TULANE EUROPEAN AND
CIVIL LAW FORUM

VOLUME 21 2006

The UNIDROIT Principles of International Commercial Contracts 2004 in Comparative Perspective*

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* This is the English version of an article first published in German in *Zeitschrift für Europäisches Privatrecht* 13 (2005), 264 ff. It appears in the present issue of the *Tulane European and Civil Law Forum* in honour of Shaël Herman as a token of friendship and with my very best wishes.

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I. THE UNIDROIT *PRINCIPLES* AND SIMILAR INITIATIVES

A. The UNIDROIT Principles *1994*

In 1980, the UNIDROIT Secretariat set up a working group to draft a set of principles on international commercial contracts.[1] UNIDROIT, the International Institute for the Unification of Private Law, had been founded in Rome in 1926 as an organ of the League of Nations; since the Second World War it has operated as an independent intergovernmental organisation. It is supported by some 60 countries, including all of the world's leading industrialized nations. As UNIDROIT celebrated its 75th

1. On details, and for background information, see Michael Joachim Bonell, *An International Restatement of Contract Law* (2d ed. 1997) 1 ff.

anniversary, the present Secretary General, Herbert Kronke, has outlined both the achievements and the failures of the organisation as well as its institutional strengths and weaknesses.[2] Its most important contribution in the field of private law, so far, was undoubtedly the preparation of a uniform international sales law.[3] The *Principles of International Commercial Contracts* constitute a similarly ambitious project. The above-mentioned working group, led by Michael Joachim Bonell of Rome, was made up of close to twenty members, representing all the world's regions.[4] After fourteen years of work, the group produced the *Principles of International Commercial Contracts 1994*.[5] In a code-like form, they laid down 120 'principles',[6] covering the topics of formation of contracts, validity (including defects of consent), interpretation and content, performance, non-performance and remedies for non-performance. These were preceded by a number of 'general provisions'.[7] The Principles, soon to be translated into other languages,[8] were divided into seven chapters. The text of each article was followed by a commentary including illustrations. The structure of the publication was thus undoubtedly inspired by the American *Restatements*. Comparative notes, however, were lacking. Only occasionally general references were made to the law prevailing in 'many' or 'most' countries. Throughout one can sense a desire to draft texts which are as readily comprehensible as possible. Great weight was also laid on ensuring a maximum degree of flexibility in the application of the *Principles*. This is why, for

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2. Herbert Kronke, 'Ziele—Methoden—Kosten—Nutzen: Perspektiven der Privatrechtsharmonisierung nach 75 Jahren UNIDROIT', (2001) *Juristenzeitung* 1149 ff.

3. This project was first tackled under the auspices of UNIDROIT in 1929 and has led to the 1964 Hague Sales Laws (Uniform Law on the Formation of Contracts for the International Sale of Goods and the Uniform Law on the International Sale of Goods). Building on these foundations, the United Nations Commission on International Trade Law (UNCITRAL)—a committee of the United Nations General Assembly—drafted the Vienna Sales Convention of 1980 (*United Nations Convention on Contracts for the International Sale of Goods*). See Peter Schlechtriem's short introduction in *idem* and Ingeborg Schwenzer (eds.), *Commentary on the UN Convention on the International Sale of Goods* (2d (English) ed. 2005) 1-11.

4. For details, see UNIDROIT (ed.), *Principles of International Commercial Contracts* (1994) xiii f.

5. UNIDROIT (ed.), *Principles of International Commercial Contracts* (1994).

6. On the use of this term (which, given the way in which the terms 'principles' and 'rules' are used in general methodological discourse, is a misnomer), see R. Zimmermann, 'Principles of European Contract Law and Principles of European Tort Law: Comparison and Points of Contact', *in* H. Koziol & B. Steininger (eds.), *European Tort Law 2003* (2004) 9.

7. Freedom of contract; no form required; binding character of contracts; mandatory rules; exclusion of modification by the parties; interpretation and supplementation of the *Principles*; good faith and fair dealing; usage and practices; notice; definitions.

8. For Germany, see UNIDROIT (ed.), *Grundregeln der internationalen Handelsverträge* (1995).

example, the *Principles* oblige the parties to observe a general duty of good faith and fair dealing in international trade;[9] and it is in this sense that reference is made, again and again, to the standards of the 'reasonable man' or 'reasonableness'.

Since their publication, the UNIDROIT *Principles* have received considerable attention internationally. Thus, they have been the subject of a number of symposia and conferences;[10] they have generated a substantial amount of literature;[11] they have influenced national law reform projects; they have played a role in the drafting of international commercial contracts; and they appear to be increasingly used by arbitral tribunals and, occasionally, even by national courts of law.[12] However, the 1994 *Principles* do not cover the whole of the law of contract. A number of important questions (primarily those which, to a German lawyer's way of thinking, belong to the 'general part' of the law of *obligations*, as opposed to the law of contract) have been left untouched, a factor which occasionally prevented the *Principles* from being applied in practice.[13]

B. The UNIDROIT Principles *2004*

It was therefore only natural that UNIDROIT's Governing Council, in 1997, set up another working group, the primary task of which was to consider a number of additional topics. This working group, led again by Michael Joachim Bonell, was made up of seventeen ordinary members

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9. Art. 1.7 *Principles of International Commercial Contracts* (PICC). Unless otherwise indicated, all references to the PICC are to the 2004 edition. The numbering of most of the PICC provisions between the 1994 and 2004 editions has remained unchanged; this also applies to Art. 1.7.

10. Cf., for example, the contributions in *American Journal of Comparative Law* 40 (1992) 541 ff. and in *Tulane Law Review* 69 (1995) 1121 ff.; Michael Joachim Bonell & Sandro Schipani (eds.), *Principi per i contratti commerciali internazionali e il sistema giuridico latinoamerico* (1996); Michael Joachim Bonell & Franco Bonelli (eds.), *Contratti commerciali internazionali e Principi UNIDROIT* (1997); Michael Joachim Bonell (ed.), *A New Approach to International Commercial Contracts: The UNIDROIT Principles of International Commercial Contracts* (1999).

11. A comprehensive bibliography for the *Principles* in general, and for particular sections, can be found in Michael Joachim Bonell, *The UNIDROIT Principles in Practice: Case Law and Bibliography on the Principles of Commercial Contracts* (2002); cf. also Wolfgang Ernst & Reinhard Zimmermann, *Zivilrechtswissenschaft und Schuldrechtsreform* (2001), 739 ff.

12. For details, see Michael Joachim Bonell, 'UNIDROIT Principles 2004—The New Edition of the Principles of International Commercial Contracts adopted for the International Institute for the Unification of Private Law' (2004) 9 *Uniform LR* 6 ff. with comprehensive references. For case law on the *Principles*, cf. also the references in Bonell, *supra* note 11; Eckart Brödermann, 'Die erweiterten UNIDROIT Principles 2004: Ein willkommenes "Werkzeug" für die Vertragsgestaltung und für Schiedsverfahren', (2004) 50 *Recht der internationalen Wirtschaft* 721 ff.

13. Bonell, *supra* note 12, at 17.

and six 'observers', the latter representing 'interested international organisations' such as Uncitral and the Court of Arbitration of the International Chamber of Commerce in Paris.[14] Ten of the ordinary members had been members of the original working group on the 1994 *Principles*. The *UNIDROIT Principles of International Commercial Contracts 2004* are the result of the deliberations of this second working group. They constitute a new edition of the 1994 *Principles* which have been amended by several chapters and sections but, for the rest, have only been slightly revised. The 1994 *Principles*, in other words, have now been replaced and superseded by the 2004 *Principles*.

C. Comparable Initiatives, in Particular, the Principles of European Contract Law

1. Differences and Common Ground I

The UNIDROIT *Principles* are not the only project for the trans-national harmonisation of contract law. In particular, they compete with the *Principles of European Contract Law* (PECL) of the so-called Lando-Commission[15] and also with the (Gandolfi) preliminary draft of a European Contract Code.[16] The latter two initiatives aim at harmonisation which is geographically limited in scope and only concerns the European legal systems; moreover, they focus on the general law of contract (as opposed to the law of commercial contracts). However, as far as general approach, style of drafting, and manner of proceeding are concerned, PECL and the Gandolfi-draft stand in sharp contrast with each other.[17] The UNIDROIT *Principles* and PECL, in turn, very much resemble each other in these respects. Neither of them takes its cue from the one or other national model system (as does the

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14. For details, see UNIDROIT (ed.), *UNIDROIT Principles of International Commercial Contracts 2004* (2004) x f [hereinafter UNIDROIT Principles 2004].

15. Ole Lando & Hugh Beale (eds.), *Principles of European Contract Law*, Parts I and II (2000); Ole Lando, Eric Clive, André Prüm & Reinhard Zimmermann (eds.), *Principles of European Contract Law*, Part III (2003). On the latter, see Reinhard Zimmermann, 'Ius Commune and the Principles of European Contract Law: Contemporary Renewal of an Old Idea', *in* Hector MacQueen & Reinhard Zimmermann (eds.), *European Contract Law: Scots and South African Perspectives* (2006) 1 ff. The Principles of European Contract Law will be referred to as PECL (as has become customary) or as European Principles (in contradistinction to PICC, or UNIDROIT Principles).

16. Giuseppe Gandolfi (ed.), *Code Européen des Contrats: Avant-projet* Livre I (2000). An English translation by Harvey MacGregor is included in volume 8 of the *Edinburgh Law Review* (2004). On the Gandolfi Code, see Reinhard Zimmermann, 'Der "Codice Gandolfi" als Modell eines einheitlichen Vertragsrechts für Europa?' *in Festschrift für Erik Jayme*, vol. II (2004) 1401 ff.

