems contain a rule on breach of confidentiality during negotiations (2:301), but not in their codes.[412] Art. 4:106 (incorrect information): no European code has a specific rule on this.[413] Art. 6:109

407 See art. 6:269 BW, 7.3.5 UP.

408 Compare art. 1.10 UP (Definitions): 'In these Principles (…) "writing" means any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form.', and Article 13 CISG (1980): 'For the purposes of this Convention "writing" includes telegram and telex.'

409 P. xxvi.

410 Not many codes contain a rule on the battle of forms (see, however, art. 6:225 (3) Dutch BW). Most systems do have such a rule however (case law). There are various options: first shot, last shot, and knock out. The knock-out rule seems to be a good solution. See further Mahé 1997.

411 See further above.

412 See Hesselink 2001-1, and Hesselink 1999-1, pp. 90 ff , with further references.

413 In most civil law systems this is dealt with by tort law. Here a party may be liable even in the absence of fraud or fundamental mistake under 4:103.

(Contract for an Indefinite Period) contains a rule which is accepted in most European legal systems, either on the basis of the principle of non-perpetuity or on the basis of good faith,[414] but is not explicitly provided for in any code. Art. 6:111 (2) says that in case of an unanticipated change of circumstances the parties must first try to sort out the consequences amongst themselves. This rule is new to all European systems. Unlike most European codes, art. 9:304 gives the innocent party the right to terminate when there is anticipatory non-performance.[415] The remedy of price reduction (art. 9:401) is known to many systems with regard to sales contracts (*actio quanti minoris*),[416] but not as a general remedy for all contracts. Art. 9:501(2)(a) provides for the general recovery of non-pecuniary loss.[417] In many systems, recovery is (in practice) much more limited.[418]

414 See Hesselink 1999-1, p. 365, with further references.

415 See, however, art. 6:80 BW. A similar rule has been accepted by the courts in England and many other countries. See art. 9:304, Notes. See also art. 7.3.3 UP and 71 CISG.

416 See above. Compare art. 50 CISG and the directive on consumer guarantees (sales law).

417 Compare art. 7.4.2(2) UP.

418 See e.g. in the Netherlands 6:106 BW.

X. Final remarks

Making law is making choices. The Lando Commission had to make choices of many kinds. Some of the most important ones have been highlighted in this paper.

When the Restatement (First) of Contracts was published it met with the following sharp criticism from Charles E. Clark, the then Dean of the Yale School of Law:[419] 'Actually the resulting statement is the law nowhere and in its unreality only deludes and misleads. It is either a generality so obvious as immediately to be accepted, or so vague as not to offend, or of such antiquity as to be unchallenged as a statement of past history. (…) There are a large number of purely bromidic sections (…). No one would wish to dissent from them. They cannot be used in deciding cases; nor are they now useful in initiating students into contract law (…). They may afford convenient citations to a court, but that is all. (…) The other sections cover up rather than disclose the problems they face. (…) Such citations, limited as they are to non-controversial points, will have no appreciable effect in unifying and clarifying our common law.' Does the same criticism also apply to the PECL? One would expect that it does, since the differences between the various European legal systems are presumably much greater than in the United States. However, I do not think that it does. I think that the Lando Commission has attained an astonishingly good result. Of course, the rules are very abstract. But they are not any more abstract than most European civil codes, in many cases rather less so. And, contrary to these codes, the PECL also provide a very useful Comment with Illustrations and Notes. In addition, they are drafted in a more elegant and plain style than most, if not all, European codes. Moreover, they are more social than many codes. Finally, they contain some very interesting new, creative solutions. On the whole, I think, that the Lando Commission has provided us with a highly inspiring starting point for a truly European debate on contract law and with an elegant and useful common language for that debate.

419 See Clark 1933, p. 654.

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Are The Principles Of European Contract Law Better Than Dutch Contract Law?

Gerard J.P. de Vries
Doctor of private law at the University of Amsterdam.

I. Introduction

The first Part of the Principles of European Contract Law, prepared by the Commission of European Contract Law – called the 'Lando'-Commission after its chairman, Ole Lando – and focussed on 'Performance, Non-Performance and Remedies', was published in 1995.[1] In 1999 the Principles of European Contract Law, Parts I and II, Combined and Revised, also prepared by the Lando-Commission, was published.[2] As its subtitle already suggests, this volume contains not only new Principles of European Contract Law, but also a revised edition of the Principles and the General Provisions mentioned in the first Part.

One of the main purposes the Principles of European Contract have been designed for, is to serve as a 'model for judicial and legislative development of contract law.'[3] The Principles are in the long run even meant to serve as 'basis for any future European Code of Contracts.'[4] The main arguments put forward for these claims are that the Principles reflect the common core of the solutions of the European law systems to problems of contract law or a progressive development from that common core.[5] These arguments and hence the feasibility of the above-mentioned claims of the Principles have been challenged, notably with the counter-argument that the Principles gathered by the Commission of European Contract Law are only directed towards finding an intermediate position between the

1 *The Principles of European Contact law, Part I, Performance, Non-Performance and Remedies, Prepared by the Commission of European Contract Law,* edited by Ole Lando and Hugh Beale, Martinus Nijhoff, Dordrecht 1995.
It should be noted that the focus of this first Part on Performance, Non-Performance and Remedies has not prevented the Lando-Commission from drafting General Provisions on contracts as well.

2 *The Principles of European Contract Law, Part I and II, Combined and Revised, Prepared by the Commission of European Contract Law*, edited by Ole Lando and Hugh Beale, Kluwer Law International, The Hague/London/Boston 2000.

3 O. Lando and H. Beale (eds), o.c., p. xxiv.

4 O. Lando and H. Beale (eds), o.c., p. xxiii.

5 O. Lando and H. Beale (eds), o.c., p. xxii ff.

European law systems and therefore do not offer much more than the greatest common denominator of these systems.[6]

The proof of the pudding is in the eating. The answer to the question whether the Principles are or are not suited to serve as a model for judicial and legislative development of contract law or even as a basis for any future European Code of Contracts, should be found by confronting them with national contract law in order to find out whether they are better. In this paper I intend to do so by comparing (important parts of the) Principles of European Contract Law with Dutch contract law.[7]

Dutch contract law offers the advantage of providing a rather hard test for the Principles. For one thing, its main source, the Dutch Civil Code, came into force only in 1992. Due to this time-factor it remains to be seen whether the claim made by the Lando-Commission that the Principles may 'on many issues covered by national law (…) be found to offer a more satisfactory answer than that which is reached by traditional legal thinking'[8] also holds true in the case of Dutch law; the examples put forward by the Commission of provisions in the Principles of European Contract Law on subjects 'on which most national laws are silent' – the provisions on Assurance of Performance (see Art. 8:105 PECL) and on Change of Circumstances (see Art. 6:111 PECL) – ,[9] do have their counterparts in the Dutch Civil Code (see the Articles 6:80 and 6:258 of this Code respectively). It does off course remain to be seen which of these two sets of provisions – the ones of the Principles or those of the Dutch Civil Code - are preferable with respect to their content. There is little danger the Dutch Civil Code has influenced the Principles to such a degree as to leave too little to be compared at all: the Commission of European Contract Law may, according to its chairman, have 'benefited greatly from the Dutch expe-

6 See particularly J.M. Smits, *The good Samaritan in European private law, On the perils of Principles without a Programme and a Programme for the Future*, Deventer 2000, p. 22 ff. The second counter-argument he puts forward – the Principles are badly in need of a programme –, highly intersting though it may be, must be left aside here, as it is in fact directed against the state of private law in Europe at large.

7 See on the significance of the Principles of European Contract Law for Dutch contract law in general D. Busch and E.H. Hondius, *Een nieuw contractenrecht voor Europa: de Principles of European Contract Law vanuit Nederlands perspectief, Nederlands Juristenblad* 2000, p. 837 ff and on their significance for various specific subjects of Dutch contract law *Europees contractenrecht, BW-krant jaarboek 1995*, Arnhem 1995 and the special issue of *Nederlands Tijdschrift voor Burgerlijk Recht*, 2000, nrs 9/10, devoted to this subject.

8 O. Lando and H. Beale (eds), o.c., p. xxii.

9 O. Lando and H. Beale (eds), l.c.

rience and from the provisions of the NBW',[10] the influence of the Dutch (draft-)Civil Code on the Principles of European Contract Law is at first sight not very evident from the 'Notes' to the Principles – i.e. additional information identifying the principal sources utilised to formulate the Principles of European Contract Law and describing briefly the manner in which the issue is dealt with in various legal systems of the Member States of the European Union – and this influence appears in the end to have been more modest than perhaps might have been expected from such a recent Code.[11]

The answer to the question I will address myself to is highly facilitated by the fact the Commission of European Contract Law has not contented itself with drafting a set of principles or rules embodied in Articles: each Article is followed by a Comment stating the reasons for the rule, and its purpose, operation and relationship to other rules; the operation of a rule is further explained by the use of Illustrations; finally the Comments are, different from those on the Unidroit-Principles of International Commercial Contracts, followed by a concluding Note to the rule identifying the principal sources utilised to formulate the Principle of European Contract Law in question and describing briefly the manner in which the issue is dealt with in various legal systems of the Member States of the European Union.

In comparing the Principles of European Contract Law with the general rules of Dutch contract law it should be born in mind that the Principles mostly – though not exclusively (see for instance Art. 1:107 PECL) – deal with contract law, whereas the rules of Dutch contract law are just part of a Code dealing with a great variety of subjects, only one of which is contract law.

It would therefore be unfair to conclude – from just a glance at the two – that the European Principles are much more consistent and accessible than the general rules of contract law contained in the Dutch Civil Code: these latter had to be fitted into a system of law that *inter alia* also takes account of unilateral promises and other statements and conduct indicating intention. Yet the way the European Principles present rules of contract law is likely to be tempting for a Dutch lawyer: compared with the two sets of contract rules he is familiar with – one pertaining to statements indicating intention in general (see title 3.2 Dutch Civil Code) and one specifically on

10 O. Lando, *Is codification needed in Europe? The Principles of European Contract Law and their relationship to the Dutch law, European Review of Private Law* 1 (1993), p. 158.

11 See J.M. Smits, *Nederlandse invloed op het internationaal (contracten)recht*, in: *Import en export van burgerlijk recht, BW-krant jaarboek 1997*, Deventer 1997, p. 127 ff.

contracts (see title 6.5 of Dutch Civil Code) –, the example of one single set of contract rules put forward by the Principles is luring.

The fact that the Principles differ from the Dutch Civil Code in that they almost exclusively deal with contract law in my opinion also entails that not too much importance should be attached to the legal foundations the Principles have to offer for rules regarding questions which are closely linked to contract law, but might also be regarded as pertaining to a different field of private law. Take for instance Liability for Negotiations (see Art. 2:301 PECL): the fact the Principles found this liability on the general duty to act in accordance with good faith and fair dealing[12] in my opinion does not imply that all of the *Fallgruppen* discerned by the Principles of European Contract Law in which it is contrary to good faith and fair dealing to negotiate or break off negotiations (see notably Art. 2:301(3) and the Illustrations of this paragraph), should rest on this foundation: some might just as well rest on tort liability. It should be borne in mind that even the Principles themselves do not pretend to offer the correct legal foundation in the above-mentioned instances: 'The Principles may be applied to claims which arise out of a contract, even if under some national systems the claim might be qualified as delictual rather than contractual, for example a claim for misrepresentation.'[13]

The Principles of European Contract Law, though - in keeping with their general name - intended to apply to contracts in general,[14] have all the appearance of having been drafted primarily to meet the needs of the international business community.[15] The European Principles for instance do not make special provision for consumer contracts[16] and provisions on the effects of

12 See also O. Lando and H. Beale, Comment to Art. 1:201 under A, o.c., p. 113.

13 O. Lando and H. Beale (eds), Comment to Art. 1:101 under E, o.c., p. 97. The Comment to Art. 2:301 under F presents the subject-matter of legal foundation of liablity as a mere technicality: 'In several of the Member countries such misrepresentation is an actionable tort, but if the claim arises out of contract the Principles should apply (…)' (o.c., p. 190).

14 See O. Lando and H. Beale (eds), o.c., p. xxv.

15 See O. Lando and H. Beale (eds), l.c. and O. Lando, *Is codification needed in Europe? Principles of European Contract Law and the relationship to Dutch law*, in: *European Review of Private Law* 1: 158 ff, 1993.

16 See O. Lando and H. Beale (eds), l.c. The Comment to Art. 4:110 on Unfair Terms not Individually Negotiated under B offers an example: 'Unlike the Directive (i.e. The EC Council Directive 93/13 on Unfair Terms in Consumer Contracts (1993)), the Principles contain no list of clauses deemed to be unfair. In contracts between professionals, a listing of contract terms as being *per se* unfair, because of the diversity of commercial contracts, is generally held to be all but impossible' (o.c., p. 266).

lack of capacity of a party[17] or of an impairment of its mental faculties are this far absent in them. The European Principles do contain several provisions rather adjusted to business transactions, such as the provisions with regard to Merger Clause (see Art. 2:105), Written Modifications Only (see Art. 2:106), Professional's Written Confirmation (see Art. 2:210). In both respects the Principles of European Contract Law show a striking similarity with the Unidroit-Principles of International Commercial Contracts.[18] In the Dutch Civil Code it is rather the other way around: it holds many provisions on consumer contracts[19] and only a few on business transactions.[20] The provisions in the Principles of European Contract Law adjusted to business transactions will be left out in this paper insofar as Dutch counterparts are absent.

For lack of room certain areas the European Principles of Contract law deal with, will not be treated in this paper: Authority of Agents (Chapter 3), most of Interpretation (Chapter 5) and of Contents and Effects (Chapter 6) and Performance (Chapter 7) have been left out.
Authority of Agents (Chapter 3) is left out for both its specialized character and its similarity to the Dutch rules on Direct Representation (title 3.3 of the Dutch Civil Code) and on Indirect Representation (notably in the

17 Art. 4:101 PECL states this explicitly: '(…) does not deal with the invalidity arising from (…) lack of capacity'

18 See also A.S. Hartkamp, *Principles of Contract Law* in: *Towards a European Civil Code*, Nijmegen 1998, p. 105 ff. Consequently Hartkamp's article *The Unidroit Principles for International Commercial Contracts and the New Dutch Civil Code* in: *CJHB (Brunner bundel)*, Deventer 1994, p. 127 ff turned out to be informative with respect to the present subject-matter as well. See on the relationship between these two sets of Principles also J.M. Bonell, *The UNIDROIT-Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purpose?* In: *Uniform Law Review* 1996, p. 229 ff and E.H. Hondius, *De betekenis van de Principles of European Contract Law voor het Nederlandse recht/Inleiding* in: *Nederlands Tijdschrift voor Burgerlijk Recht* 2000, p. 430 ff.

19 Leading T. Hartlief to the conclusion that the freedom of contract needs protection: see *De vrijheid beschermd, Enkele opmerkingen over contractvrijheid en bescherming van de zwakkere partij*, Deventer 1999, *passim*.

20 This, however, does not imply that the status of businessman is irrelevant in Dutch contract law: see for instance R.P.J.L. Tjittes, *De hoedanigheid van contractspartijen*, Deventer 1994, *passim* and *Zaken zijn zaken, Rechtsgeleerd magazijn Themis*, 2000/9, p. 321 ff.

Articles 7:420 and 421 of this Code),[21] the rules on Interpretation (Chapter V) have – with the exception of the General Rules on Interpretation in Art. 5:101 PECL[22] – been skipped for their common-sense character and their similarity to corresponding Dutch rules.[23] Contents and Effects (Chapter 7) and Performance (Chapter 6) are left out for the detailed character of the provisions on these subjects with the exception of two provisions on subjects which are rather controversial in Dutch law, Termination of Contracts just by giving notice ('opzegging') in Art. 6:109 PECL and Change of Circumstances ('verandering van omstandigheden') in Art. 6:111 PECL.

Thus, in this paper the following subjects will be dealt with:

- Formation of the Contract;
- Validity of the Contract;
- Termination and Adaptation of the Contract: just by giving notice and on account of a Change of Circumstances;
- Non-Performance and Remedies in General;
- Particular Remedies for Non-Performance

This selection of the subject-matter dóes follow the order in which the 9 Chapters of the Principles of European Contract Law divide up contract law, except for the General Provisions of the Principles (Chapter 1) which will also be dealt with, but not separately, but only where and insofar as this seems most suited to the other subject-matter mentioned above.

21 See for a comparison of the European Principles and Dutch contract law on this subject D. Busch and E.H. Hondius, *Een nieuw contractenrecht voor Europa: de Principles of European Contract Law vanuit Nederlands perspectief* in *Nederlands Juristenblad* 2000, p. 841 ff and D. Busch, *Middelijke vertegenwoordiging in de Principles of European Contract law: een evenwichtige regeling?, Nederlands Tijdschrift voor Burgerlijk Recht* 2000, p. 437 ff.

22 See Chapter II of this paper on Formation of Contract.

23 See M.H. Wissink, *Contracten uitleggen; een verkenning van hoofdstuk 5 van de Principles of European Contract Law, Nederlands Tijdschrift voor Burgerlijk Recht,* 2000, p. 465 ff.
One may, however, conclude from a glance at Chapter 5 on 'Interpretation' that the Principles of European Contract Law contain many explicit, informative and clear-cut rules on the issue which are conspicuously and deliberately (see Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Deventer 1981, p. 916) absent in the Dutch Civil Code.

II. Formation of Contract

Chapter 2 on Formation of Contract distinguishes between general provisions regarding the formation of contract, such as on the 'intention' of the parties or the 'apparent intention' of one of them as Conditions for the Conclusion of a Contract (Art. 2:101), which are gathered in Section I (General Provisions) of this Chapter and specific ones on offer and acceptance, such as on the Revocation of an Offer (Art. 2:202), which make up Section II (Offer and Acceptance). The Chapter on Formation is concluded by a Section, Section III, on Liability for Negotiations. This way of presenting the subject-matter is quite familiar to lawyers acquainted with the Dutch Civil Code and goes by the name 'layered structure'.

Similar foundations of contract, partly different results: the Principles tend to uphold contracts in more cases

In the General Provisions on Conditions for the Conclusion of a Contract (Art. 2:101) and Intention (Art. 2:102) one may discern the foundations the Art. 3:33 respectively 3:35 of the Dutch Civil Code provide for the so-called 'juristic act' ('rechtshandeling'), i.e. 'intention' and 'apparent intention':[24]

- 'A contract is concluded if the parties *intend* to be legally bound' (Art. 2:101 paragraph (1) sub (a));
- 'The intention of a party to be legally bound by contract is to be determined from the party's statements or conduct *as they were reasonably understood by the other party*' (Art. 2:102).

24 See also the reference to Art. 3:35 of the Dutch Civil Code in Note 2) to Art. 2:102 PECL.

As in Dutch law,[25] these foundations of the contract reappear in the General Rules of Interpretation of a contract, contained in Art. 5:101 paragraphs (1) and (3) of the European Principles:

– 'A contract is to be interpreted according to the common *intention* of the parties (…)' (paragraph (1));
– 'If an intention cannot be established (…), the contract is to be interpreted *according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances*' (paragraph (3)).

Despite these similarities, Illustrations in the Comments accompanying the Articles 5:101 paragraphs (2) and 4:104 PECL and the 'apparent intention'-Principle laid down in the Articles 2:102 and 5:101 paragraph (3) PECL show that *under the Principles of European Contract Law contracts would be upheld in more cases than when Dutch law were to apply*:

– One of the Illustrations in the Comment to Art. 5:101 paragraph (2) PECL: 'A, a fur trader, offers to sell B, another fur trader, hare skins at *f* 10 a kilo; this is a typing error for *f* 10 a piece. In the trade skins are usually sold by the piece and, as there are about six skins to the kilo, the stated price is absurdly low. B nonetheless purports to accept. There is a contract at *f* 10 per piece as A intended';[26] The Article just illustrated, Art. 5:101 paragraph (2) PECL, runs as follows: 'If it is established that one party intended the contract to have a particular meaning, and at the time of the conclusion of the contract the other party could not have been unaware of the first party's intention, the contract is to be interpreted in the way intended by the first party.' If Dutch law were to apply, the conclusion that in this case a contract has been concluded at *f* 10 per piece, could not be based on any hard and fast rule as Art. 5:101 paragraph (2) PECL; this conclusion might only be inferred from Art. 3:35 of the Dutch Civil Code, provided it is assumed buyer B (and not, as might have been expected, fur trader A) is the one who (by accepting A's offer without demur) made the unintended state-ment making him appear to be agreeing to what A meant and who is

25 See the decision by the Dutch Supreme Court of 13 March 1981, NJ 1981, 635 (*Haviltex*), Asser-Hartkamp, 4-II, *Algemene leer der overeenkomsten*, Deventer 1997, nrs 280 en 281 and W.L. Valk, *Rechtshandeling en overeenkomst*, Deventer 1998, nr 265.

26 See O. Lando and H. Beale (eds), Illustration 2) to the Comment to Art. 5:101 (2), o.c., p. 289.

therefore ex Art. 3:35 bound by the apparent meaning of his conduct to A.[27] It is remarkable that the Comments to the Principles themselves are ambiguous as to the foundation of the hard and fast rule art. 5:101 paragraph (2) offers: the conclusion that due to this paragraph a contract has been concluded for *f* 10 per piece is on one hand based on the 'apparent intention'-approach just put forward,[28] but it is also argued that this paragraph is 'a consequence of the rule that the intention of the parties prevails over the letter of the contract.'[29]

– One of the Illustrations in the Comment to Art. 4:104 PECL: 'A and B have been negotiating for a lease of A's villa; A has been asking *f* 1300 per month, B has offered *f* 800 per month. A writes to B offering to rent him the villa for *f* 100 per month; this is a slip of the pen for *f* 1000. B realises that A must have made a mistake but does not know what it is. He writes back simply accepting. A may avoid the contract';[30] this case illustrates Art. 4:104, that runs as follows: 'An inaccuracy in the expression or transmission of a statement is to be treated as a mistake of the person which made or sent the statement (…)' The implicit conclusion that in this case a contract has been concluded would be out of the question when Dutch law were to apply: as A's offer to rent the villa for *f* 100 per month neither rests on his expressed intention (see Art. 3:33 Dutch Civil Code) nor on the 'apparent meaning' of A's letter (see Art. 3:35 of this Code), this offer and the lease would, according to Dutch law, be null and void *ex lege*[31] (see Chapter III of this paper on 'Validity' for more information on this subject).

