ISSN 2281-5147

Opinio Juris in Comparatione

Studies in Comparative and National Law

Principles of Latin American Contract Law : General Harmonization Rehearsals | Special Issue

Scope and Functions of Principles of Latin American Contract Law: A European Comment

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Articles

Scope and Functions of Principles of Latin American Contract Law: A European Comment

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Abstract

This paper discusses the role and contents of the Latin-American Principles of Contract Law in comparison with the European harmonizing sets of rules. Although the PLACL share with the PECL the pioneering role, a striking difference can be seen in the scope of application. The same divergence is detected with the DCFR, as the PLACL stress their potential as a guide in legislation and case law. The conclusions to which the paper lead is that one can understand the PLACL as part of a global development which, especially since the adoption of the CISG, has influenced not only international contract practice but also numerous national laws. However, the PLACL may not only serve as a catalyst for the inclusion of Latin American in this global development of contract law but also offer the chance for Latin American jurists to transcend the supranational level by making their mark on international tendencies.

Key words

PLACL role and content – Scope of application – International contract practice

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I. Introduction

The Principles of Latin American Contract Law (PLACL) encourage jurists not just in Latin America but around the globe to consider the future development of their contract law on national and supranational level. In particular, they provide the opportunity to focus on the changes to contract law at national and supranational level, to compare the developments across the continents and to inquire into overarching global tendencies.
From a European perspective, examining the scope and functions of the PLACL allows one to draw comparisons with sets of proposed rules for European contract law that have been drafted over the past decades (II.)[1]. The experiences with the European sets of rules especially highlight a function of such international projects: inspiration for legislation and case-law at national and supranational level (III.). However, the European sets of rules had and have this effect in common with international legislation, in particular with the CISG, which has also influenced the PLACL. In some respect, the CISG, the Latin American, and European Principles of Contract Law may be understood as complementing sets of rules which both encourage convergence as well as modernisation of contract law in the global framework.

[1] For a recent overview from a European perspective, see also Peter Schmidt, 'The "Principles of Latin American Contract Law" against the Background of Latin American Legal Culture: A European Perspective' in Rodrigo Momberg and Stefan Vogenauer (eds), *The Future of Contract Law in Latin America* (Hart Publishing 2017) 57-96.

II. Scope compared with European sets of rules

1. Principles of Latin American contract law

The first part of the PLACL concerns the 'general provisions' with the first two provisions thereof determining the scope of application and functions. According to Art. 1(1), these principles set forth general rules applicable to domestic and international contracts.[2] Its second sentence excludes consumer contracts from the scope of application. Art. 1(2) is more specific: 'These principles apply when: a) The parties subject themselves to them, in part or in full. b) The parties have agreed that their contract be governed by general principles of law, the *lex mercatoria*, or the like.'

However, the application of the PLACL is not limited to the agreement between the parties. Art. 2 broadens the perspective with respect to the functions that the PLACL could embody: '(1) These Principles apply to interpret international uniform law instruments and domestic law governing the contract. (2) These Principles may also be used as a model for national or international legislators'.

The PLACL thereby adopt a multilateral approach towards describing their potential effects. On the one hand, Art. 1 refers to their application for individual contracts. They thus foresee a broad scope of application: general application to domestic contracts and to cross-border contracts, with the exception of consumer contracts. Their application on this level requires an agreement between the parties (Art. 1(2)); two options are available: *directly* by an agreement between the parties on 'subjecting' *('se sometan')* their contract in full or in part to the PLACL; *indirectly* by agreeing that the contract is to be governed by general principles of law. Art. 1(2)(b) provides that the PLACL shall apply in this latter context (though this provision does not provide further detail on their relationship to other general principles of law).

On the other hand, Art. 2(1) provides for the application of the PLACL in interpreting 'objective' law (in contrast to 'subjective' law, i.e. as the parties have themselves determined as the rules for their respective contract). The Principles shall also serve to interpret international and domestic law governing the contract. Although this task is listed in Art. 2 under the heading 'functions' (whereas Art. 1 concerns 'scope of application'), the concepts of 'application' and 'function' are clearly not separated strictly. This is readily apparent as 'apply' *(aplicar)* is used both in Art. 2(1) (with regard to the function of interpreting 'objective' law) and in Art. 1.

[2] The English translation this article refers to in published in Iñigo de la Maza Gazmuri, Carlos Pizarro Wilson and Álvaro Vidal Olivares (eds), *Los Principios Latinoamericanos de Derecho de los Contratos. Texto, presentatción y contenidos fundamentals* (Boletín Oficial del Estado 2017) and in Rodrigo Momberg and Stefan Vogenauer (eds), *The Future of Contract Law in Latin America* (Hart Publishing 2017).