17. See Zimmermann, *supra* note 16, at 1403 ff.

Gandolfi-draft); and both are, unlike the Gandolfi-draft, the result of a genuine group effort. Like the UNIDROIT *Principles*, PECL have taken the American *Restatements* as a template for their style of presentation[18] (appending, like the Restatements, also comparative notes to each article). In both projects different *rapporteurs* were responsible for the various chapters. Their reports and drafts were repeatedly discussed and criticized in plenary sessions, and they were refined and referred back for further revision. Both sets of Principles are drafted in a very similar style: it was deliberately attempted to avoid legal jargon and to render the provisions as easily intelligible as possible.

Both projects conceal the fact that they aim at formulating and systematically structuring legal rules behind the somewhat nebulous term '*principles*'.[19] In a whole variety of chapters these rules reach a level of specificity comparable to that of any national codification. This is true, in particular, of a number of chapters that have been drafted more recently. In this respect, therefore, both projects are comparable to the Gandolfi-draft (which, however, is the product of a much more verbose style of drafting).[20]

2. Connections

From the outset there were close personal ties between the Lando-Commission and the UNIDROIT working group. Along with Ole Lando and Michael Joachim Bonell, there were originally three further individuals who were members of both bodies. It was no coincidence, therefore, that the work of the Lando-Commission can also be traced to the early 1980s.[21] Part I of PECL was published in 1995,[22] one year after the first appearance of the UNIDROIT *Principles*. However, PECL initially covered only some of the subjects dealt with by UNIDROIT: general provisions, content and effects of contracts, performance, non-performance, and remedies for non-performance. Chapters on formation of contracts, validity, and interpretation were only added subsequently.

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18. Lando & Beale, *supra* note 15, at xxvi.

19. See *supra* note 6 and accompanying text.

20. See Zimmermann, *supra* note 16, at 1416 f. For a further example, see Reinhard Zimmermann, 'Restitutio in Integrum: Die Rückabwicklung fehlgeschlagener Verträge nach den Principles of European Contract Law, den UNIDROIT Principles und dem Avant-Projet eines Code Européen des Contrats', *in Privatrecht und Methode: Festschrift für Ernst A. Kramer* (2004) 752 f.

21. See Lando & Beale, *supra* note 15, at xi ff.

22. Ole Lando & Hugh Beale (eds.), *Principles of European Contract Law*, Part I (1995). For a discussion, see Reinhard Zimmermann, 'Konturen eines Europäischen Vertragsrechts' (1995) *Juristenzeitung* 477 ff.

An expanded, consolidated version of PECL appeared in 2000.[23] It also contained a section on agency and a regulation on contracts in favour of third parties, subjects that had not been covered by the UNIDROIT *Principles*. Moreover, the Lando-Commission had decided in 1995 to expand its field of operation,[24] and from 1997 began to address the topics of plurality of parties, assignment, substitution of a new debtor and transfer of contract, set-off, prescription, illegality, conditions, and capitalisation of interest. The UNIDROIT working group followed suit and, from 1998, pursued a similar agenda; it was able to draw on those parts of PECL that had already been published (agency, contracts for third parties) and also, occasionally, on the reports and preliminary drafts of the third Lando-Commission, established in 1996. Part III of PECL was published in 2003.[25] Unlike Parts I and II, Part III has not been integrated into the existing rules, and stands alongside the consolidated version of Parts I and II.

3. Differences and Common Ground II

As far as the substance of the rules contained in PECL and the UNIDROIT *Principles* is concerned, there is a very considerable degree of correspondence.[26] The wording of a variety of provisions is identical; in many other cases one finds only differences of formulation. Sometimes the same idea is implemented by means of a different technique. Only occasionally have the two projects pursued different policies and, even then, this has been predominantly in matters of detail. According to Bonell's analysis, about two-thirds of the provisions in the UNIDROIT *Principles* find almost literal equivalents in PECL; and even where there are differences they are, predominantly, of a technical nature.[27] Some of the differences that are not merely technical can be explained on the basis of the distinct objectives pursued by each instrument. Thus, for example, Art. 1:201 PECL obliges the parties to a contract to act in accordance with good faith and fair dealing, while in terms of Art. 1:7 PICC the parties are obliged to act in accordance with

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23. See *supra* note 15 and accompanying text.

24. Lando, Clive, Prüm & Zimmermann, *supra* note 15, at ix f.

25. *Supra* note 15 and accompanying text.

26. Arthur Hartkamp, 'Principles of European Contract Law', *in* Arthur Hartkamp, Martijn Hesselink et al. (eds.), *Towards a European Civil Code* (3d ed. 2004) 141 ff. also makes this point. Hartkamp was a member of both the Lando-Commission and the UNIDROIT working group.

27. Bonell, *supra* note 12, at 33 ff. A very helpful synopsis has recently been published by Michael Joachim Bonell & Roberta Peleggi, (2004) 9 *Uniform LR* 325 ff. Cf. also the introductory comments by both authors, (2004) 9 *Uniform LR* 315 ff.

good faith and fair dealing 'in international trade'. Similarly, while Art. 1:105 PECL obliges the parties to follow the usages and practices of the trade which would be considered generally applicable by persons in the same situation as the parties, Art. 1.9 PICC refers to usages and practices that are widely known to, and regularly observed in, international trade by parties in the particular trade.[28] None the less, considering these different aims and objectives (PECL European, PICC global; PECL covering the general law of contract, PICC relating only to commercial contracts) the extent to which the provisions of the two instruments correspond to each other is remarkable.[29] Obviously, much of what is considered fair and reasonable for commercial contracts can also be considered suitable for contracts in general (including consumer contracts) and vice versa. And it is just as obvious that rules which constitute a common core of European private law,[30] also prove to be acceptable outside of Europe.

II. PRESCRIPTION IN THE UNIDROIT *PRINCIPLES* AND THE EUROPEAN PRINCIPLES

A. Common Ground

In order to gain a better perception of the common ground and of the differences between the provisions of the recently added chapters and sections of both instruments, we will first consider the rules on prescription (chapter 10 PICC = chapter 14 PECL). The legal policy underlying these provisions is the same.[31] The law of prescription enables the debtor summarily to defend himself against a claim brought against him, and it does so because the claim may well be unfounded and because, as a result of the passage of time, it may have become impossible for the debtor to establish that fact. A period of prescription need not be very long, provided that the creditor has a fair chance to pursue his claim. At some stage, however, the debtor must be able to treat a matter as being indubitably closed. Hence, a short prescription period, the running of which depends decisively on reasonable discoverability, has to be combined with a maximum period. Apart from that, a prescription regime should display the greatest possible degree of uniformity. It is on these policy foundations that the rules on prescription

28. See further Bonell, *supra* note 12, at 34 f.

29. So, too, Hartkamp, *supra* note 26, at 142.

30. The restatement of such common core is one of the aims of the European Principles; see Lando & Beale, *supra* note 15, at xxvi. See generally Zimmermann, *supra* note 15, at 15 ff.

31. See generally Reinhard Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription* (2002), 76 ff.

in the UNIDROIT *Principles* and the European Principles have been based. Both provide for a general period of prescription of three years;[32] both ensure (albeit in different ways) that prescription does not run unless the creditor knows, or ought reasonably to have known, of the facts giving rise to his claim;[33] and both recognise a maximum period of ten years.[34] In all three points, both instruments correspond to the current of international development as well as to the approach adopted in the new German law of obligations.[35] But there are also many other points in which the two instruments accord with each other: on expiry of the period of prescription the relevant claim is not extinguished; the debtor is merely entitled to refuse performance[36] (i.e., prescription is not attributed a 'strong effect', but gives rise to a defence on the level of substantive law).[37] The commencement of judicial proceedings merely suspends the running of the period of prescription;[38] it does not, as under the old German law, lead to an 'interruption' of the period of prescription.[39] The same rule applies to arbitration proceedings.[40] *Force majeure* also gives rise to a suspension of prescription.[41] An acknowledgement of the claim resets the clock and the running of the period of prescription begins afresh.[42] Whatever has been performed in order to discharge a claim may not be reclaimed merely because the period of prescription had expired.[43] Finally, the parties can agree to shorten or lengthen the period of prescription, subject to a mandatory minimum period of one year and a maximum period of fifteen (UNIDROIT)[44] or thirty years (PECL).[45]

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32. Art. 14:201 PECL; Art. 10.2(1) PICC.

33. Art. 14:301 PECL; Art. 10.2(1) PICC.

34. Art. 14:307 PECL; Art. 10.2(2) PICC.

35. Reinhard Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives* (2005), 122 ff.

36. Art. 14:501 (1) PECL; Art. 10.9(1)-(2) PICC.

37. See Zimmermann, *supra* note 31, at 72 f.; Michael Joachim Bonell, 'Limitation Periods', *in* Arthur Hartkamp, Martijn Hesselink et al. (eds.), *Towards a European Civil Code* (3d ed. 2004) 527 f.

38. Art. 14:302 (1)-(2) PECL; Art. 10.5 PICC.

39. § 209 BGB (old version). For the options that are open to the legislator, see Zimmermann, *supra* note 31, at 117 ff.

40. Art. 14:302 (3) PECL; Art. 10.6 PICC.

41. Art. 14:303 PECL; Art. 10.8(1) PICC. The requirements for this ground of suspension are formulated almost identically (and in conformity with Art. 8:108(1) PECL and Art. 7.1.7 PICC).