27 It should, however, be noted that, as A is under Dutch law also entitled *not* to refer to Art. 3:35 of the Dutch Civil Code (see *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6*, Deventer 1981, p. 170/171 and 176), application of this Article may also lead to the conclusion that the contract is null and void *ex lege (*see *infra*).

28 See O. Lando and H. Beale (eds), Comment to Art. 4:104 under C, o.c., p. 242.

29 O. Lando and H. Beale (eds), Comment to Art. 5:101 paragraph (2) under C, o.c., p. 289. In my opinion the rule the Comment refers to here, Art. 5:101 paragraph (1) PECL, does *not* apply: Art. 5:101 (1) – stating that the intention of the parties overrides the literal meaning of the words used by them ('*falsa demonstratio non nocet*') – rests on the assumption of a 'common intention of the parties' (Art. 5:101 paragraph (1)), which in the above-mentioned Illustration is absent.

30 O. Lando and H. Beale (eds), Illustration 2) to the Comment to Art. 4:104 under D, o.c., p. 243.

31 See Asser-Hartkamp, o.c., nr 113, W.L. Valk, o.c. nr 39 and M.M. van Rossum, *Het leerstuk van de fundamental mistake van de Principles of European Contract Law (PECL) en de Nederlandse dwalingsleer, Nederlands Tijdschrift voor Burgerlijk Recht* 2000, p. 461.

– The objective way the 'apparent intention'-Principle is formulated in Article 2:102 PECL – 'The intention of a party to be legally bound by contract *is to be determined* from the party's statements or conduct as they were reasonably understood by the other party' – and its status as a General Rule of Interpretation Art. 5:101 (3) PECL bestows on it, suggest that the party the unintended statement is directed to, is not entitled *not* to invoke this Principle. When Dutch law were to apply, the party the unintended statement is directed to, however, is not only entitled to invoke its counterpart, Art. 3:35 of the Dutch Civil Code, but also *not* to invoke this Article. An illustration of this *non-usus* of Art. 3:35: A and B have been negotiating for a lease of A's villa; A has been asking *f* 1300 per month, B has offered *f* 800 per month. A writes to B offering to rent him the villa for *f* 1000 per month; this is a slip of the pen for *f* 1100. B doesn't realise that A has made a mistake and cannot be expected to realise this either. B who by referring to Art. 3:35 could uphold the lease at a price of *f* 1000 a month, decides to refrain from referring to it, thus leaving it null and void.[32] This right of the party the unintended statement is directed to, to refrain from referring to Art. 3:35 and thus leave the contract null and void, is highly criticised in Dutch legal literature.[33]

It seems to me this tendency of the Principles of European Contract Law to uphold contracts is not only in line with Dutch legal literature[34] but with the present Dutch Civil Code itself as well. For instance in that this Code – like the Principles of European Contract Law: 'A contract is concluded (…) without any further requirement' (Art. 2:101 (1))[35] – has done away with the

32 See *Parlementaire Geschiedenis van het Burgerlijk Wetboek, Boek 6*, Deventer 1981, pp. 170, 171 and 176. See also *Parlementaire Geschiedenis Invoeringswet Boek 3, 5 en 6*, Deventer 1990, pp. 1127 and 1129.

33 See for instance B.W.M. Nieskens-Isphording and A.E.M. van der Putt-Lauwers, *De derdenbescherming in boek 3 van het Nieuw Burgerlijk Wetboek, Weekblad voor Privaatrecht, Notariaat en Registratie*, nrs 5563-5569 (1981), p. 304, W.E.M. Leclerq, *Nietigheid en vernietigbaarheid in de artikelen 3.2.1, 2a en 3 NBW*, *Weekblad voor Privaatrecht, Notariaat en Registratie*, nr 5646 (1983), A.L. Croes, *Hoe (on)bekwaam wordt de handelingsonbekwame in Boek 3 Nieuw BW?, Kwartaal Bericht Nieuw BW* 1984, p. 36 ff, Jac. Hijma, *Nietigheid en vernietigbaarheid van rechtshandelingen*, diss. Leiden 1988, Deventer, p. 42 ff and M.A.B. Chao-Duivis, *Dwaling bij de totstandkoming van overeenkomsten*, diss. Tilburg 1996, Deventer, p. 191.

34 See notably Jac. Hijma, o.c., *passim*.

35 See O. Lando and H. Beale (eds), Note 3) under b) to Art. 2:101 regarding Cause, causa, o.c., p. 141.

requirement of *cause* or *causa* ('oorzaak')[36] and – also like the Principles of European Contract Law: 'A contract is not invalid merely because at the time it was concluded performance of the obligation assumed was impossible (…)' (Art. 4:102) – has refrained from stipulating that an impossibility to perform the obligation that already existed at the time of the conclusion of the contract renders it null and void.[37]

Nudus consensus obligat: rather no 'formal' and 'real' contracts

The tendency of the Principles of European Contract Law to uphold contracts may also be discerned in the respect Art. 2:101 paragraph (2) pays to the *adagium 'nudus consensus obligat'*. This paragraph states: 'A contract need not be concluded (…) in writing nor is it subject to any requirement as to form.' Its Dutch counterpart, Art. 3:37 paragraph (1) of the Civil Code, states the same principle with regard to statements indicating intention in general : 'Unless otherwise provided, statements indicating intention (…) may be made in any form and may also be inferred from conduct.'
This principle is unfavourable not only to so-called 'formal' contracts, but also to 'real' contracts, i.e. contracts that cannot be validly concluded until the property to which it relates has been handed over to the creditor or some other person authorized to receive it. But it does not off course preclude legislation to the effect that as to certain specific contracts formal requirements are to be met.
It is in the light of Art. 2:101 paragraph (2) PECL remarkable that some specific Dutch contracts have recently been transformed into 'formal' contracts or will be in short time. Yet this phenomenon is restricted to contracts concluded by consumers – such as consumer sales of time-shares (Art. 7:48b Civil Code) and of living-houses (see Art. 7.2 of this Code, as conceived in bill nr 23095) and consumer credit-transactions (see Art. 30

36 See *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6,* Deventer 1981, p. 896 ff.
See for a different approach A.C. van Schaick, *Contractsvrijheid en nietigheid*, *Beschouwingen vanuit rechtshistorisch en rechtsvergelijkend perspectief over de overeenkomst zonder oorzaak*, diss. Tilburg 1994, Zwolle and notably J.M. Smits, *Het vertrouwensbeginsel en de contractuele gebondenheid*, diss. Leiden 1995, Arnhem (Smits' approach has in turn been criticised by A.S. Hartkamp, *Weekblad voor Privaatrecht, Notariaat en Registratie* 6227 (1996)).

37 See *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6,* Deventer 1981, p. 484 ff and Asser-Hartkamp, 4-I, *De verbintenis in het algemeen*, Deventer 2000, nrs 26 and 307.

Wet op het consumentenkrediet[38] – and is therefore not primarily envisaged by the Principles of European Contract Law (see the Introduction). So-called 'real' contracts for their part are clearly on their way out of the Dutch Civil Code: 'deposit' has already been changed into a so-called 'consensual' contract (see Art. 7:600 Civil Code), 'loan of goods for consumption' or 'loan of money' will be in due time (see Art. 7.7.2.1 and 7.7.2.2, as conceived in the Draft-Meijers), leaving only 'loan of goods for use' destined to remain a 'real' contract (see Art. 7.6.1 of this Draft). This construction of 'loan of goods for use' as a 'real' contract does not seem to make much sense,[39] as according to Dutch law a merely consensual contract to lend goods for use at some time in the future is also perfectly valid and enforceable.[40]

Explicit rules on Offer and Acceptance

Overall, the rules on Offer and Acceptance gathered in Section 2 of Chapter 2 (Formation) show a resemblance to their counterparts in the Dutch Civil Code (see the Articles 6:217 ff and 3:37).
This resemblance is hardly a coincidence. The Dutch rules on formation of contract have been inspired by the Uniform Law on the Formation of Contracts for the International Sale of Goods of 1964 (ULF),[41] while the Principles of European Contract Law for their part have drawn heavily on the successor of the ULF, the UN-Convention on Contracts for the International Sale of Goods of 1980 (CISG).[42]
The rules on Offer and Acceptance in Section II do, however, seem to be different from Dutch law in that they *make more often explicit what remains more or less hidden in Dutch court decisions and/or legal literature*:

– The Dutch Civil Code stipulates that a contract 'is formed by an offer and its acceptance' (Art. 6:217 paragraph (1)), but does not define these notions. The Articles 2:201 paragraph (1) and 2:204 PECL do contain definitions of these notions, of which the one regarding Offer furnished by Art. 2:201

38 See T. Hartlief, o.c., p 38 ff.
39 See for critique O.K. Brahn, *Het irreële van het reële contract bruikleen in het NBW*, *Nederlands Juristenblad* , 1983, p. 568 ff.
40 See Asser-Hartkamp, 4-II, *Algemene leer der overeenkomsten*, Deventer 1997, nr 54 and 57.
41 See *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6*, Deventer 1981, p. 879 ff.
42 See O. Lando and H. Beale (eds), o.c., p. 161 ff.

paragraph (1) PECL is informative: 'A proposal amounts to an offer if:
a. it is intended to result in an contract if the other party accepts it; and
b. it contains sufficiently definite terms to form a contract.'

This definition, which was modelled after Art. 14 CISG, is informative in that it – under (a) – expresses the requirement for an offer that the proposer *intends to be bound*, which intention 'is to be determined from his statements or conduct as they were reasonably understood by the other party' (Art. 2:102 PECL).[43] Thus, this expressed requirement for an offer, had it been enacted, might have served as a welcome steppingstone for the decision of the Dutch Supreme Court of 10 April 1981 that a proposal in an advertisement to sell an individually determined good (a specific house) for a certain price is presumed to be only an invitation to make an offer.[44] This is in line with the Comment to Art. 2:201 PECL where it states that proposals to the public 'made "with an eye to the person" are generally presumed to be invitations to make offers only. This applies to an advertisement of a house for rent at a certain price.'[45] The definition of Offer furnished by Art. 2:201 (1) PECL is also informative in that it - under (b) – makes an offer conditional upon its containing 'sufficiently definite terms to for a contract.' This rule also holds true for Dutch law,[46] but has not been made explicit in the Civil Code itself.

– Art. 2:201 paragraph (3) PECL offers the following rule on the implications of the category of offers made to the public at large by professional suppliers: 'A proposal to supply goods or services at stated prices made by a professional supplier in a public advertisement or a catalogue, or by a display of goods, is presumed to be an offer to sell or supply at that price until the stock of goods, or the supplier's capacity to supply the service, is exhausted.' Here again the PECL make explicit what in Dutch law remains more or less hidden: this rule holds true for Dutch law as well, but is not to be found in the Civil Code itself, but in legal literature.[47]

– The last Article in the Section II on 'Offer and Acceptance', Art. 2:211 PECL, makes explicit that Offer and Acceptance are just a model that may

43 See O. Lando and H. Beale (eds), Comment to Art. 2:201(1) under B, o.c., p. 159.
44 See the decision by the Dutch Supreme Court of 10 april 1981, *Nederlandse Jurisprudentie* 1981, 532 (*Hofland/Hennis*).
45 See O. Lando and H. Beale (eds), Comment to Art. 2:201 under C, o.c., p. 160.
46 See Asser-Hartkamp, o.c., nr 136 and W.L. Valk, o.c., nr 59.
47 See Asser-Hartkamp, o.c., nr 140.

be followed when it is to be decided whether a contract has been concluded: 'The rules in this Section apply with appropriate adaptations even though the process of conclusion of a contract cannot be analysed into offer and acceptance.' The notion that the process of concluding a contract cannot always be analysed in terms of an offer made by an offeror which then has to be accepted by the offeree is also widely accepted in Dutch law:[48] one of the examples mentioned in the Comment to Art. 2:211 PECL, a third party making the draft agreement for the contract that is eventually concluded between the parties,[49] is even identical to one of the examples used in the Comment to Art. 6:217 of the Dutch Civil Code. Yet there is a difference: as Art. 6:217 of the Code, by stipulating that 'a contract is formed by an offer and its acceptance', suggests that this model for analysis is exclusive, the example in the Comment on it serves to illustrate a hidden rule that is an exception to the rule contained in Article,[50] whereas the example in the Comment to Art. 2:211 PECL serves to demonstrate the rule contained in the Article. Thus, Article 2:211 PECL also make explicit what in Dutch law remains more or less hidden in legal literature *et alia*.

– Art. 2:211 PECL only states that it may not always be possible to analyse the conclusion of a contract in terms of offer and acceptance, without, however, doing away with the offer as a requirement for a contract, a requirement that in turn requires acceptance: 'An offer is a promise which requires acceptance. An offeror is not bound by its promise unless it is accepted.' [51] Art. 2:107 PECL sails round this requirement by proclaiming the normal consequences of a contract, a legally binding obligation, in a case where no offer has been made and therefore no contract has been concluded at all,[52] the unilateral 'promise': 'A promise which is intended to be legally binding without acceptance is binding.' One of the Illustrations of such a promise: 'C sends a letter to the creditors of its subsidiary company D, which is in financial difficulties, promising that C will ensure that D will meet its existing debts. The promise is made in order to save the reputation of the group of companies to which C and D belong. It is binding upon C

48 See Asser-Hartkamp, o.c., nr 156.

49 See O. Lando and H. Beale (eds), Comment to Art. 2:211 under A, o.c., p. 187.

50 See *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek*, Boek 6, Deventer 1981, p. 879.

51 See O. Lando and H. Beale (eds), Comment to Art. 2:107 under A, o.c., p. 157.

52 Art. 1:107 discerns the promise from contract as a unilateral statement indicating intention: 'These Principles apply with appropriate modifications to (…) unilateral promises and to other statements and conduct indicating intention.'

without acceptance since it is assumed that C intends to be bound without the acceptance of each creditor.' While this promise has also been acknowledged in Dutch law, the Dutch Civil Code does not mention it. In the light of Art. 6:1 of this Code – 'Obligations can only arise if such results from the law' – this poses a problem[53] that has to be solved by an extensive interpretation of this Article or by construing unilateral promises as contracts.[54] The outright acknowledgement of the promise by the Principles of European Contract Law is in my opinion to be preferred as more direct and straightforward.

Battle of forms: the contract is usually uphold; so are the conflicting general conditions to the extent that they are common in substance

The question whether a Modified Acceptance of an offer leads to a contract and, if so, which content this contract is to have, is answered by Art. 2:208 PECL paragraphs (1) and (2) in a way resembling the Dutch answer contained in Art. 6:225 paragraphs (1) and (2) of the Code:

1. 'A reply by the offeree which states or implies additional or different terms which would materially alter the terms of the offer is a rejection and a new offer.'
2. 'A reply which gives a definite assent to an offer operates as an acceptance even if it states or implies additional or different terms, provided these do not materially alter the terms of the offer. The additional or different terms then become part of the contract.'

Modified Acceptance of an offer is often brought about by the phenomenon that offer and acceptance refer to the general conditions used by the offeror respectively the offeree, which two sets of general conditions will as a rule be conflicting conditions. The instances offer and acceptance refer to 'Conflicting General Conditions', as Art. 2:209 PECL puts it, are so numerous that they also go by another name after the carriers of these general conditions, forms: 'Battle of Forms'. Inconsistency in the parties' behaviour is in fact at the heart of this battle: each party refers to its own general conditions, neither accepts the – conflicting – general conditions of the other party, yet both wish to have the contract.

53 See for a partly different approach J.M.M. Menu, *De toezegging in het privaatrecht*, diss. KUB, 1994, Deventer, *passim*.

54 See Asser-Hartkamp, o.c., nr 43.

How do the Principles of European Contract Law find a way out of this dilemma?
Two problems have to be solved here:
1. is there a contract at all?
2. if so, which terms govern it?

1. Is there a contract at all?

Art. 2:209 paragraph (1) first sentence reads as follows: 'If the parties have reached agreement except that the offer and acceptance refer to conflicting general conditions of contract, a contract is nonetheless formed.' Paragraph (2) allows two exceptions to this rule: 'However, no contract is formed if one party:

a. has indicated in advance, explicitly, and not by way of general conditions, that it does not intend to be bound by a contract on the basis of paragraph (1);

b. without delay, informs the other party that it does not intend to be bound by such contract.'

These paragraphs constitute a deviation from the above-mentioned general rules regarding Modified Acceptance contained in Art. 2:208 PECL paragraphs (1) and (2) in that the conclusion of contract is no longer made conditional upon the degree to which the terms in an offer and the reply to it differ from one another, but on an explicit indication of one party to the other that it does not intend to be bound by the contract. As such an indication is quite exceptional – parties tend to pay little attention to differences between general conditions –, Art. 2:209 PECL tends to uphold the contract. Therefore it fits in with the above-mentioned tendency of the Principles of European Contact Law to do so. Yet, it may not *a contrario* be concluded that Dutch contract law usually brings about that in Battle of Forms-cases no contract is formed; the so-called 'first shot'-rule, contained in Art. 6:225 paragraph (3) of the Dutch Civil Code – 'Where offer and acceptance refer to different general conditions, the second reference is without effect, unless it explicitly rejects the applicability of the general conditions indicated in the first reference' –, as a rule entails that contracts áre formed. This favourable result is, however, reached at the expense of those

general conditions that were referred to only in the second place.[55] We have thus broached the second question raised above:

2. *Which terms govern the contract?*

Art. 6:225 paragraph (3) of the Dutch Civil Code rests on the assumption that when both parties have referred to their own general conditions, a choice has to be made between these two as a whole; it does so by making the applicability of the general conditions indicated in the second reference conditional upon an explicit rejection of the applicability of the general conditions indicated in the first reference, thus creating the so-called 'first shot'-rule. This rule is a *rara avis* in the law systems of the Member countries of the European Union. The so-called 'last shot'-rule, implied in the Articles 18 and 19 of the United Nations Convention for the International Sale of Goods, is on the contrary known to more legal systems;[56] the practice of parties to refer to its own general conditions, but, when things come to a head, to ignore the differences between them and carry out the contract anyway, under the CISG leads to the conclusion that the party who took the 'last shot' at its own conditions, thus making a counteroffer (see Art. 19 paragraph (1) CISG), is considered to have the privilege of seeing his offer accepted by 'other conduct of the offeree indicating assent' (Art. 18 CISG).[57] Yet this 'last shot'-rule has been widely criticised for its arbitrary character.[58] In this respect the 'first shot'-rule, contained in Art. 6:225 paragraph (3) is not any better; the Comment to Art. 2:209 PECL criticises both solutions as follows: 'To let the party which fired the first or the last shot win

55 It is furthermore not always easy to determine what constitutes an 'explicit rejection' of the applicability of the general conditions indicated in the first reference (see Asser-Hartkamp, o.c., nr 354, Asser-Schut-Hijma, *Koop en ruil*, Zwolle 1994, nr 179, B. Wessels en R.H.C. Jongeneel, *Algemene voorwaarden*, Deventer 1997, nr 57 ff and Mon. Nieuw BW B-55 (Hijma), nr 22).

56 See O. Lando and H. Beale (eds), Comment to Art. 2:209 under C, o.c., p. 182.

57 See for a different approach F. van der Velden, *Uniform international sales law and the battle of forms,* in*: Unification and comparative law in theory and practice. Contributions in honour of Jean Georges Sauveplanne*, Deventer 1984, pp. 241-242 and F. de Ly and J.L. Burggraaf, *Battle of forms en internationale contracten* in: B. Wessels and T.H.M. van Wechem (eds), *Contracteren in de internationale praktijk*, Deventer 1994, pp. 49-50.

58 See R.I.V.F. Bertrams, *Enige aspecten van het Weens Koopverdrag, Preadviezen uitgebracht voor de Vereniging voor Burgerlijk Recht*, Lelystad 1995, p. 43 ff, J. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention,* Deventer/Boston 1991, nrs 170-170.4 ad Art. 19 CISG, C.M. Bianca and M.J. Bonell, *Commentary on the International Sales Law, the 1980 Vienna sales convention,* Milano 1987, nr 2-5 and 2-8 Illustration 3), Von Caemmerer/Schlechtriem, *Kommentar zum einheitlichen UN-Kaufrecht*, München 1990, Rdnr 19-20.

the battle would make the outcome depend upon a factor which is often coincidental.'[59] Furthermore, both solutions rest on the assumption that a choice has to be made between two sets of general conditions as a whole; the Comment to Art. 2:209 PECL, however, remarks rightly: 'As neither party wishes to accept the general conditions of the other party, neither should prevail.'[60]

Art. 2:209 paragraph (1) PECL provides a non-exclusive solution to the Battle of Forms-dilemma: 'The general conditions form part of the contract to the extent that they are common in substance.' As this solution primarily aims at the result that both sets of general conditions form part of the contract, it might be seen as another manifestation of the above-mentioned tendency of the Principles of European Contract Law to uphold contracts. The contract is of course not upheld insofar as the terms 'knock out' each other. It is for the courts to fill the resulting gaps in the contract; the Principles themselves, usages of employing certain conditions in the relevant trade, practices the parties have established between themselves and the standards of good faith and fair dealing may be used by the court to do so.[61]

Liability for negotiations: a variety of categories, none of them leading to liability for 'expectation interest'

Section 3 of Chapter 2 on Liability for Negotiations consists of just one Article, Art. 2:301, dealing with the situation that no contract has been formed on account of behaviour aimed at capsizing it.[62] [63]

After the proclamation of the self-evident rules that a party is not only 'free to negotiate' but also 'not liable for failure to reach an agreement' in Art. 2:301 paragraph (1), paragraph (2) offers a more interesting exception to the latter rule, reading as follows: '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.'