Complementing Art. 1(1) and the use of the PLACL on a national and international level, Art. 2(2) states a further effect of the PLACL: its use as a model for the legislator. Here it does not concern the application to (existing) 'subjective' or 'objective' law but rather the decision on the law itself – in other words not the application, but 'policy' and 'creation'. However, it is not an easy task to draw a clear line between this function in creation and the function in interpretation [Art. 2 (1)] when one considers the discussion on the 'creative' role of case-law in civil law jurisdictions.[3] In a – nowadays unlikely – extreme case, the function as a model law for the international legislator could be linked to the notion that the PLACL are to be used to create a uniform contract law for Latin America by means of a convention from the Latin American countries. However, it is more likely that the Principles will gradually gain influence on legislation at national level.

2. Comparison between two European sets of rules

a) The Principles of European Contract (PECL) display a comparable pioneering role as could be played by the PLACL for Latin American contract law.[4] The PECL were developed in the 1980s by a group of scholars chaired by the Danish comparative lawyer, Ole Lando ('Lando Commission').[5] They have given decisive impulses to the discussion on the development of a common European contract law both on academic and political level.[6] These Principles were probably also the most important foreign role model for the project to create principles of Latin American contract law.

However, these European principles feature several distinctions from the PLACL with regard to their scope of application. Where the application via party agreement is concerned, the Latin American and European principles do overlap in substance (except for the PECL's problematic claim to also apply when the parties have not any system or rules of law for their contract, Art. 1:101(3)(b) PECL). The application via the parties' choice of law is not, however, the main aspect: the PECL were conceived primarily as a model for a

[3] From the perspective of comparative law, see Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, translated by Tony Weir (3rd edn, OUP 1998) 256ff.

[4] Ole Lando and Hugh Beale (eds), *Principles of European Contract Law*, Parts I & II (Kluwer Law International 1999); Ole Lando, Eric Clive, André Prüm and Reinhard Zimmermann (eds.), *Principles of European Contract Law*, Part III (Kluwer Law International 2003); Reiner Schulze and Reinhard Zimmermann (eds), *Textos básicos de derecho privado europeo – recopilacion, presentación y coordinación de la edición española, estudios preliminar y anotaciones de derecho español y europeo de Esther Arroyo i Amayuelas* (Marcial Pons 2002) III.10 Principios de Derecho europeo de los contratos, 449-490.

[5] Hugh Beale, 'Towards a Law of Contract for Europe: the work of the Commission of European Contract Law', in Günter Weick (ed), *National and European Law on the Threshold to the Single Market* (Lang 1993).

[6] Overviews on this development in Reiner Schulze and Fryderyk Zoll, *European Contract Law* (2nd edn, C.H.Beck/Hart/Nomos 2018) ch 1, para 44ff; Nils Jansen and Reinhard Zimmermann (eds), *Commentaries on European Contract Laws* (OUP 2018).

future European contract law, as is emphasised by their first rule on the scope of application (Art. 1:101(1) PECL), whereas the reference to the PLACL's function as a model for the international legislator appears after Art. 2(2) on party agreement and does not refer to a specific international (or supranational) legislator (such as the European Union in Europe). However, in contrast to the European PECL, the Latin American PLACL refer not only to the international legislator but also the national legislator *(legisladores estatales)*. The PECL are silent on their potential effect on national legislation in the EU Member States or beyond. Furthermore, European PECL are more reserved – or at least not as direct as Art. 2(1) PLACL – in expressing their application in interpreting national or international law. Art. 1:101(4) merely states that '[t]hese Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so.'

b) The PECL's contribution to the discussions surrounding European contract law has been further enriched by additional sets of rules drafted by groups of scholars. These include, for example, the *'Pavia Draft of a European Contract Code'*[7] (Academy of European Private Lawyers), the *'Principes contractuels communs'*[8] (Association Henri Capitant), and the '*Principles of the Existing EC Contract Law'*[9] (Acquis Group). However, it has been the academic *'Draft Common Frame of Reference'*[10] (DCFR), drafted by over 100 scholars in a network funded by the European Commission, which has received the most attention since the PECL.

Preparations for the DCFR date back to suggestions contained in the European Commission's 2003 'Action Plan on a more coherent European contract law'[11]. This provided the basis for the notion to draft of a Common Frame of Reference as a 'blueprint' for future coherency in European contract law and as a 'toolbox' for corresponding EU legislation.[12] The provisions on the 'intended field of application' in Art. I.–1:101 DCFR do not, however, make express reference to this function. In contrast to the PECL, the DCFR is not expressly addressed to the European Union. The provisions are rather so phrased that they could be adopted relatively easily in EU law.[13] The wording does not in itself contain any statements corresponding to the rules in Art. 2 PECL on the function of the Principles with regard to

[7] Academie des Privatistes Européens (ed), *Code Européen des Contrats – Avant Projet*, Book 1, coordinated by Giuseppe Gandolfi (3rd edn, Dott. A. Giuffrè Editore 2004). The English, French, German, Italian, and Spanish versions of the 'European Contract Code' are available online under <http://www.eurcontrats.eu/acd2/> accessed 15 March 2019.

