

Tenancy Law in Europe and the Principles of European Contract Law

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I. Tenancy Law, Contracts and the Principles of European Contract Law

Tenancy Law and the Principles of European Contract Law is a subject of a very special kind: Is it a subject at all? To begin, a few observations on the Principles of European Contract Law are required.

The Principles of European Contract Law¹ have been prepared by the Commission on European Contract Law². This Commission is a private creation of academics from all the Member States of the European Community; with the accessions of new Member States to the Community, also the Commission on European Contract Law has adopted new members. This commission has started its works in the early eighties of the twentieth century and has laboured under the chairmanship of the Copenhagen-based commercial lawyer Ole Lando. It has endeavoured to develop principles common to the contract laws of the Member States and has worked in parallel, sometimes in symbiosis, to the Unidroit group working on Principles of international commercial contracts.

The model for this enterprise are the Restatements of Law of the American Law Institute³, which aim at restating the rules of the common laws of the states of the American union. Despite this inspiration, the Commission on European Contract Law has always been aware of the great differences between the European and the American legal situations – on this side of the Atlantic an old continent with many different national codes, legal traditions, a far-reaching influence of the Roman law and a particular area largely dominated by English common law on the British Isles,

¹ See Lando/Beale (ed.), Principles of European Contract Law, Parts I and II, Combined and revised (2000); Lando/Clive/Prüm/Zimmermann (ed.), Principles of European Contract Law, Part III (2003); in German von Bar/Zimmermann (ed.), Grundregeln des Europäischen Vertragsrechts, Teile I und II, Deutsche Ausgabe (2002); in French Rouhette/de Lamberterie/Tallon/Witz, Principes du droit européen du contrat (2003).

² On the PECL see for instance Ole Lando, European Contract Law, American Journal of Comparative Law 31 (1983) 653-659; Oliver Remien, Ansätze für ein europäisches Vertragsrecht, Zeitschrift für Vergleichende Rechtswissenschaft 87 (1988) 105-122; Ulrich Drobniig, Ein Vertragsrecht für Europa, in: Festschrift für Steindorff (1990) 1141-1154; Denis Tallon, Vers un droit européen du contrat, in: Mélanges offerts à André Colomer (1993) 485-494.

³ For more information see the website at <http://www.ali.org>

on the other side of the ocean the states forming the United States of America which - with just one exception - once adopted old English common law. Contract law in America therefore can be supposed to be more uniform than in Europe, and can more easily be the subject of endeavours to restate it. The European task therefore nearly by necessity is more creative or, to put it another way, implies more choices to be made by the persons working on the restatement. Nevertheless, the Commission on European Contract Law has arrived at presenting its Principles in a form like the American Restatements: first, a black-letter-rule resembling a provision of a Code or Law, then a comment explaining the functioning of the proposed Principle or rule and demonstrating this with some – real or hypothetical – case illustrations, then a comparative note showing what the existing national laws are saying on the subject matter of the Principle at hand. The Commission on European Contract Law has presented its Principles of European Contract Law in three installments, in the years 1995, 1999 and 2003⁴. Thus, it has drafted some kind of a Contract Act with more than hundred articles.

The area covered is the general contract law and law of obligations. The Principles do not contain rules on specific contracts. In a relatively early stage, the Commission has made some check to see whether its rules would fit for some specific kinds of contract and the finding was positive. But the intention has not been to tackle problems which only arise for a certain kind of specific contract. Therefore, problems peculiar to tenancy law have not been in the focus of the Commission on European Contract Law and cannot have a prominent place in the Principles of European Contract Law. However, tenancy law mostly will have a relationship to general contract law and therefore the question what would be the relationship between the Principles and tenancy law rules arises. Of course, such a question can be answered only in the light of the respective tenancy law. One may argue whether there already is a European Contract Law, but it is clear that there is no or not yet a European Tenancy Law. Rather, even within Europe, the task to study tenancy law in a comparative perspective is a challenging one. Though the Member States have much in common and the acceding States are successively joining them in this communality, nobody will be surprised that distinctive differences exist in the field of real property and tenancy. As yet, the European Convention on Human Rights

