Principles of European Law
Study Group on a European Civil Code

Mandate Contracts
(PEL MC)

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and the Drafting Committee approved by the
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Foreword

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

Both groups have undertaken to ascertain and formulate European standards of 'patrimonial' law for the Member States of the European Union. The Commission on European Contract has achieved this for the field of general contract law *(Lando and Beale* [eds.], Principles of European Contract Law, Parts I and II combined and revised, The Hague, 2000; *Lando/Clive/Prüm/Zimmermann* [eds.], Principles of European Contract Law Part III, The Hague, 2003). These Principles of European Contract Law (PECL) have been adopted with adjustments by the Study Group on a European Civil Code to take account of new developments and input from its research partners. The Study Group has itself dovetailed its principles with those of the PECL, extending their encapsulation of standards of patrimonial law in three directions: (i) by developing rules for specific types of contracts; (ii) by developing rules for extra-contractual obligations, i.e. the law of non-contractual liability arising out of damage caused to another (tort/delict), the law of unjustified enrichment, and the law of benevolent intervention in another's affairs *(negotiorum gestio);* and (iii) by developing rules for fundamental questions in the law on mobile assets – in particular transfer of ownership, security for credit, and trust.

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

The working methods of the Commission on European Contract Law and the Study Group on a European Civil Code were likewise quite similar. The Study Group, however, has had the benefit of Working (or Research) Teams – groups of younger legal scholars under the supervision of a senior member of the Group (a Team Leader) which undertook the basic comparative legal research, developed the drafts for discussion and assembled the extensive material required for the notes. Furthermore, to each Working Team was allocated a consultative body – an Advisory Council. These bodies – deliberately kept small in the interests

of efficiency – were formed from leading experts in the relevant field of law who are representative of the major European legal systems. The proposals drafted by the Working Teams and critically scrutinised and improved in a series of meetings by the respective Advisory Council were submitted for discussion on a revolving basis to the actual decision-making body of the Study Group on a European Civil Code, the Co-ordinating Group. Until June 2004 the Co-ordinating Group consisted of representatives from all the jurisdictions belonging to the EU immediately prior to its enlargement in Spring 2004 and in addition legal scholars from Estonia, Hungary, Norway, Poland, Slovenia and Switzerland. Representatives from the Czech Republic, Malta, Latvia, Lithuania and Slovakia joined us after the June meeting 2004 in Warsaw.

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

Work on this series of Principles of European Law had begun long before the European Commission published its Communication on European Contract Law (in 2001), its Action Plan for a more coherent European contract law (in 2003), and its follow-up Communication "European Contract Law and the revision of the *acquis:* the way forward" (in 2004). These documents for their part were published before we formed the Network of Excellence, together with other European research groups and institutions, which have been collaborating in the preparation of an Academic Common Frame of Reference with the support of funds from the European Community's Sixth Research Framework Programme. This network first published an outline edition of its research results: as a first step, in 2008, an interim outline edition *(von Bar/Clive/Schulte-Nölke et al.* [eds.], Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Interim Outline Edition, Munich 2008); and, with revisions and additions, a final outline edition in 2009 *(von Bar/Clive/Schulte-Nölke et al.* [eds.], Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition, Munich 2009). A final and full edition was published later in 2009 *(von Bar/Clive,* Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full Edition, Munich 2009). The texts laid

before the public by the Study Group on a European Civil Code are integrated in these latter texts. However, the extensive comparative law introductions and the translations of the articles of the Book or Part concerned into the other languages of the Member States are only being published in the PEL Series. Moreover, there are occasionally small discrepancies between the model rules published in this series and those of the Draft Common Frame of Reference because each publication within the PEL Series is conceived and prepared as a self-contained treatment of the field while in the consolidated composite DCFR text certain provisions could be trimmed. Repetitions could be avoided. It was also possible to respond to criticism which had been made of the model rules in the PEL Series and which had convinced us of the need to make changes.

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

Osnabrück, September 2012 *Christian von Bar*

Our Sponsors and Donors

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

Our thanks go first of all to the *Deutsche Forschungsgemeinschaft (DFG),* which has supplied the lion's share of the financing for the first phase of this project, including the salaries of the Working Teams based in Germany and the direct travel costs for the meetings of the Coordinating Group and the numerous Advisory Councils. The work of the Dutch Working Teams was financed by the *Nederlandse Organisatie voor Wetenschappelijk Onderzoek (NWO).* Further personnel costs were met by the Flemish *Fonds voor Wetenschappelijk Onderzoek-Vlaanderen (FWO),* the *Onassis-Foundation,* the Austrian *Fonds zur Förderung der wissenschaftlichen Forschung, Norges forskningsråd* (the Research Council of Norway) and the *Fundação Calouste Gulbenkian.* From the middle of 2005 funds were made available to us under the mantle of the 'CoPECL' Network of Excellence established under the European Union's Sixth Framework Programme for Research and Technological Development.