[8] Association Henri Capitant (ed), *Principes contractuels communs – Projet de cadre commun de référence* (Société de législation comparée 2018).

[9] European Research Group on Existing EC Private Law (Acquis Group) (ed), *Principles of the Existing EC Contract Law (Acquis Principles) – Contract II* (Sellier 2009).

[10] Christian von Bar, Eric Clive and Hans Schulte-Nölke (eds), *Principles, definitions and model rules of European private law. Draft Common Frame of Reference (DCFR) – Full Edition* (Sellier 2009).

[11] European Commission, 'A more coherent European contract law: an action plan' COM(2003) 68 final.

[12] See, for example, European Commission, 'European Contract Law and the revision of the acquis: the way forward' (Communication) COM(2004) 651 final, 3.

[13] Except for the somewhat vague wording '[t]hese rules are intended to be used…' (Art. I.–1:101(1) DCFR).

national and international legislation. Art. I.–1:101 DCFR instead focuses more on describing the application of the DCFR by listing the applicable fields: 'These rules are intended to be used primarily in relation to contracts and other juridical acts, contractual and non-contractual rights and obligations and related property matters' (Art. I.–1:101 DCFR). In this respect, the DCFR's provisions on the scope of application are more 'one dimensional' than the 'multilateral' approach favoured by the PLACL.

A further distinction between the DCFR and the PLACL can be observed with regard to the former's rules on the material scope of application: the DCFR is broader, yet stricter. The DCFR's scope of application is broader in as far as it its rules apply not only to contracts but also to the aforementioned fields (including non-contractual obligations and related property matters). This provision reflects that the DCFR extends far beyond the framework of a European contract law as it includes other aspects of the law of obligations, such as benevolent intervention in another's affairs (Book V), non-contractual liability (Book VI)[14], and unjustified enrichment (Book VII). The DCFR's further books cover the acquisition and loss of ownership of goods (Book VIII), proprietary security in moveable assets (Book IX), and trusts (Book X).[15] The design underpinning the DCFR thus differs greatly from sets of rules for contract law, such as the PECL and PLACL, and therefore the scope of mutual inspiration is somewhat limited.

Nonetheless, if one takes a close look at Book II DCFR (contracts and other juridical acts), one will observe one particular feature which, in comparison the PLACL, is notable and potentially useful for the further discussion: the title of Book II already announces that its scope extends beyond contracts to 'other juridical acts', which are substantiated in more details in particular in Art. II.– 4:301 to 4:303 DCFR through the inclusion of a unilateral juridical act. The DCFR thus deepens an approach that was already outlined in European contract law by the PECL, namely that a promise intended to be legally binding without acceptance is binding (Art. 2:207 PECL). This extension to the rules on the contract with provisions on unilateral promises may be attributed in part to Scandinavian law, which traditionally gives more weight to such binding effect than in most other European legal systems. However, it does reflect a need that also features for various other matters in modern European private law – from EU rules on the binding effect of prizes to being unilaterally bound with regard to options in business law to the binding effect of statements during contractual negotiations. It is especially in this latter area where the topic of unilateral promises brushes against another notable development in contract law: the increasing significance of contracts that are concluded in a manner that do not fall neatly into 'offer' and 'acceptance' (such as the preparation of complex contracts on mergers and

[14] Full title: Non-contractual liability arising out of damage caused to another.

[15] This extended scope was not uncontroversial, see e.g. Reiner Schulze (ed), *Common Frame of Reference and Existing EC Contract Law* (2nd edn, Sellier 2009); Reiner Schulze and Thomas Wilhelmsson, 'From a Draft Common Frame of Reference towards European Contract Law Rules' [2008] European Review of Contract Law (ERCL) 154-168.

acquisitions with instruments such as the 'letter of intent').[16] The PECL had also recognised this development and outlined an approach for European contract law, which responds to the needs of modern contracting and which was adopted by the DCFR in its rules on the conclusion of contract, which apply with the appropriate adaptations even though the process of conclusion of contract cannot be analysed into offer or acceptance (Art. II. – 4:211 DCFR, inspired by Art. 2:211 PECL). These provisions in both of these European sets of rules follow a similar direction as the UNIDROIT Principles of International Commercial Contracts[17] (PICC) for international commercial law: 'A contract may be concluded either by the acceptance of an offer or by conduct of the parties that is sufficient to show agreement.' (Art. 2.1.1. PICC). Arts 13 and 14 PLACL contain a similar approach, albeit not to the same extent.

3. The 'gaps' in determining the scope

a) The 'Principles of Latin American Contract Law' will possibly serve as a starting point for future developments in contract law in Latin America in a manner similar to the effect of the 'Principles of European Contract Law' on the developments in Europe. However, the comparison of the introductory provisions in both sets of rules highlights that the PECL are lacking a provision corresponding to Art. 2 PLACL on the 'functions' of the principles for the interpretation and legislative development of international and national law. The reason for this may certainly be that the 'functions' do not concern the application of existing law, in contrast to the 'application' of norms – in this stricter sense there is rather just a 'persuasive' role with regard to the case law and legislation at international and national level.