42. Art. 14:401 PECL; Art. 10.4 PICC.

43. Art. 14:501(2) PECL; Art. 10.11 PICC.

44. Art. 10.3(1)(c) PICC.

45. Art. 14:601(2) PECL.

B. Differences

There is thus a very significant degree of common ground. But the list of differences in questions of detail is also long. The following overview highlights what appear to the present writer to be the most important of them; it follows the systematic structure of chapter 10 of the UNIDROIT *Principles*. A comparative evaluation is not facilitated by the fact that the commentary to the UNIDROIT *Principles* does not normally disclose the reason why its draftsmen chose to deviate from the solution adopted in the *Principles of European Contract Law* (or in other national or international documents), why a regulation of a particular problem was regarded as dispensable, etc. The commentary to the European Principles is much more discursive in character. This, as well as the drafting, and publication, of comparative notes is indicative of the more academic aims pursued by the European Principles. The draftsmen of the UNIDROIT *Principles*, on the other hand, appear to have had in mind primarily the practical utility of their work for judges, arbitrators and businessmen who are usually more interested in a compact volume with concise comments than in academic background considerations.

1. Terminology

One point is readily apparent at the first glance: both instruments employ a different terminology: while chapter 14 PECL carries the heading 'Prescription', chapter 10 PICC uses the term 'Limitation Periods'. And indeed, for a common lawyer the term 'prescription' (or 'extinctive prescription') has an odd ring in the present context.[46] He rather refers to 'limitation of actions'. As the term suggests, the English institution is procedural in nature: limitation does not affect the right (i.e., the substantive 'cause of action'), but merely the creditor's ability to pursue that right in court.[47] It is in order to escape these procedural connotations that the International Convention on Limitation Periods in the International Sale of Goods merely refers to 'limitation periods'.[48]

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46. 'Prescription' is a term used in the common law to denote the process by which limited rights of use over another's land (such as easements) may be acquired: Andrew McGee, 'England', *in* Ewoud H. Hondius (ed.), *Extinctive Prescription: On the Limitation of Actions* (1995) 135. On the distinction between *praescriptio extinctive* and *acquisitive* in the *ius commune*, see the references in Zimmermann, *supra* note 31, at 69 f. It is in this vein that Bonell is critical of the use the concept of 'prescription' in the European Principles: Bonell, *supra* note 37, at 521.

47. Characteristically, therefore, prescription is dealt with by Peter Birks (ed.), *English Private Law* (2000), as part of the chapter on civil procedure.

48. Convention on Limitation Periods in the International Sale of Goods 1974, amended by the Protocol of 11th April 1980; easily accessible in Oliver Radley-Gardner, Hugh Beale,

The UNIDROIT working group has followed suit. As a result, however, the chapter heading 'Limitation Periods' has become imprecise, for it does not only deal with the periods of prescription but also covers all the other rules of which a prescription regime is normally made up. Since the UNIDROIT *Principles*, like the European Principles, consider limitation to be a matter of substantive law,[49] the difference in terminology is not practically relevant.[50]

2. Point of Reference of the Prescription Rules

In terms of Art. 14:101 PECL, 'claims' are subject to prescription, while Art. 10.1 PICC, refers to 'rights governed by these Principles'. The scope of application of Art. 10.1 is wider, for it also covers 'the exercise of rights which directly affect a contract',[51] such as the right to terminate a contract or to reduce the purchase price. But it is open to doubt whether such a rule is really sensible. Take termination: both instruments provide that the right to terminate is lost if the aggrieved party does not give notice to terminate 'within a reasonable time' after it has, or ought to have, become aware of the non-performance.[52] There is thus a special time-bar (period of preclusion, or *Ausschlußfrist*) to which the rules on prescription (in particular those on renewal and suspension) do not in principle apply.[53] This period of preclusion will, as a rule, be much shorter than the period of prescription which would, therefore, be without practical effect. The same applies for the exceptional situation, envisaged in the commentary to Art. 10.1 PICC, that the 'reasonable time' is longer than the relevant period of prescription.[54] In this case, too, it is the period of preclusion that is relevant (presumably because it

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Reinhard Zimmermann & Reiner Schulze (eds.), *Fundamental Texts on European Private Law* (2003) 269 ff. Generally speaking, this (UNCITRAL) Convention should be treated with caution when it comes to harmonize the law of prescription, for it only refers to one specific type of claims, i.e., those arising from international contracts for the sale of goods. The UNIDROIT Principles, by contrast, cover contractual claims within the entire field of obligations. High priority must be given to the establishment of a prescription regime which is as simple, straight forward and uniform as possible: see, for details, Zimmermann, *supra* note 31, at 79 ff.

49. Lando, Clive, Prüm & Zimmermann, *supra* note 15, at 157 f.; Bonell, *supra* note 37, at 520 f. For a comparative and historical perspective, see Zimmermann, *supra* note 31, at 70 ff.

50. A further, purely terminological, point is that, whereas the European Principles use the familiar terms 'creditor' and 'debtor' throughout, the UNIDROIT Principles refer to 'obligee' and 'obligor'.

51. UNIDROIT Principles 2004, *supra* note 14, at 312; in German law, so-called *Gestaltungsrechte*.

52. Art. 9:303(2) PECL; Art. 7.3.2(2) PICC.

53. The point is specifically made in Lando, Clive, Prüm & Zimmermann, *supra* note 15, at 159; UNIDROIT Principles 2004, *supra* note 14, at 313.

54. UNIDROIT Principles 2004, *supra* note 14, at 313.

constitutes a *lex specialis*). Matters are somewhat different with regard to the right to reduce the purchase price. Neither PICC nor PECL recognise a period of preclusion in this case; under the PICC, incidentally, the purchaser only has a right to reduce the purchase price if such right has been conferred upon him by way of agreement with the seller.[55]

However, here too, there is no need for prescription. Take illustration 2 provided in the commentary to Art. 10.1 PICC:[56] *A* sells a tanker to *B* which, on delivery, turns out to be defective. Two situations can be envisaged. First, *B* has not yet paid the (full) purchase price. He should then still be able to reduce the price as long as *A* continues to be able to demand the price. If the period of prescription concerning *A*'s claim for the purchase price has expired, *B* can refuse to pay the whole price. Second, *B* has already paid an amount exceeding the (reduced) price that is proportionate to the decrease in value of the performance. In that case, his claim for restitution is subject to the general rules of prescription.[57]

3. Beginning of the Period of Prescription

According to the somewhat cumbersome provisions of Art. 10.2 PICC, the period of prescription begins to run 'on the day after the day . . .'.[58] It is not clear whether this corresponds to the commencement of prescription according to the European Principles; for on the one hand, the prescription regime of the European Principles has to be read in the light of the general provision on the computation of time in Art. 1:304 (3) PECL in terms of which periods of time expressed in days, weeks,

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55. This, incidentally, is a point with regard to which the UNIDROIT Principles appear to require revision. For there is no reason why a right to price reduction should not be granted in commercial transactions. The present position may be due to the influence of the common law (where a right to price reduction is also not recognized) on the UNIDROIT Principles. Admittedly, it must be taken into consideration that at least the practical effect of a price reduction can be achieved by the way in which the amount of damages is calculated. But, then, it must also be taken into account, at least as far as the Principles are concerned, that price reduction is more readily available to the purchaser than a claim for damages; see Art. 8:101 PECL and, concerning termination, Art. 7.1.7(4) PICC.

56. UNIDROIT Principles 2004, *supra* note 14, at 312 f.

57. This applies if the right to price reduction is not a *Gestaltungsrecht* such as the right to termination according to Art. 9:303(1) PECL. This, however, is unclear: see Art. 9:401(2) in conjunction with (1) PECL. Should the right to claim restitution depend on a notice of price reduction on the part of the purchaser vis-à-vis the seller, the European Principles would contain a defect in that the right to price reduction could then be claimed indefinitely; such a result is hardly sensible.

58. See, too, Arts. 10.2(2), 10.4(1) PICC.

months or years 'shall begin at 00.00 on the next day'.[59] There is no such general provision for calculating time periods in the UNIDROIT *Principles*. On the other hand, the systematic context reveals that Art. 1:304 (3) PECL only refers to periods of time fixed by contract.[60] It would be sensible for that provision also to be applied to statutory periods of time, something which the draftsmen of the European Principles do not, however, appear to have had in mind.[61]

4. The Systematic Place of the Discoverability Criterion

Under Art. 10.2 (1) PICC the general, three-year period of prescription runs from the day after the day on which the creditor knows, or ought to know, the facts as a result of which the creditor's right can be exercised. The European Principles, on the other hand, allow the period of prescription to run from the time when the debtor has to effect performance, but provide for a suspension as long as the creditor does not know, and could not reasonably know, of the identity of the debtor or of the facts giving rise to the claim. That prescription ought not to run against a creditor who cannot pursue his claim corresponds to the general maxim *agere non valenti non currit praescriptio*. As with the other applications of this maxim, we are dealing here with an exceptional situation. As a rule the creditor will know about his claim at the time it falls due. That, exceptionally, this was not so, is a matter to be raised, and established to the satisfaction of the court, by the creditor. The UNIDROIT *Principles* place this onus on the debtor and thus confront him with an unreasonably difficult task. For whether the damage to the creditor's house, the injury to the creditor's body, the consequences flowing from defective delivery, etc., were reasonably discoverable, or whether the creditor perhaps even had positive knowledge, are matters within the creditor's sphere and largely removed from the debtor's range of perception.[62] The way of proceeding adopted by the European Principles also considerably simplifies the structure of the prescription

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59. This, essentially, corresponds to Art. 3(1) of the European Convention on the Calculation of Time Limits of 16 May 1972.

60. The same applies to the commentary to Art. 1:304 PECL: Lando & Beale, *supra* note 15, at 132 f. The European Convention on the Calculation of Time Limits, in contrast, applies also to time limits which arise *ex lege*. In passing it might be added that Art. 1:304 PECL is also rather unhappily formulated in that it does not specify the day on the basis of which the 'next' day is to be established that is relevant for the running of the period.

