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**INTRODUCTION**

**INTRODUCTION TO THE SPECIAL ISSUE  
ON THE COMPARISON OF THE  
PRINCIPLES OF EUROPEAN  
CONTRACT LAW WITH THE  
UNIFORM COMMERCIAL CODE**

**Henry D. Gabriel\***

Despite the prognostications in some quarters a few years ago about the imminent death of contract law,<sup>1</sup> in publishing this Special Issue the editors of the Pace International Law Review show that the principles of the law of contract are thriving and that the law of contract is being examined and promulgated by several important bodies throughout the world that are dedicated to the scientific study of law.

This Special Issue is ostensibly about the comparison of two of the projects in this area: the recently issued Principles of Eu-

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<sup>1</sup> See, e.g., GRANT GILMORE, *THE DEATH OF CONTRACT* (Ohio State University Press 1974).

ropean Contract Law (PECL)<sup>2</sup> with the American Uniform Commercial Code (UCC).<sup>3</sup> This Special Issue does in fact tackle several comparative aspects of these two bodies of law, but as the reader will quickly grasp, it does much more. For, as the authors point out, to grasp the significance of the relationships between the PECL and the UCC, one must also examine and contrast several other modern attempts to grapple with the questions presented by the law of contract and its practical sub-branch, the law of sales. Thus, as the authors in this Special Issue show, an appreciation must also be shown for the various cross influences of other bodies of contract principles to the PECL and the UCC,<sup>4</sup> particularly the United Nations Convention on Contracts for the International Sale of Goods (CISG)<sup>5</sup> the UNIDROIT Principles of International Commercial Contracts,<sup>6</sup> and the *Restatement (Second) of Contracts*.<sup>7</sup>

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<sup>2</sup> THE COMMISSION ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW PARTS I AND II COMBINED AND REVISED (Ole Lando & Hugh Beale eds. 2000). The Commission on European Contract Law (CECL) began its work in 1982. In 1995, the CECL published part I of its work, which deals with performance, non-performance and remedies and in 1999, the CECL published part II of its work, which deals with formation, validity and interpretation. Part III is underway, and is intended to cover such matters as assignment and prescription.

<sup>3</sup> The Uniform Commercial Code is a joint project of the National Conference of Commissioners on Uniform State Laws and the American Law Institute. It has been adopted in some form in all of the states (except for Louisiana, which has adopted all but the sales and leases provisions) as well as the District of Columbia and the Virgin Islands.

<sup>4</sup> Article 2 of the UCC, which governs the sale of goods, has been in existence since the early 1950's, and was part of a drafting process that began in the early 1940's. These provisions have been through a process of revision since 1992, and is still currently under consideration for revision. For a discussion of the history and politics of the process, see Henry Gabriel, *The Revision of the Uniform Commercial Code- How Successful Has It Been?* 52 HASTINGS L. REV. 653 (2001); Henry D. Gabriel, *The Revision of the Uniform Commercial Code- Process and Politics* 19 J. LAW AND COM. 125 (1999).

<sup>5</sup> For a discussion of the effect of the CISG on the revision of the UCC, see Henry D. Gabriel, *The Inapplicability of the United Nations Convention on the International Sale of Goods as a Model for the Revision of Article Two of the Uniform Commercial Code*, 72 TUL. L. REV. 1995 (1998).

<sup>6</sup> International Institute for the Unification of Private Law (UNIDROIT), *Principles of International Commercial Contracts* (Rome:UNIDROIT, 1994).

<sup>7</sup> See Maria del Pilar Perales Viscasillas, *Formation of Contracts and the PECL*, 13 PACE INT. L. REV. 371 (2001). Professor Perales is explicit that the influence of the UCC on the PECL is based on the influence of the UCC to both the subsequently drafted United Nations Convention on Contracts for the International Sale of Goods and the UNIDROIT Principles of International Commercial Contracts, which were both in turn sources of the PECL.

