

INFORMATION REQUIREMENTS AND REMEDIES IN THE PRINCIPLES OF EUROPEAN CONTRACT LAW

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I. On the Style of the PECL and possible remedies in general

A. The style

This contribution intends to analyse how informational problems are dealt with in the principles of European Contract Law drafted by the Commission on European Contract Law¹. In a book devoted mainly to the *acquis communautaire*, an analysis of PECL can be interesting especially insofar as it concentrates on the remedies and their structure, and this has determined also the structure of this contribution. When analysing these Principles, one will notice that many rules have some connection to such informational problems in a large sense of the word. However, duties to inform are rarely spelled out in the PECL. I see two reasons for this. On the one hand, the PECL only deal with general contract law, not with specific contracts, and many duties to inform have – in national laws as well as in the *acquis communautaire* - been developed in the context of specific contracts². On the other hand, the PECL are basically (not radically) remedy-oriented. Duties, burdens (*Obliegenheiten*), etc. are not in the first place formulated in themselves, but mainly formulated as conditions for remedies. Most of these duties are indeed not actionable in themselves (which would imply that specific performance cannot be claimed) and thus become really relevant only when their violation causes a non-performance (in the sense of Art. 1:301 (4) PECL) or when other types of legal effects are available. Before going to the different rules concerning information in PECL, I will therefore first give a typology of their remedies

B. Remedies in general

Four types of remedies for informational problems can be found in our law, and esp. also in PECL. From the type of remedy, one can deduce the qualification of the requirement relating to information, according to more or less traditional categories.

¹ *Principles of European Contract Law, Part I and II combined and revised*, eds. O. Lando & H. Beale, Kluwer Law international / Nijhoff Dordrecht 2000; *Principles of European Contract Law, Part III*, eds. O. Lanod, E. Clive e.a., Kluwer Law international 2003.

² Some commentators – and I agree with them - have already indicated that they wish the Principles to contain more rules on additional or ancillary duties in the general part of contract law. Eg M. HESSELINK, *Principles of European Contract Law*, Preadviezen voor de Vereniging voor burgerlijk recht, Kluwer 2001, p. 62.

1. The first possible remedy consist of compensation of the damage in the sense of the “negative interest” (reliance interest, *Vertrauensinteresse*), as in tort law. It is the remedy for violation of a “duty” (*Verpflichtung*). A number of them will be indicated *infra*.

2. The second possible remedy is a specific right to information. It corresponds an “obligation” (*Verbindlichkeit*) of the other party. In case of non-performance, the creditor is in principle entitled to specific performance. Such rights / obligations will be found mainly in specific contracts, eg. in the Commercial Agents Directive. The Consumer Sales Directive grants the consumer a right to receive the guarantee in a written document or similar form. Equally, in other specific contracts, a party may be entitled to receive a “written” or similar document containing (and proving) the contract. In the general contract law, as expressed in PECL, such obligations are rare. They may be deduced from the general duty to co-operate in Art. 1:202. An explicit example is on the other hand found in Articles 3:302 and 3:303 concerning undisclosed agency: if the intermediary (the agent) becomes insolvent, or commits a fundamental non-performance towards one of the parties (or prior to the time for performance it is clear that there will be a fundamental non-performance), the intermediary shall communicate him the name and address of the other party.

3. A third possible remedy is that a party loses certain rights it would have had if it had fulfilled the information requirements. A fourth remedy its its mirror : a party is bound by the information it gave, whereas it could have avoided being bound by complying with information requirements. These remedies could be seen as the result of not complying with some “burden” (*Obliegenheit*). There was no obligation to comply, but due to the sanction imposed by law it is clearly against one’s own interest not to comply.

Let us see in how far these concepts are present in PECL. I have deliberately chosen to deal with information problems in general, in a broad sense. Thus we can distinguish basically cases where the problem is the incorrectness of the information (II) from cases where the information is absent (or given too late) (III). In both types of situations, I will draw a list of situations where the different remedies apply, with the exception of the right to information as such, which has already been explained sufficiently *supra*.

II. Incorrect information

A. Remedied by compensation of damages

Compensation for damage caused by false information can be based on 2 provisions in PECL.