⁴ See the references in note 1.

appears to have had only relatively slight effects on national tenancy law⁵. Indeed, the country reports presented in the framework of this project by the national reporters show this diversity, but also a number of discernible topics or fields of legal regulation in the area of tenancy which are common to many or at least a number of Member States present or future. These tenancy topics can be regarded in their relationship to the Principles of European Contract Law. Thus, we are not restricted to a comparison of merely one national tenancy law with the Principles of European Contract Law, but can analyze how the topics of national European tenancy laws interrelate to the Principles of European Contract Law proposed by Ole Landos Commission.

II. Topics of tenancy law and the PECL

1. Private autonomy and mandatory law

The PECL start with an affirmation of freedom of contract, Art. 1:102. In the first version of the Principles this had even been left out because it was considered as superfluous and self-evident, but later the express statement contained in the Unidroit-Principles has been adopted also by the PECL. However, even the PECL contain some, though very few mandatory rules. And Art. 1:103 acknowledges that national mandatory rules may be given effect to.

National tenancy law very often is dramatically different from the approach of the PECL. Tenancy law is one of the areas famous for containing mandatory provisions aimed at the protection of the tenant. The country reports paint an impressive tableau of its variety. It is also visible that the degree of intervention through mandatory rules varies from country to country. Some Member States even appear to renounce to mandatory tenancy law. However, the drafters of the PECL were well aware of some of these differences. In the introduction, it is expressly stated that “they do not make special provision for consumer contracts, which raise policy issues more appropriately determined by Community law and national legislation”. Thus, like other specific rules charged with considerations and disputes of economic and social policy, also the specific issues of tenancy law were left out. The divergence of PECL

⁵ See e.g. Remien, *Zwingendes Vertragsrecht und Grundfreiheiten des EG-Vertrages* (2003) 174ff.

and national tenancy law therefore is clear but due to the deliberate abstention of the drafters of the PECL to consider policy issues.

2. Distinctions between civil, consumer and commercial tenancy

The PECL do not make distinctions between general civil, commercial or consumer contracts. But whether a room is let for purposes of habitation or commercial use is a standard distinction in national tenancy regulations. Some countries like France have a special protective regime even for the commercial tenant. In case of tenancy for habitation, a distinction could be envisaged on the side of the landlord: do or should the protective provisions in favour of the tenant apply vis-à-vis any landlord or only in relation to commercial landlords? Though of much interest, the answer to this question of course is not within the ambit of the PECL. But it should be noted that Spain appears to distinguish between civil and commercial tenancy.

3. Form

The PECL champion freedom from form requirements. Art. 2:101 (2) says: "A contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form. The contract may be proved by any means, including witnesses." Some national tenancy laws at least appear to say something different. This applies, for instance, to France, Italy and Slovenia. However, at least in France the landlord cannot invoke the lack of form⁶. German law has the peculiar rule of § 550 BGB, according to which a tenancy for more than a year is considered to be for indeterminate time if not concluded in writing. Thus, form requirements in tenancy may be not so much prerequisites of validity but a way to provide security for the tenant. This reduces the contrast to the approach of the PECL. And further, the PECL in their note on formal requirement in Art. 2:101 (2) expressly give a hint to national form requirements for specific contracts⁷.

4. Duration of the contract

with some references.

⁶ French report p. 15 on question 4.

⁷ Note 4 c) on Art. 2:101, p. 142f.

The duration of the contract is an economically very important question which, however, appears to come only rarely into the focus of studies of general contract law⁸. Duration of the contract in tenancy has two aspects: first, the initial time period for which the contract is concluded; second, the ending of the contract, namely the eviction of the tenant by the landlord. Both need consideration.