The situation where a party 'has negotiated' contrary to good faith is exem-

59 O. Lando and H. Beale (eds), Comment to Art. 2:209 under C, o.c., p. 183.

60 O. Lando and H. Beale (eds), l.c.

61 See O. Lando and H. Beale (eds), l.c. as well as the Comment to Art. 6:102 under C, p. 303.

62 See O. Lando and H. Beale (eds), Comment to Art. 2:301 under A, o.c., p. 189.

63 See for a comparison of the European Principles and Dutch contract law on this subject F. Nieper, *Aasnsprakelijkheid voor onderhandelingen. Onderhandelingen in strijd met de goede trouw (art. 2:301 PECL)*, *Nederlands Tijdschrift voor Burgerlijk Recht* 2000, p. 433 ff.

plified in paragraph (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.'

These provisions are not new: they have been modelled after Art. 2.15 of the Unidroit-Principles of International Commercial Contracts. Yet they may come as a bit of a surprise to the Dutch lawyer. Liability for negotiations has been much discussed in Dutch legal literature, but these discussions mainly took place in the wake of a number of judicial decisions by the Dutch Supreme Court, notably its landmark-decision of 18 June 1982,[64] and therefore the judicial *discours* has, in my opinion, to too large an extent been dominated by them; not only by these decisions themselves, that is, but also by the type of cases at hand in them, all of them cases where the action of a party contrary to good faith and fair dealing consisted in 'breaking off' negotiations.[65] The abortive attempt that has been made to enact the present subject-matter in the Dutch Civil Code, Art. 6.5.2.8a of the draft-Civil Code, might illustrate this point: 'Each of the parties is free to break off negotiations, unless this would be unacceptable …' Therefore, it might strike Dutch lawyers as a new phenomenon[66] that parties may not only act contrary to good faith and fair dealing by breaking off negotiations, but also by the way they handle the negotiating process itself. As Art. 2:301 paragraph (3) PECL points out and as the following Illustrations to this paragraph exemplify, they may act contrary to good faith and fair dealing both by entering into negotiations and by continuing to negotiate:

– 'A intends to enter the trade as a competitor of B. He enters into negotiations with B claiming to be interested in becoming B's sales manager. B pays A's travel expenses and the cost of a short training programme for A, which A had wished to join, before signing the contract. When A has got the information about B's sales and production methods, which he can use as a future competitor of B's, he breaks off the negotiations and starts his own

64 See Dutch Supreme Court 18 June 1982, *Nederlandse Jurisprudentie* 1983, 723 (*Plas/Valburg*).

65 See besides the landmark-decision by the Dutch Supreme Court mentioned in the previous note, also its decisions of 23 October 1987, *Nederlandse Jurisprudentie* 1988, 1017, 31 May 1991, *Nederlandse Jurisprudentie* 1991, 647, 14 June 1996, *Nederlandse Jurisprudentie* 1997, 481 and 4 October 1996, *Nederlandse Jurisprudentie* 1997, 65.

66 See for an exception C.J.H. Brunner who in his annotation to the above-mentioned decision by the Dutch Supreme Court of 18 June 1982 – with reference to B.M. Telders, *Praecontractuele verhoudingen, Weekblad voor Privaatrecht, Notariaat en Registratie* 3536-3537 (1931) – points out that a party who continues negotiations with no real intention of reaching an agreement with the other party, is liable for tort.

enterprise. A is liable to B for the costs B incurred in paying A's travel expenses and tuition.'[67]

– 'The facts are the same as in Illustration 1) except that when starting the negotiations A did intend to become B's sales manger. The decision to become B's competitor was made after his travels but before he joined the training programme. He then made his first preparations to start by himself, but continued the negotiations and joined the programme in order to learn more about the trade and B's business. A is liable to B for the costs incurred by B after a made the decision.'[68]

The losses for which the party negotiating contrary to good faith and fair dealing is liable, the so-called 'reliance interest', include not only expenses incurred by the other party, as the travel expenses and tuition mentioned in the Illustrations above, but for instance also work done by the other party and the loss of opportunities to conclude a contract similar to the one that broke down.[69] This category of liability for negotiations would be handled by Dutch lawyers by resorting to tort[70] (see art. 6:162 of the Dutch Civil Code) or possibly[71] to undue payment or unjust enrichment (see Art. 6:210 and 6:212 of this Code). The Principles of European Contract Law , while acknowledging the practice in several Member counties of the European Union to found the liability for negotiations in tort,[72] add a tag that I find puzzling: 'In several of the Member countries such misrepresentation is an actionable tort, *but if the claim arises out of the contract the Principles should apply* (…)'[73]

67 O. Lando and H. Beale (eds), Illustration 1) to the Comment to Art. 2:301, o.c., p. 190.

68 O. Lando and H. Beale (eds), Illustration 2) to the Comment to art. 2:301, l.c.

69 See O. Lando and H. Beale (eds), Comment to Art. 2:301 under G. See on damages for loss of opportunities M.W. Hesselink, *De schadevergoedingsplicht bij afgebroken onderhandelingen in het licht van het Europese privaatrecht, Weekblad voor Privaatrecht, Notariaat en Registratie* 6248-6249 (1996).

70 See C.J.H. Brunner, l.c. and B.M. Telders, l.c.

71 Unjust enrichment of the party who has broken off the negotiations leads only to liability of this party 'to the extent this is reasonable' (Art. 6:210 and 6:212 of the Dutch Civil Code); this requirement precludes that an offeror who is waiting for a reply, but begins to carry out the wished for contract anyway, may have a claim against the offeree for the work done (see also the decision by the Dutch Supreme Court of 18 April 1969, *Nederlandse Jurisprudentie* 1969, 336).

72 See for a general survey M.W. Hesselink, *De redelijkheid en billijkheid in het Europese privaatrecht*, diss. Utrecht 1999, p. 80 ff.

73 O. Lando and H. Beale (eds), Comment to Art. 2:301 under F, l.c.

The second category of instances that according to Art. 2:301 PECL leads to liability of a party for negotiations – those instances where a party has 'broken off negotiations' contrary to good faith and fair dealing – is better known to Dutch lawyers from various recent judicial decisions. The Comment to Art. 2:301 refrains from defining this category,[74] but does offer an Illustration of it:

'B has offered to write a software programme for A's production. During the negotiations B incurs considerable expenses in supplying A with drafts, calculations and other written documentation. Shortly before the conclusion of the contract is expected to take place, A invites C, who can use the information supplied by B, to make a bid for the programme, and C makes a lower bid than the one made by B. A then breaks off the negotiations with B and concludes a contract with C. A is liable to B for his expenses in preparing the documentation.'[75]

This Illustration resembles the Dutch leading case on pre-contractual liability leading to the above-mentioned decision by the Dutch Supreme Court of 18 June 1982:

A construction firm, whose offer for the building of a municipal swimming pool has already been accepted by the mayor and aldermen, is passed over by the city council, opting for a cheaper offer proposed by one of its competitors. The firm claims damages for both expenses incurred and for loss of the profit it would have made if the construction contract had been duly performed.

The Dutch Supreme Court decided that:

1. It is not impossible that negotiations about a contract have reached a stage where the breaking-off of the negotiations may in the circumstances be considered contrary to reasonableness and equity because the parties[76] were entitled to expect that a contract of some kind[77] would

74 The Notes to this Article, however, do – with reference to Precontractual liablity, Reports to the XIIIth Congress International Academy of Comparative Law (ed. E.H. Hondius), Deventer/Boston 1991 – define this category as instances in which a party 'has made the other party believe that he is prepared to conclude a contract, and then without good cause breaks off negotiations' (see under 2 (b), o.c., p.192) . See for a survey of various European law systems on this subject M.W. Hesselink, o.c., p. 71 ff.

75 O. Lando and H. Beale (eds), Illustration 3) to the Comment to Art. 2:301, l.c.

76 'Parties' should be read as the other party than the one who has broken off negotiations (see Dutch Supreme Court 23 October 1987, *Nederlandse Jurisprudentie* 1988, 1017 and 31 May 1991, *Nederlandse Jurisprudentie* 1991, 647 and the above-mentioned abortive Art. 6.5.2.8a of the draft-Civil Code).

77 'A contract of some kind' should be read as a contract of the kind the parties were bargaining over before negotiations were broken off (see Dutch Supreme Court 23 October 1987, *Nederlandse Jurisprudentie* 1988, 1017).

result from the negotiations anyway. In such a case there may be also place for compensation for loss of profits.

2. An obligation to compensate the other party for expenses made may even exist if negotiations have not yet reached the stage mentioned above, but do have reached a stage in which the party who breaks them off is not free to do so without compensating the other party's expenses in part or in whole.

It is the first decision by the Dutch Supreme Court mentioned above that really deviates from Art. 2:301 PECL in that it awards to the construction firm not only the reliance interest, but also the so-called 'expectation interest', i.e. the loss of profits that it would have made if the building contract that broke down, had been duly performed.[78, 79, 80] If Art. 2:301 PECL would have applied, the construction firm could on the contrary nót have claimed its 'expectation interest': 'the aggrieved party cannot claim to be put into the position in which it would have been if the contract had been duly performed.'[81] The decision of the Dutch Supreme Court to allow that 'expectation interest' be awarded has been much debated in Dutch legal literature, the main critique being directed at the argument put forward for it, that the other party than the one who has broken off negotiations was entitled to expect that a contract of the kind the parties were bargaining over before negotiations were broken off, would result from it anyway: how can this argument, that acknowledges that the contract is still to be concluded, ever justify that the other party be put into a position in which it would have been if the contract had been duly performed?[82]

78 See A.S. Hartkamp, *Interplay between Judges, Legislators and Academics, The Case of the New Civil Code of the Netherlands,* in: B.S. Markesinis (ed.), *Law Making, Law Finding, and Law Shaping: the diverse influences*, Oxford 1997, p. 91 ff.

79 It should be noted that there is no Dutch case law this far in which 'expectation interest' has actually been awarded. See for a rare Belgian judicial decision awarding loss of profit: Court of Appeal Antwerp 22 March 1994, *Rechtskundig Weekblad* 1994-1995, nr 9.

80 This decision deviates from Art. 2:301 PECL as well in that it implies that the court may under Dutch law order the party which broke off negotiations to resume them (see Art. 3:296 of the Civil Code) (see O. Lando and H. Beale (eds), Notes to Art. 2:301 PECL under 3 (b), o.c., p. 193, where France is also mentioned as an exception in that the court may under French law in certain cases order for specific performance; see for a survey on this subject M.W. Hesselink, o.c., p. 71 ff).

81 O. Lando and H. Beale (eds), Comment to Art. 3:203 under G, o.c., p. 191. See also the Notes to this Article under 3), p. 193.

82 See M.W. Hesselink, l.c.

III. **Validity of Contract**

Chapter 4 on Validity[83] deals mainly with topics often considered under the notion of vices of consent. It does not only deal with the requirements for avoidance of contract on these grounds (see the Articles 4:103-105 and 4:107-113; see also Art. 4:114 on Confirmation), but also with the effects of avoidance (see the Articles 4:115 and 116). Liability for damages for vices of consent is also treated in this Chapter (see the Articles 4:106 and 4:117). Fraud (Art. 4:107), the influence of Third Persons on vices of consent (Art. 4:111), Notice of Avoidance (Art. 4:112 and 113), Confirmation (Art. 4:114) and the effects of avoidance (see the Articles 4:115 and 116) will not be dealt with in this paper or just indirectly.

Matters not covered: lack of capacity, illegality and immorality

As has already been pointed out in the Introduction to this paper, the Principles of European Contract Law have been drafted primarily to meet the needs of the international business community. Therefore, provisions on for instance the lack of capacity of a party are absent. The Principles do not deal with illegal or immoral contracts either, but for a different reason: 'Because of the great variety among the legal systems of Member States as to which contracts are regarded as unenforceable on these grounds, and the very different consequences which follow from this categorisation, further investigation is needed to determine whether it is feasible to draft European Principles on these subjects.'[84] These factors add up to the first Article of

83 See for a comparison of the European Principles and Duch contract law on this subject Jac. Hijma, *Hoofdstuk 4 (Geldigheid) van de Principles of European Contract Law, Nederlands Tijdschrift voor Burgerlijk Recht* 2000, p. 448 ff.

84 O. Lando and H. Beale (eds), Comment to Art. 4:101, o.c., p. 227. According to the Preface to O. Lando and H. Beale (eds), *The Principles of European Contracty Law, Part I and II, Combined and Revised*, Part III of the European Principles of Contract Law, which the Lando-Commission is still working on, 'will deal with the effects of illegality and immorality' (see o.c., p. xiv and D. Busch and E.H. Hondius, *Een nieuw contractenrecht voor Europa: de Principles of European Contract Law vanuit Nederlands perspectief, Nederlands Juristenblad* 2000, p. 837 ff).

the Chapter on 'Validity', Chapter 4, Art. 4:101: 'This chapter does not deal with invalidity arising from illegality, immorality or lack of capacity.'

An explicit rule that contracts are not merely invalid for Initial Impossibility

Art. 4:102 on Initial Impossibility is aimed at avoiding the consequence of a contract being invalid and therefore fits in with the above-mentioned tendency of the European Principles to uphold contracts: 'A contract is not invalid merely because at the time it was concluded performance of the obligation assumed was impossible, or because a party was not entitled to dispose of the assets to which the contract relates.' This Article, which was modelled after Art. 3.3 of the Unidroit Principles of International Commercial Contracts,[85] protects the contract from invalidity 'merely' (Art. 4:102) on the ground just mentioned, but invalidity of the contract will in the cases at hand quite often result from other provisions: 'Very often such cases will be ones of fundamental mistake under which either party affected may avoid the contract (…)'[86] Yet Art. 4:102 PECL would not have made any sense if there would not be 'cases when a party should be treated as taking the risk of impossibility and therefore should not be entitled to avoid the contract.'[87]

In Dutch law a rule similar to Art. 4:102 applies: 'This draft (of the present Dutch Civil Code) does not hold the rule that a contract directed at a performance that was already impossible from the beginning, is invalid.'[88] It may therefore be concluded that the European Principles treat the situation where performance of the obligation was already impossible at the time of the conclusion of the contract the same way as under Dutch law: not only the Article on Mistake, Art. 6:228 of the Civil Code, applies, but so do the Articles of this Code on Non-Performance.[89] The European Principles differ in this respect from the Dutch law only in that they make this rule explicit.

85 See for critique J.M. Smits, *Het vraagstuk van de 'initial impossibility' en de contractsvisie van de Unidroit Principles* in: *Europees contractenrecht, BW-krant jaarboek 1995*, Deventer 1995, p. 127 ff.

86 O. Lando and H. Beale (eds), Comment to Art. 4:102, o.c., p. 228.

87 O. Lando and H. Beale (eds), l.c.

88 *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6*, Deventer 1981, p. 485. See also p. 896 and Asser-Hartkamp, 4-I, *De verbintenis in het algemeen*, Deventer 2000, nr 26.

89 See *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6*, pp. 485, 486, 897, 1002 and 1005.

It should, however, be noted that one of the Articles of the European Principles on Non-Performance, Art. 8:108 PECL on 'Excuse due to an Impediment', does not apply: 'It is conceivable that an impediment at the time the contract was made existed without the parties knowing it. For example, the parties might sign a charter of a ship which, unknown to them, has just sunk. This situation is not covered by Article 8:108 but the contract might be avoidable under Art. 4:103, Mistake as to Facts or Law.'[90]

Fundamental Mistake: mistake must make the contract 'fundamentally' different

Art. 4:103 paragraph (1) on Fundamental Mistake as to Facts or Law[91] has much in common with its Dutch counterpart, Art. 6:228 paragraph (1):
'A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:
a. 1. the mistake was caused by information given by the other party; or
2. the other party knew or ought to have known of the mistake and it was contrary to good faith and fair dealing to leave the mistaken party in error; or
3. the other party made the same mistake,
and
b. the other party knew or ought to have known that the mistaken party, had it known the truth, would not have entered the contract or would have done so only on fundamentally different terms'

The content and set-up of this paragraph are quite similar to Art. 6:228 paragraph (1) of the Dutch Civil Code.[92] So are the Comments on them:
– 'Even if the party which gave the information reasonably believed it to be true, it chose to give the information; and it cannot complain if the recipient is allowed to avoid the contract (…)'[93]
– '(…) the fact the information was false justifies the avoidance when this

90 O. Lando and H. Beale (eds), Comment to Art. 8:108 under B, o.c., p. 379.
91 See for a comparison of the European Principles and Dutch contract law on this subject M.M. van Rossum, *Het leerstuk van de fundamental mistake van de Principles of European Contract Law (PECL) en de Nederlandse dwalingsleer, Nederlands Tijdschrift voor Burgerlijk Recht* 2000, p. 455 ff.
92 See for some reservations with respect to the identity of common mistake as mentioned in Art. 4:103 paragraph (1) under (a) (iii) PECL and in Art. 6:228 paragraph (1) under (c) of the Civil Code M.M. van Rossum, o.c., p. 457 ff.
93 O. Lando and H. Beale (eds), Comment to Art. 4:103 under D, o.c., p. 231.

information caused the recipient to conclude the contract, even if the party which gave the information reasonably believed it to be true.'[94]

Yet some differences may also be noted, some of which are important:

1. Art. 4:103 PECL paragraph (1) makes explicit that mistake may not only be with regard to facts but also with regard to law – 'A party may avoid a contract for mistake of fact or law (…)' –, whereas this information is not to be found in Art. 6:228 of the Civil Code but has to be gathered from Dutch judicial decisions and legal literature.[95]

2. Art. 4:103 PECL paragraph (1) provides under (b) a combination of the requirements for Fundamental Mistake 'Causality' and 'Recognizeability' – 'the other party knew or ought to have known that the mistaken party, had it known the truth, would not have entered the contract or would have done so only on fundamentally different terms' – which in my opinion is more informative as to their mutual relationship than Art. 6:228 of the Dutch Civil Code, where these requirements have been scattered all over paragraph (1).

3. The main difference lies, however, in its definition of the requirement for 'Causality' in Art. 4:103 paragraph (1) under (b) that the mistaken party, had it known the truth, 'would not have entered the contract or would have done so only on fundamentally different terms.' According to the Comment to this Article this requirement as just defined, from which this Article derives its name '*Fundamental* Mistake', should not be taken light-heartedly: '(…) the Principles require that a mistake should be as to something fundamental, not just material (…) a mistake as to something which is material but not fundamental will not give rise to a right of avoidance under Article 4:103.'[96] This warning is accompanied by the following Illustration: 'A, a developer, buys a plot of land for *f* 5 million, relying *inter alia* on a statement by the seller that the land is not subject to any rights in favour of third parties. Later A finds that there is a right of way running across part

94 *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6*, Deventer 1981, p. 902.

95 See Asser-Hartkamp, o.c., nr 196, Asser-Schut-Hijma, o.c., nr 228 and M.M. van Rossum, o.c., p. 456.

96 O. Lando and H. Beale (eds), Comment to Art. 4:103 under C, l.c.

of the site. This is not serious enough to constitute a mistake within Art. 4:103 (…)'[97]

The Dutch requirement for avoidance that 'the contract would not have been entered into, had the mistaken party known the truth' (Art. 6:228 of the Dutch Civil Code) is on the contrary easy to meet:[98] ' "The contract" is the contract that actually has been concluded. It is therefore not a requirement for avoidance that the mistaken party, had it known the truth, would not have entered a similar contract; it is sufficient that it would not have concluded the contract on the same terms.'[98] Therefore, this requirement for avoidance only serves to prevent parties from abusing the right to avoid[99]

As the PECL-requirement for avoidance of a 'Fundamental' mistake not just incidentally, but categorically prevents the far-going consequences of avoidance from being applied in cases of non-fundamental mistake, it is in my opinion better than its Dutch counterpart.

4. Art. 4:103 PECL differs from Art. 6:228 of the Civil Code in that it does not make explicit a party may not avoid a contract if the mistake was based on a fact (or law) which at the time of the conclusion of the contract was still exclusively in the future. This is in my opinion merely a matter of presentation,[101] as may be gathered from the following part of the Comment on Art. 6:111 PECL: 'If unknown to either party circumstances which make

97 O. Lando and H. Beale (eds), Illustration 6) to the Comment to Art. 4:117 under C, o.c., p. 283.

98 'A liberal approach on the question of the other party's knowledge is that of Dutch BW 6:228 (1). This requires that the contract was entered into under the influence of error and would not have been entered had there been a correct assessment of the facts' (O. Lando and H. Beale (eds), Notes to Art. 4:103 under 3), o.c., p. 237).
See for a different approach to the effect that this Dutch requirement for Causality equates the requirement of the European Principles for a 'Fundamental' Mistake M.M. van Rossum, o.c., p. 456.

99 *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6*, Deventer 1981, p. 901. See for a rare exception to this rule in the field of insurance law the decision of the Dutch Supreme Court of 19 May 1978, *Nederlandse Jurisprudentie* 1978, 607 (*Hotel Wilhelmina*).

100 See the decision of the Dutch Supreme Court of 17 March 1921, *Nederlandse Jurisprudentie* 1921, p. 675 ff. When the value of the performance received by the avoiding party has meanwhile diminished or when the value of the performance rendered by itself has increased and it is likely it would not have been chosen for avoidance had this change in value not occurred, the avoiding party is by virtue of Art. 6:278 of the Civil Code obliged to reestablish the original relative values of the performances by way of a supplementary payment.

101 M.M. van Rossum has some midsgivings in this respect (o.c., p. 459).

the contract excessively onerous for one of them already existed at that date (i.e. the date the contract was made; GdV), the rules on mistake will apply, see Articles 4:103 and 4:105.'[102]

Non-fundamental Mistake: liability of the party who was careless in giving Incorrect Information for the loss caused to the other party by its mistake

When a mistake is not fundamental, so that the contract may not be avoided for 'Fundamental Mistake' (Art. 4:103), the mistaken party may sometimes recover damages in virtue of the Articles 4:106 (Incorrect Information) and 4:117 (Damages),[103] which may be summed up as follows: a party which has concluded a contract relying on incorrect information given it by the other party may recover damages limited to the loss caused to it by the mistake even if the information does not give rise to a fundamental mistake under Art. 4:103, unless the party which gave the information had reason to believe that the information was correct.