The work of the Austrian working team was financed by the Austrian *Fonds zur Förderung der wissenschaftlichen Forschung* (FWF) and the European Commission's Sixth Framework Program for Research and technological Development.

In addition we have consistently been able to fall back on funds made available to the respective organisers of the eighteen week long sittings of the Coordinating Group by the relevant university or other sources within the country concerned. It is therefore with the deepest gratitude that I must also mention the *Consiglio nazionale forense* (Rome) and the *Istituto di diritto privato* of the *Università di Roma La Sapienza,* which co-financed the meeting in Rome (June 2000), which followed our inaugural meeting in Utrecht (December 1999). The session in Salzburg (December 2000) was supported by the Austrian *Bundesministerium für Bildung, Wissenschaft und Kultur,* the *Universität Salzburg* and the *Institut für Rechtspolitik* of the *Universität Salzburg.* The discussions in Stockholm (June 2001) were assisted by the *Department of Law, Stockholm University,* the *Supreme Court Justice Edward Cassel's Foundation* and *Stiftelsen Juridisk Fakultetslitteratur (SJF).* The meeting in Oxford (December 2001) had the support of *Shearman & Sterling,* the *Hulme Trust, Berwin Leighton Paisner* and the *Oxford University Press (OUP).* The session in Valencia (June 2002) was made possible by the *Asociación Nacional de Registradores de la Propiedad, Mercantil y Bienes Muebles,* the *Universitat de València,* the *Ministerio Español de Ciencia y Tecnología,* the *Facultad de Derecho* of the *Universitat de València,* the *Departamento de Derecho Internacional, Departamento de Derecho Civil* and the *Departamento de Derecho Mercantil "Manuel Broseta Pont"* of the *Universitat de València,* the law firm *Cuatrecasas,* the *Generalitat Valenciana,* the *Corts Valencianes,* the *Diputación Provincial de Valencia,* the *Ayuntamiento de Valencia,* the *Colegio de Abogados de Valencia* and *Aran-*

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Osnabrück, September 2012 *Christian von Bar*

Preface to this volume

These Principles were developed to be included in the Draft Common Frame of Reference (DCFR). They were intended to fill a gap that existed in the works of the Working Team on Commercial Agency, Franchising and Distribution Contracts – of which Odavia Bueno Díaz was a member – and those of the Working Team on Service Contracts – of which I was a member, and in the Principles of European Contract Law (PECL). The PECL contain provisions on representation, dealing with the effects of contracts concluded in the name and on behalf of another party, but do not contain any specific rules governing the internal relationship between the party that is being represented (the principal) and the party representing the principal (the agent). Similarly, the Principles on Commercial Agency, Franchising and Distribution Contracts (included in the DCFR as Book IV.E) more or less presuppose specific provisions on mandate contracts. The Principles on Service Contracts (included in the DCFR as Book IV.C) contain some rules that could be applied to the relationship between the principal and the agent, but these Principles were not developed with this relationship in mind. The relation between these Principles on Mandate Contracts and the DCFR is further explained in Section III of the General Introduction of this Book. In the preceding Section II the relation between these Principles and the Principles of European Law on Service Contracts is explained.

The Working Team on Mandate Contracts, consisting only of Odavia and me, started its work in the spring of 2005, when the volumes on Commercial Agency, Franchising and Distribution Contracts and on Service Contracts were still being developed (the first of these was published in 2006, the second in 2007). It soon became clear that the Working Team would be under a lot of pressure to produce results quickly – the Interim Outline Edition of the DCFR ultimately was published already in 2008, which implied that the major part of the work – consisting of the development of the national reports and the construction on the basis thereof of the major policy choices to be taken and the development of the Articles to be included in the DCFR – would have to be finished as early as the end of 2007 (although the final preparation of this volume would take significantly more time).

Given the time pressure, we were very fortunate to receive the help of the national reporters and, at a later stage, the advisors to prepare our drafts. Both the national reporters and the advisors were willing to come to Amsterdam for extensive discussions on these drafts and the policy decisions that needed to be presented to the Coordinating Committee of the Study Group on a European Civil Code. We are indebted to them for their valuable and generous help. Thanks also go out to Kristen Zetzsche of International Writers for checking the English texts (any remaining errors of course are our responsibility), to my (former) assistants Anouk de Morree, Lotte van der Laan, Daniela Baidoo and Esmée Hoogenkamp for their assistance throughout the project, and to Justus Könkkölä, Michel Séjean, Martin Schmidt-Kessel and Christina Dierks, Cecilia Carrara and Adele Pascale, Monika Jurčová and Marianna Novotná, and Jeanette Andersson for the Finnish, French, German, Italian, Slovak, and Swedish translations of the Principles. The Dutch and Spanish translations were obviously prepared by us.

Amsterdam, September 2012 *Marco Loos*

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