As to the initial period of time, one may distinguish between contracts for a definite and contracts for an indefinite period. The PECL in Art. 6:109 tackle the contract for an indefinite period: "A contract for an indefinite period may be ended by either party by giving notice of reasonable length." In the comment, it is expressly made clear that the principle does not cover contracts for which statutory provisions of notice apply⁹. Whether a contract is concluded for definite or indefinite time is not specifically dealt with by the PECL. National tenancy laws are quite different. There are tenancy laws which restrict recourse to tenancies for a definite time and favour tenancies for an indefinite time. And also others considering tenancies to be concluded for a definite time may protect the tenant against a non-prolongation by the landlords by giving him a right to renewal of the tenancy. Clearly, the PECL cannot contribute very much to this question.

The ending of the tenancy contract by one of the parties is the other duration related issue, also addressed in Art. 6:109 PECL and the mentioned comment B. The ending of the tenancy by the landlord leads – or at least is intended to lead – to the eviction of the tenant who thereby in general is losing his home. Therefore, many national tenancy laws restrict ending of the tenancy by the landlord. However, national laws are far from uniform. For instance, Germany has strong restrictions, while Switzerland is very landlord friendly. A very far-reaching protection of the tenant can even have a constitutional dimension because it may violate the fundamental rights property guarantee. The PECL of course do not deal with these aspects.

⁸ For some considerations on the duration of contracts in a general perspective see Remien, *Zwingendes Vertragsrecht und Grundfreiheiten des EG-Vertrages* (2003) 417-460.

⁹ Comment B, p. 316.

5. Rent-control

In contracting, the price very often is of decisive importance. Social market economies adhere to the principle of freedom of prices which is a part of the broader principle of freedom of contract. The PECL in Art. 1:102 expressly state the principle of freedom of contract; in doing so, they also refer to the “content”, and the price has to be considered as part of the content of the contract. Thus, the PECL may be said to adhere to the principle of freedom of prices. The price is expressly mentioned in Art. 6:104 on the determination of the price. However, this is a rule which is destined to apply only if the parties were not clear on the price to be paid. Thus, it does not say anything on the price that the law permits to charge, but only on the price to be paid if the contract has a lacuna as to the price. In the PECL, Art. 4:109 on excessive benefit or advantage is of special importance for the price. It may be considered as the usury-rule of the PECL. As to other contracts, the excessive benefit or advantage rule of Art. 4:109 PECL could also be applied to tenancies. This would give some protection to the tenant.

However, not rarely national tenancy laws go much further and establish specific rent-control regimes. A distinction between initial and subsequent control must be made. Some countries, such as Sweden and Ireland, have specific rules controlling the amount of the rent when the contract is made. This is a clear restriction of the freedom of prices. Other countries do not go so far or at least not in general. Rent-control can also come into play at a subsequent stage – when the rent shall be increased. Here, many laws provide for restrictions protecting the tenant. All this is, notwithstanding Art. 4:109 PECL, unfamiliar to the PECL. In case of rent-control, there is a clear contrast between PECL and national tenancy laws.

6. Standard-terms control

Standard-terms control, addressed in Case 18, in the PECL is expressly dealt with in Art. 4:110. The rule there is oriented at the example of the EC-directive 93/13 on unfair terms in consumer contracts¹⁰. However, it is different in at least two respects: First, Art. 4:110 is not restricted to consumer contracts but is of general applicability.

Thus, it could cover consumer as well as commercial tenancies. Second, Art. 4:110 only allows a party to “avoid a term” which is unfair. Thus, under the PECL the unfair term is not automatically without effect. It is questionable, whether this is in line with the EC-directive and the ECJ-judgment in the Océano case¹¹. And, in my view, it is also questionable whether this approach of the PECL is reasonable and really assures protection against unfair terms. But as far as tenancy is concerned, it can at least be stated that here Art. 4:110 PECL brings a rule which can clearly apply to tenancy contracts and there fulfill an – as a rule – useful function.