An Illustration to this rule: 'A, a developer, buys a plot of land for *f* 5 million, relying *inter alia* on a statement by the seller that the land is not subject to any rights in favour of third parties. Later A finds that there is a right of way running across part of the site. This is not serious enough to constitute a mistake within Art. 4:103 but it still will cost *f* 10.000 to divert the path. A has a claim under Article 4:106.'[104]

When, however, the party which gave the information 'had reason to believe that the information was correct' (Art. 4:106), the other party is prevented from claiming damages in virtue of the Articles 4:106 and 4:117 PECL. As has been noted before, this situation does not in itself prevent it from avoiding the contract under Art. 4:103, but then, as also has been noted before, it may only do so on the basis of 'fundamental' mistake under this Article.[105]

102 See O. lando and H. Beale (eds), Comment to Art. 6:111 under B, o.c., p. 325.

103 See for a comparison of the European Principles and Dutch law on this subject Jac. Hijma, o.c., p. 454 and M.M. van Rossum, o.c., p. 458.

104 O. Lando and H. Beale (eds), Illustration 6) to the Comment to Art. 4:117 under C, o.c., p. 283.

105 See O. Lando and H. Beale (eds), Comment to Art. 4:103 under D, o.c., p. 232.

Inaccuracy in Communication: the contract is not null and void, but Avoidable for Fundamental Mistake

Art. 4:104 of the Principles of European Contract Law on Inaccuracy in Communication[106] reads as follows: 'An inaccuracy in the expression or transmission of a statement is to be treated as a mistake of the person which made or sent the statement and Article 4:103 applies.'
An illustration to this Article: 'A and B have been negotiating for a lease of A's villa; A has been asking *f* 1300 per month, B has offered *f* 800 per month. A writes to B offering to rent him the villa for *f* 100 per month; this is a slip of the pen for *f* 1000. B realises that A must have made a mistake but does not know what it is. He writes back simply accepting. A may avoid the contract.'[107]
One should pay attention to the limitations to the applicability of Art. 4:104 PECL:

– Art. 4:104 PECL does not apply when the party the inaccurately expressed or transmitted statement was addressed to – i.e. B in the Illustration above -, knew or should have known what the first party – i.e. A in the Illustration above - intended; in that case 'the contract is to be interpreted in the way intended by the first party' (Art. 5:101 paragraph (2));[108]

– Art. 4:104 PECL does not apply either when the party the inaccurately expressed or transmitted statement was addressed to – i.e. B in the Illustration above – did not realize that the first party – i.e. A in the Illustration above – must have made a mistake and could not be expected to realize this either; in that case the intention of the first party is to be determined from its 'statement or conduct as they were reasonably understood by the other party' (Art. 2:102 PECL) and the contract 'is to be interpreted according to the meaning that reasonable persons of the same kind a the parties would have given to it' (Art. 5:101 paragraph (3)).[109]

106 See for a comparison of the European Principles and Dutch law on this subject M.M. van Rossum, o.c., p. 460 ff.
107 O. Lando and H. Beale (eds), Illustration 2) to the Comment to Art. 4:104 under D, o.c., p. 243.
108 See O. Lando and H. Beale (eds), Comment to Art. 4:104 under C and E, o.c., p. 242 ff.
109 See O. Lando and H. Beale (eds), Comment to Art. 4:104 under A, o.c., p. 242. See for a different approach M.M. van Rossum, o.c., p. 461.

Art. 4:104 is to be applied when the party the inaccurately expressed or transmitted statement was addressed to – i.e. B in the Illustration above – knew of the inaccuracy but not what the first party – i.e. A in the Illustration above – intended.[110] When B nonetheless accepts A's offer to rent him the villa for only *f* 100 per month without pointing the inaccuracy out, A should be able to avoid the contract, provided his mistake is fundamental.

As A may by virtue of Art. 4:104 PECL avoid the contract, it is assumed here that a contract between them has been concluded.

This would have been out of the question if Dutch law were to apply: as A's offer to rent the villa for *f* 100 per month neither rests on his expressed intention (see Art. 3:33 Dutch Civil Code) nor on the 'apparent meaning' of A's letter (see Art. 3:35 of this Code), this offer and the lease would, according to Dutch law, be null and void *ex lege*.[111] In this respect Art. 4:104 PECL – in combination with Art. 4:105 PECL on Adaptation of the Contract, which will be dealt with in a moment – exemplifies the above-mentioned tendency of the Principles of European Contract Law to uphold contracts (see Chapter II of this paper on Formation).

Instead of Avoidance for Mistake: Adaptation of the Contract as it was understood by the mistaken party

The paragraphs (1) and (2) of Art. 4:105 PECL on Adaptation of the Contract[112] read as follows:

– 'If a party is entitled to avoid the contract for mistake but the other party indicates that it is willing to perform, or actually does perform, the contract as it was understood by the party entitled to avoid it, the contract is to be treated as if it had been concluded as that party understood it. The other party must indicate its willingness to perform, or render such performance, promptly after being informed of the manner in which the party entitled to avoid it understood the contract and before that party acts in reliance on any notice of avoidance.

– After such indication or performance the right to avoid is lost and any earlier notice of avoidance is ineffective.'

110 See O. Lando and H. Beale (eds), Comment to Art. 4:104 under D, o.c., p. 243.

111 See Asser-Hartkamp, 4-II, *Algemene leer der overeenkomsten*, Deventer 1997, nr 113, W.L. Valk, o.c. nr 39 and M.M. van Rossum, l.c.

112 See for a comparison of the European Principles and Dutch law on this subject M.M. van Rossum, o.c., p. 463.

This Article will usually apply when the mistake stems from an Inaccuracy in Communication under Art. 4:104 PECL;[113] an illustration: A and B have been negotiating for a lease of A's villa; A has been asking *f* 1300 per month, B has offered *f* 800 per month. A writes to B offering to rent him the villa for *f* 100 per month; this is a slip of the pen for *f* 1000. B realises that A must have made a mistake but does not know what it is. After finding out that A actually meant to rent the villa for *f* 1000, B writes promptly back accepting the villa for this amount of money. A cannot avoid the lease any longer by virtue of Art. 4:104 PECL and this contract is to be treated as if it had been concluded for *f* 1000 per month.

The paragraphs (1) and (2) of Art. 4:105 PECL may also apply to mistakes as to facts or law as described in general in Art. 4:103 PECL, as Illustration 1) to the former Article shows: 'A flooring contractor employed to floor a large building makes a fundamental mistake over the amount of work needed. This mistake should have been known to the other party so the contractor has the right to avoid the contract. The employer offers to release the contractor from the extra work without any reduction in the payment. The contractor cannot avoid the contract.'[114]

This applicability of the paragraphs (1) and (2) of Art. 4:105 PECL to Art 4:103 PECL includes cases of shared or common mistake as described in paragraph (1) under (a) (iii) of the latter Article. Thus, if one party seems to stand to benefit from the mistake and the other to lose, the first may declare itself willing to perform in the way the contract was originally understood.

But in these cases of shared mistake it may not be clear that one stands to lose more than the other. As it may then still be more appropriate to adjust the contract than simply to avoid it, paragraph (3) of Art. 4:105 PECL permits in cases of shared mistake either party to apply to the court for the contract to be adjusted in such a way as to reflect what might have been agreed had the mistake not occurred.[115]

Illustration 2) to Art. 4:105 PECL exemplifies the two possibilities this Article thus offers to adapt the contract in cases of shared mistake: 'The facts are as in Illustration 1 except that both parties were mistaken as to the amount of work needed. The other party may declare itself ready to release the contractor from the extra work under Article 4:105 (1). Alternatively, either party may request the court to adapt the contract under Article 4:105

113 See O. Lando and H. Beale (eds), Comment to Art. 4:105 under A, o.c., p. 246.
114 O. Lando and H. Beale (eds), Illustration 1) to the Comment to Article 4:105 under A, l.c.
115 See O. Lando and H. Beale (eds), Comment to Art. 4:105 under B, l.c.

(3). In such a case the court might apply the contract rates to the additional work, with appropriate adjustments for the volume of work involved.'[116]

The Dutch counterpart to this Article, Art. 6:230 of the Dutch Civil Code, is different in three respects;

1. The right of the other party to prevent avoidance of the contract is not conditioned upon its indicated willingness to perform the contract 'as it was understood by the party entitled to avoid it' – the so-called 'subjective' approach, laid down in Art. 4:105 paragraph (1) PECL – , but upon a more 'objective' test, a proposal to the mistaken party that 'removes adequately the prejudice this party would suffer if the contract were to be continued' (Art. 6:230 paragraph (1) *in fine*);[117]
2. Art. 6:230 paragraph (1) of the Civil Code provides with regard to the factor 'time' only that the proposal should be done timely, whereas Art. 4:105 paragraph (1) PECL provides that the other party must 'indicate its willingness to perform (…) promptly after being informed of the manner in which the party entitled to avoid it understood it and before that party acts in reliance on any notice of avoidance.'
3. The right of either party to request the court to adapt the contract is not limited to cases of shared mistake, but pertains to the other categories of mistake as well (see Art. 6:230 paragraph (2)).[118]

It seems to me the 'subjective' test for adaptation, laid down in Art. 4:105 paragraph (1) PECL, is to be preferred as the more informative one: Dutch law simply leaves open how it is to be determined whether a proposal by the other party constitutes an 'adequate' removal of the prejudice suffered by the party entitled to avoid the contract. The extra information contained in the 'subjective' test for adaptation provided by paragraph (1) of Art. 4:105 PECL may account for the fact paragraph (3) reserves the right of either party to request the court to adapt the contract to cases of shared mistake:[119] in other cases of mistake the 'subjective' test shows the way.[120]

116 O. Lando and H. Beale (eds), Illustration 2) to the Comment to Article 4:105 under B, o.c., p. 246 ff.

117 See M.W. Hesselink, *Het wijzigingsvoorstel* in: *Europees contractenrecht, BW-krant jaarboek 1995*, Deventer 1995, p. 44 ff.

118 See also O. Lando and H. Beale (eds), Notes to Art. 4:105, o.c., p. 247.

119 See for a Dutch example of shared mistake where one of the mistaken parties requested the judge to bring the contract into accordance with what might reasonably have been agreed had the mistake not occurred the decision by the Dutch Supreme Court of 28 November 1997, *Nederlandse Jurisprudentie* 1998, 659 (*Luycks/Kroonenberg*).

120 See for some misgivings in this respect M.M. van Rossum, o.c., p. 463.

Paragraph (1) of Art. 4:105 PECL is in my opinion also preferable in that it puts stricter time limits on the exercise of the other party's autonomous right to adapt the contract.

Threat: possibly a less 'objective' test, definitely a more explicit rule that a contract may also be avoided when it is wrongful to use threat of an act just as a means to obtain its conclusion

The threat of an act which influenced the party seeking to avoid must, according to Art. 4:108 PECL, have been 'imminent and serious.' This requirement, though impressive, does not necessarily provide for an 'objective' test. Dutch law seems to do so: in its Dutch counterpart, Art. 3:44 paragraph (2) of the Dutch Civil Code, it is provided 'that the threat must be one that would have influenced a reasonable person.' Therefore, in the Notes to Art. 4:108 PECL it is concluded: 'The Dutch law takes an objective approach (…)'[121] Yet it may be doubted whether this constitutes a difference. As has been pointed out in Dutch literature, the Dutch test for Threat also takes account of all kinds of particular circumstances of the party seeking avoidance on this ground and the test of the European Principles also takes account of several objective elements such as the imminence and seriousness of the Threat and the presence of an alternative for the party seeking avoidance.[122]

Art. 4:108 PECL explicitly provides – under (b) – that it also applies when 'it is wrongful to use (threat of an act) as a means to obtain the conclusion of the contract.'

The same is true when Dutch law applies, but the pertinent information is not to found in the Civil Code itself, but in judicial decisions and legal literature.[123] Thus Art. 4:108 PECL is more explicit than Art. 3:44 paragraph (2) as to its applicability.

121 O. Lando and H. Beale (eds), Notes to Art. 4:108 under 1), o.c., p. 260.

122 See Asser-Hartkamp, o.c., nr 208 and Jac. Hijma, o.c., p. 449.

123 See for instance the decision of the Dutch Supreme Court of 8 January 1999, *Nederlandse Jurisprudentie* 1999, 342.

Excessive Benefit or Unfair Advantage: an explicit rule that Art. 4:109 PECL also applies if the exchange of goods between the parties is not excessively disparate in terms of value for money, but grossly unfair advantage has been taken in another way

Art. 4:109 PECL is on Excessive Benefit *or* Unfair Advantage. One of the requirements of the Article entails that the party seeking avoidance must bring to the fore that the other party 'took advantage of the first party's situation in a way which was grossly unfair *or* took an excessive benefit' (paragraph (1) under (b)).[124] Benefit is deemed to be 'Excessive' where the benefit 'gained by one party is demonstrably excessive in comparison to the "normal" price or other return in such contracts.'[125] Art. 4:109 PECL may, however, also apply in cases where disparity is absent, which cases have been dubbed '(Grossly) Unfair Advantage': 'The Article may apply even if the exchange is not excessively disparate in terms of value for money, if grossly unfair advantage has been taken in other ways. For example, a contract may be unfair to a party who can ill afford it even if the price is not unreasonable.'[126] This latter category is illustrated in the Comment as follows: 'X, a widow, lives with her many children in a large but dilapidated house which Y, a neighbour, has long wanted to buy. X has come to rely on Y's advice in business matters. Y is well aware of this and manipulates it to his advantage: he persuades her to sell it to him. He offers her the market price but without pointing out to her that she will find it impossible to find anywhere else to live in the neighbourhood for that amount of money. X may avoid the contract.'[127]

This category 'Grossly Unfair Advantage' corresponds to Dutch law in that avoidance by virtue of Art. 3:44 paragraph (4) of the Civil Code does not always require that "objective unfairness" has been done to the party seeking avoidance: if an old widow, had she been independent of her selfish

124 As has just been pointed out, Excessive Benefit is just 'one' of the requirements that have to be met when Art. 4:109 PECL is to apply. This Article is in this respect quite different from Art. 3.10 of the Unidroit Principles of International Commercial Contracts that on the contrary centers on Excessive Benefit: 'A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract gave the other party an excessive advantage.' See for citique O.A. Haazen, *The principle of gross disparity en misbruik van omstandigheden* in: *Europees contractenrecht, BW-krant jaarboek 1995*, Deventer 1995, p. 13 ff.

125 O. Lando and H. Beale (eds), Comment to Art. 4:109 under D, o.c., p. 262.

126 O. Lando and H. Beale (eds), Comment to Art. 4:109 under E, l.c.

127 O. Lando and H. Beale (eds), Illustration 5) to the Comment to Art. 4:109 under E, o.c., p. 263.

counsellor, would not have sold her house to him, it is, according to Dutch law, no excuse for him that she received a fair price.[128]
It may not be appropriate simply to avoid the contract. The disadvantaged party may wish to continue the contract but in modified form. Conversely it may not be fair to the party which gained the advantage simply to avoid the whole contract. So the court has by virtue of the paragraphs (2) and (3) of Art. 4:109 PECL power to modify the contract at the request of either party, provided the request so to do is made promptly and before the party who has given a notice of avoidance has acted on it.[129] The Dutch counterpart of these paragraphs, Art. 3:54 of the Civil Code, while also providing for power of the courts to modify the contract at the request of either party (see paragraph (2)), provides as well for the autonomous power of the party which has gained the advantage to prevent avoidance by making a proposal to the disadvantaged party which 'removes adequately the prejudice this party would suffer if the contract were to be continued' (see paragraph (1) of Art. 3:54 of the Civil Code). The absence of a similar provision in the European Principles is in my opinion regrettable.[130]

Unfair Terms not Individually Negotiated: avoidance of terms which have not been 'individually negotiated'; no lists of terms deemed to be unfair on behalf of consumers

Art. 4:110 on Unfair Terms not Individually Negotiated reads as follows:
'1. A party may avoid a term which has not been individually negotiated if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party, taking into account the nature of the performance to be rendered under the contract, all other terms of the contract and the circumstances at the time the contract was concluded.
2. This Article does not apply to:
a. term which defines the main subject matter of the contract provided the term is in plain and intelligible language; or to
b. the adequacy in value of one party's obligations to the value of the obligations of the other party.'

128 See the decision of the Dutch Supreme Court of 29 May 1964, *Nederlandse Jurisprudentie* 1965, 104 (*Van Elmbt/Feierabend*), which decision has been referred to by O. Lando and H. Beale, Notes to Art. 4:109 PECL under 5), o.c., p. 265.
129 See O. Lando and H. Beale (eds), Comment to Art. 4:109 PECL under G, o.c., p. 263.
130 See also Jac. Hijma, o.c., p. 450.

The Articles 4:109 PECL on Excessive Benefit or Unfair Advantage, that has just been dealt with, and 4:110 PECL on Unfair Terms not Individually Negotiated, that is to be dealt with now, at first sight have something in common. However, they deal with different situations. Article 4:109 deals with the case where A takes advantage of B's difficult position. The provision covers both the situation where the price or other essentials of the contract, or the general conditions are excessive in one way or another. Article 4:110 deals only with what mainly are general conditions, and not with price (see paragraph (2)). It covers a very frequent situation, where one of the parties has drafted the contract terms in advance.[131]
A 'significant imbalance in the parties' rights and obligations' is required for Art. 4:110 PECL to come into operation. As the following Illustrations to the Comment on this Article exemplify, this imbalance may be of an economic or of a legal nature:

- A car dealer sells an expensive car, which is so popular that there is a six month waiting list. The dealer sells the car for the price "as listed by the manufacturer at the time of delivery."[132]
- A contract between a bank and a customer allows the bank to set off any claim it wishes and the customer none.[133]

Whether a term has caused this significant imbalance is to be judged by taking into account the diverse circumstances mentioned in paragraph (1), which have in common that they are circumstances 'at the time the contract was concluded' (art. 4:110 paragraph (1)).
What by virtue of Art. 4:110 may not be judged is the relation between the price and the main subject matter of the contract (see paragraph (2)). The Comment on this prohibition: 'Article 4:110 does not reintroduce the *iustum pretium* doctrine of canon law.'[134] As may be gathered from the second Illustration above, this exception should be interpreted strictly.[135]

Art. 4:110 PECL resembles Art. 6:233 under (a) of the Dutch Civil Code – 'A term in general conditions may be avoided if it is unreasonably onerous to the party which has accepted their applicability, taking into account the

131 See O. Lando and H. Beale (eds), Comment to Art. 4:110 PECL under E, o.c., p. 269.
132 O. Lando and H. Beale (eds), Illustration 2) to the Comment Art. 4:110 PECL under D, o.c., p. 269.
133 O. Lando and H. Beale (eds), Illustration 3) to the Comment to Art. 4:110 PECL under G, l.c.
134 O. Lando and H. Beale (eds), Comment to Art. 4:110 PECL under D, l.c.
135 See O. Lando and H. Beale (eds), l.c.

nature and further content of the contract, the manner in which the general conditions have become part of the contract, the mutually apparent interests of the parties and the other circumstances of the case' – , as the latter Article also provides for:

1. avoidance of contract;
2. on account of the unfair content of a term;
3. in general conditions, i.e. 'one or more written terms which have been drafted to be included into a number of contracts' (Art. 6:231 under c of the Civil Code);
4. with the exception of terms which do in plain and intelligible language define the main subject matter of the contract;[136]
5. while in judging the unfairness of the term only those circumstances may be taken into account that already occurred at the time of the conclusion of the contract.[137]

Yet Art. 4:110 PECL differs from Art. 6:233 under (a) of the Civil Code on at least two important points:

1. Art. 4:110 PECL applies, in conformity with Art. 3 paragraph (1) of the EC Council Directive 93/13 on Unfair Terms in Consumer Contracts (1993), to unfair terms which 'have not been individually negotiated' (Art. 4:110 paragraph (1)). This requirement may, as has just been done in the enumeration above under 3), as a rule be equated with the 'general conditions', which Art. 6:233 under a of the Civil Code applies to; the Comment to Art. 4:110 PECL puts it this way: 'A term in general conditions of contract which is used in a number of contracts will usually be considered not individually negotiated.'[138] Yet, as may be gathered from the Comment on Art. 4:110 PECL, these two requirements are not identical: 'A term has been "individually negotiated" when it has been the explicit subject of negotiations between the parties. Such negotiations may result in a draft term proposed by the other party being amended or struck out. They may

136 Art. 6:231 under (c)of the Civil Code: ' "general conditions" denotes one or more written terms which have been drafted to be included into a number of contracts, *with the exception of terms which in plain and intelligible language define the main subject matter of the contract*.'
As may be gathered from the decision of the Dutch Supreme Court of 19 September 1997, *Nederlandse Jurisprudentie* 1998, 6 (*Lotto*) this exception should also be interpreted strictly.

137 See *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6, Invoering Boeken 3, 5 en 6*, Deventer 1990, p. 1622 ff.

138 O. Lando and H. Beale (eds), Comment ot Art. 4:110 under F, l.c.

also result in the term remaining unchanged.'[139] According to Dutch law, however, such 'individually negotiated' terms may still constitute 'general conditions' and therefore may still be avoided by virtue of Art. 6:233 under (a) of the Code: free and lengthy negotiations between the parties on terms in general conditions drafted by one of them, which eventually become part of the contract unchanged, according to Dutch law, do nót alter the fact that these terms are general conditions, not even when these negotiation result in an advantage to the other party by way of compensation.[140]

The solution in the Principles is in my opinion to be preferred as the intrinsically better one. This solution – have terms been "individually negotiated"? – may also serve to solve the following dispute[141] that has arisen under Dutch contract law: do terms of a contract which have been drafted by a lawyer in order to be included in a number of contracts to be concluded by his clients and which actually become part of a contract concluded by a client of his, constitute 'general conditions' used by this particular client?[142] Insofar as consumer contracts are concerned, it follows in my opinion already from duty of judges of Member States of the European Union to interpret national law in conformity with EC/EU Council Directives[143] that the criterion to be used is whether a term 'has been individually negotiated' (Art. 3 paragraph (1) of the above-mentioned Council Directive).[144]

139 O. Lando and H. Beale (eds), l.c.

140 See *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6, Invoering Boeken 3, 5 en 6*, Deventer 1990, pp. 1534, 1541, 1562 and 1564.