Nevertheless, this difference between the European and Latin American principles is notable and even surprising when one considers the actual effects of the PECL. It has been shown that the PECL have gained far more significance in their 'persuasive' function for the courts and legislator than Art. 1:101(2) PECL would otherwise imply.

[16] See, for example, Reiner Schulze, 'Precontractual Duties and Conclusion of Contract in European Law' [2005] European Review of Private Law (ERPL) 841-866; published in Spanish i.a. in Reiner Schulze, *Ciencia jurídica y unificacíin del Derecho Privado Europeo*, edited by Andrés Sánchez Ramírez (Ediciones Olejnik 2017); see also the contributions by Giuditta Cordero Moss, 'The Function of Letters of Intent and their Recognition in Modern Legal Systems', 139-160, and Thomas Pfeiffer, 'New Mechanisms for Concluding Contracts', 161-168, both in Reiner Schulze (ed), *New Features in Contract Law* (Sellier 2007); Sjef van Erp, *Contract als Rechtsbetrekking: Een rechtsvergelijkende Studie* (W.E.J. Tjeenk Willink 1990).

[17] International Institute for the Unification of Private Law (UNIDROIT) (ed), *UNIDROIT Principles of International Commercial Contracts*, Rome, 2016, <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016> (accessed 4 March 2019); see also Michael J. Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles Of International Commercial Contracts* (3rd edn, Ardsley 2005); Michael J. Bonnell, 'The law governing international commercial contracts and the actual role of the Unidroit Principles' (2018) 23(1) *Uniform Law Review* 15–41.

The PECL have had such 'persuasive' effect above all on (national) legislation in several countries (although this potential effect was not even indicated in the introductory provisions). This effect can be observed not only in the 'transition countries' in Mid- and Eastern Europe in their transition since the 1990s from socialist planned economy to market economy[18] and even Eastern European countries outside of the EU, such as Russia[19]. Moreover, the PECL also belong to the sources which inspired the 2002 modernisation of the German law of obligations[20] and the 2016 reform of the French law of obligations[21]. This wave of reforms to national laws, which has been inspired by the 'Principles of European Contract Law' together with other new sets of rules, has changed the entire fact of contract law in Europe. Indeed, it is the PECL's contribution to the change at national level that one may consider as their most important effect in practice so far.

As for legislation at supranational level; the PECL's intention 'to be applied as general rules of contract law in the European Communities' (Art. 1:101(1) PECL) has not been realised (and is not expected in the foreseeable future). The PECL have had a certain 'persuasive effect' at this level, as is apparent from EU projects (corresponding to the function described in Art. 2(2) PLACL, i.e. 'to be used as a model for…national legislators'). In particular, the PECL were used together with the 'Principles of Existing EC Contract Law'[22] (Acquis Group) as a model for preparing the law of contract in the 'Draft Common Frame of Reference'. In turn, this draft served as a basis for the European Commission's

[18] On this subject, cf Reiner Schulze and Fryderyk Zoll (eds), *The Law of Obligations in Europe: A New Wave of Codifications* (Sellier 2013); Péter Cserne, 'Drafting Civil Codes in Central and Eastern Europe: A Case Study on the Role of Legal Scholarship in Law-Making' [2011] Pro Publico Bono: Állam- és Közigazgatástudományi Szemle, Támop special issue, available at <http://works.bepress.com/peter_cserne/66/> accessed 4 March 2019.

[19] Natalya Y. Rasskazova, 'Russian Law of Obligations: Structure, Positioning and Connection with Supranational Law', in Reiner Schulze and Fryderyk Zoll (eds), *The Law of Obligations in Europe: A New Wave of Codifications* (Sellier 2013) 139-152.

[20] Draft legislation by the SPD Parliamentary Group and the Bündnis 90/Die Grünen Parliamentary Group, BT-Drucks. 14/6040 of 14 May 2001, 129, 135; Hans Schulte-Nölke and Reiner Schulze (eds), *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts* (Mohr Siebeck) 2001; Giovanna D'Alfonso, 'The European Judicial Harmonization of Contractual Law: Observations on the German Law Reform and "Europeanization" of the BGB' (2003) 6 European Business Law Review 689-726; Peter Schlechtriem, 'The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe' (2002) 2 Oxford University Comparative Law Forum <https://ouclf.iuscomp.org/the-german-act-to-modernize-the-law-of-obligations-in-the-context-of-common-principles-and-structures-of-the-law-of-obligations-in-europe/> accessed 15 March 2019.