7. Non-performance and remedies

With contracts, parties pursue economic or other objectives. Due performance of the contract is important for attaining these objectives. Therefore, in the case of any shortcoming in the performance of a contract the legal regime regulating the consequences of non-performance and the relevant remedies of the aggrieved party are important. One may distinguish between the general concept of non-performance and the particular remedies which may be available.

a) Concept of non-performance

The PECL use a unitary concept of non-performance, meaning that whenever a party does not perform any obligation under the contract there is “non-performance”. The concept covers defective, late, premature, or totally lacking performance and includes violations of accessory duties. Art. 1:301 (4) gives a definition of the term “non-performance”: “‘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”. In general, there is not distinction between different kinds of non-performance, though there are some specificities for failure to accept, non-conforming tender and delay in payment of money¹².

¹⁰ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/29-34.

¹¹ ECJ 27.6.2000 – joint cases C-240/98 to C-244/98 (Océano Grupo editorial SA ./ Murciano Quintero), Rep. 2000 I-4941.

¹² See Comment D on Art. 1:301, on p. 124.

This is indicated by the broad formula of Art. 8:101, which makes a distinction only between excused and non-excused non-performances and states:

“(1) 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.

(2) 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 and damages.

(3) A party may resort to any of the remedies set out in Chapter 9 to the extent that its own act caused the other party’s non-performance.”

Whether there is a non-performance thus depends on the content of the obligation to perform. Chapter 7 of the PECL gives a number of rules for some specific questions such as place of performance, time of performance, early performance, order of performance, alternative performance, performance by a third person, form of payment, currency of payment, appropriation of performance, costs of performance and also deals with the case of a performance – whether property or money - which is not accepted. These are questions of general law of obligations having relatively little potential for conflict with specific tenancy rules. However, for any case of contract and thus also for tenancies the important question of what constitutes proper performance arises. In tenancy law, one problem can be the quality of the premises. Generally this will depend on the agreement of the parties, but tenancy law may in case of leases for purposes of habitation prescribe some basic requirements, such as habitability. The country reports, however, show that is not the case everywhere, e.g. apparently not in England and Wales. To put it generally, national tenancy law may regulate whether there is a non-performance or not, and the results could vary from Member-State to Member-State even if the PECL were applicable.

If there is non-performance, the aggrieved party may in accordance with Art. 8:101 (3) resort to remedies. What about the remedies of Chapter 9 PECL and tenancy law?

b) A variety of remedies

Chapter 9 of the PECL enlists and regulates the “Particular Remedies for Non-Performance”.

aa) Right to performance or Enforced performance

A party to a contract has a right to performance and under the PECL can, as a rule, also enforce this right. This is stated for monetary obligations in Art. 9:101 and for non-monetary obligations in Art. 9:102. For non-monetary obligations, however, Art. 9:102 (2) contains some specific limitations and (3) erects a time limit. The exceptions of Art. 9:102 (2) are, in sketchword, impossibility and illegality (lit. a)), unreasonable effort or expense (lit. b)), provision of services or work of a personal character (lit. c)) and cover transaction (lit. d)). The latter, the cover transaction, could in the light of tenancy law constitute a problem. Two different situations might be envisaged: the landlord does not put the dwelling at the disposal of the tenant, the landlord (or the tenant) do not properly repair the premises.

In the first case, one may ask whether the landlord can refer the tenant to making a cover transaction. It may be that this would, under English equity principles, not be the case because a dwelling might be considered as unique and therefore specific performance generally be granted. But the PECL are not explicit on this question. Arguably, however, lit. d) should – practically - never apply in a case where the rooms are not put at the disposal of the tenant. He should be entitled to enforced performance. Though, lit. d) constitutes some danger for the value of the contractual right of the tenant.