At the broadest level of generalization, a comparison of the PECL with the UCC is a comparison of the common law and civil law traditions. But as the authors of this Special Issue show, the nuances and subtleties of the PECL and the UCC cannot be reduced to such blunt categorizations, particularly in light of the fact that the PECL has attempted in many respects to come to a balance between Civil Law and Common Law principles. Thus, for example, as Professor Pilar Perales points out, the Common Law doctrine of parole evidence is adopted, while the Common Law doctrine of consideration is not.<sup>8</sup>

The comparisons between the PECL and the UCC not only include a contrast between different legal traditions, but also require an appreciation of the difference between an expression of positive law such as a statute or a code, and a "Restatement" of the law which has no legally binding impact. Thus, as Professor Lando points out, the PECL is closer in effect to the American *Restatement (Second) of Contracts*, which is not binding legislation, than it is to the UCC which is enacted legislation.<sup>9</sup> However, whereas the *Restatement (Second) of Contracts* was never intended to be passed as a statute, and never has been, Professor Lando posits the hope that the PECL may in fact be the basis, along with the UNIDROIT Principles of International Commercial Contracts for future legislation.<sup>10</sup> What is implicit in Professor Lando's suggestion and is explicit in the structure of the PECL, is that, like the UCC, the PECL is not drafted as a statutory compilation of rules as is the *Restatement*

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<sup>8</sup> *Id.*

<sup>9</sup> Another important similarity between the production of the PECL and the Restatement of Contracts is that, as Professor Lando indicates, the drafters of the PECL were not legislators, but were disinterested lawyers, mostly academics, who saw their roles as producing the best possible product without the influence of specific interest groups. See Ole Lando, *Salient Features of the Principles of European Contract Law: A Comparison with the UCC*, 13 PACE INT. L. REV. 339 (2001). Likewise, the RESTATEMENT OF (SECOND) CONTRACTS was drafted by the American Law Institute, a non-governmental organization that seeks to produce guiding principles of law that are not the product of specific interest groups. The UCC, although a joint product between the National Conference of Commissioners on Uniform State Laws and the American Law Institute, often shows the pressures of legislation which is drafted with enactability in mind. See, Gabriel, *The Revision of the Uniform Commercial Code- How Successful Has It Been?*, *supra* note 4; Henry D. Gabriel, *The Revision of the Uniform Commercial Code- Process and Politics*, *supra* note 4.

<sup>10</sup> Lando, *supra* note 9.

(*Second*) of Contracts, but is structured as a systematic codification of contractual principles.<sup>11</sup>

A final broad distinction between the PECL and the UCC that this Special Issue raises is the jurisdictional focus of the rules. The UCC is intended as domestic legislation, and as such, it is derived from and accommodates a single legal tradition.<sup>12</sup> The PECL, on the other hand, in an attempt to be inclusive of the various legal traditions of Europe, is an amalgam of different legal traditions. As such, the PECL in many respects is much more similar to the CISG than the UCC. To one author in this Special Issue, this point suggests that for the purpose of examining the development of the doctrine of impossibility as it is embodied in the PECL, one should look to the CISG.<sup>13</sup>

Ultimately, as exhibited in Professor Flechtner's detailed and nuanced comparison of the good faith requirements in the PECL and the UCC,<sup>14</sup> the similarities between these two important articulations of contract law are quite great when looked at as broad principles, but the seemingly small distinctions in the rules can be of much significance when applied to the discreet and specific facts of actual cases.<sup>15</sup> It is these distinctions, that are so well articulated in the articles in this Special Issue, that make these contributions significant works of comparative law.

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<sup>11</sup> Professor Lando is quite clear on the point that the PECL is designed as a Code, and he tells us that the influence for the structure is the Swiss Civil Code of 1907-11. *Id.*

<sup>12</sup> The sales provisions of the UCC are derived from a prior codification of the law that was embodied in the Uniform Sales Act, itself a direct descendant of the British Sale of Goods Act. All of these codifications are imbued with the strong consistent flavor of the Common Law.

<sup>13</sup> See Dionysios P. Flambouras, *The Doctrine of Impossibility of Performance and Clausula Rebus Sic Standibus in the 1980 Vienna Convention on International Sales and the Principes of European Contract Law- A Comparative Analysis*, 13 PACE INT. L. REV. 261 (2001).

<sup>14</sup> Harry Flechtner, *Comparing the General Good Faith Provisions of the PECL and the UCC: Appearance and Reality*, 13 PACE INT. L. REV. 295 (2001).

<sup>15</sup> For example, Professor Flechtner points out that the transposition of a few words in the operative language of the good faith provisions embodies the entire historical conflict between the Common Law and Civil Law positions on the question of a pre-contractual obligation of good faith. *Id.*