61. See, for example, illustration 1 to Art. 14:203 PECL.

62. Lando, Clive, Prüm & Zimmermann, *supra* note 15, at 177; Zimmermann, *supra* note 31, at 106 f.

regime.[63] As has been pointed out above, a short period of prescription which revolves around reasonable discoverability has to be accompanied by a maximum period which is not tied to discoverability. The UNIDROIT *Principles* regard this maximum period as another period of prescription which runs alongside the general period of prescription, but which starts to run from a different date.[64] This second period of prescription requires to be regulated by special rules which can indeed be found in two different places within the UNIDROIT *Principles*. The first concerns the question of how far the parties may shorten the maximum period;[65] the second deals with the impact of an acknowledgment on the running of the maximum period.[66] According to the European Principles there is always only *one* period of prescription. As a rule, this will be the three-year period laid down in Art. 14:201 PECL. It runs from due date but can be extended (by way of suspension of the running of the period or by a postponement of its expiry) to no more than ten years.[67] The long-stop is thus turned into a maximum period for extension. It is a scheme that would appear to promote clarity and uniformity in prescription matters.[68]

5. Maximum Period

There is another difference between both sets of rules in that the UNIDROIT *Principles* provide for a uniform maximum period of ten years,[69] whereas the European Principles draw a distinction: thirty years in case of claims for personal injuries and ten years in other cases.[70] The first of these solutions has the advantage of uniformity. In favour of the second solution it can be said that it is increasingly regarded as unreasonable, internationally, to subject claims for personal injuries to a maximum period of only ten years.[71] The regulation provided in Art. 10.2

63. A different view is taken by Bonell, *supra* note 37, at 523, who considers the approach adopted by the UNIDROIT Principles to be 'more linear'.

64. Art. 10.2(2) PICC.

65. Art. 10.3(2)(b) PICC.

66. Art. 10.4(2) PICC.

67. Art. 14:307 PECL.

68. The draftsmen of the new German law of obligations appear to have been similarly unimpressed by these arguments and have taken account of the discoverability criterion in the same way, structurally, as the UNIDROIT Principles. For criticism, see Zimmermann, *supra* note 35, at 138 ff.

69. Art. 10.2(2) PICC.

70. Art. 14:307 PECL.

71. For Germany, see the regulation now adopted in § 199 II-IV BGB. For England, see the Law Commission's recommendations: Law Comm'n Report No. 270, *Limitation of Actions* (2001) 65 ff. (where it is recommended that personal injury claims ought not to be subject to a maximum period of prescription at all). Cf. further Ewoud Hondius, 'General Report', *in id.*

PICC can probably be explained on the basis that chapter 10 of the UNIDROIT *Principles* refers only to the exercise of rights 'governed by these principles', i.e., contractual rights. Chapter 14 of the European Principles, in contrast, has in mind the entire law of obligations and thus also applies to claims arising from wrongful acts.[72]

6. Special Rules for the Commencement of Prescription

Art. 14:203 PECL contains a rule specifically dealing with damages claims: commencement of the period of prescription is not dependent on the occurrence of damage. This clarifies the position for a practically very important situation. Illustration 2 to Art. 10.2 PICC,[73] appears to indicate that the draftsmen of the UNIDROIT *Principles* proceeded from the same assumption: for if the ability to pursue a claim were dependent on the occurrence of damage, the maximum period of prescription would, according to the facts provided in that illustration, not yet have expired. Furthermore, the UNIDROIT *Principles* lack a provision regulating the beginning of the period of prescription for continuing obligations to do or to refrain from doing something; yet such a provision would have been just as appropriate in the UNIDROIT *Principles* as it is in the PECL regime.[74]

7. Prescription of Claims Established by Legal Proceedings

Most national codes recognize a special period of prescription for claims established by judgment.[75] As a rule, that period is relatively long. This is appropriate in view of the fact that a claim which has been established by a court of law is as easily ascertainable as possible; it is not as susceptible to the 'obfuscating power of time'[76] as other claims are. Moreover the creditor has put it beyond doubt that he intends to pursue his claim; and the debtor, therefore, knows that he will still have to make performance. And, finally, the legal dispute between the parties has been conclusively decided; no longer does it constitute a source of uncertainty

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(ed.), *Extinctive Prescription: On the Limitation of Actions* (1995) 9 ff. and, generally, Zimmermann, *supra* note 31, at 99 ff. (suggesting a uniform period of 15 years).

72. Lando, Clive, Prüm & Zimmermann, *supra* note 15, at xvi, 158 f.

73. UNIDROIT Principles 2004, *supra* note 14, at 316.

74. Art. 14:203(2) PECL; on which, see Zimmermann, *supra* note 31, at 150 f.

75. Cf.*, e.g.*, § 197 I no. 3 BGB; Art. 268 *Astikos Kodikas*; Art. 311 I Portuguese *Código civil*; Art. 3:234 BW; Zimmermann, *supra* note 31, at 112 ff.; Law Comm'n, *supra* note 71, at 155 (which recommends that the general period of prescription should apply).

76. Bernhard Windscheid & Theodor Kipp, *Lehrbuch des Pandektenrechts* (9th ed. 1906) § 105, at 544.

and jeopardize the public interest.[77] Art. 14:202 PECL, therefore, provides for a period of prescription of ten years in this situation. This is the only special period of prescription recognized by the European Principles. The UNIDROIT *Principles* do not contain a corresponding provision.

8. Ancillary Claims

There is also no equivalent for Art. 14:502 PECL in the UNIDROIT *Principles*. According to this provision the period of prescription for a right to payment of interest, and other claims of an ancillary nature, expires not later than the period for the principal claim. There is a corresponding rule in German law as well as in a number of other legal systems.[78] It is based on the fact that the policy objectives pursued by the law of prescription would be undermined if the creditor could still demand payment of interest that may have become due on a claim for which the period of prescription has run out; for the debtor, in order to defend himself, might then be forced to go into the merits of the principal claim itself. The draftsmen of the UNIDROIT *Principles* deal with the prescription of ancillary claims in their commentary to Art. 10.2 PICC but give no indication as to why they consider a special rule on this issue to be dispensable.[79]

9. Renewal of the Period

Both instruments recognise that an acknowledgement of the claim on the part of the debtor entails what was traditionally called an interruption of prescription.[80] The European Principles refer to a 'renewal' of the period of prescription. An attempt at execution undertaken by the creditor, on the other hand, only leads to a renewal of the period of prescription, in this case the ten-year period of Art. 14:202 PECL, according to the European Principles (Art. 14:402 PECL).[81] The UNIDROIT *Principles* lack a corresponding rule; this is probably related

77. On the purposes of prescription, see, along these lines, Zimmermann, *supra* note 31, at 63 f.

78. § 217 BGB; Art. 274 *Astikos Kodikas*; Art. 27 UNCITRAL Prescription Convention; cf. further Art. 3:312 BW and Karl Spiro, *Die Begrenzung privater Rechte durch Verjährungs-, Verwirkungs- und Fatalfristen*, vol. 1 (1975), §§ 59, 236; Zimmermann, *supra* note 31, at 157 f.

79. UNIDROIT Principles 2004, *supra* note 14, at 318.

80. See *supra* note 42 and accompanying text.

81. Cf. further § 212 I no. 2 BGB; Art. 264 *Astikos Kodikas*; Art. 2943 *Codice civile*; Art. 2244 *Code civil*; Spiro, *supra* note 78, § 134; Zimmermann, *supra* note 31, at 125 f.

to the fact that they also lack a special period of prescription for a claim established by judgment.

10. Suspension in Case of Judicial and Other Proceedings and in Case of Negotiations

The commencement of legal proceedings, as has already been mentioned, suspends the running of the period of prescription according to both sets of Principles.[82] The UNIDROIT *Principles* place insolvency proceedings and, where the debtor is an entity that is in the course of being dissolved, dissolution proceedings on the same footing.[83] They also contain a detailed provision on the effect of arbitral proceedings on the running of prescription which is very closely modelled on the one concerning judicial proceedings but which also specifies the commencement of the arbitral proceedings for the purposes of the law of prescription.[84] Moreover, proceedings of alternative dispute resolution have the effect of suspending prescription.[85] In contrast, Art. 14:302 PECL gives a rule for judicial proceedings which is applicable *mutatis mutandis* to arbitration proceedings, as well as 'to all other proceedings initiated with the aim of obtaining an instrument which is enforceable as if it were a judgment'. Alternative dispute resolution proceedings do not fall within this provision; however, they are covered by Art. 14:304 PECL: if the parties negotiate about the claim, or about the circumstances from which a claim might arise, the period of prescription does not expire before one year has passed since the last communication made in the negotiations;[86] this is an extension brought about by a postponement of the expiry of the period of prescription. This much more comprehensive idea, which has been gaining ground particularly in Germany,[87] but which is also taken into account, in some or other way, by other legal systems,[88] has been rejected by the draftsmen of the UNIDROIT *Principles* in their commentary to Art. 10.7:[89] parties who do not wish to negotiate under the pressure of an impending prescription of

82. See *supra* note 42 and accompanying text; see also Bonell, *supra* note 37, at 525.
83. Art. 10.5(1)(b)-(c) PICC.
84. Art. 10.6 PICC.
85. Art. 10.7 PICC.
86. Lando, Clive, Prüm & Zimmermann, *supra* note 15, at 187.
87. See now § 230 BGB; and further, Zimmermann, *supra* note 31, at 142 ff.
88. For details, see the country reports and the comparative evaluation in Reinhard Zimmermann & Simon Whittaker (eds.), *Good Faith in European Contract Law* (2000) 493 ff. and 530 f.
89. UNIDROIT Principles 2004, *supra* note 14, at 328; on which, see also Bonell, *supra* note 37, at 526.

the claim are referred to the possibility of concluding an express agreement to extend the period of prescription. Here we have, for once, a manifestation of the UNIDROIT *Principles* aiming to provide a set of rules for international *commercial* contracts.

