

General Principles of Contract Law in Transnational Legal Instruments

The past 20 years saw a multiplication of ‘model codes’ with the purpose of harmonizing contract law. On a European level, these include the Principles of European Contract Law (PECL), the Principles of Existing EC Contract Law, or ‘Acquis Principles’ (ACQP), the Draft Common Frame of Reference (DCFR), the Feasibility Study (FS) of the so-called ‘Expert Group’ and, finally, the 2011 Commission Proposal for a Regulation on a Common European Sales Law (CESL). On a global level, the UNIDROIT Principles of International Commercial Contracts (PICC) have to be mentioned.

All of these instruments spell out a number of ‘fundamental’, ‘general’ or ‘underlying principles’ of contract law – a feature which distinguishes them from most national private law codifications and the major international treaty in the field of contract law, the Vienna Convention on Contracts for the International Sale of Goods (CISG).

The exact number and the precise content of these principles differ across the instruments. However, all of the texts deal, in one way or another, with at least some of the five principles that I will discuss in this presentation: freedom of contract; the binding effect of contracts; good faith and fair dealing; freedom from formalities; and the duty to co-operate. More often than not, these principles are given particular prominence by being laid down at the very outset of the respective instrument. The very first three articles of the CESL, for example, concern ‘freedom of contract’, ‘good faith and fair dealing’ and ‘cooperation’.

I intend to highlight some of the issues pertaining to the five principles just mentioned. The concern is not so much with their substantive content. I will rather explore whether such principles should be codified at all and, if so, how they can be given the fullest possible effect. In order to do so, I will briefly sketch the background against which the drafters of the PECL and the other instruments worked, ie the earlier national and transnational approaches to codifying general principles of contract law. Thereafter, I will analyse the relevant provisions in the PECL and the subsequent transnational instruments, so as to identify the difficulties encountered in, and the benefits that can be derived from, the codification of general contract law principles in transnational contract law regimes. I will finally attempt to make some structural and formal suggestions for the codification of such principles with the aim of maximising their impact.