[21] Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du février 2016 portant réforme du droit des obligations, du régime générale et de la preuve des obligations, JO of 11 February 2016, text nr. 25, 4, 13, 19; Carole Aubert de Vincelles, 'France: Position of the Law of Obligations in National and Supranational Law', in Reiner Schulze and Fryderyk Zoll (eds), *The Law of Obligations in Europe: A New Wave of Codifications* (Sellier 2013) 321-342; Bénédicte Fauvarque-Cosson, 'The French Contract Law. Reform in a European Context' [2014] ELTE Law Journal 59-71; Bénédicte Fauvarque-Cosson, 'The French Contract Law Reform and the Political Process' (2017) 13 (4) ERCL 337-354; François Ancel, Béndédicte Fauvarque-Cosson and Juliette Gest, *Aux sources de la réforme* (Dalloz 2017) para 13.12; François Chénedé, *Le Nouveau Droit des Obligations et des Contrats. Consolidations – Innovations – Perspectives* (Dalloz 2016) para 62.22.

[22] n 9.

Draft Regulation on a 'Common European Sales Law' (CESL).[23] This project for a Common European Sales Law still represents the EU's most extensive legislative project in the field of contract law. Although the European Parliament did approve the proposal in principle, it ultimately failed following resistance from several EU Member States.[24] The influence of the PECL on the CESL project did not extend so far that they would have remained and accordingly applied unchanged 'as general rules of contract law in the European Communities' (Art. 1:101(1) PECL) – this was already excluded as, amongst other aspects, specific principles of existing EU contract law (including consumer law and non-discrimination law, neither of which are contained in the PECL) also had to be considered. Furthermore, unlike the PECL the CESL was not designed as a general law of contract, but rather just as sales law for particular B–B contracts and B-C contracts. Nonetheless, the PECL belonged without doubt to the models which had considerable influence on the development of this proposed legislation.

It is not just the legislator who has used the PECL and DCFR as a model: the courts have also referred to these in interpreting supranational[25] and, above all, national law. Such reference is certainly not standard practice in all European countries, but the PECL/DCFR have been used as an aid in applying national law.[26] In particular, the Spanish Supreme Court has used this possibility to give a contemporary European perspective to understanding national law.[27]

It does appear convincing that, in light of these European experiences, the Latin American Principles are not aimed just at their application in individual contracts as a result of being chosen by the parties, but stress their potential in legislation and case law. The reluctance of the introductory provisions in the aforementioned European sets of rules does in fact represent a stark contrast to the actual development since their publication. It is to be

[23] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law' COM(2011) 635 final.

[24] On this development and on the CESL's structure and content see Reiner Schulze and Fryderyk Zoll, European Contract Law (2nd edn, C.H. Beck/Hart/Nomos 2018) ch 1, para. 52ff.

[25] See, for example, Opinion of Advocate General Trstenjak delivered on 6 July 2010, in C-137 / 08 *VB Pénzügyi Lízing Zrt. v Ferenc Schneider*, n.y.r.; Opinion of Advocate General Trstenjak delivered on 24 March 2010, in C-540 / 08 *Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG v "Österreich"-Zeitungsverlag GmbH*, n.y.r.; Opinion of Advocate General Trstenjak delivered on 8 September 2009, in C-215 / 08 *E. Friz GmbH v Carsten von der Heyden*, n.y.r.; Opinion of Advocate General Trstenjak delivered on 18 February 2009, in C-489 / 07 *Pia Messner v Firma Stefan Krüger* [2009] ECR I-7315; Opinion of Advocate General Poiares Maduro delivered on 21 November 2007, in C-412 / 06 Annelore *Hamilton v Volksbank Filder eG.* [2008] ECR I-2383.

[26] See for Sweden Mateusz Grochowski, 'The practical potential of the DCFR Judgment of the Swedish Supreme Court (Högsta domstolen) of 3 November 2009, Case T 3-08' [2013] ERCL 96-104.

[27] For example, for Spain: Vendrell Cervantes , 'The Application of the Principles of European Contract Law by Spanish Courts' [2008] Zeitschrift für Europäisches Privatrecht (ZEuP) 534; Pilar Perales Viscasillas, 'Aplicación jurisprudencial de los Principios de Derecho contractual europeo', in María del Rosario Díaz Romero et al (eds), *Derecho privado europeo: estado actual y perspectivas de futuro, Jornadas en la Universidad Autónoma de Madrid, 13 y 14 de diciembre de 2007* (Civitas 2008) 463-464, 472-474, 478-500.