11. Suspension of Prescription by *Force Majeure*

Both instruments recognize three further grounds of suspension: *force majeure*, death, and incapacity. These, too, are expressions of the old maxim *agere non valenti non currit praescriptio*.[90] Instead of the concept of *force majeure*, both instruments refer back to their (almost identical) definition of circumstances under which non-performance is excused: there must have been an impediment which is beyond the creditor's control and which the creditor could neither avoid nor overcome.[91] However, the impact of this ground of suspension is determined differently in the UNIDROIT *Principles* compared with the European Principles; for Art. 10.8 PICC (following, in this regard, Art. 21 of the Uncitral Limitation Convention) provides that the period of prescription is suspended '… so as not to expire before one year after the relevant impediment has ceased to exist'. Both the Uncitral Convention and the UNIDROIT *Principles* thus endeavour to minimise the influence of this ground for suspension on the running of the period of prescription; for as a result of their respective provisions only impediments that have occurred within the last year of the period of prescription are taken into account. And indeed, there is no reason to take into account events which have arisen, and fallen away, well before the end of the period of prescription, i.e., at a time when the creditor still had ample time to pursue his claim. Were it otherwise, the computation of periods of prescriptions would be rendered unreasonably difficult.[92] At the same time, it appears unnecessary to accord to the creditor the full year after the impediment has ceased to exist. Most of the impediments covered by Art. 21 of the Uncitral Convention and Art. 10.8 of the UNIDROIT *Principles* last only for a short period of time. It thus appears to be preferable to extend the period of prescription by the amount of time for which the creditor was prevented, within the last six months of the period of prescription, from pursuing his claim. This is the solution adopted by Art. 14:303 PECL. As a result, whatever is left of

90. See Zimmermann, *supra* note 31, at 129 ff. with further references.
91. Art. 8:108 PECL; Art. 7.11 PICC.
92. Zimmermann, *supra* note 31, at 131 f.

the original period of prescription is available to the creditor from the moment when the impediment falls away.

12. Suspension in Case of Death or Incapacity

The UNIDROIT *Principles* conceive of death and incapacity as specific examples of suspension in case of an impediment beyond the creditor's control and, therefore, apply the same regime as to the latter situation. Only one special rule has been added, for these two cases, concerning the end of the suspension: this depends on when a representative for the incapacitated or deceased party or its estate has been appointed; or a successor has inherited the respective party's position.[93] The additional one-year period of Art. 10.8 (1) PICC applies accordingly. However, it may be doubted whether the death of either the creditor or the debtor can always be qualified as an impediment 'that is beyond the [creditor's] control and that the creditor could neither avoid nor overcome'. One can easily conceive of a situation where the creditor has exposed himself frivolously to the danger as a result of which he died; or where he has caused the death of his debtor. Moreover, no consideration has been given to the situation that the incapacity ends without a representative having been appointed.[94] Finally, the person subject to an incapacity does not appear to be sufficiently protected in cases where the representative fails to pursue his claim before the period of prescription has elapsed. Art. 14:305 (2) PECL thus provides for an extension by way of postponement of expiry of the period of prescription not only with regard to claims held by or against a person subject to an incapacity who is without a representative, but also with regard to claims between a person subject to an incapacity and that person's representative. The mechanism of postponing the expiry of the period of prescription chosen by the European Principles ('… the period of prescription … does not expire before one year has passed after …')[95] will, in many cases, lead to the same result as the suspension provided in the UNIDROIT *Principles* which, if it occurs within the last year of a period of prescription, triggers a one-year period running from the moment after the impediment has ceased to exist. A difference only exists in cases where the impediment ceases to exist before the last year of the period of prescription has started; the European Principles, insofar,

93. Art. 10.8(2) PICC.

94. Contrast Art. 14:305(1) PECL; for the various possibilities of regulating this question, see Zimmermann, *supra* note 31, at 138 f.

95. See Lando, Clive, Prüm & Zimmermann, *supra* note 15, at 188; Zimmermann, *supra* note 31, at 138 f.

offer a solution encroaching less upon the running of a period of prescription.

13. Defences; Set-off

Art. 10.9 (3) PICC codifies the principle, recognized under the *ius commune*, 'quae ad agendum sunt temporalia, ad excipiendum sunt perpetua': a right may still be relied on as a defence even though the expiration of the period of prescription of that right has occurred. The European Principles proceed from the same principle, even if it is only referred to in the commentary and the comparative notes.[96] It is practically relevant, particularly, for the right to withhold performance according to Art. 9:201 PECL (Art. 8.1.3 PICC). Both the European Principles and the UNIDROIT *Principles* also deal with the effect of the expiry of the period of prescription on the ability to exercise a right of set-off.[97] The basic principle is the same: set-off is no longer possible, if the debtor has invoked the defence of prescription. This fits in well with the policy considerations underlying the law of prescription. None the less, the rule found in Art. 10.10 PICC ("The [creditor] may exercise the right of set-off until the [debtor] has asserted the expiration of the [period of prescription]") does not sufficiently take into account that the debtor has no reason to invoke prescription as long as the creditor does not assert his claim (be it by bringing an action or be it by exercising a right of set-off). The European Principles, therefore, grant the debtor a reasonable period of time, following the notice of set-off, to raise the defence of prescription.[98]

III. THE OTHER NEWLY COVERED AREAS OF LAW

A. Set-off

The same picture emerges with regard to the other areas of the law that have now been included into the UNIDROIT *Principles*, if they are compared with the European Principles: far-reaching correspondence in matters of principle, but also a number of differences in detail. In the case of set-off, it is worth noting that both instruments essentially follow the German model of set-off by notice[99] but that, contrary to the German

96. Lando, Clive, Prüm & Zimmermann, *supra* note 15, at 158, 160; Zimmermann, *supra* note 31, at 161 f.

97. Art. 14:503 PECL; Art. 10.10 PICC.

98. Art. 14:503 PECL; Zimmermann, *supra* note 31, at 160 f.

99. Art. 13:104 PECL; Art. 8.3 PICC; Zimmermann, *supra* note 31, at 32 ff.

model, they refuse to attribute retrospective effect to such notice.[100] That the requirements for set-off are largely identical (mutuality, obligations of the same kind, the cross-claim must be due, the party declaring set-off must be entitled to perform),[101] follows from the nature of things. Following the French model, the UNIDROIT *Principles* contain a fifth requirement for set-off, namely, liquidity of the cross-claim ('… if at the time of set-off, … the other party's obligation is ascertained as to existence and amount …').[102] The UNIDROIT *Principles* thus go one step further than the European Principles which, essentially mirroring the position in Dutch law in this respect, leave the matter to the judge's discretion.[103] Both instruments, however, agree to facilitate set-off in situations where both claims arise from the same legal relationship: for that legal relationship will, in any event, be subject to judicial scrutiny as a result of the legal proceedings concerning the principal claim. But good reasons can be mustered to dispense altogether with the liquidity requirement, as long as some provision is made to ensure that set-off cannot be declared, or invoked, at an unreasonably late stage in the proceedings.[104]

That the parties owe to each other money in different currencies does not present an impediment for set-off, as long as they have not agreed that the party declaring set-off is to pay exclusively in a specified currency.[105] Art. 8.2 PICC, moreover, requires that both currencies be freely convertible;[106] a requirement that is implicit in Art. 13:103 PECL. Remarkably, the UNIDROIT *Principles* do not contain a provision corresponding to Art. 13:107 PECL on the exclusion of the right of set-off.[107]

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100. Art. 13:106 PECL; Art. 8.5(3) PICC; Zimmermann, *supra* note 31, at 36 ff.

101. Art. 13:101 PECL; Art. 8.1 PICC; Zimmermann, *supra* note 31, at 44 ff.

102. Art. 8.1(1)(b) PICC.

103. Art. 13:102 PECL; Zimmermann, *supra* note 31, at 51 ff.

104. Pascal Pichonnaz, *La compensation: Analyse historique et comparative des modes de compenser non conventionels* (2001) 611 ff.; cf. also Reinhard Zimmermann, '§§ 387-396, Aufrechnung' *in* Mathias Schmoeckel, Joachim Rückert & Reinhard Zimmermann (eds.), *Historisch-kritischer Kommentar zum BGB*, vol. II (forthcoming), nn.56 f.

105. Art. 13:103 PECL; Art. 8.2 PICC; Zimmermann, *supra* note 31, at 48 ff.

106. See Bonell, *supra* note 12, at 33, who identifies the global application of the UNIDROIT Principles as the basis of this rule.

107. For which, see Zimmermann, *supra* note 31, at 56 ff.

B. Assignment

The doctrine of assignment has recently been analyzed, in the context of the international development, by Horst Eidenmüller.[108] Apart from the Ottawa Convention,[109] the UN Convention on the Assignment of Receivables[110] and the Cape Town Convention,[111] this 'international context' is also made up of the UNIDROIT and European Principles. According to both of the last two instruments, a claim may be assigned by mere agreement between the assignor and assignee,[112] though for the resolution of priority conflicts notification of the debtor is of decisive importance.[113] Concerning the validity of a contractual prohibition of assignment both instruments pursue an approach favouring free assignability.[114] Both instruments permit the assignment of future claims[115] as well as global assignments.[116] Differences exist, in particular, on the issue of debtor protection: under which circumstances a debtor may retain the possibility to effect set-off against his new creditor;[117] to what extent a modification of the claim between the assignor and the debtor will affect the assignee;[118] and when the debtor will be discharged by paying the assignor or the assignee.[119] On all three issues, Eidenmüller favours the solution propagated by the European Principles.[120] There is, essentially, conformity between the two instruments that the debtor may

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108. Horst Eidenmüller, 'Die Dogmatik der Zession vor dem Hintergrund der internationalen Entwicklung', (2004) 204 *Archiv für die civilistische Praxis* 457 ff.