1. Contractual liability

On the one hand, there is the general rule on contractual liability in 9:501 („The aggrieved party is entitled to damages for loss caused by the other party's non-performance which is not excused under Article 8:108”), which could sanction any “non-performance”. This last concept is defined in 1:301 (4) as “any failure to perform an obligation under the contract, whether or not excused, and incl. delayed performance, defective performance and failure to co-operate in order to give full effect to the contract”. PECL is thus not explicitly

distinguishing the real obligations and the mere duties. But, where the damage is caused by false information, it makes no sense to see this as the non-performance of a real “obligation” to inform.

2. Pre-contractual liability³

The concepts are clearer in the case of pre-contractual liability for misrepresentations. Art. 4:106 provides that “a party which has concluded a contract relying on incorrect information given it by the other party may recover damages in accordance with Article 4:117(2) and (3) (...). Art. 4:117 specifies that the damages are “limited to the loss caused to (the party) by the (...) incorrect information (...)”.

B. Remedied by withholding profit or rights

Further, there are a number of provisions where one can see how incorrect information leads to the loss of certain rights one would otherwise have, and especially to the loss of the contract (and its benefits). This will be the case – under certain conditions -:

- where the incorrect information causes a mistake (art. 4:103 (1) (a) (i) – the remedy being avoidance unless the other party agrees to adapt the contract (i.e. to perform as it was understood by the party entitled to avoid it);
- where incorrect information causes an error in the declaration of the other party (eg a misleading webform) (see art. 4:104 *juncto* 4:103 (1)), the remedy being the same;
- where it amounts to a “fraudulent representation”, the remedy being avoidance for fraud.

Although in some cases, the incorrect information will also amount to a violation of a pre-contractual duty to inform, it can in all these cases be analysed also as the non-fulfilment of a burden.

C. Remedied by giving binding force to incorrect statements

Thirdly, false information may be sanctioned by binding the party to the statements it made. In this sense, „pre-contractual“ behaviour may have contractual effects and give rise to contractual remedies.

A traditional doctrine distinguishes „declarations of intent“ (*Willenserklärungen*) from statements of fact (*Wissenserklärungen*).

1. Declarations of intent

As to the first, Art. 2:102 PECL provides that „The intention of a party to be legally bound by contract is to be determined from the party's statements or conduct as they were reasonably understood by the other party”. One is thus bound to live up to the reasonable expectations of the other party, unless one has avoided such expectations by precisely not creating such expectations not corresponding to one's real intent. Equally, Art. 3:201 (3) provides that ” A

³ I am deliberately short on informational problems leading to defects of consent as the contribution of Prof. GRIGOLEIT in this book is focused more specifically on these questions.

person is to be treated as having granted authority to an apparent agent if the person's statements or conduct induce the third party reasonably and in good faith to believe that the apparent agent has been granted authority for the act performed by it."

Whether one is bound or not, is thus partly determined by the information one has given about one's intentions – in a certain sense thus by one's precontractual behaviour in this respect. This also follows from the rules on interpretation. Art. 5:101 – General rules of interpretation – implies some burdens of information. On the one hand, para (3) provides that "(...) the contract is to be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances", thus obliging a party to use words basically in their normal meaning, unless he clarifies their meaning. On the other hand, para (2) provides that "If it is established that one party intended the contract to have a particular meaning, and at the time of the conclusion of the contract the other party could not have been unaware of the first party's intention, the contract is to be interpreted in the way intended by the first party", thus obliging to other party to speak up if he wants to avoid to be bound by this particular meaning. The latter rule is therefore rather an example of absence of information (dealt with infra, III) than of false information.

2. Statements of fact

When statements of fact contain performance-related information, they will also often have contractual effects. It is interesting to see under which conditions such statements do not merely lead to liability for the damage caused by the information (negative or reliance interest), but to an obligation or guarantee for the positive or expectation interest.

a) Statements giving rise to contractual obligations under Art. 6:101 PECL, CISG and the CSD

A therefore dogmatically interesting provision is found in Art. 6:101 PECL, which reads:

- (1) A statement made by one party before or when the contract is concluded is to be treated as giving rise to a contractual obligation if that is how the other party reasonably understood it in the circumstances, taking into account:
 - (a) the apparent importance of the statement to the other party;
 - (b) whether the party was making the statement in the course of business; and
 - (c) the relative expertise of the parties.
- (2) If one of the parties is a professional supplier which gives information about the quality or use of services or goods or other property when marketing or advertising them or otherwise before the contract for them is concluded, the statement is to be treated as giving rise to a contractual obligation unless it is shown that the other party knew or could not have been unaware that the statement was incorrect.
- (3) Such information and other undertakings given by a person advertising or marketing services, goods or other property for the professional supplier, or by a person in earlier links of the business chain, are to be treated as giving rise to a contractual obligation on the part of the professional supplier unless it did not know and had no reason to know of the information or undertaking.