hoped that the countries of Latin America utilise this potential of the draft at least to the extent as several European countries.
b) While the PLACL are less reluctant than the European in outlining their function, the PECL and – to some extent the DCFR – are less reluctant than the PLACL with respect to the inclusion of the 'scope' of contracting in their field of application. On the one hand, this concerns acts of private parties with similar objectives, but in different forms that through the conclusion of contract (be this instead of conclusion, or in preparation thereof). As mentioned above, the PECL take account of the practical relevance of this issue by including unilateral promises in their scope of application (Art. 2:107 PECL on promises binding without acceptance). On the other hand, the scope of application in contract preparation also has to be considered. It is with good reason that the PLACL and the European sets of rules include the pre-contractual phase in their rules by adopting provisions on contract negotiations (Arts 10-12 PLACL; Arts 2:301, 2:302 PECL; Arts II. 3:301, 3:302 DCFR). However, the DCFR is more extensive as it contains a broad set of pre-contractual information duties which in part apply specifically to consumer contracts, but also in part to other contracts (Art. II. 3:101 et seq. DCFR). In particular, the DCFR has recognised the importance of EU rules for e-commerce by adopting provisions which concern the new questions surrounding contract preparation via electronic means. These concern not only the information duties (i.a. Art. II.–3:105 DCFR) but, for example, also the correction to input errors and confirmation of the receipt of offer and acceptance via electronic means (Arts II. – 3:201, 3:202 DCFR). In comparison, the PLACL did not use the opportunity as a new set of rules to consider these 21st century challenges through its own tailor-made provisions. In this regard, one could ask whether there is a 'gap' to be closed in a second stage of the work on Latin American principles.

III. Source of inspiration for the legislator

Looking back at over the more than three decades since the 'Lando Commission' began its work on the Principles of European Contract Law, one can observe their lasting effect in inspiring the European legislator. This concerns both the willingness of the legislative bodies to take measures in the field of contract as well as the content of legislative projects. At a supranational level, this effect can be seen in the 1989 resolution of the European Parliament[28] to the proposal for a Common European Sales Law, which may not have entered into force, but did influence the recent Directives on the Supply of Digital

[28] Resolution of the European Parliament of 26 May 1989, 'On action to bring into line the private law of the Member States', A2-157 / 89, OJ [1989] C 158/400.

Content, and on consumer sales[29].[30] The PECL's lasting effect can be seen above all as a source of inspiration for national legislators – as can be seen above in the reforms in Eastern Europe, to the modernisation of the law of obligations in Germany, and in the 2016 reforms in France. Other countries are also discussing potential reforms (e.g. in Spain[31]). These reforms have each combined different national elements and overarching European tendencies; they have by no means created a fully harmonized European contract law in the respective countries. However, they have not only effected a change to contract law (often labelled as a 'modernisation') in each of the respective legal systems, but they have rather also, to a degree, aligned key principles of national contract laws in as far as they refer to common sources of inspiration, such as the PECL, and have combined these with the national tradition.

IV. The collection of sources

1. The influence from the CISG

However, the PECL cannot be understood as no more than an isolated phenomenon as the reforms they have inspired in several European countries. These national reforms, the 'Lando Commission's' principles and the drafts they have inspired, such as the DCFR, are rather embedded in a global development of contract law which is also home to the PLACL.

One of the most important starting points for this development is the signing of the CISG in 1980. This sales law, as well as the earlier Hague Conventions, were heavily based on the work undertaken by the comparative lawyer, *Ernst Rabel*, who combined the experi-

[29] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services [2019] OJ L 136/1 and Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods [2019] OJ L 136/28.

[30] Reiner Schulze and Fryderyk Zoll, *European Contract Law* (2nd edn, C.H.Beck/Hart/Nomos 2018) ch 1, para 61ff.; Tatiana Arroyo Vendrell and Reiner Schulze, 'Contratos de contenidos digitales: Introducción' in Johann Kindl, Tatiana Arroyo Vendrell and Beate Gsell (eds), *Verträge über digitale Inhalte und digitale Dienstleistungen* (Nomos 2018) 11-20 (12).

[31] Comisión general de codificación. Sección de Derecho Civil, 'Propuesta de Anteproyecto de Ley de Modernización del Código Civil en materia de Obligaciones y Contratos' (2009) LXIII Boletín Informativo del Ministerio de Justicia. On the reform projects in Spain, see also Klaus Jochen Albiez Dohrmann, María Luisa Palazón Garrido and María del Mar Méndez Serrano (eds), *Derecho privado europeo y modernización del derecho contractual en España* (Atelier 2011); Éric Savaux, Javier Lete, Rose-Noëlle Schütz and Hélène Boucard (eds), *La recodification du droit des obligations en France et en Espagne* (Presses universitaires juridiques de Poitiers/LGDJ-Lextenso 2016); Nieves Fenoy Picón, 'The Spanish Obligation and Contract Law and the Proposal for its Modernisation', in Reiner Schulze and Fryderyk Zoll (eds), *The Law of Obligations in Europe: A New Wave of Codifications* (Sellier 2013) 397-430; Carmen Jerez Delgado and Máximo Juan Pérez García, 'La comisión general de codificación y su labor en la modernización del derecho de obligaciones' [2009] 19 Revista Jurídica de la Universidad Autónoma de Madrid (RJUAM) 155-179.

ences of the continental European legal traditions and of the common law. The CISG is, however, much more successful than these earlier conventions. This success is not limited to its application in national contract practice but also can be seen in its influence on other international sets of rules and national legislation.