109. UNIDROIT Convention on International Factoring of 28th May 1988; easily accessible in Radley-Gardner, Beale, Zimmermann & Schulze, *supra* note 48, at 295 ff.

110. Easily accessible in Radley-Gardner, Beale, Zimmermann & Schulze, *supra* note 48, at 333 ff.; for comments, see Spyros V. Bazinas, 'Der Beitrag von UNCITRAL zur Vereinheitlichung der Rechtsvorschriften über Forderungsabtretungen: Das Übereinkommen der Vereinten Nationen über Abtretungen im internationalen Handel', (2002) 10 *Zeitschrift für Europäisches Privatrecht* 782 ff.

111. Convention on International Security Interests in Mobile Equipment of 16 November 2001; see (2002) 7 *Uniform LR* 132 ff.; for comment, see Christoph Henrichs, 'Das Übereinkommen über internationale Sicherungsrechte an beweglicher Ausrüstung', (2003) *Praxis des internationalen Privat- und Verfahrensrechts* 210 ff.

112. Art. 11:104 PECL; Art. 9.1.7(1) PICC.

113. Art. 11:401 PECL; Art. 9.1.11 PICC; on which see Eidenmüller, (2004) 204 *Archiv für die civilistische Praxis* 473 ff.

114. For details, see Eidenmüller, (2004) 204 *Archiv für die civilistische Praxis* 464 ff.

115. Art. 11:102(2) PECL; Art. 9.1.5 PICC.

116. Eidenmüller, (2004) 204 *Archiv für die civilistische Praxis* 463 f.

117. Art. 11:307(2) PECL; Art. 9.1.13(2) PICC.

118. Art. 11:308 PECL.

119. Art. 11:303 f. PECL; Art. 9.1.10 ff. PICC.

120. Eidenmüller, (2004) 204 *Archiv für die civilistische Praxis* 484 ff.

assert against the assignee all defences that he could have asserted against the old assignor.[121]

C. Transfer of Obligations and Assignment of Contracts

The converse of assignment of claims is the transfer of obligations (UNIDROIT *Principles*)[122] or substitution of new debtor (European Principles).[123] In this respect, the UNIDROIT *Principles* offer a more detailed regulation than the European Principles; this does not only cover the situation where the original debtor is discharged but also where the new debtor becomes an additional debtor.[124] As far as the mechanism for effecting a transfer of obligations is concerned, both instruments agree that the transfer of an obligation by an agreement between the original debtor and the new debtor requires the consent of the creditor.[125] However, they differ as to the question whether the (old) debtor's consent is necessary for the substitutionary effect of an agreement concluded between the creditor and the new debtor. The European Principles answer this question in the affirmative,[126] while the UNIDROIT *Principles* dispense with such requirement.[127] Notable points of conformity between the two instruments, however, may be found in their treatment of the effect of substitution on defences,[128] rights of set-off[129] and securities.[130]

Following some of the more modern civil codes,[131] both the UNIDROIT *Principles* and the European Principles dedicate a specific section to the regulation of the assignment of contracts (PICC) or transfer of contract (PECL). In the European Principles this consists of a single provision.[132] It determines that a transfer of a contract requires the

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121. Art. 11:307(1) PECL; Arts. 9.1.13(1) PICC.

122. Arts. 9.2.1 ff. PICC.

123. Arts. 12:101 f. PECL.

124. Art. 9.2.5 PICC. In the commentary to Art. 12:101 PECL, in contrast, it is said merely that the type of transaction where the new debtor becomes an additional debtor does not give rise to any problems requiring regulation: Lando, Clive, Prüm & Zimmermann, *supra* note 15, at 125.

125. Art. 12:101(1) PECL; Art. 9.2.3 PICC.

126. Art. 12:101 PECL and commentary: Lando, Clive, Prüm & Zimmermann, *supra* note 15, at 125 f.

127. Art. 9.2.1(b) PICC.

128. Art. 12:102(4) PECL; Art. 9.2.7 PICC.

129. Art. 9.2.7 PICC; for PECL see the commentary in Lando, Clive, Prüm & Zimmermann, *supra* note 15, at 131 f.

130. Art. 12:102(2)-(3) PECL; Art. 9.2.8(2)-(3) PICC.

131. Arts. 1406 ff. *Codice civile* (Italy); Arts. 424 ff. Portuguese *Código civil*; Art. 6:159 BW.

132. Art. 12:201 PECL.

consent of all of the affected parties; apart from that it declares the provisions on the assignment of claims and the substitution of a new debtor to be applicable to the extent that the transfer of a contract involves the transfer of rights to performance or the transfer of an obligation. Again, the UNIDROIT *Principles* contain a substantially more detailed treatment.[133] It is also, however, founded on the basic principle that the third party affected by the transfer of the contract (the 'other party') has to consent to the transaction; and it is also, essentially, based on the rules relating to the assignment of claims and the transfer of obligations. Apart from an assignment of a contract involving the discharge of the assignor the UNIDROIT *Principles* also recognize a type of transaction where the assignor is retained as a party to the contract.[134]

D. Agency

The newly adopted UNIDROIT provisions on agency have recently been the subject of a comparative study by Michael Joachim Bonell[135] which, apart from the European Principles, draws on the Geneva Convention on Agency in the International Sale of Goods 1983[136] and the draft of the Third *Restatement* of Agency Law in the United States. Again, there is a considerable amount of conformity between the provisions in the UNIDROIT *Principles* and the European Principles. Neither concerns itself with the internal relationship between principal and agent[137] (hence the choice of title: 'authority of agents') and both limit their treatment to an authority conferred upon the agent by contract.[138] The respective rules in the two instruments concerning the granting of authority,[139] scope of authority,[140] the liability of an agent acting without or outside his authority,[141] the treatment of contracts involving the agent in a conflict of interest,[142] ratification by the principal of a contract concluded by an agent without authority or outside his

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133. Arts. 9.3.1 ff. PICC.

134. Art. 9.3.5 PICC; cf. the commentary in UNIDROIT Principles 2004, *supra* note 14, at 307 ff.

135. Michael Joachim Bonell, 'Agency', *in* Arthur Hartkamp, Martijn Hesselink et al (eds.), *Towards a European Civil Code* (3d ed. 2004) 381 ff.

136. Easily accessible in Radley-Gardner, Beale, Zimmermann & Schulze, *supra* note 48, at 283 ff.

137. Art. 3:101(3) PECL; Art. 2.2.1(2) PICC.

138. Art. 3:101(2) PECL; Art. 2.2.1(3) PICC.

139. Art. 3:201(1) PECL; Art. 2.2.2(1) PICC.

140. Art. 3:201(2) PECL; Art. 2.2.2(2) PICC. For sub-agency, cf. Art. 3:206 PECL; Art. 2.2.8 PICC.

141. Art. 3:204 PECL; Arts. 2.2.5(1) and 2.2.6 PICC.

142. Art. 3:205 PECL; Art. 2.2.7 PICC.

authority,[143] and termination of authority,[144] essentially correspond to each other; partly they are even identical.[145] However, Art. 3:205 (2) PECL, differing in this respect from Art. 2.2.7 PICC, adds to the general rule on conflict of interest two presumptions concerning the types of situations covered by § 181 BGB. Unlike the UNIDROIT *Principles*, the European Principles do not address the question of a time limit for ratification.[146] And while the European Principles attribute the same legal effect to apparent authority as to express or implied actual authority,[147] the respective regulation of the UNIDROIT *Principles* is based on the prohibition of *venire contra factum proprium* (with the result that the principal may not invoke against the third party the lack of authority of the agent).[148]

The most important difference, doctrinally, between the two instruments is that the European Principles differentiate between direct representation (the agent acts in the name of the principal) and indirect representation (the intermediary acts on the instructions and on behalf of, but not in the name of, the principal and the third party neither knows or has reason to know that the intermediary acts as an agent).[149] In the first case, a direct legal relationship between the principal and the third party comes into existence;[150] this does not, as a rule, happen in the second case.[151] This distinction, however, is departed from in the practically significant situations of the intermediary's insolvency and fundamental non-performance towards the principal or towards the third party.[152] In contrast, under Art. 2.2.3 (1) PICC, the establishment of a direct legal relationship between the third party and the principal depends only on two requirements: that the agent acts within the scope of his authority and that 'the third party knew or ought to have known that the agent was acting as an agent'. Only the case of the undisclosed principal is to be treated differently;[153] that is, where the agent acts within the scope of his authority but the third party neither knew nor ought to have known that the agent was acting as an agent. In this situation a direct legal

143. Art. 3:207 PECL; Art. 2.2.9 PICC.
144. Art. 3:209 PECL; Art. 2.2.10 PICC.
145. For more detail, see Bonell, *supra* note 135, at 385 ff.
146. Art. 2.2.9(2) PICC; cf. also the third paragraph of this provision. Bonell, *supra* note 135, at 393 f., criticizes the attitude of the European principles here as 'surprisingly agnostic'.
147. Art. 3:201(3) PECL.
148. Art. 2.2.5(2) PICC; for which see Bonell, *supra* note 135, at 385 ff.
149. Art. 3:102 PECL.
150. Arts. 3:201 ff. PECL.
151. Art. 3:301 PECL.
152. Arts. 3:302 and 3:303 PECL.
153. Art. 2.2.4 PICC.

relationship between the third party and the principal never arises. Substantial differences between these two models, Bonell has rightly emphasized,[154] will probably only exist in the case of the undisclosed principal. Similarly, one can hardly disagree with Bonell's observation that the UNIDROIT solution is distinguished by greater elegance and intellectual coherence.