In sales law, there are more specific provisions along the same lines, especially the provisions requiring the goods:

- to comply with the description given by the seller (Art. 2 Para 2 lit. (a) Directive EG 99/44);
- to possess the qualities of the goods which the seller has held out to the consumer as a sample or model (Art. 35 Para 2 lit. c CISG and Art. 2 Para 2 lit. (a) Directive EG 99/44);
- to be fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, (Art. 35 Para 2 lit. b CISG; comp. Art. 2 Para 2 lit. b Directive EG 99/44). In CISG, this only applies unless “the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement”.
- to show the quality and performance (...) which the consumer can reasonably expect, (...) taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling. (Art. 2 Para 2 lit. (d) Directive EG 99/44). Art. 2 Para 4 of the Directive makes an exception by providing that „The seller shall not be bound by public statements, as referred to in paragraph 2(d) if he (a) shows that he was not, and could not reasonably have been, aware of the statement in question, (b) shows that by the time of conclusion of the contract the statement had been corrected, or (c) shows that the decision to buy the consumer goods could not have been influenced by the statement.”

On the other hand, these requirements are limited by Art. 2 Para 3 of EC Directive 99/44 and Art. 35 Para 3 CISG, according to which there shall be deemed not to be a lack of conformity *c.q.* the seller is not liable for any lack of conformity if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

These provisions partly deal with cases of incorrect information, partly with problems of absence of information. Anyway, such provisions imply duties or burdens (i.e. *Obliegenheiten*) to inform and examine for both parties: the seller should enquire the purposes of the buyer and the qualities of the goods and inform the buyer about them; the buyer should examine the quality of the goods and inform the seller about his (specific) purposes. In principle, knowledge about specific purposes of the buyer is a responsibility of the buyer and knowledge about the qualities of the goods a responsibility of the seller. But the intensity of these duties or burdens depends on the position and capacity of the parties, especially their professional status.

Although such duties and burdens are pre-contractual in nature, their sanction is basically contractual: when a buyer does not inform the seller about a specific purpose, being fit for this purpose is not required for the conformity of the goods; when a seller gives erroneous information on the qualities the goods possess, possession of these qualities is nevertheless an element of the required conformity. The content of contractual claims is thus in part determined by the pre-contractual behaviour of the parties.

b) Other examples

Equally, information given about one's products or services, with stated prices, in the form of a public advertisement or a catalogue, is according to Art. 2:201 (3) PECL "presumed to be an

offer to sell or supply at that price until the stock of goods, or the supplier's capacity to supply the service, is exhausted.”

A last example is found in Art. 3:204: Where a person, pretending to be an agent, acts without authority or outside the scope of its authority, (its acts are not binding upon the principal and the third party, and failing ratification) “the agent is liable to pay the third party such damages as will place the third party in the same position as if the agent had acted with authority. This does not apply if the third party knew or could not have been unaware of the agent’s lack of authority.” Again, a pre-contractual statement containing incorrect information, gives rise to contractual remedies (damages for the “positive interest”).

III. Absent or late information

A. Remedied by compensation of damages

1. Pre-contractual liability

As to damage caused by withholding information in the pre-contractual stage, PECL only deals with the case where a party has a right to avoid the contract for mistake, fraud, threat or taking of excessive benefit or unfair advantage (even if it does not exercise its right or has lost its right under the provisions of Articles 4:113 (Time limits) or 4:114 (Confirmation)). In those cases, compensation for damage is granted provided that the other party knew or ought to have known of the mistake, fraud, threat or taking of excessive benefit or unfair advantage. As we have seen *supra*, in case of incorrect information, compensation for damage is granted “even if the information does not give rise to a fundamental mistake under Article 4:103, unless the party which gave the information had reason to believe that the information was correct”. As to the measure of damages, for withholding information (as well as for incorrect information), it depends on whether there is actual avoidance (positive interest) or not (negative interest) (see Art. 4:117 (1) *c.q.* (2)).