In Europe, the CISG not only influenced the work of the 'Lando Commission' on the PECL but also the work of the European Union on its legislation. In particular, the 1999 Consumer Sales Directive[32] contains many elements that are based on concepts and principles featuring in the CISG, but which have been modified by the European legislator.[33] At national level, for example, the preparations in the 1980s for the reform of the German law of obligations already took account of the CISG, which served as an important source of inspiration (alongside European legislation) for the 2002 reform[34] as well as for the 2016 reform in France. Furthermore, it has influenced not only reforms and reform projects in other European countries (such as the law of contract in the Dutch civil code and the 2009 Spanish reform project) but also has given long term inspiration to the development of contract law outside of Europe, for example in the world's most populated country, China.[35]

At international level, the CISG, alongside numerous other initiatives, inspired in particular the creation and content of the PICC[36]. However, especially this 'soft' set of rules shows that the inspiring effects do not have to be unilateral, but rather that a bilateral exchange exists between the international sets of rules and which can impact on their function as a model for national law. Firstly, the PICC have not only adopted principles from the CISG but have extended their scope of application (albeit only as 'soft law') as they have used this sales law as a basis for a general contract law for commercial contracts. They have thereby sought a similar 'generalisation' of CISG principles for international commercial law as the PECL sought in the European framework. Secondly, the preamble to the PICC makes express references to their function as a 'means of interpreting and supplementing international uniform law instruments'. They should therefore not only serve as an instrument to interpret the CISG – as the most important 'hard law' in the field of international trade – but also to supplement it, i.e. to have an effect on the set of rules which served as

[32] European Parliament and Council Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (Consumer Sales Directive) [1999] OJ L 171/12.

[33] Reiner Schulze, 'The New Shape of European Contract Law' [2015] Journal of European Consumer and Market Law (EuCML) 139–144.

[34] Hans Schulte-Nölke and Reiner Schulze, *Die Schuldrechtsreform vor dem Hintergrund des Gemeinschaftsrechts* (Mohr Siebeck 2001); Stefan Grundmann and Marie-Sophie Schäfer, 'The French and the German Reforms of Contract Law' (2017) 13(4) ERCL 459-490 (465).

[35] For an overview on the effects of the CISG, see Ingeborg Schwenzer and Pascal Hachem, 'The CISG – A Story of Worldwide Success', in Jan Kleinemann (ed), *CISG Part II Conference* (Stockholm Centre for Commercial Law 2009) 125.

[36] n. 17.

a source of inspiration. All of these elements do not feature in each of the laws of contract inspired by the CISG. However, the overlaps with each of these core elements.

2. The 'Common Core' of modern contract laws

The enquiry into the common characteristics of these international sets of rules and the national laws they have inspired allows one to recognise several core elements behind the veil of differences.[37] This includes, for example, the general decision in favour of a claim to performance *in natura* ('specific performance', in contrast to the common law), and the concepts of conformity and non-conformity as a basis to determine the contractual obligations and rights. A further characteristic can be seen in the catalogue of remedies, which refer to these concepts and comprise subsequent performance, revocation ('termination'), price reduction, and damages, as well as favouring strict liability over fault-based liability. Where conclusion of contract is concerned, the agreement between the parties is central (and is not subject to additional requirements such as 'consideration' in the common law or '*cause*', as was required under French law prior to the 2016 reforms). However, the contract laws influenced by the CISG do not each feature all of these core elements. Nonetheless, the overlaps with several of these elements do indeed show the close links in the international sets of rules from the CISG to the PICC to the different European drafts, but also the alignment of the aforementioned national laws with these elements as their basis. In this respect, the commonalities or similarities between the concepts and principles allows the reference to a 'common core' of modern contract laws. Where the PLACL are concerned, the overlaps in content cannot be denied, but they do not exclude modifications (especially with regard to the role of '*cause*' / '*causa*' in the process of conclusion of contract, which do not follow the approaches in the other sets of rules).

3. A preference clause favouring the PLACL?

In light of this background, it does appear understandable that the drafters of the PLACL did refrain from expressly stipulating that the PLACL take priority over the application over other sets of rules. The 2014 version of the PLACL did contain such a preference clause: '*Estos principios se aplican con preferencia a cualquier otro cuerpo de principios…*', (Art. 1(2) PLACL 2014)[38]. The final version no longer contains this strict approach of a hegemony of the Latin American principles over other sets of rules, and with good reasons.

[37] Reiner Schulze, 'Supply of Digital Content. A New Challenge for European Contract Law', in Alberto de Franceschi (ed), *European Contract Law and the Digital Single Market* (Intersentia 2016) 127-147 (131f); Reiner Schulze, 'Nuevos retos para el Derecho de contratos europeo y cuestiones específicas acerca de la regulación del suministro de contenidos digitales', in Esther Arroyo Amayuelas and Ángel Serrano de Nicolás (eds), *La Europeización del Derecho Privado: Cuestiones actuales* (Marcial Pons 2016) 15-27.