E. Contracts in Favour of Third Parties

Finally, the rules on contracts in favour of third parties are problematic, particularly those contained in the European Principles. Art. 6:110 PECL is based on a broad European consensus in that two parties can confer by (express or implied) agreement a right on a third party.[155] The third party does not have to consent. However, as under § 333 BGB, he may revoke that right which is then treated as never having accrued to him. What is unconvincing is the rule contained in Art. 6:110 (3) PECL: the promisee may, by notice to the promisor, deprive the third party of his right, unless (a) the third party has received notice from the promisee that the right has been made irrevocable, or (b) the promisor or promisee has received notice from the third party that the latter accepts the right. According to the commentary, such an acceptance can, 'in general', only be given by the third party, if he has been informed of his right by the promisor or promisee, i.e., not if he heard of it by chance.[156] This regulation is based on outdated conceptions and unduly jeopardizes both the legal position of the third party and the freedom of the parties to determine the content and effect of their transactions.[157] Art. 5.2.1 (2) PICC, on the other hand and consistent with the approach adopted by § 328 II BGB, provides that '[t]he existence and content of the beneficiary's right against the promisor are determined by the agreement of the parties'. And even if Art. 5.2.1 PICC allows the parties to modify or revoke the rights conferred by the contract on the beneficiary until the beneficiary has accepted them or reasonably acted in reliance on them, these rules appear to be a better reflection of the typical interests of the parties than those found in Art. 6:110 (3) PECL.

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154. Bonell, *supra* note 135, at 387 ff., 390.

155. Zimmermann, *supra* note 15, at 19.

156. Lando & Beale, *supra* note 15, at 320.

157. For details, see Reinhard Zimmermann, 'Vertrag und Versprechen', *in Festschrift für Andreas Heldrich* (2005) 479.

IV. FURTHER CHANGES TO THE UNIDROIT *PRINCIPLES* 1994

These are the additional subject-areas by which the UNIDROIT *Principles* 1994 have been expanded. Set-off (chapter 8), assignment of rights, transfer of obligations, assignment of contracts (chapter 9) and prescription (chapter 10) have simply been appended to the seven existing chapters of the UNIDROIT *Principles* 1994; agency and contracts in favour of third parties have been inserted as individual sections in chapters 2 and 5 respectively. The intention of the draftsmen has evidently been to interfere as little as possible with the familiar sequence of the articles. They have thus also very largely resisted the temptation to revise the other parts of the 1994 version. There have only been marginal changes. For example, some comments to the existing articles have been amended or changed;[158] the reason being, partly, to take account of the additional subjects covered by the new edition of the UNIDROIT *Principles*. Art. 1.12 PICC now contains a general provision on the computation of time set by the parties to a contract.[159] Three provisions have been slightly modified so as to make allowance for the specific conditions of electronic contracting.[160] Finally two new provisions have been inserted into chapters 1 and 5. One of them deals with inconsistent behaviour and thus constitutes a modern version of the traditional prohibition of *venire contra factum proprium*; it is a manifestation of the general precept to act in accordance with good faith and fair dealing in international trade.[161] There is in fact no difference with the European Principles in this regard; the latter refer to the problem of inconsistent behaviour in their commentary to Art. 1:201 PECL.[162] The other newly inserted article provides that the creditor can release his right by agreement with his debtor.[163] Again, there is no parallel provision in the European Principles. These, however, contain a rule

158. See the references in UNIDROIT Principles 2004, *supra* note 14, at vii, and in Bonell, *supra* note 12, at 18. Two new sections have also been added to the preamble according to which the UNIDROIT Principles may be applied when the parties have not chosen any law to govern their contract, and may be used to interpret or supplement domestic law. New is also the model clause for parties wishing their agreement to be governed by the Principles which has been appended as a footnote to the preamble.

159. Art. 1.12(1)-(2) (concerning the impact of official holidays nor non-business days on the calculation of periods of time) corresponds to Art. 1:304(2) PECL. Art. 1.12(3) PICC (on the relevant time zone) does not have a counterpart in PECL. Conversely, there is no equivalent in the UNIDROIT Principles to Art. 1:304(3) PECL (on the question when periods of time expressed in days, weeks, months or years begin); see *supra* Part II.B.3.

160. Art. 1.2; Art. 2.1.8; Art. 2.1.18 PICC; see Bonell, *supra* note 12, at 19.

161. Art. 1.8 PICC; see UNIDROIT Principles 2004, *supra* note 14, at 21.

162. Lando & Beale, *supra* note 15, at 114 f.

163. Art. 5.1.9 PICC.

according to which a promise which is intended to be legally binding without acceptance is binding.[164] The European Principles thus obviously adopt the position that a right can be waived not only by way of concluding a contract of release but also unilaterally.[165] Herein lies a significant doctrinal difference between the two instruments, for the UNIDROIT *Principles* have no provision corresponding to Art. 2:107 PECL. The insistence on a release by agreement in Art. 5.1.9 PICC runs counter to the exigencies of commercial life and constitutes a limitation on the freedom of commercial parties to regulate their affairs that is hardly justifiable.[166] These considerations are taken into account somewhat imperfectly by the deeming provision of Art. 5.1.9 PICC: an offer to release a right gratuitously shall be deemed accepted if the debtor does not reject the offer without delay after having become aware of it.

V. FUTURE DEVELOPMENTS

A. Extension and Revision of the UNIDROIT Principles *2004*

1. Extension

The publication of the UNIDROIT *Principles* 2004 does not signal the end of work on this project. Rather the Governing Council has asked the UNIDROIT secretariat to initiate consultations on the question by which subject-areas another new edition of the Principles should be extended. A comparison with Part III of the European Principles reveals four areas which have been tackled by the European Principles but not yet by the UNIDROIT *Principles*: plurality of debtors and creditors, illegality, conditions, and capitalisation of interest.[167] The first two of them were among the most difficult subjects to have been dealt with by the Lando-Commission. Whether principles of European contract law can be established with regard to the question of how to deal with illegal and/or immoral contracts has, for a long time, been doubted,[168] even though the ground had been prepared by comparative work.[169] Hardly

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164. Art. 2:107 PECL; on which see Zimmermann, *supra* note 15, at 30; Zimmermann, *supra* note 157, at 480 ff.

165. Surprisingly, however, no reference is made to waiver in the commentary to Art. 2:107 PECL.

166. A point made already by Philipp Heck, *Grundriss des Schuldrechts* (1929) 122; see now the detailed discussion by Jens Kleinschmidt, *Der Verzicht im Schuldrecht: Vertragsprinzip und einseitiges Rechtsgeschäft im deutschen und US-amerikanischen Recht* (2004) 44 ff. and *passim*; see further Zimmermann, *supra* note 157, at 483 f.

167. Chapters 10, 15-17 PECL.

168. Cf. the commentary to Art. 4:101 PECL: Lando & Beale, *supra* note 15, at 227.

169. See, above all, Hein Kötz, *European Contract Law*, vol. 1 (1997, trans. by Tony Weir) 154 ff.

any comparative work had been done in the field of plurality of parties; and here the Lando-Commission, therefore, advanced into virginal territory.[170] Even the creation of a terminology which is both unambiguous and generally recognized turned out to be a formidable task.[171] Thus, for example, it was necessary to get away from the common law's peculiar and—even for English lawyers—confusing terminology of 'joint' and 'joint and several'[172] liability.[173] The inclusion of the 'communal obligations' as a third type of plurality of debtors, in contrast, derives from German legal doctrine;[174] but it may well be asked whether the draftsmen of the German code, who specifically decided not to take account of 'communal obligations',[175] were not better advised in this regard than the Lando-Commission.[176] The chapters on conditions and capitalisation of interest respectively are less problematic. Both are relatively modest in scope. In the one case we are dealing with a single provision which complements Art. 9:508 (1) PECL (delay in payment of money); in the other we have three provisions the substance of which should be familiar to every Continental lawyer.[177]

In comparison with Parts I and II of the European Principles, the most noticeable[178] omission evident from the UNIDROIT *Principles* is a specific provision policing the content of standard terms of business.[179] Given the scope of application of the UNIDROIT *Principles* such omission could only be justified if the issue were to be viewed as one of consumer protection. But this is not the case, at least not in the first

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170. But see now the comparative and historical analysis on plurality of debtors and creditors by Sonja Meier, *in* Mathias Schmoeckel, Joachim Rückert & Reinhard Zimmermann (eds.), *Historisch-kritischer Kommentar zum BGB*, vol. II (forthcoming), §§ 420-432.

171. For the result of these endeavours, see Art. 10:101 PECL.

172. For an overview, see Sir Guenter Treitel, *in* Peter Birks (ed.), *English Private Law*, vol. II (2000) 101 ff.

173. The UNIDROIT Principles, in contrast, employ the phrase 'joint and several liability' in Art. 9.2.5(3) and Art. 9.3.5(3) without explaining either the concept or the legal consequences in any detail.

174. Walter Selb, *Mehrheit von Gläubigern und Schuldnern* (1984) 189 ff.; Dieter Medicus, *Schuldrecht I, Allgemeiner Teil* (14th ed. 2003) 398. See Lando, Clive, Prüm & Zimmermann, *supra* note 15, at 62: 'German law is the only legal system to find a place for the communal obligation'.

175. See for details, Meier, *supra* note 170, §§ 420-432 n.93.

176. *Id.* at n.98.

177. Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996) 716 ff.

178. But see also, for example, the question of computation of time (on which see Hans-Georg Hermann, *in* Mathias Schmoeckel, Joachim Rückert & Reinhard Zimmermann (eds.), *Historisch-kritischer Kommentar zum BGB*, vol. I (2003), §§ 186-193 n.8), for which a provision on the model of Art. 1:304(3) PECL may be recommended for the UNIDROIT Principles; cf. *supra* Part II.B.3.