2. Contractual liability

Again, there are nearly no specific rules on contractual duties to inform in PECL. Such duties will follow from the determination of the contents of contracts according to the rules on interpretation, including implied terms (Art. 6:102), the general duty to co-operate in order to give full effect to the contract (Art. 1:202) and other duties arising out of the good faith and fair dealing (Art. 1:303). The remedy is, as said *supra* for incorrect information, spelled out in Art. 9:501. Evidently, most of these duties will be found in the law on specific contracts. A rare case where a duty to inform is spelled out in general contract law is Art. 8:108 (3): where non-performance is due to an impediment which could excuse non-performance, “the non-performing party must ensure that notice of the impediment and of its effect on its ability to perform is received by the other party within a reasonable time after the non-performing party knew or ought to have known of these circumstances. The other party is entitled to damages for any loss resulting from the non-receipt of such notice.”

B. Remedied by withholding profit or rights

Again, withholding information can also have other effects than compensation for damages. The PECL imply a whole series of pre-contractual burdens to inform or speak up – or to do it in time - in order to maintain one's rights. A party will lose rights it would otherwise have in many cases.

Some of them concern declarations of intent – or rather their absence or lateness - and are thus traditionally not considered as the effect of burdens to inform. I nevertheless mention them, as the borderline between declarations of intent and statements of fact is not a sharp one (compare already supra Art. 6:101). Thus, the opportunity to conclude a contract is lost when an offer of an offeror is not accepted within the time fixed by it or, if no time has been fixed by the offeror, within a reasonable time (Art. 2:206). There is nothing special about this rule, as it is an application of the basic notion that you can create contracts by offer and acceptance (which does not prevent the PECL from also recognizing the binding effect of unilateral promises without acceptance under Art. 2:107).

A borderline case is found in Art. 2:104: if one does not take took reasonable steps to inform the other party before or when the contract was concluded about one's standard conditions or other contract terms which have not been individually negotiated, such terms cannot be invoked. Para (2) specifies that "terms are not brought appropriately to a party's attention by a mere reference to them in a contract document, even if that party signs the document". I would like to remark that even if such terms haven been brought appropriately to the other party's attention, they are stioll subject to the fairness test of Art. 4:110 and may be avoided when "contrary to the requirements of good faith and fair dealing, (they) cause a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party, taking into account the nature of the performance to be rendered under the contract, all the other terms of the contract and the circumstances at the time the contract was concluded". In the last article, one also finds the requirement of using "plain and intelligible language" in order to escape this fairness test for term defining the main subject matter of the contract (the only terms not individually negotiated escaping this test).

In other cases, it is clearly withholding factual information which causes the loss of a right. Thus, the advantage of a concluded contract is lost when:

- when one has led the other party to conclude it by a fraudulent non-disclosure of any information which in accordance with good faith and fair dealing it should have disclosed (Art. 4:107);
- when one has led the other party to conclude it by leaving the other party in error although one knows or ought to have known of its mistake, provided it was contrary to good faith and fair dealing to leave the mistaken party in (and provided one knew or ought to have known that the mistaken party, had it known the truth, would not have entered the contract or would have done so only on fundamentally different terms, and provided the mistake was not inexcusable) error (Art. 4:103 (1)(a)(ii));
- when the contract was made by a person who was also agent for the other party, or by a person whose agent was also agent for the other party or otherwise involved in a conflict of interest (in the latter two cases provided the principal knew or could not have been unaware

of the conflict of interest), and one has not disclosed the conflict of interest to the other party (See Art. 3:205).

In all 3 cases, the loss of contract is the result of the right of the other party to avoid it (whereas in the *acquis communautaire*, the remedy is often the right to cancel the contract, the nature of which is much debated...). In case of mistake (not: fraud), the loss of the contract can be prevented by indicating in time one's willingness to perform, the contract as it was understood by the mistaken party; "in time" means "promptly after being informed of the manner in which the party entitled to avoid it understood the contract and before that party acts in reliance on any notice of avoidance" (Art. 4:105). Here, the required information is not a pre-contractual, but a contractual declaration of intent.

