

<b>Institution:</b> University of Warwick
<b>Unit of Assessment:</b> School of Law
<b>Title of case study:</b> European Contract Law
<p><b>1. Summary of the impact:</b> Beale was a major contributor to research published in 2000 as <i>The Principles of European Contract Law (The Principles)</i>. <i>The Principles</i> had and continue to have a major impact on the development of contract law at both the EU and national levels. They formed the basis of subsequent work that led to the Draft Common Frame of Reference (DCFR, 2009), which incorporated <i>The Principles</i>. <i>The Principles</i> and the DCFR have influenced interpretation in the European Court of Justice (ECJ) / Court of Justice of the European Union (CJEU) and are cited in national courts. They have had a significant impact on reform of national laws and led directly to the European Commission's proposal for a Regulation on a Common European Sales Law (CESL, 2011). With support from the University of Warwick, Beale played a key role not only in producing <i>The Principles</i> but in all the subsequent stages, including being a member of the Expert Group that produced a first draft of the CESL.</p>
<p><b>2. Underpinning research:</b> Each Member State of the European Union has its separate law of contract. Some harmonisation has been brought about by EU Directives, particularly of consumer law, but major differences of both form and substance remain between the general laws of contract. Terminology and concepts vary widely and are not always understood by lawyers from other jurisdictions. In some cases, the laws produce very different results. This makes it hard to draft and to interpret both supposedly harmonising measures and actual contracts, and so adds to the cost of cross-border trade in the Internal Market. The project of harmonising contract law across the EU is thus of profound significance in both conceptual and practical terms, and Beale's comparative research into contract law has played a major role at key stages of this project.</p> <p>From 1987 until 2000, Beale was, in addition to holding a chair at Warwick, a leading member of the <b>Commission on European Contract Law</b>, the research group composed of professors from the Member States that had been established by Professor Ole Lando to examine the possibility of achieving such harmonisation. In this role he was engaged in researching, drafting and editing the Commission's major output, <i>The Principles of European Contract Law, Parts I and II</i> (2000: 3a).</p> <p><i>The Principles</i> employed a 'functional' comparative law approach that looked at practical outcomes to demonstrate that in reality the laws of the various EU Member States had much in common, and, insofar as national outcomes or rules found in international conventions differed, that it would be possible to develop a workable 'European' contract law that would be broadly acceptable to lawyers from the various Member States. The research involved close comparative study and intensive discussion to find the most appropriate formulations and solutions. Beale was one of five scholars who carried out the initial comparative research and drafted the articles and accompanying Comments.</p> <p>Once the texts had been approved by the Commission, Beale, with Lando, synthesised the comparative material into detailed 'Notes' and revised the Comments. With Parts I and II having been published in 2000, Beale was also a member of the drafting group for Part III until 2000, with Professors Clive (Edinburgh, from 2000), Goode (then at QMU), Wilson (Edinburgh, until 1992) and MacQueen (Edinburgh, from 1996) also being members of one or more of the groups.</p> <p><i>The Principles</i> formed the basis of subsequent work in this area. From 2000 to 2007 Beale, by then a Law Commissioner on temporary secondment from Warwick, was a leading member of the <b>Study Group on a European Civil Code</b>, which, adopting a similar research methodology and format to the Commission, produced a series of restatements that, where relevant, built on or referred to <i>The Principles</i> (3b). Meanwhile the European Commission's <i>Action Plan on European Contract Law</i> proposed a Common Frame of Reference to assist in the drafting or revision of EU legislation on contract law, and to form the basis for developing an 'Optional Instrument', a single European system which could be used across the EU in particular for cross-border transactions. The Study Group and the 'Acquis' Group (working on underlying principles in existing EU Law) were commissioned to produce the <b>Draft Common Frame of Reference</b> (DCFR: 3c).</p> <p>To achieve this, within the Study Group draft articles, comments and notes were produced by teams working under experienced academics, with advice from Specialist Advisors and a drafting committee; texts were approved by a Co-ordinating Committee. Beale was a leading member of both committees, and as such engaged in continuing research into comparative contract law. He</p>

## Impact case study (REF3b)

also advised several of its teams and was a member of the small team (drawn from the Study Group on a European Civil Code and the Acquis Group) responsible for drafting the text of the DCFR, which incorporated *The Principles* (sometimes adjusted so as to cover all kinds of obligation). He played a leading role in presenting drafts of the DCFR (and later the Common European Sales Law) at stakeholder workshops organised by the European Commission. The DCFR was submitted to the European Commission at the end of 2007.