141 See Asser-Hartkamp, o.c., nr 347.

142 See for a positive reply to this question notably R.H.C. Jongeneel, *Vallen door een ander dan partijen opgestelde algemene voorwaarden onder afd. 6.5.3?, Weekblad voor Privaatrecht, Notariaat en Registratie* 6027 (1991) and *Waarom moet een wederpartij beschermd worden tegen vooraf geformuleerde bedingen?, Weekblad voor Privaatrecht, Notariaat en Registratie* 6037 (1992) and for a negative one J.H.M. van Erp, *Reactie*, l.c.

143 See the decisions of the Court of Justice of the European Union of 13 November 1990, *Marleasing*, C-106/89, Jurispr., p. I-4135, point 8, of 16 December 1993, *Wagner Miret*, C-334/92, *Jurisp*., p. I-6911, point 20 and of 4 July 1994, *Faccini Dori*, C-91/92, *Jurisp*., p. I-3325, point 26 as well as *Nederlandse Jurisprudentie* 1995, 321.

144 The Court of Justice of the European Union has for instance decided that the duty of judges to interpret national law in conformity with Council Directives entails that judges, in order to realise the protection against unfair terms the EC Council Directive 93/13 offers to consumers, may – despite of a national rule (such as Art. 6:233 under (a) of the Dutch Civil Code) conferring on consumers 'the right to avoid' unfair terms – also overrule these terms *ex officio* (see the decision of the Court of Justice of 27 June 2000, *Nederlandse Jurisprudentie* 2000, 730 and C240-4/98, *Nederlands Juristenblad* 2000, p. 1445 and E.H. Hondius, *Ambtshalve toetsing van algemene voorwaarden: het Europese Hof van Justitie spreekt zich uit*, *Weekblad voor Privaatrecht, Notariaat en Registratie* 6417 (2000)).

2. Art. 4:110 PECL aims especially at providing protection against unfair terms in commercial contracts. Therefore the Principles of European Contract Law do not offer black and or grey lists of terms which are deemed respectively presumed to be unfair in consumer contracts, as contained in the Articles 6:236 and 237 of the section of the Civil Code on 'General Conditions', Section 6.5.3, which aims at protecting against unfair terms at large. The Comment on Art. 4:110 PECL puts it this way: 'Unlike the Directive (i.e. The EC Council Directive 93/13 on Unfair Terms in Consumer Contracts (1993)), the Principles contain no list of clauses deemed to be unfair. In contracts between professionals, a listing of contract terms as being *per se* unfair, because of the diversity of commercial contracts, is generally held to be all but impossible.'[145] This argument is unconvincing insofar as it suggests there is no way of preventing these lists from applying to commercial contracts. Yet is does point out the above-mentioned almost exclusive interest the Principles of European Contract Law take in contracts of a commercial character.

Dutch law on the other hand excludes precisely 'big business' from the protection offered by Section 6.5.3 against unfair terms (see Art. 6:235 paragraph (1) of the Civil Code): 'big business' is for protection against unfair terms referred to the general article of the Civil Code which invalidates unfair terms if they are contrary to the requirements of reasonableness and equity, Art. 6:248 paragraph (2).[146] This exclusion from protection of 'big business' by Dutch law, which has been contested as unworkable and arbitrary,[147] seems to be just as unconvincing as the above-mentioned exclusion of consumers by the Principles from the extra-protection provided by the black and grey lists.

A Measure of Damages in case of avoidance for mistake, fraud, threat or taking of excessive benefit or unfair advantage of which the other party knew or ought to have known: at most the 'reliance loss' or 'negative interest' may be recovered, not the 'expectation interest' or 'positive interest'

Paragraph (1) of Art. 4:117 PECL on 'Damages'[148] reads as follows: 'A party which avoids a contract under this Chapter may recover from the other

145 O. Lando and H. Beale (eds), o.c., p. 266.

146 See Asser-Hartkamp, o.c., nrs 358 and 359.

147 See Asser-Hartkamp, o.c., nr 359.

148 See for a comparison of the European Principles and Dutch law on this subject Jac. Hijma, o.c., p. 453 ff and M.M. van Rossum, o.c., p. 463 ff.

party damages so as to put the avoiding party as nearly as possible into the same position as if it had not concluded the contract, provided that the other party knew or ought to have known of the mistake, fraud, threat or taking of excessive benefit or unfair advantage.'

This paragraph sets a measure for damages in that the avoiding party may only claim the so-called 'reliance loss' or 'negative interest', not the so-called 'expectation interest' or 'positive interest': 'If there was no promise that what was stated was true, the untrue statement should not have caused any "loss of expectation" and the damages should not include an element for this. The aim should be to put the party back into the position it would have been in had it not entered the contract.'[149]
The Illustrations 3) and 4) to Art. 4:117 paragraph (1) PECL exemplify this measure for damages:
– 'L lets a flat to T, telling T that the occupier of the flat has the right to use a garden in the square opposite the apartment building. L should have known that this is not true. T agrees to pay *f* 400 per month; the normal rent for such a flat would be *f* 350 per month. Some similar flats in the building do have the use of the garden; the "going rent" for these is *f* 500 a month. T may recover damages of *f* 50 a month, not of *f* 150 a month.'
– 'A leases a used car to B, fraudulently telling B that it has only done 20.000 km when in fact the meter has been "clocked" and it has done 70.000 km. Because the car has covered such a great distance, a fair rental would be much less than B agreed to pay. Soon after he has taken delivery of the car, B discovers the truth and avoids the contract. His money is refunded. He has not suffered any further loss for which damages may be compensable under this Article, even if it costs him more to lease a car from another company.'[150]

As Illustration 5) to Art. 4:117 paragraph (1) PECL shows, damages under this Article may include compensation for opportunities which the party passed over in reliance on the contract: 'E accepts an offer of employment from F after F fraudulently tells him that the job carries an index-linked pension. E finds that the job does not have such a pension scheme and he resigns. To take the job he had passed up another job at a much better salary than he can now get elsewhere. E may recover as damages the difference

149 O. Lando and H. Beale (eds), Comment to Art. 4:117 under B, o.c., pp. 281 and 282.
150 O. Lando and H. Beale (eds), Illustration 3) and 4) to the Comment to Art. 4:117 under B, o.c., p. 282.

between what he would have earned in the other job and the salary he can now get.'[151]
It should be noted that under paragraph (1) of Art. 4:117 damages may only be recovered by the avoiding party 'provided the other party knew or ought to have known of the mistake, fraud, threat or taking of excessive benefit or unfair advantage' (Art. 4:117 paragraph (1)). It should also be noted that this knowledge regards the vices of consent themselves, not their causality.[152]

As in many other legal systems in the European Union,[153] the liability covered by Art. 4:117 PECL is delictual in Dutch law.[154] Therefore in Dutch law, unlike in the Principles of European Contract Law, this liability is not covered by any special provision tailored to this particular situation, but by the general provision on tort, Art. 6:162 of the Civil Code, which is mainly pertinent to fields of law way outside contract law. This foundation in tort law does nót lead to different results:
– though some have argued that the mistaken party may recover its 'expectation interest' or 'positive interest',[155] it is in Dutch legal literature almost generally held that this party, as under Art. 4:117 paragraph (1) PECL, may only recover its 'reliance loss' or 'negative interest'.[156]
– though some have argued that the party which causes the mistake of the other party by giving it incorrect information (see Art. 6:228 paragraph (1) under (a) of the Civil Code) or by leaving it in error while its mistake is or ought to have been known (see Art. 6:228 paragraph (1) under (b)) is always liable, it is in Dutch legal literature almost generally held that the party causing the mistake is only liable for damages if these result from its 'fault';[157] this corresponds to Art. 4:117 paragraph (1) where it – this time explicitly – states that the mistaken party may recover damages 'provided the other party knew or ought to have known of the mistake'.

151 O. Lando and H. Beale (eds), Illustration 5) to the Comment to Art. 4:117 under B, l.c.
152 See Jac. Hijma, o.c., p. 453.
153 See O. Lando and H. Beale (eds), Comment to Art. 4:117 under A, o.c., p. 281 and Notes to this Article under 1), p. 283.
154 See Asser-Hartkamp, o.c., nr 487 and Jac. Hijma, o.c., p. 453..
155 See notably M.M. van Rossum, *Dwaling, in het bijzonder bij de koop van onroerend goed,* diss. Utrecht 1991, Deventer 1991, p. 50 ff and A.G. Castermans, *De medelingsplicht in de onderhandelingsfase*, diss. Leiden, Deventer 1992, p. 139 ff.
156 See Asser-Hartkamp, l.c.
157 See Asser-Hartkamp, l.c.

A Measure of Damages in case the right to avoid the contract was not exercised or when a party was misled by incorrect information in the sense of Article 4:106: damages are limited to the loss 'caused to it by the mistake, fraud, threat, taking of excessive benefit, unfair advantage or incorrect information'

Paragraph (2) of Art. 4:117 PECL reads as follows: 'If a party has the right to avoid a contract under this Chapter, but does not exercise its right or has lost it under the provisions of Articles 4:113 or 4:114, it may recover, subject to paragraph (1), damages limited to the loss caused to it by the mistake, fraud, threat or taking of excessive benefit or unfair advantage. The same measure of damages shall apply when the party was misled by incorrect information in the sense of Article 4:106.'

According to the Principles of European Contract Law, 'reliance loss' or 'negative interest' is mostly an appropriate measure of damages in cases of vices of consent, but not always: the party at whose side such a vice occurred 'should not necessarily be put into the same position as if it had not entered the contract. To allow this might permit it to throw other losses, such as a decline in the value of the property, on the other party, when that item of loss was in no way related to the ground for avoidance. The same applies particularly to a case of incorrect information under Article 4:106.' [158] Illustration 6) to Art. 4:117 exemplifies the point: 'A, a developer, buys a plot of land for *f* 5 million, relying *inter alia* on a statement by the seller that the land is not subject to any rights in favour of third parties. Later A finds that there is a right of way running across part of the site. This is not serious enough to constitute a mistake within Art. 4:103 but it still will cost *f* 10.000 to divert the path. A has a claim under Article 4:106. Meanwhile, because of a slump in property prices, the value of the site has fallen from *f* 5 million to *f* 2.5 million. A's damages are limited to *f* 10.000.'[159]
As A may not recover the fall in value of the site from *f* 5 million to *f* 2.5 million, he may in this case nót in full recover damages so as to be put as nearly as possible into the same position as if he had not concluded the contract. As A's mistake is not fundamental, this exception to the principle that the 'reliance loss' or 'negative interest' be compensated should not come as a surprise: as A is under the Principles of European Contract Law not entitled to avoid the contract (see Art. 4:103), he is not capable of throwing the

158 O. Lando and H. Beale (eds), Comment to Art. 4:117 under C, o.c., p. 282.
159 O. Lando and H. Beale (eds), Illustration 6) to the Comment to Art. 4:117 under C, o.c., p. 283.

loss consisting in the decline in the value of the plot of land on to the seller; therefore A should also prevented from throwing this loss on to the seller by way of recovering damages from him.

This argument in favour of the limitation of damages contained in paragraph (2) of art. 4:117 PECL does of course nót apply when A ís entitled to avoid the contract, as would have been the case had his mistake been fundamental (see Art. 4:103 PECL): as A may then, by avoiding the contract, throw the loss consisting in the decline in the value of his plot of land on to the seller, it does not speak for itself that A may nót do so by way of recovering damages from him. Yet paragraph (2) of Art. 4:117 PECL prevents A also from recovering these damages in this case insofar as it extends the limitation of damages contained in it to situations where 'a party has the right to avoid a contract under this Chapter, but does not exercise its right'. As an Illustration of the effect of this limitation of damages on these situations is absent in the Comment to Art. 4:117, I take the liberty of adding some facts to Illustration 6) to this Article, quoted above, so as to make A's mistake fundamental:

A, a developer, buys a plot of land for *f* 5 million, relying *inter alia* on a statement by the seller that the land is not subject to any rights in favour of third parties. Later A finds that there is a right of way running across part of the site. This is serious enough to constitute a fundamental mistake within Art. 4:103, as it will cost *f* 1.000.000 to divert the path. A may avoid the contract under Article 4:103. Meanwhile, because of a slump in property prices, the value of the site has fallen from *f* 5 million to *f* 2.5 million. Yet A decides to keep the plot of land anyway and therefore refrains from avoiding the sale. A's damages are limited to *f* 1.000.000.

It follows from paragraph (2) of Art. 4:117 PECL – '(…) damages limited to the loss caused to it by (…)' – this outcome[160] is based on the lack of causality between A's vice of consent and the fall in value of the site.

Dutch legal literature says with regard to the present subject matter that the seller is 'liable irrespective of the exercise of the right of avoidance' without going into the amount of damages that may be recovered.[161] It therefore seems as if A might have a claim for the fall in value of the site from *f* 5 million to *f* 2.5 million under Dutch law. Yet in Dutch law A's damages would in my opinion not include this fall in value either. The reason for this similar outcome would in my opinion also be similar, i.e. lack of causality between A's vice of consent and his above-mentioned damages. This answer

160 Which has been criticized by M.M. van Rossum, o.c., p. 463.

161 See Asser-Hartkamp, l.c.

is, however, not to be found in an Article in the Civil Code tailored to the present subject matter, but in the general Article in it on Causality of Damages, Art. 6:98[162] (see on this Article also Chapter VI of this paper).

162 See for a different approach Jac. Hijma, o.c., p. 454

IV. Termination and/or Adaptation of Contract: by giving notice or on account of Change of Circumstances

Chapter 6 on 'Content and Effects' contains provisions on two subjects concerning the termination and adaptation of contracts which are rather controversial in Dutch law :

– may a contract for an indefinite period be put to an end by a party just by giving notice of reasonable length?
– may a contract be adapted or ended for reason that performance of it has become excessively onerous because of a change of circumstances?

We will now go into these provisions, Art. 6:109 PECL on Contract for an Indefinite Period and Art. 6:111 PECL on Change of Circumstances respectively.

Putting a contract for an indefinite period to an end unilaterally: a welcome general rule that notice of reasonable length suffices for termination, which rule, however, should not be extended to contracts which have been intended by the parties to last forever

Art. 6:109 PECL reads as follows: 'A contract for an indefinite period may be ended by either party by giving notice of reasonable length.'
This is what the Comment to this Article has to say in favour of the rule that contracts for an indefinite period may thus be ended:
'Article 6:109 applies both to contracts which purport to be everlasting (e.g. "at all times hereafter") and to contracts which are for an indeterminate period. It expresses two principles:
1. even a contract which purports to be everlasting may be ended. No party is bound to another for an indefinite period of time.
2. to end such a contract, or one which is for an indeterminate period, either party must give reasonable notice.'[163]

163 O. Lando and H. Beale (eds), Comment to Art. 6:109 under A, o.c., p. 316.

This Comment equates contracts which 'purport to be everlasting' to contracts which just 'are for an indeterminate period' in that a party to either contract may put it to an end by giving notice of reasonable length.
This equation is in my opinion unjustified.
It is a truism that both types of contract bind the parties eternally but the foundations of this eternal bond are very different from one another:

– in case of contracts which '*purport* to be everlasting', it is the *intention* of the parties (see the Articles 2:201 paragraph (1) under (a) and 5:101 paragraph (1) PECL) to be eternally bound to one another that establishes this bond; when A leases his plot of land to B and they make a special provision to the effect that their contract will last 'for eternity' it is this *common intention* of A and B that accounts for their eternal bond;
– in case of contracts which just 'are for an indeterminate period' there is no intention whatsoever of the parties to establish an eternal bond between themselves – their only 'contribution' in this respect consisting of the fact they refrain from making any provision for the time the contract is to last –, yet they get bound by such a bond as it *happens to them by virtue of the fact the obligations they assume are of such a nature as to accrue automatically in the course of time*; when A leases his plot of land to B, as A's obligation to lease his plot of land accrues automatically in the course of time, it happens to A and B that their bond turns out to be eternal.

These two types of contracts – contracts which are intended by the parties to be everlasting and those which just happen to be so – are carefully distinguished in American law, as may be concluded from the following quotation on termination of distribution agreements according to American law: 'The presumption that parties by concluding their contract for an indeterminate period of time have thus concluded an 'eternal' contract is generally rejected. If the parties wish to bind themselves in this latter, far-reaching way, they will have to do so expressly and unequivocally. See for instance the decision of the Court of Appeals of New York in Haines v. City of New York: after having established that "the contract did not expressly provide for perpetual performance" and that the two courts formerly involved in the case had established the parties had not intended the contract to last for eternity, this Court of Appeals concluded that "under these circumstances the law that a contract calling for continuous performance is perpetual in duration does not apply."'[164]

164 C.A.M. van den Paverd, *De opzegging van distributieovereenkomsten*, diss. Vrije Universiteit Amsterdam 1999, p. 218 ff.

One may recognize here, put in other words, the above-mentioned distinction between contracts which are intended by the parties to be everlasting and contracts for an indeterminate period which just happen to be everlasting. These two types of contract are distinguished in order *to stress that contracts intended by the parties to be everlasting may as a rule not be terminated unilaterally just by giving notice.*

This deviation from the Comment on Art. 6:109 PECL does not only hold true for American law but for Dutch law as well, for instance in that:

- contract of lease intended to be everlasting may not be terminated just by giving notice;[165]
- loans of money at an interest intended to last forever may not be ended by the creditor just by giving notice (see Art. 7A:1809 of the Civil Code);
- emphyteusis intended to last forever may not be put to an end just by giving notice;[166]
- it is argued in legal literature that all contracts intended to be everlasting may not be ended just by giving notice.[167]

It is in my opinion unjustified that the Comment on Art. 6:109 PECL extends the right to put contracts for an indefinite period to an end unilaterally just by giving notice to these contracts intended to last forever: this extension contravenes the *adagium 'pacta sunt servanda'.* This is not to say contracts intended to last forever should be excluded from termination categorically. They should be terminable, but not at will, as would follow from the application of Art. 6:109 PECL, but on the foundation 'Change of

165 See bill nr 26089 (Memorie van Toelichting, p. 11) with regard to Title 7.4 (Lease) of the Civil Code.

166 See *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 5,* Deventer 1981, p. 304.

167 See for instance L.J. Hijmans van den Bergh, *Bestaat er behoefte aan een wettelijke regeling voor de beëindiging van duurzame contractuele rechtsbetrekkingen in de opzegging waarvan niet is voorzien?, Preadvies Nederlandse Juristenvereniging* 1952, p. 128 ff, J.F.M. Strijbos, *Opzegging van duurovereenkomsten*, diss. Nijmegen 1985, p. 152 ff and G.J.P. de Vries, *Opzegging van obligatoire overeenkomsten,* diss. Amsterdam 1990, p. 348 ff.

Circumstances', provided by Art. 6:111 PECL (see *infra)*, as is also the case in Dutch law.[168]

This inconsistency between the right to put a contract to an end at will and the agreement, the '*pactum'*, is absent where the latter is not intended to be everlasting but just happens to be so. It is precisely the fact that in this case the everlasting duration of the contract – as a result of the obligations thereby assumed – *happens to* the parties that justifies the right of each of them to put an end to it: without this right either party would have been bound to the contract for eternity without any intention whatsoever to this effect! It is therefore justified for Art. 6:109 PECL to provide the right of unilateral termination just by giving notice as for contracts for an indeterminate period which just happen to be everlasting.

Dutch law, though acknowledging the right of unilateral termination with respect to various specific contracts for an indefinite period (which just happen to be everlasting), does not hold a general rule to this effect in the Civil Code. Such a general rule has been advocated in legal literature,[169] but some decisions of the Dutch Supreme Court to the effect that termination is 'causal', i.e. conditional upon a *causa*, has led other authors to the conclusion that the right to terminate the contract just by giving notice is to such a degree dependent on the nature of the contract in question that a general rule to this effect would be too far-reaching.[170]

168 The Article on Change of Circumstances, Art. 6:258, is referred to as the appropriate foundation to end a lease intended to be everlasting in bill nr 26089 (Memorie van Toelichting, p. 11) and the same reference has been made for emphyteusis intended to last forever in *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 5,* Deventer 1981, p. 304. This Article 6:258 has also been acknowledged as the appropriate foundation to end contracts for a definite periode prematurely by giving notice in the decisions of the Dutch Supreme Court of 21 October 1988, *Nederlandse Jurisprudentie* 1990, 439, 10 August 1994, *Nederlandse Jurisprudentie* 1995, 614 and 25 June 1999, *Rechtspraak van de Week* 1999, 109 (see for a reference to this practice in Dutch law and other law systems O. Lando and H. Beale (eds), Notes to Art. 6:111 under 3, o.c., p. 317).

169 See H. Winkel, *Bestaat er behoefte aan een wettelijke regeling voor de beëindiging van duurzame contractuele rechtsbetrekkingen in de opzegging waarvan niet is voorzien?, Preadvies Nederlandse Juristenvereniging* 1952, p. 197 ff, Hofmann-Abas, *Het Nederlands verbintenissenrecht, De algemene leer van de verbintenissen, Deel 1, tweede gedeelte,* Groningen 1977, p. 248 ff, J.F.M. Strijbos, *Opzegging van duurovereenkomsten*, diss. Nijmegen 1985, p. 69 ff and G.J.P. de Vries, *Opzegging van obligatoire overeenkomsten,* diss. Amsterdam 1990, p. 346 ff, W.L. Valk, *Rechtshandeling en overeenkomst,* Deventer 1998, nr 297 and C.A.M. van den Paverd, *Opzegging van distributieovereenkomsten*, diss. Vrije Universiteit Amsterdam 1999, p. 64.

170 See notably Asser-Hartkamp, o.c., nr 310 and A. Hammestein and J.B.M. Vranken, *Beëindigen en wijzigen van overeenkomsten*, *Monografieën Nieuw BW A10*, Deventer 1998, nr 16.