In the second case, the landlord (or vice versa the tenant) may refuse to repair or renovate and try to invoke lit. d). Thus the other party would be left with caring for repair or renovation and only have a claim in damages against his contract partner. Art. 9:102 (1) expressly says that it applies also to situations of “the remedying of a defective performance”. However, this does not appear to rule out application of (2). Generally speaking, repair or renovation in most cases can certainly be obtained from another party than the landlord (or tenant). Therefore, the exception of (2) lit. d)

would generally appear to apply. Though the other remedies remain unaffected, this seems to severely curtail the rights of the party to the contract, the tenant (or vice versa the landlord). In my view, the suitability of Art. 9:102 (2) lit. d) for tenancy cases is doubtful. Landlord and tenant have entered into a longterm relationship where one of the parties should not be allowed to refer the other one to the market to make a cover transaction for a part of his performance, such as repair or renovation.

bb) Withholding performance

Art. 9:201 regulates withholding performance, the well-known *exceptio non adimpleti contractus*. It is easily envisageable that this remedy can have its importance for tenancy. At first glance, no specific problems appear to arise.

cc) Termination

The remedy of termination on the PECL is regulated in Artts. 9:301ff. Under the PECL, termination is a self-help remedy. This is in line with many European laws but also in contrast to others. Thus, under the PECL no specific clause *résolutoire* would be necessary. The special rules of Member State tenancy laws on ending the contract have already been referred to above.

dd) Price reduction

The PECL also acknowledge the remedy of price reduction, the classic *actio quanti minoris*, and even generalize it for any kind of contract. Thus, the PECL can deal with Case 24. Art. 9:401 (1) sentence 1 says that the party “may reduce the price”. Further, (2) speaks of a “party which is entitled to reduce the price”, and (3) of a “party which reduces the price”. Thus, no court intervention is necessary, but the reduction of the price rather is effected by the aggrieved party resorting to this remedy and therefore will have to be analyzed as a self-help remedy. This is in line with certain Member States laws. However, it may be noted that just in the case of tenancy there are also deviations. For instance, while Germany in general has the same approach, in case of tenancy price reduction because of a defect of the thing

which is let is according to § 536 (1) BGB effected ex lege. And there are also some European laws which do not know price reduction in case of tenancy.

ee) Damages

Artr. 9:501ff. PECL provide detailed rules on damages and interest. Damages are according to Art. 9:501 (1) available for “loss caused by the other party’s non-performance which is not excused under Article 8:108”. Art. 8.108 PECL is deliberately and expressly modelled upon Art. 79 CISG¹³. Culpa is not required¹⁴. But, anyway, the results of Artt. 8.108 PECL/79 CISG and a culpa liability with reversed burden of proof and objective standards will more or less be the same. One may, however, ask about the relationship to objective guarantee liability. This can be found in tenancy law, at least in Germany in § 536a BGB. Under that rule, the landlord is liable for defects which existed at the time the contract was concluded even if he did not cause them and could not know of them. One may argue that in such a case the defect is beyond the control of the landlord and that he therefore would be excused under Art. 8.108. Then, the PECL would be more lenient to the landlord. It may be that the situation is an extreme one, but it appears that the effect of application of the PECL to tenancy cases here is not entirely clear.

For the remedy of damages, another interesting question arises, too. Under Art. 9:501 (2) loss for which damages are recoverable includes also “non-pecuniary loss” (lit. a)). The Comment points to “pain and suffering, inconvenience and mental distress resulting from the failure to perform”¹⁵. On the level of existing European Community private law, a parallel to Art. 9:501 (2) lit. a) has in the meantime arisen in the Simone Leitner case of the ECJ. In this case on the package tours directive 90/314/EEC¹⁶ the ECJ has ruled that the damages provision of article 5 of the directive “is to be interpreted as conferring, in principle, on consumers a right to compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday”¹⁷. Austrian

¹³ Note 1 on Art. 8:108, p. 383.

¹⁴ The note on p. 383f. does not even mention the concept of liability for culpa.

¹⁵ Comment E in Art. 9:501, on p. 436.

¹⁶ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ 1990 L 158/59.