179. Cf. Art. 4:110 PECL.

place. We are dealing, here, with a partial failure of the market which may legitimately be corrected by means of judicial intervention.[180] Significantly, therefore, German case law concerning the open fairness control under § 9 Standard Terms of Business Act (now § 307 BGB) continues to be dominated by standard terms involving commercial transactions.[181] Apart from that, the introduction of a remedy of price reduction into the UNIDROIT *Principles* would appear to be appropriate.[182]

Finally, if existing national codes, such as the BGB, are taken as the comparative benchmark, the topics of contractual capacity should be considered in a revised set of Principles.[183]

2. Revision

Future work on the UNIDROIT *Principles* should not, however, merely contemplate another extension. One point that requires both revision and a much more detailed examination than has hitherto been devoted to it, is the unwinding of failed contracts. Presently the UNIDROIT *Principles* contain two sets of rules which are very similar (though not identical!); the one concerns the consequences of avoidance, the other of termination.[184] Some of these rules are rather vague, and they leave open important questions (risk distribution!).[185] It is becoming increasingly apparent today that it is both feasible and desirable to devise a uniform restitution regime which would have to cover all cases in which a contract has failed to materialize, was void *ab initio*, has been avoided or terminated.[186] In the case of the European Principles, the need for revision in this regard is even more pressing.[187] Another matter, which has not, so far, found a satisfactory solution, is the system of the Principles. Chapters 8 to 10 appear to be somewhat inorganically tacked

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180. For details, see Jürgen Basedow, *in Müncher Kommentar zum Bürgerlichen Gesetzbuch*, Band II a (4th ed. 2003), Preliminary comments to § 305 nn.1 ff.; Hein Kötz, 'Der Schutzzweck der AGB-Kontrolle—eine rechtsökonomische Skizze', 2003 *Juristische Schulung* 209 ff.; Zimmermann, *supra* note 35, at 175 f.

181. Sibylle Hofer, *in* Mathias Schmoeckel, Joachim Rückert & Reinhard Zimmermann (eds.), *Historisch-kritischer Kommentar zum BGB*, vol. II (forthcoming), §§ 305-310 nn.20, 28.

182. See *supra* note 57 and accompanying text.

183. For comparative comments, see Kötz, *supra* note 169, at 97 ff.

184. Art. 3.17 (2) and Art. 7.3.6 PICC.

185. Christoph Coen, *Vertragsscheitern und Rückabwicklung* (2003) 221 f.; Zimmermann, *supra* note 20, at 749 ff.

186. See, in particular, Philip Hellwege, *Die Rückabwicklung gegenseitiger Verträge als einheitliches Problem: Deutsches, englisches und schottisches Recht in historisch-vergleichender Perspective* (2004).

187. See Zimmermann, *supra* note 20, at 737 ff.

on to the preceding chapters. Set-off has nothing to do with either damages in case of non-performance or assignment, i.e., with the two areas of the law dealt with immediately before and after set-off. Also, one can imagine a number of places where the rules on prescription might have been placed (for example, together with set-off, as in the Swiss Code of Obligations); but there is no inner relationship with assignment of rights, transfer of obligations, and assignment of contracts.

B. The UNIDROIT Principles *and the European Principles: A Parting of the Way*

1. General Part of the Law of Obligations

In terms of Art. 10.1 PICC, prescription refers to contractual claims.[188] Assignment, transfer of obligations, and set-off are not, according to the wording of Art. 9.1.1, 9.2.1 and 8.1 PICC, limited in their scope of application in the same way. The reference to the law of contract (or, more precisely, international commercial contracts) merely follows from the systematic context. In principle, all of the three new chapters (i.e., including prescription) could also refer to non-contractual claims.[189] Such a change of tack, however, will not occur as long as the UNIDROIT Working Group's mandate remains limited to the law of international commercial contracts. The alternative would consist in the creation of a global private law (perhaps initially limited to patrimonial law); but even the current Secretary General of UNIDROIT regards such a step as not sensible 'for our generation'.[190] Matters are different in the European Union. Here, the Principles of European Contract Law have established themselves as a blueprint for a 'common frame of reference', and also probably for an 'optional instrument'.[191] Moreover, consideration is given to the basic structure of a European law of delict and unjustified enrichment;[192] and steps have been taken to elaborate a draft civil code covering all the areas of the law.[193] The Lando-Commission has, therefore, deliberately formulated chapters 10-14 PECL (plurality of creditors and debtors, assignment of claims,

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188. That is the intention of the words 'rights governed by these Principles'.

189. See also Bonell, *supra* note 12, at 29 f.

190. Kronke, 2001 *Juristenzeitung* 1149, 1156.

191. Communication from the Commission to the European Parliament and the Council: *European Contract Law and the revision of the acquis: the way forward*, 11th October 2004, COM (2004) 651 final.

192. Reinhard Zimmermann (ed.), *Grundstrukturen des Europäischen Deliktsrechts* (2003); *idem* (ed.), *Grundstrukturen eines Europäischen Bereicherungsrechts* (2005).

193. Christian von Bar, 'Die Study Group on a European Civil Code', *in Festschrift für Dieter Henrich* (2000) 1 ff.

substitution of new debtor, transfer of contract, and set-off) as core provisions of a 'General Part' of a European law of obligations.[194] The provisions contained in chapters 15-17 PECL, on the other hand, will be integrated into chapters 1-9 in a new and consolidated version of all three parts.[195] At the same time, consideration will have to be given to which of the other subjects dealt with in the first nine chapters ought to be moved into the General Part that is to be created. An obvious candidate is the law of damages.[196] Also, the provisions on the unwinding of failed contracts[197] would have to be unified and could then be brought forward into a General Part. As a result of these developments, however, the congruence between the UNIDROIT *Principles* and the European Principles, that has hitherto been so remarkable, will be brought to an end.

2. Consumer Contract Law

The same will also be true for another reason. For, unlike the UNIDROIT *Principles*, the European Principles also, in principle, refer to consumer contracts.[198] Admittedly, they do not, so far, contain any rules specifically protecting consumers.[199] In particular, the *acquis communautaire* in the field of consumer contract law, that has been built up over the past 25 years, has very largely been disregarded.[200] Thus, one will have to consider whether, on the basis of that *acquis*, a separate Consumer Contract Code should be created[201] or whether the relevant rules should be incorporated into the general law of contract. From a German point of view, this implies the continuation, on a European level,

194. Lando, Clive, Prüm & Zimmermann, *supra* note 15, at xvi.

195. *Id.* at xvii; cf. also the references in the commentaries to Arts. 15:101, 16:101 and 17:101 PECL (Lando, Clive, Prüm & Zimmermann, *supra* note 15, at 211, 229, 239).

196. For details, see Zimmermann, *supra* note 6, at nn.18 ff.

197. Arts. 4:115, 9:305 ff., 15:104 PECL; see *supra* Part V.A.2.

198. The restriction of the scope of application of the UNIDROIT Principles to international commercial contracts entails, in the first place, an exclusion of consumer transactions.

199. But see the enumeration of provisions contained in the European Principles which at least partially aim at the protection of the weaker party (though not specifically the consumer) in Bonell, *supra* note 12, at 34 f.

200. This has frequently been criticized: cf. Wolfgang Wurmnest, 'Common Core, Grundregeln, Kodifikationsentwürfe, Acquis-Grundsätze—Ansätze internationaler Wissenschaftsgruppen zur Privatrechtsvereinheitlichung in Europa', (2003) 11 *Zeitschrift für Europäisches Privatrecht* 729 f.; Hans-W. Micklitz, 'Verbraucherschutz in den Grundregeln des Europäischen Vertragsrechts' (2004) 103 *Zeitschrift für Vergleichende Rechtswissenschaft* 88 ff.; Hannes Rösler, *Europäisches Konsumentenvertragsrecht* (2004) 137 ff.

201. See Rösler, *supra* note 200, at 205 ff. (arguing that this might form the 'nucleus' of a European Civil Code).

of the debate on the question of the intellectual integrity of private law. If the view prevails,[202] as is to be hoped, that the law of contract is not, or should not be, split into two distinct parts—one of them being the domain of a very formal conception of freedom of contract, the other being informed by loosely defined social concerns,[203]—then the face of the European Principles is going to change as dramatically as that of Book II (on the law of obligations) of the German Civil Code in 2002. This is a major task and one can only hope that it will be completed more successfully than in Germany. At the same time, it is a task which is not on the agenda of the UNIDROIT Working Group.

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202. See Franz Bydlinski, *System und Prinzipien des Privatrechts* (1996) 718 ff.; Thomas Pfeiffer, 'Die Integration von "Nebengesetzen" in das BGB', *in* Wolfgang Ernst/Reinhard Zimmermann (eds.), *Zivilwissenschaft und Schuldrechtsreform* (2001) 494 ff.; Wulf-Henning Roth, 'Europäischer Verbraucherschutz und BGB', 2001 *Juristenzeitung* 484 ff.; Josef Drexl, 'Verbraucherrecht—Allgemeines Privatrecht—Handelsrecht', *in* Peter Schlechtriem (ed.), *Wandlungen des Schuldrechts* (2002) 117 ff.; Thomas Duve, in Mathias Schmoeckel, Joachim Rückert and Reinhard Zimmermann (eds.), *Historisch-kritischer Kommentar zum BGB*, vol. I (2003), §§ 1-14 nn.84 ff.; Zimmermann, *supra* note 35, at 159 ff.

203. Rather, it should be maintained that the notion of freedom of contract has to be the lodestar for the entire law of contract; but, at the same time, a contract may only be accepted by the legal community if it can typically be regarded as reflecting both parties' right of self-determination. See, in particular, Josef Drexl, *Die wirtschaftliche Selbstbestimmung des Verbrauchers* (1998); Drexl, *supra* note 202, at 109 ff.; Claus-Wilhelm Canaris, 'Wandlungen des Schuldvertragsrechts—Tendenzen zu seiner Materialisierung, (2000) 200 *Archiv für die civilistische Praxis* 273 ff.; Zimmermann, *supra* note 35, at 205 ff.