Such a rule, as provided by Art. 6:109 PECL, is in my opinion nót far-reaching, but even self-evident: without this right to terminate contracts for an indeterminate period either party would be bound to the contract for eternity without any intention of the parties to this effect whatsoever! The decisions of the Dutch Supreme Court to the effect that termination is 'causal' are in fact just well-defined and precise exceptions to this rule aimed at the limited goal of protecting the other party than the one giving notice from the ending of the contract in cases where this other party is dependent on continuation of the contract for its housing or for its job.[171]

Change of Circumstances: a more clear-cut rule containing an objective criterion for the expectancy of the change, envisaging an obligation of the parties to negotiate with a view to adapting the contract or ending it

Art. 6:111 PECL on Change of Circumstances[172] reads as follows:

'1. A party is bound to fulfil its obligations even if performance has become more onerous, whether because of the cost of performance has increased or because the value of the performance it receives has diminished.
2. If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or ending it, provided that:
a. the change of circumstances occurred after the time of conclusions of the contract,
b. the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and
c. the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.
3. If the parties fail to reach agreement within a reasonable period, the court may:
a. end the contract at a date and on terms to be determined by the court; or

171 See G.J.P. de Vries, l.c.

172 See for a comparison of the European Principles and Dutch contract law on this subject D. Busch and E.H. Hondius, *Een nieuw contractenrecht voor Europa: de Principles of European Contract Law vanuit Nederlands perspectief*, *Nederlands Tijdschrift voor Burgerlijk Recht* 2000, p. 843 ff.

b. adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances.

In either case, the court may award damages for the loss suffered through a party refusing to negotiations or breaking off negotiations contrary to good faith and fair dealing.'

This is what the Comment has to say on the background and purpose of this Article:

'The majority of countries in the European Community have introduced into their law some mechanism intended to correct any injustice which results from an imbalance in the contract caused by supervening events which the parties could not reasonably have foreseen when they made the contract. In practice contracting parties adopt the same idea, supplementing the general rules of law with a variety of clauses, such as "hardship"-clauses.

The Principles adopt such a mechanism, taking a broad and flexible approach, as befits the pursuit of contractual justice which runs through them; they prevent the cost caused by some unforeseen event from falling wholly on one of the parties. The same idea may be expressed in different terms: the risk of a change of circumstances which was unforeseen may not have been allocated by the original contract and the parties or, if they cannot agree, the court must now decide how the cost should be borne. The mechanism reflects the modern trend towads giving the court some power to moderate the rigours of freedom and sanctity of contract.'[173]

As may also be gathered from this background and purpose of Art. 6:111 PECL, this Article is quite like its Dutch counterpart, Art 6:258 of the Civil Code, which runs as follows:

'1. Upon the request of a party the court may adapt the contract, or may end it in whole or in part because of unforeseen circumstances which are of such a nature that the other party may not, according to the criteria of reasonableness and equity, expect the contract to be upheld.

2. The court may not adapt the contract or end it insofar as the party invoking the unforeseen circumstances is accountable for them according to the nature of the contract or to common opinion.'

However, some interesting differences between Art. 6:111 PECL and Art. 6:258 of the Civil Code may also be noted:

173 O. Lando and H. Beale (eds), Comment on Art. 6:111 under A, o.c., p. 323.

1. The text of Art. 6:111 PECL makes it very clear that the circumstances in which its rules permitting revision of the contract will operate, have to be exceptional. Its first paragraph restates the principle of the sanctity of the contract in unambiguous terms, and the exceptional nature of the intervention is reinforced by the word "However" which introduces the rule on renegotiation in paragraph (2). The mere fact that a contract has become more onerous is not enough for Art. 6:111 PECL to operate: in conformity with the phrase used by the Italian Civil Code, Art. 1467, the contract must have become 'excessively' onerous. The text of Article 6:258 of the Civil Code – 'circumstances which are of such a nature that the other party may not, according to the criteria of reasonableness and equity, expect the contract to be upheld' - is on the contrary not very informative with regard to the prerequisite that the circumstances be exceptional; this requirement may only be gathered from the Comment on Art. 6:258 of the Civil Code [174] and from several decisions of the Dutch Supreme Court.[175]

2. The text of Art. 6:111 PECL is also more informative than Art. 6:258 of the Civil Code in adding in pararaph (1) that this excessive burdensomeness may be the result of both an increase in the cost of performance – for example the increased cost of transport if the Suez Canal is closed and ships have to be sent around the Cape of Good Hope – and of a diminution of the value of the counter-performance – for example if the cost of building work which has already been executed is to be determined by reference to some index of a price which collapses in a quite unforeseeable way.[176] These two categories may only be recognized in the Comment[177] on Art. 6:258 of the Civil Code and in judicial decisions by the Dutch Supreme Court.[178] These

174 See for instance *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6,* Deventer 1981, p. 974.

175 See for instance its decisions of 27 April 1984, *Nederlandse Jurisprudentie* 1984, 679, 10 July 1989, *Nederlandse Jurisprudentie* 1989, 786 and 20 February 1998, *Nederlandse Jurisprudentie* 1998, 493.

176 See O. Lando and H. Beale (eds), Comment to Art. 6:111 under B, o.c., p. 325.

177 See *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6,* Deventer 1981, p. 969.

178 These categories may already be recognized in the two leading cases decided by the Dutch Supreme Court at a time where Change of Circumstances was still repudiated by it as a basis to revise contracts: see its decisions of 8 January 1926, *Nederlandse Jurisprudentie* 1926, p. 203 ff *(Sarong)* and 2 January 1931, *Nederlandse Jurisprudentie* 1931 (*Mark is Mark*), p. 274 ff respectively.

categories should, however, not be treated as covering all cases where performance of the contract has become excessively onerous.[179]

3. Art. 6:111 PECL on 'Change of circumstances' refers to such a change in its text as a requirement for applicability of the Article, whereas Art. 6:258 of the Civil Code does not. This requirement has been left out of Art. 6:258 deliberately in order to make it also available in cases where the parties had expected a certain event to occur, which eventually did not occur.[180] It seems to me Art. 6:258 of the Civil Code is to be preferred in this respect.

4. Art. 6:111 PECL is to be preferred in that it expressly requires the change of circumstances to have 'occurred after the time of conclusion of the contract' (paragraph (2) under (a)), whereas this requirement may not to be found in Art. 6:258 of the Civil Code itself but only in the Comment on the Article.[181]

5. In order for Art. 6:111 PECL to apply it is required that 'the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of the conclusion of the contract' (paragraph (2) under (b)). This requirement entails that Art. 6:111 PECL 'cannot be invoked if the matter would have been foreseen by a reasonable man in the same situation, by a person who is neither unduly optimistic or pessimistic, nor careless of his own interests.'[182] An Illustration of what 'the reasonable man' would have refrained from: 'During a period when the traffic in a particular region is periodically interrupted by lorry driver's blockades, this reasonable man would not choose a route through that region in the hope that on the day in question the road will be clear; he would choose another route.'[183] This objective requirement that 'the possibility of a change of circumstances was not one which could *reasonably* have been taken into account' (Art. 6:111 PECL) is in keeping with the objective requirement for Excuse due to an Impediment that the non-performing party 'could not *reasonably* have been expected to take the impediment into account' (Art. 8:108 PECL) (see Chapter IV). Art. 6:258 of the Civil Code requires the cir-

179 See Jac. Hijma, *Imprévision* in: *Europees Contracrenrecht, BW-krant jaarboek 1995*, p. 60 ff.

180 See *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6*, Deventer 1981, p. 969. See for an example the case decided by the Supreme Court on 20 February 1998, *Nederlandse Jurisprudentie* 1998, 493.

181 See *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek*, l.c.

182 O. Lando and H. Beale (eds), Comment on Art. 6:111 under B (iii), o.c., p. 325.

183 Illustration 3) to the Comment on Art. 6:111 under B (iii), l.c

cumstances to be 'unforeseen'. This term does nót hinge on what 'the reasonable man' would have refrained from, as may be gathered from the Comment on Art. 6:258 of the Civil Code: 'The term "unforeseen circumstances" means what it means as a standard expression in everyday speech. Thus a war may even qualify as unforeseen circumstances when the contract in question was concluded at a time of such international tension that war was not only foreseeable but one of the parties had also actually thought of the possibility of war. The only thing that matters is what the parties have presumed vis-à-vis one another; whether they have provided for the possibility of the outbreak of a war.'[184] The requirement that the circumstances be 'unforeseen' (Art. 6:258) has been criticised in Dutch legal literature as an unjustified deviation from what is usual in European law systems.[185] This critique seems right: it has in no way been made clear why it is the criterion with regard to the expectancy of the change of circumstances should be 'subjective' and, if it has to be this way, why it is this criterion is nót subjective when a related object of expectancy is concerned, namely impediment needed for *force majeure* ('overmacht', 'niet-toerekenbare tekortkoming'), a related subject, is concerned.

6. Art. 6:111 PECL is significantly different from Art. 6:258 of the Civil Code in that it envisages at the outset, like many expressly agreed clauses, a process of negotiations between the parties to reach an amicable agreement varying the contract. It is, according to Art. 6:111 PECL, only if the parties' negotiations do not succeed, that the matter may be brought before the court. The process of negotiations between the parties envisaged by the Art. 6:111 PECL to reach an amicable agreement is not left to the free will of the parties but constitutes an obligation incumbent on them. The parties are, according to paragraph (2) of Art. 6:111 PECL, '*bound* to enter into negotiations with a view to adapting the contract or ending it', which duty is elaborated further in the Comment as follows: 'Under the general duty of good faith, the party which will suffer the hardship must initiate the negotiation within a reasonable time, specifying the effect the changed circumstances have had upon the contract (…) The negotiations must be conducted in good faith, that is to say, they must not be either protracted or broken off abusively. There will be bad faith if one party continues to negotiate after it has already entered another, incompatible contract with a third party. Normally the principle of good faith will require that every point of

184 *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6*, p. 968.

185 See notably P. Abas, *Rebus sic stantibus*, Deventer 1989, *passim* and *Rebus sic stantibus, Eine Untersuchung zur Anwendung der clausula rebus sic stantibus in der Rechtsprechung einiger Europäischer Länder,* Köln 1993, *passim*.

dispute between the parties should be brought up in the negotiations.'[186] The obligation to negotiate is independent and carries its own sanction in paragraph (3) of Art. 6:111 PECL, the compensation provided by this paragraph normally consisting of damages for the harm caused by a refusal to negotiate or a breaking off of negotiations in bad faith (for instance, the expenses of bringing the action insofar as these have not been recouped by an award of costs).[187] Under Art. 6:258 of the Civil Code there is no obligation for the parties to enter into negotiations and therefore as a rule no sanction on a refusal by a party to do so either, so the courts are under Dutch law more often called upon to decide the matter.[188] An obligation of the parties to enter negotiations with a view to adapting the contract or ending it, as envisaged by Art. 6:111 PECL, has been advocated in Dutch legal literature by a number of authors as a better way to go about the task to revise the contract than by intervention by the court, as envisaged by Art. 6:258 of the Dutch Civil Code.[189] A solution by way of negotiations by the parties themselves in stead of by the court is evidently advantageous in that the parties are better informed, will keep in touch with one another in a less adversary way and will come to a conclusion faster and cheaper. The European Principles keep the parties longer away from the court than Dutch law in other cases as well: whereas the right of a party to avoid a contract for vices of consent and to terminate it for non-performance may according to Dutch law be exercised by notice to the other party and court order equally (see the Articles 3:49 and 6:267 of the Dutch Civil Code respectively), these rights are under the European Principles to be exercised primarily by notice to the other party (see the Articles 4:112 and 9:303 paragraph (1) PECL respectively).

186 O. Lando and H. Beale (eds), Comment on Art. 6:111 under C, o.c., p. 326.

187 See O. Lando and H. Beale (eds), Comment on Art. 6:111 under C, l.c.

188 This set-up does, however, not entail that a party may in all cases without any sanction turn down any proposal on the part of the other party to revise the contract: when the party suffering the hardship turns down a proposal of the other party which fairly deals with the unforeseen circumstances, the former party will thus lose its right under Art. 6:258 to request the court to do so (see Asser-Hartkamp, o.c., nr 334; see for a different opinion P. Abas, *De 'reductio ad aequitatem' in het nieuwe BW* in: *In het nu, wat worden zal, Schoordijk-bundel,* Deventer 1991, p. 1 ff).

189 See notably Jac. Hijma, *Imprévision* in: *Europees contractenrecht, BW-krant jaarboek*, Arnhem 1995, p. 57 ff and *Het constitutieve wijzigingsvonnis*, Deventer 1989, p. 14 ff, J.M. van Dunné, *Verbintenissenrecht, Deel 1: Contractenrecht*, p. 622 ff, M.E.M.G. Peletier, *Rechterlijke vrijheid en partij-autonomie*, diss. Vrije Universiteit Amsterdam, p. 137 ff (with some reservations), M.W. Hesselink, *De redelijkheid en billijkheid in het Europese privaatrecht*, diss. Utrecht 1999, p. 348 and D. Busch and E.H. Hondius, *Een nieuw contractenrecht voor Europa: de Principles of European Contract Law vanuit Nederlands perspectief, Nederlands Juristenblad* 2000, p. 844.

V. The concept of Non-Performance and Remedies in general

Chapter 8 of the European Principles on Non-Performance and Remedies in general deals with the concept of non-performance and with other general subjects which may be pertinent to the particular remedies for non-performance contained in Chapter 9, i.e. the right to performance, to withhold performance, to terminate the contract for non-performance or to reduce the price and the right to damages.[190]

The concept of Non-Performance: almost as wide and open as the Dutch concept of 'failure in the performance of an obligation' ('tekortkoming in de nakoming van een verbintenis')

Paragraph (1) of Art. 8:101 PECL reads as follows: 'Whenever a party does not perform an obligation under the contract and the non-performance is not excused under Article 8:108, the aggrieved party may resort to any of the remedies set out in Chapter 9.'

Not only this paragraph, but the following Comment on it as well show that the concept of 'Non-Performance' is wide and open: 'Under the system adopted by the Principles there is non-performance whenever a party does not perform any obligation under the contract. The non-performance may consist in a defective performance or in a failure to perform at the time performance is due, be it a performance which is effected too early, too late or never. It includes a violation of an accessory duty as such the duty of a party not to disclose the other party's secrets. Where a party has a duty to receive or accept the other party's performance a failure to do so will also constitute a non-performance.'[191]
So it is not only Non-Performance for a builder not to erect the building

190 See for a comparison of the European Principles and Dutch contract law on this subject J.M. Smits and P.L.P. Meiser, *Niet-nakoming in de Principles of European Contract Law en in het Nederlandse recht, Nederlands Tijdschrift voor Burgerlijk Recht* 2000, p. 476 ff.

191 O. Lando and H. Beale (eds), Comment on Art. 8:101 under A, o.c., p. 359.

contracted for at all, but also to erect it only partly in accordance with the contract or to complete it too late.
The second feature of Non-Performance, to be gathered from this paragraph and from Art. 9:501 PECL – 'The aggrieved party is entitled to damages for the loss caused to the other party's non-performance which is not excused under Article 8:108' –, is that it includes not only non-excused non-performance but also excused non-performance.
These feature add up to the following definition: "non-performance' denotes any failure to perform an obligation under the contract, whether or not excused, and includes delayed performance, defective performance and failure to co-operate in order to give full effect to the contract' (paragraph (4) of Art. 1:301 PECL on Meaning of Terms).
These features which are not to be found in all European law systems,[192] may also be found in the corresponding Dutch concept 'failure in the performance of an obligation' ('tekortkoming in de nakoming van een verbintenis' (Art. 6:74 of the Dutch Civil Code)), since this latter concept also includes:
– not only the complete failure to perform but also all forms of defective and late performance;[193]
– both non-excused and excused non-performance.[194]

Yet the two terms – Non-Performance and 'failure in the performance of an obligation' ('tekortkoming in de nakoming van een verbintenis') – are not identical: when there is according to Dutch law a need for the aggrieved party to serve a notice on the non-performing party in order to put the latter into breach (see the Articles 6:81-83 of the Dutch Civil Code), there can not be a 'failure in the performance of an obligation' ('tekortkoming in de nakoming van een verbintenis') before the expiry of the additional period

192 The term 'non-performance' has for instance been preferred to 'breach' used in CISG, since the latter is in the common law restricted to non-excused non-performance (see A.S. Hartkamp, *Principles of Contract Law* in: A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra and E. du Perron (eds), *Towards a European Civil Code*, Second Revised and Expanded Edition, Nijmegen 1998, p. 115).

193 See *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6*, Deventer 1981, p. 254 and *Parlementaire Geschiedenis van het nieuwe burgerlijk Wetboek, Boek 6, Invoering Boeken 3, 5 and 6*, Deventer 1990, p. 1247.

194 See *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6*, Deventer 1981, p. 258 and *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6, Invoering Boeken 3, 5 and 6*, Deventer 1990, p. 1247 ff.

for performance fixed in this notice.[195] Under the Principles of European Contract Law, however, as there is not any need for the aggrieved party to serve a notice on the non-performing party in order to put the latter into breach,[196] 'Non-Performance' cannot hinge upon such a notice.
Non-Performance is under the Principles, however, not always a sufficient foundation for the particular remedies for non-performance listed in Chapter 9: sometimes Non-Performance has to be Fundamental in order to serve as such.
Dutch law on the contrary employs for all remedies the unitary concept of a 'failure in the performance of an obligation' ('tekortkoming in de nakoming van een verbintenis').

Fundamental Non-Performance

Non-Performance is not always a sufficient foundation for the particular remedies for non-performance listed in Chapter 9.
The aggrieved party is under the Principles of European Contract Law as a rule only entitled to terminate the contract if the Non-Performance is 'Fundamental': 'A party may terminate the contract if the other party's non-performance is fundamental' (Art. 9:301).
The right to cure a non-performance may under these Principles also hinge upon the question whether it is 'fundamental': 'A party whose tender of performance is not accepted by the other party because it does not conform to the contract may make a new and conforming tender where the time for performance has not yet arrived or the delay would not be such as to constitute a fundamental breach' (Art. 8:104 PECL).
And so does the right by a party which reasonably believes that there will be 'fundamental' non-performance to demand for adequate assurance and its accompanying right to withhold performance of its own obligation (see Art. 8:105 PECL).
When then is Non-Performance 'Fundamental'?
Art. 8:103 PECL provides for the following definition:
'A non-performance of an obligation is fundamental to the contract if:

195 See the decisions of the Dutch Supreme Court of 20 september 1996, *Nederlandse Jurisprudentie* 1996, 748 and 27 november 1998, *Rechtspraak van de Week* 1998, 224 and *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6, Invoering Boeken 3, 5 and 6*, Deventer 1990, p. 1248.

196 See O. Lando and H. Beale (eds), Comment on Art. 8:106 under A, o.c., p. 373.

a. strict compliance with the obligation is of the essence of the contract; or
b. the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result; or
c. the non-performance is intentional and gives the aggrieved party reason to believe that it cannot rely on the other party's future performance.'

Under Article 8:103 under (a) the relevant factor is not the actual gravity of the breach but the agreement between the parties that strict adherence to the contract is essential and that any deviation from the obligation goes to the root of the contract so as to entitle the other party to be discharged from its obligations under the contract. This agreement may derive either from express or from implied terms of the contract. Thus, the contract may provide in terms that in the event of any breach by a party the other party may terminate the contract. The effect of such a provision is that every failure in performance is to be regarded as fundamental. Even without such an express provision the law may imply that the obligation is to be strictly performed. For example, it is a rule in many systems of law that in a commercial sale the time of delivery of goods or the presentation of documents is of the essence of the contract. The duty of strict compliance may also be inferred from the language of the contract, its nature or the surrounding circumstances, and from custom or usage or a course of dealing between the parties.[197] When A agrees to build as house for B by a certain day this provision in the building contract of a certain day for completion will, however, normally nót be of the essence.[198]

Art. 8:103 under (b) looks not at the strictness of the duty to perform but at the gravity of the consequences of non-performance. Where the effect of non-performance is substantially to deprive the aggrieved party of the benefit of its bargain, so that it loses its interest in performing the contract, then in general the non-performance is fundamental. This is not the case, however, where the non-performing party did not foresee and could not reasonably have foreseen those consequences. The following Illustration may clarify this criterion:

'A, a contractor, promises to erect five garages and to build and pave the road leading to them for B's lorries, all the work to be finished before October 1st, when B opens its warehouse. On October 1st the garages have

197 See O. Lando and H. Beale (eds), Comment on Art. 8:103 under A, o.c., p. 364.

198 See O. Lando and H. Beale (eds), Illustration 3) to the Comment on Art. 8:104, o.c., p. 368.

been erected; the road has been built but not paved, which prevents B from using the garages. A's performance is fundamental.'[199]

It should be noted that this Illustration not only exemplifies the criterion for 'fundamental' non-performance in question, gravity of its consequences under (b), but also provides a counterexample of the criterion under (a) that strict compliance with the obligation is of the essence of the contract: the Illustration would not have made much sense if strict compliance with A's duty to complete the paving of the road by October 1st would have been of the essence of the contract.

When the unpaved road in the above-mentioned Illustration would have been sufficiently smooth that the garages might have been used anyway, and A paves the road soon after October 1st, A's non-performance would under the criterion in question, however, not have been fundamental.[200]

Even where the contractual term broken is minor, so that Art. 8:103 under (a) does not apply, and the consequences of the non-performance do not substantially deprive the aggrieved party of the benefit of the bargain, so that the criterion under (b) does not apply either, it may treat the non-performance as fundamental if it was intentional and gave it reason to believe that it could not rely on the other party's future non-performance (see Article 8:103 under (c)). The following example illustrates this criterion: 'A, who has contracted to sell B's goods as B's sole distributor and has undertaken not to sell goods in competition with those goods, nevertheless contracts with C to sell C's competing goods. Although A's efforts to sell C's goods are entirely unsuccessful and do not affect the sale of B's goods, B may treat A's conduct as a fundamental non-performance.'[201]

As has already been pointed out above, Dutch law employs for all remedies the unitary concept of a 'failure in the performance of an obligation' ('tekortkoming in de nakoming van een verbintenis') and therefore does not apply the concept of 'Fundamental' Non-Performance. As this difference applies mainly to the remedy 'termination of the contract on account of non-performance', it will dealt with at large in the next Chapter of this paper on Particular Remedies for Non-Performance.