**3. References to the research** (indicative maximum of six references)

(a) Lando, O. and Beale, H. (eds) *Principles of European Contract Law, Parts I and II* (Kluwer, 2000) (For a list of translations see item 4, Outline Edition, p 5.) [funded in part by a grant of £20,000 to Beale from the Lord Chancellor's Department; seen as a key reference text in European Contract Law (see 5l, describing this and the DCFR as 'a real point of reference for the European policy makers and legislators in the area of European and national private law' and referring to Beale's research as 'ground-breaking', and 5m, noting the scholarly work underpinning the *Principles*); articles included in many contract books and collections of statutes]

(b) Study Group on a European Civil Code, *Principles of European Law: Commercial Agency, Franchise and Distribution Contracts* (2006); *Service Contracts* (2007); *Sales* (2008); *Acquisition and Loss of Ownership of Goods* (2011) (all Sellier); (volumes from series to which Beale had direct input).

Study Group on a European Civil Code, and Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR): Outline Edition* (Sellier, 2009); complete edition (six volumes, Sellier and OUP 2009) [also regarded as a key reference text in European Contract Law: see 5l and m]

**4. Details of the impact** (indicative maximum 750 words): *The Principles* and the Draft Common Frame of Reference are considered essential reference points in the field of European Private Law. They have informed debate and discussion among practitioners and policy-makers, changed the way in which the subject is taught, and influenced the development of legislation and legal principle across a range of jurisdictions both within Europe and further afield.

**Impact as a statement of legal principle:** As one scholar has noted, *The Principles* 'have been assigned substantial informal authority. Many actors in the legal field treat these Principles as reference texts, on which they can base legal decisions without further argument.' (5a). For example, the European Court of Justice (now the CJEU) has held that legal terms used in EU legislation are to be given an 'autonomous European legal meaning'. When the legislation does not provide its own definition, *The Principles* and/or the DCFR have been relied upon by the Advocates-General in the ECJ for interpretive purposes (5b). Similarly, Law Commission papers on contract issues regularly take account of *The Principles* or the DCFR: the 2011 consultation paper on *Consumer Redress for Misleading and Aggressive Practices* devoted several pages to the DCFR (5c). The Law Commission has also stated that Directives should be interpreted in the light of the DCFR: in the 2008 Consultation Paper on *Consumer Remedies for Faulty Goods*, for example, it was noted that the relevant Directive 'does not specifically define sales contracts, but we think that it must be interpreted in the light of the Draft Common Frame of Reference' (5d). Key individuals have also referred to *The Principles* and the DCFR as important reference points (5l and m), with the President of the European Law Institute noting that it is 'hard to emphasise sufficiently the influence that the PECL and the DCFR have had ...in this developing field of European Union law, through their use by both the European legislators and the courts at all levels when interpreting European law' (5m).

**Impact on the development of legal principle:** The influence of *The Principles* and the DCFR is evident in the way that they are referred to by the courts in this jurisdiction. In *Yam Seng Pte Limited v International Trade Corporation Limited* [2013] EWHC 111 (QB), para 124 (5e), it was noted that they embodied a general duty to act in accordance with good faith and fair dealing, with the judge noting that '[t]here can be little doubt that the penetration of this principle into English law and the pressures towards a more unified European law of contract in which the principle plays a significant role will continue to increase.' Even where the courts decline to adopt the approach proposed, *The Principles* are still seen as a key reference point from which any departure needs to be justified (see e.g. *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, para 39 (5e)).

**Impact on government policy and legislative change:** *The Principles* have been particularly influential in the newer democracies in Central Europe and some of the Baltic States, many of which have revised or are in the process of revising their laws of contract or their civil codes (see 5f). In Hungary, drafters of the new Civil Code were expressly directed to take into consideration the solutions offered by *The Principles* (Kisfaludi, 5f), while in Poland, ‘a number of new rules introduced to the Civil Code have been inspired by solutions adopted in European (PECL) and UNIDROIT (UPICC) principles of contract law.’ (Rajski, 5f). Estonia now has a modern law of contract that draws on *The Principles* as a major source of its provisions, with changes being made to both the law of obligations and the Civil Code (Kull, 5f). Within Western Europe, the French Ministry of Justice is considering new articles for the Civil Code drawn directly from the *Principles* (2008 to the present: see 5g).