¹⁷ ECJ 12.3.2002 (Simone Leitner ./ TUI Deutschland), Rep. 2002 I-2631.

law, which had refused “compensation for non-material damage caused by loss of enjoyment of the holidays (‘entgangene Urlaubsfreude’)”, therefore was not in line with the Court’s interpretation of the directive. The decision, which is perfectly in line with § 651f (2) BGB of the very developed German tourism law, is somewhat doubtful¹⁸, but it may nevertheless be that it will be extended to other damages rules of European law. What does all this mean for tenancy law? Compared to the state of affairs in countries where non-material damage is not generally recoverable, it might mean a considerable extension of the remedy of damages. Perhaps, to the loss of enjoyment of the holidays the loss of the enjoyment of the apartment, the garden or the balcony may easily be comparable. Art. 9:501 (2) lit. a) may contain potential for new disputes between landlord and tenant.

8. New party to the contract

Member States tenancy laws contain specific rules on a change of the party to the contract, on both sides: on the side of the tenant where the spouse or successor may become the new party to the contract against the will of the landlord, and on the side of the landlord where in case of sale of the property the new owner may become the party to the existing tenancy. These are specific tenancy rules protecting the tenant respectively his family or loved ones. The PECL, though now in the new Chapter 12 dealing with “Substitution of new debtor: transfer of contract”, do not deal with these specific problems but concentrate on substitution effected by will of the parties. Thus, the PECL do not envisage these questions.

9. Pre-emption right, solidary liability, statutory pledge

Member States tenancy regulations have specific provisions on preemption rights, solidary liability and statutory pledge and probably other questions. The PECL say nothing on all this, and cannot do so: the general contract rules of the PECL cannot meet any peculiar problem of certain specific contracts, even not of the important tenancy contract.

¹⁸ See Remien, Folgen von Leistungsstörungen im europäischen Vertragsrecht der EG-Richtlinien und Verordnungen, in: Europäisches Vertragsrecht im Gemeinschaftsrecht/European Contract Law in Community Law, edited by Schulte-Nölke/Schulze/Bernardeau (2002), p.139-150 (145f.).

10. Procedure: conciliation

There are Member States tenancy laws providing for conciliation. The PECL in Art. 1:301 (2) treat courts and arbitral tribunal alike, but leave the parties entirely free to resort to courts or arbitration. Thus, the PECL specifically address also arbitrators, but do not impose a specific way of dispute resolution.

III. Result: Topics for the comparison of tenancy laws in Europe

It is not even ten years since European private law has become a subject of broader discussion in legal academia and European legal policy. Tenancy law until now has mostly been neglected in this discourse¹⁹. It appears that in a certain sense this is not only politically wise but also in line with the EC-Treaty, which states in Art. 295 EC-Treaty that the Eigentumsordnung remains unaffected. Nevertheless, tenancy law in Europe merits discussion. First, from harmonization or even unification of laws their comparison has to be distinguished, and comparing the divergent European laws clearly is instructive also in the field of tenancy. Second, in case European contract law will further advance, then the compatibility of common European rules with existing Member States rules for specific fields and among them tenancy could become important. In the course of this study, some important topics of tenancy law have become apparent and so have some problems of the compatibility – and suitability – of PECL and Member States tenancy laws. Sure, on many classical questions of tenancy law the PECL do not say a word. However, this is due to the general orientation of the PECL deliberately excluding questions of social policy and mandatory law. These cases do not indicate incompatibility but just show the present state of development of, on the one hand, European private law, and, on the other hand, national tenancy policies and regimes. For the PECL, the topics where doubts concerning the suitability of the PECL for tenancy questions have arisen may invite to reconsider these principles or reappraise their sphere of application. For Member States tenancy laws, the topics and the PECL may invite to reconsider specificities of the tenancy law regime. In tenancy law, there is a call for a certain amount of protection, but also to have a functioning market with its instrument, the contract.

¹⁹ A noteworthy exception is Stabentheiner (ed.), *Mietrecht in Europa* (Wien 1996).