Some remarks of a more general nature qualifying the importance of the concept of 'Fundamental' Non-Performance must, however, be made now:

– Insofar as there is according to Dutch law a need for the aggrieved party to serve a notice on the non-performing party in order to put the latter into

199 O. Lando and H. Beale (eds), Illustration 1) to the Comment on Art. 8:103, o.c., p. 365.
200 See O. Lando and H. Beale (eds), Illustration 2) to the Comment on Art. 8:103, l.c.
201 O. Lando and H. Beale (eds), Illustration 5) to the Comment on Art. 8:103, o.c., p. 366.

breach (see the Articles 6:81-83 of the Dutch Civil Code), there cannot, as we have seen, be a 'failure in the performance of an obligation' ('tekortkoming in de nakoming van een verbintenis') before the expiry of the additional period for performance fixed in this notice.[202] As Non-Performance under the Principles cannot hinge upon such a notice,[203] the 'extra'-requirement in the European Principles for a 'Fundamental' Non-Performance may in these cases up to a certain extent be a matter of optical illusion.[204]

– In cases of delay in performance which are not fundamental where the aggrieved party has given a notice fixing an additional period of time of reasonable length for performance, it may terminate the contract at the end of the period of notice (see the Articles 8:106 paragraph (3) and 9:301 PECL). Thus the aggrieved party may in these cases skip the requirement 'Fundamental' Non-Performance by giving the above-mentioned notice.

Excuse due to an 1) Impediment that is 2) irresistible and insurmountable and 3) did not already exist at the time the contract was concluded

Paragraph (1) of Art. 8:108 PECL on 'Excuse due to an Impediment' runs as follows:
'A party's non-performance is excused if it proves that it is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.'

The conditions laid down in this Article for its operation are, according to the Comment on it, 'analogous to the conditions traditionally required for *force majeure.*'[205]
Generally the same holds true when it is compared to the Dutch provisions on *force majeure* ('overmacht', 'niet-toerekenbare tekortkoming') in the Articles 6:75-77 of the Dutch Civil Code, for instance in that:

202 See the decisions of the Dutch Supreme Court of 20 september 1996, *Nederlandse Jurisprudentie* 1996, 748 and 27 november 1998, *Rechtspraak van de Week* 1998, 224 as well as *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6, Invoering Boeken 3, 5 and 6*, Deventer 1990, p. 1248.

203 See O. Lando and H. Beale (eds), Comment to Art. 8:106 under A, o.c., p. 373.

204 See O. Lando and H. Beale (eds), Notes to Art. 8:103 under 3), o.c., p. 367 and J.M. Smits and P.L.P. Meiser, o.c., p. 477.

205 See O. Lando and H. Beale (eds), Comment to Art. 8:108 under C, o.c., p. 379.

– for Art. 8:108 PECL to apply it is also not only necessary that the impediment has come about without the 'fault' of the debtor, but also that the obstacle must be something outside his sphere of control (Art. 8:108: 'an impediment beyond its control'), i.e. that he does not bear the 'risk', as in case of a breakdown of machinery he employs or for acts of persons for whom he is responsible , particularly those he puts in charge of the performance;[206]
– it is also for the party which invokes Art. 8:108 to show that the conditions are fulfilled.[207]

Yet some differences should be noted as well:

1. Art. 8:108 PECL explicitly requires that the non-performance is due to an 'impediment', whereas this requirement has not been mentioned in Art. 6:75 in order to include cases as the one of an heir who does not perform a debt of his testator just because he is unaware of his death.[208] One may doubt whether such an exceptional case[209] may justify the crossing out of this requirement from Art. 6:75 of the Dutch Civil Code.

2. Art. 8:108 PECL requires the impediment to be both 'irresistible' and 'insurmountable',[210] so that the party invoking the article must not only show that it could not reasonably have been expected to have avoided it but also that it could not reasonably have been expected to have overcome it or its consequences (see Art. 8:108 paragraph (1) PECL *in fine*). Art. 6:75 is not so specific as to these diverse qualities of the impediment.

3. From the requirement that performance is not just excessively onerous, but that the impediment 'prevents performance'[211] and from the extra-requirement that it is 'insurmountable' – as well as from the juxtaposition in Art. 9:102 paragraph (2) PECL of the requirement that performance be 'impossible' to other requirements which justify that specific performance cannot be obtained (see also the next Chapter) – it may be concluded that the concept of 'impediment' is not as wide and open as its Dutch counter-

206 See O. Lando and H. Beale (eds), Comment to Art. 8:108 under C, o.c., p. 380.
207 See O. Lando and H. Beale (eds), l.c.
208 See *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6*, Deventer 1981, p. 263.
209 See Asser-Hartkamp, 4-I, *De verbintenis in het algemeen*, Deventer 2000, nr 319.
210 See O. Lando and H. Beale (eds), Comment to Art. 8:108 under C (iii), o.c., p. 381.
211 O. Lando and H. Beale (eds), Comment on Art. 8:108 under A, o.c., p. 379 and on Art. 6:111 under A, o.c., p. 324.

part ('onmogelijkheid' or 'verhindering') which also includes cases where performance would only 'cause the debtor unreasonable effort or expense.'[212]

4. When the impediment already existed at the time of the conclusion of the contract without the parties knowing it – the parties might sign a charter of a ship which, unknown to them, has just sunk – Art. 8:108 PECL does not apply, but the contract may, as has been pointed out in the Chapter on Validity, be avoidable under Article 4:103 PECL on Fundamental Mistake as to Facts or Law. This situation may under Dutch law lead to partially different consequences: not only the Article in the Civil Code on Mistake, Art. 6:228, applies, but so does the Article of this Code on Excuse due to an Impediment, Art. 6:75.[213] It seems to me that the one way-solution of the Principles is to be preferred.

5. The non-performing party must by virtue of paragraph (3) of Art. 8:108 PECL ensure that notice of the impediment and of its effect on its ability to perform is received by the other party within a reasonable time after the non-performing party knew or ought to have known of these circumstances. The other party is entitled to damages for any loss resulting from the non-receipt of such a notice. This notice is not to be found in the Dutch Civil Code, but the need for it may result from the requirements of reasonableness and equity which, according to Art. 6:248 of the Code, govern the contract.

212 See for instance the decisions of the Dutch Supreme Court of 2 May 1976, *Nederlandse Jurisprudentie* 1977, 73 and 27 June 1997, *Nederlandse Jurisprudentie* 1997, 641.

213 See *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6*, Deventer 1981, pp. 485, 486, 897, 1002 and 1005.

VI. Particular Remedies for Non-Performance: Right to Performance, Termination of the Contract, Damages and Interest

Chapter 9 of the European Principles deals with Particular Remedies for Non-Performance.[214] It builds on the preceding Chapter on Non-Performance and Remedies in General.
The following Particular Remedies are dealt with in this Chapter:
– Right to Performance;
– Withholding Performance;
– Termination of the Contract;
– Price Reduction;
– Damages and Interest

These particular remedies will be dealt with in this Chapter with the exception of Withholding Performance and Price Reduction.

Right to Performance: specific performance of a non-monetary obligation may not be obtained in as many cases as under Dutch law

The paragraphs (1) and (2) of Art. 9:102 PECL run as follows:
1. The aggrieved party is entitled to specific performance of an obligation other than one to pay money, including the remedying of a defective performance.
2. Specific performance cannot, however, be obtained where:
a. performance would be unlawful or impossible; or
b. performance would cause the debtor unreasonable effort or expense; or
c. the performance consists in the provision of services or work of a personal character or depends upon a personal relationship; or
d. the aggrieved party may reasonably obtain performance from another source.

214 See for a comparison of the European Principles and Dutch contract law on this subject J.M. Smits and P.L.P. Meiser, *Niet-nakoming in de Principles of European Contract Law en in het Nederlandse recht, Nederlands Tijdschrift voor Burgerlijk Recht* 2000, p. 476 ff.

The creditor of a monetary obligation is, according to Article 9:101 PECL, 'entitled to recover money which is due to him.' This article reflects, as does its counterpart in the Unidroit-Principles of International Commercial Contracts, Art. 7.2.1, the generally accepted principle that payment of money which is due under a contractual obligation can always be demanded and, if the demand is not met, enforced by legal action before a court. [215]

As may be concluded from the exceptions listed in paragraph (2) of Art. 9:102 PECL, this principle is not as widely accepted as for Non-monetary Obligations.
This has in part to do with the fact that the common law systems treat 'specific performance', as the subject is dubbed there, as an exceptional remedy. Here is what the Comment on the Article has to say on the subject:
'Whether an aggrieved party should be entitled to require performance of a non-monetary obligation, is very controversial. The common law treats specific performance as an exceptional remedy whilst the civil law regards it an an ordinary remedy. These Principles have sought a compromise: a claim for performance is admitted in general (paragraph 1) but excluded in several special situations (paragraphs (2) and (3)).
A general right to performance has several advantages. Firstly, through specific relief the creditor obtains as far as possible what is due to it under the contract; secondly, difficulties in assessing damages are avoided; thirdly, the binding force of contractual obligations is stressed. A right to performance is particularly useful in cases of unique objects and in times of scarcity.
On the other hand, comparative research of the laws and especially commercial practices demonstrate that even in the Civil Law countries the principle of performance must be limited. The limitations are variously based upon natural, legal and commercial considerations and are set out in paragraphs (2) and (30. In all these cases other remedies, especially damages and, in appropriate cases, termination, are more adequate remedies for the aggrieved party.'[216]
The exceptions where specific performance cannot be obtained mentioned in

215 See *Unidroit-Principles of International Commercial Contracts*, Rome 1994, Art. 7.2.1, Comment, p. 172 and O. Lando and H. Beale (eds), Comment on Art. 9:101 under A, o.c., p. 391.

216 O. Lando and H. Beale (eds), Comment on Art. 9:102 under B, o.c., p. 395.

paragraph (2) under (a) – 'performance would be unlawful or impossible' [217] – and (b) of Art. 9:102 PECL – 'performance would cause the debtor unreasonable effort or expense' –, though omitted in the Civil Code, are well known in Dutch law, but they are all brought under one and the same heading, 'impediment' ('onmogelijkheid'; 'verhindering'): not only cases where performance is impossible, but also those where performance is unlawful or would cause the debtor unreasonable effort, are characterized as such.[218] The variety of headings used in Art. 9:102 PECL seems to be more realistic.

The first category discerned in the exception where specific performance cannot be obtained mentioned in paragraph (2) under (c) – 'the performance consists in the provision of services or work of a personal character' – corresponds to the exception mentioned in Art. 3:296 of the Civil Code where it states that it follows from 'the nature of the obligation' that specific performance cannot be obtained. Thus the following Illustration of this exception in the Comment on Art. 9:102 would also constitute an exception under Dutch law:

'A, a famous artist, contracts with B, a wealthy merchant, to paint a picture for him. If A does not comply with her promise B cannot require performance, because performance of A's obligation requires individual skills of an artistic nature and thus consists in work of a personal nature.'[219]

It may be doubted, however, whether the second category mentioned in the exception where specific performance cannot be obtained mentioned in paragraph (2) under (c) – 'performance (…) depends upon a personal rela-

217 With regard to the situation performance is 'impossible' it may be noted that Art. 8:101 paragraph (2) PECL provides that 'where a party's non-performance is excused under Article 8:108, the aggrieved party may resort to any of the remedies set out in Chapter 9 except claiming performance (…)'
By refering to Art. 8:108 PECL so indiscriminately, this provision suggests quite wrongfully that the right to claim performance hinges upon other requirements for this latter Article to apply than just 'Impediment'. This is of course not the case (see for similar critique J.M. Smits and P.L.P. Meiser, o.c., p. 481 and for a similar wrongful suggetion in the Dutch Civil Code Art. 6:79: 'Where the debtor is prevented from performance by a cause which is *excusable*, but the creditor is nevertheless in a position to procure for itself what is owed to it, by way of execution or of set-off, it may do so').

218 See *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6,* Deventer 1981, pp. 264 and 485 as well as the the decisions of the Dutch Supreme Court of 2 May 1976, *Nederlandse Jurisprudentie* 1977, 73 and 27 June 1997, *Nederlandse Jurisprudentie* 1997, 641.

219 O. Lando and H. Beale (eds), Illustration 5) in the Comment on Art. 9:102, o.c., p. 397. See for a similar example from Dutch law: *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 3,* Deventer 1981, p. 896.

tionship' – would also constitute an exception under Dutch law. An illustration of this category:
The six heirs of a factory-owner conclude a contract in due form to create a partnership in which all the partners are to play an active role in order to continue the inherited business. Later A, one of the heirs, refuses to cooperate in the creation of a partnership.[220]
The exception where specific performance cannot be obtained mentioned in paragraph (2) under (d) – 'the aggrieved party may reasonably obtain performance from another source' – intends to 'encourage the aggrieved party to choose from among the remedies which would fully compensate it the one which can most simply be obtained. According to practical experience, termination and damages will often satisfy its requirements more easily than enforcement of performance.'[221]
It may not be assumed too easily that the requirement that the aggrieved party 'may reasonably obtain performance from another source' (under (d)) is met: 'If the aggrieved party chooses to require performance, this will generally create a presumption that this remedy optimally satisfies his needs. Consequently, the non-performing party will have to prove that the aggrieved party can obtain performance from other sources without any prejudic and that therefore it may reasonably be expected to make a cover transaction.'[222]
This exception is illustrated as follows:
'A sells to B a certain set of chairs which are of an ordinary kind and without special value. A refuses to deliver. A proves that B may without suffering a prejudice obtain chairs of the kind sold from other sources. B cannot require performance by A.'[223]
Though this exception to the rule that the aggrieved party is entitled to specific performance under (d) may not be applied too easily, it is a far-reaching exception that is unknown to Dutch law and other civil law systems as a general exception. This exception may be be branded as only directed towards finding an intermediate position between the European law systems.[224] This exception, which has been motivated by 'commercial observations' – 'especially commercial practices demonstrate that even in

220 This illustration has been derived from O. Lando and H. Beale (eds), Illustration 5) to the Comment on Art. 9:102, o.c., p. 397.
221 O. Lando and H. Beale (eds), Comment on Art. 9:102 under H, o.c., p. 398.
222 O. Lando and H. Beale (eds), l.c.
223 O. Lando and H. Beale (eds), Illustration 8) to the Comment on Art. 9:102, l.c.
224 See J.M. Smits and P.L.P. Meiser, o.c., p. 481.

the Civil Law countries the principle of performance must be limited';[225] the similarities between this paragraph and its counterpart in the Unidroit-Principles of International Commercial Contracts, Art. 7.2.2, point into the same direction –, may also be branded as sacrificing the interests of consumers: is it reasonable that professional seller A is entitled to tell his non-professional buyer B to go and procure the set of chairs he has bought, somewhere else?

This is not to say the exception to the rule that the aggrieved party is entitled to specific performance in Art. 9:102 paragraph (2) under (d) PECL is totally unknown in Dutch law; the following provision of the Dutch Civil Code in the field of consumer sale shows some parallelisms: 'If, in a consumer sale a good has been delivered that does not conform to this contract, and the buyer requires repair of the good or delivery of a substitute good, the seller is entitled to choose between delivery of the substitute good or the reimbursement of the purchase price' (Art. 7:21 paragraph (2)).

Two differences between these provisions should, however, also be noted:

– Art. 7:21 paragraph (2) of the Code is an even more-far-reaching exception to the rule that the aggrieved party is entitled to specific performance in that in order for this paragraph to apply it is not necessary that the requirement is met that the buyer can obtain performance from other sources without any prejudice and that therefore it may reasonably be expected to make a cover transaction;[226]
– As the exception in Art. 9:102 paragraph (2) under (d) has been motivated by 'commercial observations' (see *supra*), it is peculiar that in Dutch law precisely the buyer in a *consumer* sale has been chosen as the aggrieved party which is supposed to obtain performance from another source.[227]

A party may terminate the contract if the other party's Non-Performance is 'Fundamental'

Paragraph (1) of Art. 9:103 PECL runs as follows: 'A party may terminate the contract if the other party's non-performance is fundamental.'

The concept of 'Fundamental' Non-Performance, defined in Art. 8:103 PECL, has already been dealt with in the former Chapter. Its most impor-

225 O. Lando and H. Beale (eds), Comment to Art. 9:102 under B, o.c., p. 395.

226 See *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 7*, Deventer 1991, p. 138.

227 See G.J.P. de Vries, *Recht op nakoming in het Belgisch en Nederlands recht* in: *Remedies in het Belgisch en Nederlands contractenrecht*, Antwerpen/Groningen 2000, p. 37 ff.

tant, though not exclusive (see the Articles 8:104 and 105 PECL), role is to serve as a requirement for termination of the contract. We will now go into the background and effects of this role.

The requirement of a 'Fundamental' Non-Performance for termination is based upon the following weighing of conflicting considerations:

'On the one hand, the aggrieved party may desire wide rights of termination. It will have good reasons for terminating the contract if the performance is so different from that for which it had bargained that it cannot use it for its intended purpose, or if it is performed so late that its interest in it is lost. In some situations termination will be the only remedy which will properly safeguard its interests, for instance when the defaulting party is insolvent and cannot perform its obligations or pay damages. The aggrieved party may also wish to be able to terminate in less serious cases. A party which fears that the other party may not perform its obligations may wish to be able to take advantage of the fact the threat of termination is a powerful incentive to the other to perform to ensure that the other performs every obligation in complete compliance with the contract.

For the defaulting party, on the other hand, termination usually involves a serious detriment. In attempting to perform it may have incurred expenses which are now wasted. Thus it may lose all or most of its performance when there is no market for it elsewhere. When the other remedies such as damages or price reduction are available these remedies will often safeguard the interests of the aggrieved party sufficiently so that termination should be avoided.

For these reasons it is a prerequisite for termination of the contract that the non-performance is 'fundamental' in the sense defined in Article 8:103.'[228]

This weighing of considerations has led to a solution in favour of the non-performing debtor: the requirement for a 'Fundamental' non-performance definitely does for instance nót take into consideration the above-mentioned wish of the creditor 'to be able to terminate in less serious cases.' An illustration: A agrees to build a house for B by 1 March. By this day some important items of work remain incomplete. Since time for completion is not normally of the essence, A may under Art. 9:301 PECL not terminate the contract.[229]

According to Dutch law A would have had the right to terminate the contract, as may be gathered from paragraph (1) of Art. 6:265 of the Civil Code: '*Every* failure of a party in the performance of *one* of his obligations

228 O. Lando and H. Beale (eds), Comment on Art. 9:301 under A, o.c., p. 409.

229 See O. Lando and H. Beale (eds), Illustation 3) to Art. 8:104, o.c., p. 368. See also Illustration 2) to Art. 8:106, o.c., p. 374.

gives the other party the right to terminate the contract in whole or in part, unless the failure, given its special nature or minor importance, does not justify the termination or the consequences flowing therefrom.'[230] Quite a few recent decisions of the Dutch Supreme Court confirm the rule that Non-Performance does nót have to be 'Fundamental in order to legitimise termination of the contract.[231]

This rule has been challenged in Dutch legal literature[232] along the following lines:

– termination should be a 'subsidiary' remedy to be employed only if other remedies do not help the aggrieved creditor;
– the non-performance on which termination is based should be 'proportional' to this far-reaching remedy so that the availability of this remedy should – as in Art. 9:301 PECL – hinge upon the non-performance being 'fundamental'.

Both lines of critique have, however, been rejected by the Dutch Supreme Court.[233]

Art. 9:103 PECL is not in line with Dutch law on the additional requirement of a 'fundamental' non-performance.

In my opinion this discrepancy does, however, nót exist insofar as far as the

230 See also *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6*, p. 1005.

231 See for instance 24 November 1995, *Nederlandse Jurisprudentie* 1996, 160 *(Tromp/Regency)*, 27 November 1998, *Nederlandse Jurisprudentie* 1999, 197, 5 March 1999, *Nederlandse Jurisprudentie* 1999, 444, 22 October 1999, *Nederlandse Jurisprudentie* 2000, 208 and 4 February 2000, *Rechtspraak van de Week* 2000, 44.

232 See notably F.B. Bakels, *Ontbinding van wederkerige overeenkomsten*, diss. Leiden 1993, p. 260 ff and T. Hartlief, *Ontbinding*, diss. Groningen 1993, p. 183 ff, J.H. Nieuwenhuis, *Vernietigen, ontbinden of aanpassen: wat is het lot van teleurstellende overeenkomsten, Weekblad voor Privaatrecht, Notariaat en Registratie* 6164 and 6165 (1995), T. Hartlief and M. Stolp, *De ontbinding wegens tekortkoming aan banden gelegd: de eisen van subsidiariteit en proportionaliteit als nieuw referentiekader* in: J. Smits and S. Stijns (eds), *Remedies in het Belgische en Nederlandse contractenrecht*, Antwerpen/Groningen 2000, p. 245 ff and M. Stolp, *De bevoegdheid tot ontbinding ex art. 6:265 lid 1 BW in het licht van de subsidiariteit en proportionaliteit, Nederlands Tijdschrift voor Burgerlijk Recht* 2000, p. 352 ff.

233 'Subsidiarity' has been expressly rejected as a requirement for termination in its decisions of 24 November 1995, *Nederlandse Jurisprudentie* 1996, 160 *(Tromp/Regency)* and 4 February 2000, *Rechtspraak van de Week* 2000, 44; the requirement 'proportionality' has in my opinion been rejected in its decision of 22 October 1999, *Nederlandse Jurisprudentie* 2000, 208 if only insofar as this requirement implies that the obligation should in the sense of Art. 8:103 under (a) PECL be such that strict compliance with it is of the essence.

above-mentioned plea for 'subsidiarity' of the remedy termination of the contract is concerned: as Art. 9:103 PECL and the European Principles at large simply do not provide either that the aggrieved creditor may only terminate the contract if other remedies do not help him, there is no discrepancy on this point.[234]

This discrepancy dóes, however, exist as for the above-mentioned aspect of the 'proportionality' of the non-performance to the remedy termination of the contract: the PECL-requirement for termination that non-performance is 'fundamental' (Art. 9:301 PECL) does imply that it is 'proportional' to this far-reaching remedy.[235] The illustration quoted above – A agrees to build a house for B by 1 March. By this day some important items of work remain incomplete – may be used to exemplify this discrepancy: when the European Principles apply, A, as we have seen, does nót have the right to terminate the contract,[236] whereas, if Dutch law were to apply, A would have had this right.