C. Remedied by giving binding force to absence of information.

Finally, absence of a declaration of intent or of a statement of fact or similar information may result in being bound by one's inactivity given its context.

First of all, there may be pre-contractual burdens to object in order to prevent being bound by a contract or by certain contractual terms.

- Thus, when an offeror receives a reply which gives a definite assent to an offer, but which states or implies additional or different terms, which do *not* materially alter the terms of the offer, the offeror must object to the additional or different terms without delay, or the reply will operate as an acceptance and the additional or different terms become part of the contract (Art. 2:208, rule on modified acceptance).

- When parties have reached agreement except that the offer and acceptance refer to conflicting general conditions of contract, a contract is nonetheless formed (with the general conditions not being part of the contract except to the extent that they are common in substance), unless one (a) has indicated in advance, explicitly, and not by way of general conditions, that one does not intend to be bound by a contract on this basis; or (b) without delay, informs the other party that one does not intend to be bound by such contract.

- When a professional who has consented to a contract, which is not embodied in a final document, receives without delay a writing by the other party which purports to be a confirmation of the contract but which contains additional or different terms not materially altering the terms of the contract, such terms will become part of the contract unless the addressee objects to them without delay (Article 2:210, rule on Professional's Written Confirmation).

- When a party who concludes a contract knows (or could not have been unaware) that the other party intends the contract to have a particular meaning – and does not speak up on this – the contract is to be interpreted in the way intended by the first party, although (a) there is no common intention and (b) that meaning is not the "normal" meaning (i.e. to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances) (See Art. 5:101, esp. paragraph (2)).

- When one receives a written confirmation from another party requesting ratification of an act performed by a person who has acted as agent of the first one, and one's statements or conduct had the third party given reason to believe that the act performed by the agent was

authorised, the agent's act is treated as having been authorised, and one is bound, unless one objects or answers the request without delay (Art. 3:208).

- When one is informed by one's agent about a conflict of interest in which he is involved (i.e. because he intends to contract with himself in its personal capacity, or for another principal), one has to object within a reasonable time in order to preserve one's right to avoid the contract (Art. 3:205 (3)(b)).

A further example does not imply a pre-contractual burden, but a contractual one, but the situation is comparable: when a principal wants to bring to an end his agent's authority, the agent's authority nevertheless continues until (a) this has been communicated or publicised in the same manner in which the authority was originally communicated or publicised or (b) the third party is considered to know that the agent's authority has been brought to an end (Art. 3:209). Keeping up appearances implies that one remains bound by the agent's acts. Similarly, a right to terminate a contract and similar remedies must be exercised within time limits (See Art. 4:113, 9:102(3), 9:303 (2) and the rules on extinctive prescription in Ch. 14 PECL). Inversely, not informing the other party about its rights or not giving it the required information to exercise its rights, will lengthen the period of time the other party has to exercise that right (examples of this can be found in rules of the *acquis communautaire* lengthening cancellation periods, and implicitly in some rules on prescription, such as 14:301 PECL).

Further contractual burdens concern information related to performance. Thus, an agent who entered into a contract in the name of a principal whose identity is to be revealed later, and who fails to reveal that identity within a reasonable time after a request by the third party, is itself bound by the contract (Art. 3:203). An assignee who wants to receive performance from the debtor, must send the debtor a notice in writing from the assignor or the assignee which reasonably identifies the claim which has been assigned and requires the debtor to give performance to the assignee (Art. 11:303); he must at least inform the debtor in one way or another about the assignment in order to prevent him from paying validly to the assignor. A principal, or inversely a third party, who wants to take over the rights acquired by an intermediary acting on instructions and on behalf, but not in the name, of a principal ("Indirect Representation" or "undisclosed agency"), must give notice to the intermediary and the other party, until receipt of such notice, the other party remains entitled to render performance to the intermediary.

IV. Conclusion

In this contribution, I have deliberately dealt with information requirements in the widest possible sense. My purpose was indeed mainly to show the structure of possible remedies for information requirements, as exemplified by the already published rules of the Principles of European Contract Law. As in many other fields of law, the real thing is not so much to spell out requirements, but to formulate remedies. The structure of remedies in PECL is certainly not the only possible one, but it certainly is one worthwhile of being contemplated when reformulations of the *acquis communautaire* is on the agenda.