[38] Printed in the annex of Lis Paula San Miguel Pradera, 'Los Principios latinoamericanos de derecho de los contratos: una revisión crítica. Jornadas de discusión y análisis. Madrid, 16 y 17 de junio de 2016. Real Academia de Jurisprudencia y Legislación' [2016] 69(3) Anuario de derecho civil (ADC), 991-1038.

One reason may be that, realistically, the primary function of these principles does not lie in their application in contract practice, but rather in their aforementioned function as a potential source of inspiration for the legislator, courts and scholars in the Latin American states. Where such function is concerned, a formal preference clause is not relevant because the influence on the legislator, courts and scholars already may be of persuasive character. In this context, it is more important to emphasise the overlaps between the PLACL and international tendencies in the development of contract law. The discussions in Latin American politics and academia can give more weight to the PLACL in the context of similar sets of rules and as embedded as a Latin American variant in a global development of modern contract law.

The extensive overlaps with other international sets of rules, especially the CISG and PICC, can be an advantage also where the PLACL are applied by virtue of party agreement as the legal experiences (both in practice and literature) with these other sets of rules may also be used for the PLACL. This may make it easier for the parties in Latin America to subject themselves to these principles (Art. 1(2)(a)) or at least agree that their contract will be governed by the general principles of law in the sense of Art. 1(2)(b) PLACL. In the former case, the application of the PLACL is ensured in any case: a preference clause is not required. However, it may be useful to include an additional reference to other sets of rules such as the PICC as an aid to interpret the PLACL. In the latter case, the reference to general principles of law may, however, give rise to the problem whether the PLACL or other sets of rules are decisive. A strict preference clause in the PLACL would, however, not provide an adequate solution to this problem, but would rather deter the parties. For example, the question of the extent to which such a clause favouring a regional set of rules can exclude the application of the principle *lex specialis derogate legi generali* (i.e. 'regional specialty' above 'specialty in content') would remain open. The difficult question would be that the general contract law of the PLACL would prevent reference to sets of rules particular to commercial contracts (such as the PICC) or for the sale of goods even though such a contract is at issue and the relevant set of rules contains a suitable rule. It would also not be convincing if standardised contracts from Latin American firms were subject to other such sets of rules when concluded with partners around the globe, whereas the same contracts would be subject to different approaches when concluded domestically.

For these reasons, it may be preferential if the rules on the PLACL's scope of application were not to include, as originally proposed, a preference clause favouring the application of the PLACL. The preferential aspect of the future discussion, both in politics and academia, on the PLACL may rather be the tendency to consider a further assimilation of modern international instruments of contract law – a tendency that has a starting point in 1980 for the CISG and included, with modifications, in Latin American contract law through the PLACL.

V. Conclusions

In summary, the recent experiences with the sets of rules for European contract law indicate that one of their main functions may lie in their use as a source of inspiration for legislators, legal doctrine and even the courts with regard to national law. They can thereby contribute to a modernisation of contract law through reforms and through new interpretations and doctrinal approaches. However, beyond this they can even stimulate a particular assimilation of national laws through a link between the individual national traditions with common concepts and principles. The 'Principles of Latin American Contract Law highlight this important aspect of their potential effect with their statements on the application in the interpretation of domestic law and their use as a model for the national legislator (Art. 2(1) and (2)). This effect can be strengthened by the overlaps between the PLACL and other international sets of rules (especially the CISG and the PICC) with respect to core matters. It is here in which one can understand the PLACL as part of a global development which, especially since 1980 with the adoption of the CISG, has influenced not only international contract practice but also numerous national laws. However, the PLACL may not only serve as a catalyst for the inclusion of Latin American in this global development of contract law but also offer the chance for Latin American jurists to transcend the supranational level by making their mark on international tendencies.

However, the global efforts towards modernising the law of contract under the influence of the CISG will soon be likely to be followed by a second phase that takes heed of the challenges from the 'digital revolution'. It is here in which the law of contract is faced with many new questions and tasks. The conclusion and performance of contracts in e-commerce has been discussed for many years. The contracts for the supply of digital content and the role of data therein (especially as consideration for digital services) are part of the EU's recent legislation. The pre-contractual and contractual responsibility of internet platforms, the use of artificial intelligence in concluding contracts and the associated questions of 'smart contracts' and blockchain technology, contractual and non-contractual rights to access data, and many more issues all belong to the future challenges for contract law in the 'digital age' and will be faced by legislators, scholars and practitioners in Europe and Latin America. These 21st century challenges will require the further development of principles of contract law as well as the extension and modification to the aforementioned sets of rules for both of these world regions. In this respect, the Principles of Latin American Contract Law do not mark the end to an academic discussion, but are rather the basis in order to tackle the new global challenges together with jurists from across the globe.