Yet some remarks qualifying this discrepancy with regard to the requirement for a 'fundamental' non-performance must also be made here:

– Insofar as there is according to Dutch law a need for the aggrieved party to serve a notice on the non-performing party in order to put the latter into breach (see the Articles 6:81-83 of the Dutch Civil Code), there cannot, as we have seen, be a 'failure in the performance of an obligation'

234 See for a different approach C.E. Drion, *Kroniek van het vermogensrecht, Nederlands Juristenblad* 2000, p. 499.
See for a provision where termination of the contract for non-performance actually ís a 'subsidiary' remedy: Art. 3 paragraph (5) of Directive 1999/44/EC of the European Parliament and Council of 25 May 1999 concerning certain aspects of the sale of and guarantees for consumergoods. As this Directive allows the Member States of the European Union to apply provisions safeguarding the interests of consumers which are more strict than those of the Directive itself (see Art. 8 paragraph (2)), Art. 6:265 of the Dutch Civil Code may still allow for the right of consumers to terminate the contract for non-performance right away.

235 See for another provision where termination of the contract for non-performance hinges on its 'fundamental' character Art. 3 paragraph (6) of the Directive mentioned in the previous note. As this Directive allows the Member States of the European Union to apply provisions safeguarding the interests of consumers which are more strict than those of the Directive itself (see Art. 8 paragraph (2)), Art. 6:265 of the Dutch Civil Code may still allow for the right of consumers to terminate the contract in cases where non-performance is nót fundamental (see C.E. Drion, l.c. and N.J.H. Huls and R.H. Stutterheim, *Kroniek van het consumentenrecht, Nederlands Juristenblad* 2000, p. 540).

236 See O. Lando and H. Beale (eds), Illustration 3) to Art. 8:104, o.c., p. 368. See also Illustration 2) to Art. 8:106, o.c., p. 374.

('tekortkoming in de nakoming van een verbintenis') before the expiry of the additional period for performance fixed in this notice.[237] As Non-Performance under the Principles cannot hinge upon such a notice,[238] the 'extra'-requirement in the European Principles for a 'Fundamental' Non-Performance may in these cases up to a certain extent be a matter of optical illusion.[239]

– An element of optical illusion may also lie in the fact in Dutch law the remedy termination of the contract is only available in case of non-performance of obligations arising from a so-called 'synallagmatic' contract, which is defined as a contract where each of the parties assumes an obligation in order to obtain the performance the other party obliges itself to (see paragraph (1) of Art. 6:261 of the Dutch Civil Code);[240] therefore it is already from the very outset more likely that the breached obligation will be one strict compliance with which is of the essence of the contract and thus also more likely that the non-performance would have been 'fundamental' (see Art. 8:103 PECL) under the European Principles; under these Principles termination of the contract is nót limited to cases of non-performance of obligations arising from synallagmatic contracts, so that the requirement that non-performance may also be just a matter of compensation.

– An element of optical illusion may also lie in the fact that the Principles of European Contract Law, as we have seen, have been drafted primarily to meet the needs of the international business community.[241] The long distances involved in the return of goods which are not in conformity with inter-

237 See the decisions of the Dutch Supreme Court of 20 september 1996, *Nederlandse Jurisprudentie* 1996, 748 and 27 november 1998, *Rechtspraak van de Week* 1998, 224 and *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6, Invoering Boeken 3, 5 and 6*, Deventer 1990, p. 1248.

238 See O. Lando and H. Beale (eds), Comment to Art. 8:106 under A, o.c., p. 373.

239 See O. Lando and H. Beale (eds), Notes to Art. 8:103 under 3), o.c., p. 367 and J.M. Smits and P.L.P. Meiser, o.c., p. 477.

240 See paragraph (2) of Article 6:261 for an extension of the rules pertaining to 'synallagmatic' contracts to other juridical relationships aiming at reciprocal performance between the parties.

241 See O. Lando and H. Beale (eds), l.c. and O. Lando, *Is codification needed in Europe? Principles of European Contract Law and the relationship to Dutch law*, in: *European Review of Private Law* 1: 158 ff, 1993.

national contracts may therefore also account for the fact that termination of the contract is limited to cases where this non-conformity is 'fundamental'.[242]

– In cases of delay in performance which is not fundamental where the aggrieved party has given a notice fixing an additional period of time of reasonable length for performance, it may terminate the contract at the end of the period of notice (see the Articles 8:106 paragraph (3) and 9:301 paragraph (2) PECL). Thus the aggrieved party may in these cases simply skip the requirement of a 'fundamental' non-performance by giving the above-mentioned notice. The Dutch leading case on termination of the contract for non-performance, the decision of the Dutch Supreme Court of 24 November 1995 *(Tromp/Regency)*[243] may illustrate the point: Tromp sells a plot of land to Regency for a price of *f* 240.000, the land and the money to be transferred not later than 6 March. When Regency fails to pay this purchase price on time, Tromp on 12 May gives a notice fixing an additional period for payment by Regency till 18 May. When Regency also fails to pay on 18 May, Tromp terminates the contract for non-performance and, according to the Dutch Supreme Court, he may do so.
If the European Principles would have applied the outcome would probably have been the same, as Tromp by virtue of Art. 8:106 paragraph (3) PECL might have terminated the contract *regardless* of the weight of Regency's non-performance.

Damages for non-performance are *grosso modo* more readily available

The first Article of the Section 5 of Chapter 9 on Damages and Interest, Art. 9:501, runs as follows: 'The aggrieved party is entitled to damages for loss caused by the other party's non-performance which is not excused under Art. 8:108.'

242 P. Schlechtriem, *Uniform Sales Law, The UN-Convention on Contracts for the International Sale of Goods*, Vienna 1986, p. 76: 'The decisive consideration was probably that the delivery of substitute goods practically always requires the return of defective goods and, therefore, is as serious to the seller as an avoidance (i.e. the CISG-term for termination for fundamental non-performance) of the contract.'

243 See *Nederlandse Jurisprudentie* 1996, 160.

The above-mentioned requirements for damages – 'Non-Performance', its 'Inexcusability' under Art. 8:108 PECL, 'Loss' and 'Causality' – resemble its Dutch counterparts,[244] respectively:
– 'failure in the performance of an obligation' ('tekortkoming in de nakoming van een verbintenis') in Art. 6:74 of the Civil Code;
– its 'imputability' to the debtor ('toerekenbare' tekortkoming) in the Articles 6:75-77 of the Code;
– 'loss' ('schade') in the Articles 6:95 and 6:96 of the Code;
– 'causality' as elaborated in Art. 6:98 of the Code.

Yet these requirements for damages may nót be identified:

– When there is according to Dutch law a need for the aggrieved party to serve a notice on the non-performing party in order to put the latter into breach (see the Articles 6:81-83 of the Dutch Civil Code), there can not be a 'failure in the performance of an obligation' ('tekortkoming in de nakoming van een verbintenis') before the expiry of the additional period for performance fixed in this notice.[245] Under the Principles of European Contract Law, however, as there is no need for the aggrieved party to serve a notice on the non-performing party in order to put the latter into breach,[246] 'Non-Performance' cannot hinge upon such a notice. Therefore the Principles differ from Dutch law in that notice of non-performance is nót a condition for claiming damages.[247]

– The conditions for 'Excusability' under Art. 8:108 PECL differ from those for *force majeure* ('overmacht', 'niet-toerekenbare' tekortkoming) in the Articles 6:75-77 of the Civil Code notably in that the PECL-concept of 'impediment' is nót as wide and open as its Dutch counterpart ('onmogelijkheid' or 'verhindering') which also includes cases where performance would only 'cause the debtor unreasonable effort or expense.'[248]

244 See for a general survey of the conditions for and consequences of damages for non-performance according to Dutch law: H.B. Krans, *Schadevergoeding bij wanprestatie*, diss. Leiden 1999.

245 See the decisions of the Dutch Supreme Court of 20 september 1996, *Nederlandse Jurisprudentie* 1996, 748 and 27 november 1998, *Rechtspraak van de Week* 1998, 224 and *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6, Invoering Boeken 3, 5 and 6*, Deventer 1990, p. 1248.

246 See O. Lando and H. Beale (eds), Comment on Art. 8:106 under A, o.c., p. 373.

247 See O. Lando and H. Beale (eds), Notes to Art. 9:501 under 3) (a), o.c., p. 437

248 See for instance the decisions of the Dutch Supreme Court of 2 May 1976, *Nederlandse Jurisprudentie* 1977, 73 and 27 June 1997, *Nederlandse Jurisprudentie* 1997, 641.

– The requirement for damages 'Loss' is different from its Dutch counterpart, 'schade' (Articles 6:74 and 6:95 of the Civil Code), in that the non-pecuniary loss for which damages are also recoverable (see Art. 9:501 paragraph (2) under (a) PECL), includes more than Art. 6:106 of the Dutch Civil Code would allow for, as may be gathered from the following Illustration to Art. 9:501 PECL: 'A books a package holiday from B, a travel organisation. The package includes a week in what is described a spacious accommodation in a luxury hotel with excellent cuisine. In fact, the bedroom is cramped and dirty and the food is appalling. A is entitled to recover damages for the inconvenience and loss of enjoyment he has suffered.'[249]

– The requirement for damages 'Causality' is elaborated in the European Principles in a way different from its Dutch counterpart. Under the PECL 'Causality' is equated with 'Foreseeability': 'The non-performing party is liable only for loss which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as the likely result of its non-performance, unless the non-performance was intentional or grossly negligent' (Art. 9:503 PECL). This provision is in line with the CISG (see Art. 74), the Unidroit-Principles of International Commercial Contracts (see Art. 7.4.4) and with the former Dutch Civil Code (see the Articles 1283 and 1284). Its Dutch counterpart in the present Civil Code, Art. 6:98, provides for a rather vague rule[250] for Causality, which does not even mention 'Foreseeability': 'One is liable for loss only if it related to the event giving rise to liability so as to imputable to it as a consequence, taking also into consideration the nature of the liability and of the loss.' The point is not that Art. 6:98 of the Civil Code precludes 'Foreseeability' of the loss as a criterion for damages,[251] but that other criteria for damages – notably 'the nature of the liability and of the loss', mentioned in Art. 6:98 of the Civil Code - may be used as well so that a party may also be liable for a loss it could not foresee.[252] Dutch legal literature has, however, advocated to read

249 O. Lando and H. Beale (eds), Illustration 7) to the Comment to Art. 9:501, o.c., p. 436.

250 This vagueness has to do with the wide applicability of Art. 6:98 including liability for tort, from which field of law this Article has originated: see notably the decision of the Dutch Supreme Court of 20 March 1970, *Nederlandse Jurisprudentie* 1970, 251. The rule contained in Art. 6:98 has been applied by this Court in the field of contractual liability only since its decision of 13 November 1987, *Nederlandse Jurisprudentie* 1988, 210 and only in few instances.

251 See for instance Asser-Hartkamp 4-I, *De verbintenis in het algemeen*, Deventer 2000, nr 435a.

252 See J.M. Smits and P.L.P. Meiser, o.c., p. 479.

the criterion 'the nature of the liability' (Art. 6:98) in cases of contractual liability as 'Foreseeability'.[253]

Insofar as 'Foreseeability' is used by Dutch law as the criterion for damages, it still remains to be seen whether it is determined from the perspective of 'the time of the conclusion of the contract', as Art. 9:503 PECL as a rule has it, or from the time of non-performance: Dutch legal literature is divided on the issue.[254] 'The time of the conclusion of the contract' (Art. 9:503 PECL) seems the better time to determine foreseeability by, as it realizes 'the underlying idea that the parties, at the conclusion of the contract, should be able to calculate the risks and potential liability they assume by their agreement.'[255] Insofar as the non-performance was intentional or grossly negligent, Dutch law and the European Principles are in line with one another in that an indemnity may be awarded even though the non-performing party could not reasonably have foreseen the magnitude of his liability.[256]

The above-mentioned differences with regard to the requirements for damages have – with the possible exception of the requirement 'Causality' – in common that damages may be recovered more easily under the Principles than under Dutch law. It remains, however, te be seen whether this also holds true for the concept 'damages' itself.

Damages: a clear-cut measure, the 'expectation-interest'; not as much 'abstract' assessment of damages as under Dutch law

Art. 9:502 PECL – 'The general measure of damages is such as will put the aggrieved party as nearly as possible into the position in which it would have been if the contract had been duly performed' – does not constitute a deviation from Dutch law. The 'expectation interest'-basis of damages expressed here, is widely accepted in European legal systems[257] and corresponds with Dutch law.[258] This basis of damages may, however, only be gathered from Dutch Civil Code itself, from Art. 6:277: 'Where a contract has

253 See notably H.B. Krans, o.c., p. 136 ff.

254 See Asser-Hartkamp, l.c. and H.B. Krans, l.c.

255 See P. Schlechtriem, *Uniform Sales Law, The UN-Convention on Contracts for the International Sale of Goods,* Vienna 1986, p. 97. See also H.B. Krans, o.c., p. 130.

256 See O. Lando and H. Beale (eds), Comment to Art. 9:503 under B, o.c., p. 442.

257 See O. Lando and H. Beale (eds), Notes to Art. 9:502 under 1), o.c., p. 440.

258 See *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6,* Deventer 1981, p. 1035 ff.

been terminated (…), the party whose failure in performing the obligation has been the cause of it, is liable for the loss the other party suffers in that *the contract has not been reciprocally performed* but terminated.' This rule is not only rather implicit but also to be found at a peculiar place in the Code, Section 6.5.5 on 'Synallagmatic contracts.'
The general measure of damages laid down in Art. 9:502 PECL is elaborated in the European Principles for some cases of non-performance in that it is equated with the difference between the contract price and the price of the substitute transaction where the aggrieved party has made such a cover transaction, and with the current price for the performance if it has not made such a transaction:

– 'Where the aggrieved party has terminated the contract and has made a substitute transaction within a reasonable time and in a reasonable manner, it may recover the difference between the contract price and the price of the substitute transaction (…)' (Art. 9:506 PECL);
– 'Where the aggrieved party has terminated the contract and has not made a substitute transaction but there is a current price for the performance contracted for, it may recover the difference between the contract price and the price current at the time the contract is terminated (…)' (Art. 9:507 PECL).

These rules on assessment of damages are, as may be gathered from the Articles 7:36 and 7:37 of the Civil Code, not unknown in Dutch law, but some differences must also be noted:

– Whereas the Articles 9:506 and 9:507 PECL are to be applied to contracts in general, the above-mentioned Articles of the Dutch Civil Code are confined to just Sales. One general Article of the Code on 'Assessment of Damages', Art. 6:97 – 'The judge assesses damages in the manner corresponding best to their nature' – may, however, be put to use to attain the goals set out in the Articles 9:506 and 507 PECL: it allows not only for the so-called 'concrete' way of assessing damages, followed in Art. 9:506 PECL, but also for the so-called 'abstract' way of assessment,[259] set by Art. 9:507.

259 See *Parlementaire Geschiedenis van het nieuwe Burgerlijk Wetboek, Boek 6,* Deventer 1981, p. 339 and, as for the 'abstract' way of assessing damages in Art. 9:507 PECL, O. Lando and H. Beale (eds), Notes to Art. 9:507 under 1), o.c., p. 450.

– According to Art. 9:506 PECL the difference between the contract price and the price of the substitute transaction may be recovered only if the aggrieved party has terminated the contract first and made the substitute transaction afterwards. This particular sequence of acts, which is also required from the aggrieved party under the CISG (see Art. 75) and the Unidroit-Principles of International Commercial Contracts (see Art. 7.4.5), is not required by Art. 7:37 of the Dutch Civil Code.

– According to Art. 9:507 PECL, as under CISG (see Art. 76) and the Unidroit-Principles of International Commercial Contracts (see Art. 7.4.6), the current price to be taken into consideration is the price 'at the time the contract is terminated', whereas, according to Art. 7:36 of the Dutch Civil Code, the current price 'at the time of the non-performance' [260] is to be taken into account. Dutch law has refrained from the time of termination as the time of reference, as this remedy may under Dutch law not only be brought about by notice[261] to the non-conforming party but also by ruling of a court (see Article 6:267) and this latter route does take a considerable period of time.[262]

– Last but not least, whereas the aggrieved party may under the European Principles recover the difference between the contract price and the current price for performance only if it 'has not made a substitute transaction' (Art. 9:507), it may according to Dutch law also do so it hás made such a transaction.[263]

This latter right of the aggrieved party under Art. 7:36 of the Civil Code to recover the difference between the contract price and the current price for the performance even if it has made a substitute transaction may reflect the

260 See also the decision of the Dutch Supreme Court of 28 January 1977, *Nederlandse Jurisprudentie* 1978, 174.

261 This notice differs from the one in the Principles of European Contract law in that it: has to be a written notice (see paragraph (2) of Art 6:267 of the Civil Code), whereas under the Principles 'any notice may be given by any means, whether in writing or otherwise, appropriate to the circumstances' (paragraph (1) of Art. 1:303 on Meaning of Terms); must have reached the non-performing party in order to be effective (see paragraph (3) of Art. 3:37 of the Code), whereas under the Principles 'its failure to arrive does not prevent it from having effect' (paragraph (4) of Art. 1:303).

262 See Asser-Schut-Hijma, *Koop en ruil*, Zwolle 1994, nr 484.

263 See the decision of the Dutch Supreme Court of 6 March 1998, *Nederlandse Jurisprudentie* 1998, 442.

importance Dutch law attaches to 'abstract' assessment of damages, the importance of which is also exemplified by Art. 6:97 of this Code.
This Dutch tendency to attach importance to the 'abstract' way of assessing damages may also account for the following discrepancy in the field of Interest for Delay in Payment of Money:

– If payment of a sum of money is late, the aggrieved party is under Dutch law entitled to no more (and no less) than a specific form of 'abstract' assessment of its damages, consisting in the so-called 'legal' interest, i.e. the interest rate fixed by a government regulation (see the Articles 6:119 and 120 of the Civil Code);

– Under the European Principles the aggrieved party is also entitled to a form of 'abstract' assessment of its damages – 'the average commercial bank short-term lending rate to prime borrowers prevailing for the contractual currency of payment at the place where payment is due' (paragraph (1) of Art. 9:508 PECL) – but it 'may in addition recover damages for any further loss so far as these are recoverable under this Section' (paragraph (2) of Art. 9:508 PECL); an Illustration to this additional right of the aggrieved party under the Principles which is denied to it by Dutch law: 'C agrees to lend *f* 200.000 to D to purchase a business at a price equal to that sum from E. Under the contract of sale, the terms of which are known to C, time of payment is of the essence. At the last moment C refuses to advance the money and D is unable to obtain funds in time. E terminates the contract and sells his business to F for *f* 300.000, its true value. D is entitled to damages from C for the loss of the contract.'[264]

264 O. Lando and H. Beale (eds), Illustration 2) to the Comment to Art. 9:508 under C, o.c., p. 451 ff.

VII. Conclusions

Are the Principles of European Contract law better than Dutch contract law?
If such a far-reaching conclusion may be based on the limited number of subjects presented in this paper, I think they are.
The European Principles of Contract Law are in my opinion better than Dutch contract law in that they:

– provide on the whole for more explicit, informative and clear-cut rules: see the Articles 2:107 (Promises Binding without Acceptance), 2:201 (Offer) paragraphs (1) and (3), 2:211 (Contracts not Concluded through Offer and Acceptance), 2:301 (Negotiations Contrary to Good Faith), 4:102 (Initial Impossibility), 4:105 (Adaptation of the Contract) paragraphs (1) and (2), 4:108 (Threats), 4:109 (Excessive Benefit or Unfair Advantage), 4:110 (Unfair Terms not Individually Negotiated) paragraph (1), 4:117 (Damages) paragraphs (1) and (2), 6:109 (Contract for an Indefinite Period), 6:111 (Change of Circumstances) paragraphs (1) and (2) under (a), (b) and (c), 8:103 (Fundamental Non-Performance), 8:108 (Excuse Due to an Impediment), 9:102 (Non-monetary Obligations) paragraph (2) under (a), (b) and (c), 9:502 (General Measure of Damages), 9:506 (Substitute Transaction) and 9:507 (Current Price) PECL;

– tend to uphold contracts in more cases: see the Articles 2:101 (Conditions for the Conclusion of a Contract) paragraph (1), 2:102 (Intention) in combination with Art. 5:101 (General Rules of Interpretation) paragraph (3), 2:209 (Conflicting General Conditions), 4:103 (Mistake as to Facts or Law) in combination with Art. 4:106 (Incorrect Information), 4:104 (Inaccuracy in Communication), 5:101 (General Rules of Interpretation) paragraph (2) and 9:301 (Right to Terminate the Contract) PECL;

– tend to leave more room to the parties to the contract to negotiate or decide for themselves with regard to problems arising instead of leaving these matters to the court: see notably Art. 6:111 (Change of Circum-

stances) paragraph (2) and also the Articles 4:112 (Notice of Avoidance) and 9:303 (Notice of Termination) paragraph (1) PECL (see for an exception to this tendency *infra*).

This is off course not to say the Principles of European Contract law are better in every respect:

– Art. 4:109 (Excessive Benefit or Unfair Advantage) PECL fails to provide for the autonomous power of the party which has gained the advantage to prevent avoidance by making a proposal to the disadvantaged party which removes adequately the prejudice this party would suffer if the contract were to be continued.

– Art. 6:109 (Contract for an Indefinite Period) PECL, which has just been praised as providing for a more explicit, informative and clear-cut rule, may also be branded for extending the right to end contracts unilaterally by giving notice to contracts which have been intended by the parties to last forever;

– Art. 9:102 (Non-monetary Obligations) paragraph (2) under (d) PECL may be branded as only directed towards finding an intermediate position between the European law systems.

These flaws in the European Principles are rather incidental.
However, these Principles are in my opinion on the whole inferior to Dutch law in that they do not make special provision for consumers: see notably the Articles 4:110 (Unfair Terms not individually Negotiated) and 9:102 (Non-monetary Obligations) paragraph (2) under (d) PECL.

Register of Articles
Principles of European Contract Law (PECL)