**Impact on developing a European Contract Law:** At a conceptual level, *The Principles* have had an impact in developing the idea of European Contract Law. Previously most contract teaching was on the basis of national law or of comparison between national systems. There are now many courses across Europe on European Contract Law, using *The Principles* as a primary source (see e.g. 5h) or using a casebook in which they form a key element and which is distributed across the continent (5i). In the UK *The Principles* are reproduced in standard student collections of statutory material. The President of the European Law Institute has noted how *The Principles* and the DCFR provided a model on which the Legal Affairs Committee of the European Parliament relied heavily when dealing with the ‘European Contract Law Project’ (5m).

At a practical level, both *The Principles* and the DCFR have also had substantial impact in informing the development of new rules. One particular problem for businesses operating across the EU has been the lack of common rules. In a cross-border contract, because any contract has to be governed by a national legal system, at least one of the parties must contract under a law that is foreign to it and which often will be in a foreign language. For businesses trying to sell across borders to consumers, there is an additional problem. In order to prevent consumers losing their rights by businesses choosing governing laws that have little or no protection for consumers, the Rome I Regulation provides that where a business has directed its activities towards consumers in another country (by mailshots or via a website that appears to invite orders from that country), a consumer who is habitually resident there and who contracts with the business is entitled to the protection of the mandatory rules of the targeted country. This means that a business seeking to sell to consumers Europe-wide has to deal with 28 different legal systems. These rules discourage businesses, especially small and medium enterprises, from selling across borders. Even for business-to-business sales, differences between systems remain a major problem. The UN Convention on the International Sale of Goods (1980; the UK has not adopted the Convention) applies to sales between businesses (it does not apply to consumer sales) but it omits many of the protections that Small and Medium Enterprises need. To address this problem, and to make it easier and more attractive to businesses to market their goods and services across borders, develop further the internal market and provide buyers with increased choice and, with more competition, lower prices, the European Commission has drawn up a proposed Regulation for a Common Sales Law. Both *The Principles* and the DCFR have been a major inspiration and source of material for this (see e.g. 5l, describing them as ‘the backbone of the proposal for the Common European Sales Law’), with the ‘Feasibility Study’ produced by the EC’s Expert Group, and the proposed Common Sales Law itself, drawing heavily on Books I-III and IVA of the DCFR and also on *The Principles*, which provided the basic rules for contracts (see 5j). As at 31 July 2013, the proposed Regulation is the subject of negotiations between the Commission, the Council of Ministers and the European Parliament. Beale continues to play a direct and influential role in the progress of these negotiations, having presented drafts of the DCFR and now the Regulation at stakeholder workshops organised by the European Commission and having given evidence to the Legal Affairs Committee of the Parliament. Drawing on his research over the last two decades, he is currently writing a Commentary on the text for the Commission, for officials to use during negotiations and for ultimate publication.

**Impact on policy debate outside Europe:** *The Principles* have also had an impact by informing the policy discussions outside Europe. They have been discussed by practitioners and academics in Chile (‘*Modernization of the Law of Obligations in Europe and Latin America*’, Valparaiso, Chile, September 2008) and by a Commission on Asian Contract Law (see 5k).

**5. Sources to corroborate the impact** (indicative maximum of 10 references)

- (a) N Jansen (2012), 'Legal Pluralism in Europe' (pp 11-12 : 'The PECL were used to fill gaps in the *Acquis Group's* Acquis Principles, and a revised version of the PECL became a core part of the DCFR; furthermore the PECL were taken up by the French *Association Henri Capitant* and the *Société de Législation Comparée* who published a reformulated version, with a French flavour, under the name *Principes Contractuels Communs* (PCC)... the PECL have been assigned substantial informal authority. Many actors in the legal field treat these Principles as reference texts, on which they can base legal decisions without further argument.');
- [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1840356](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1840356)
- (b) *Quelle* (Case C-404/06) [2008] 2 CMLR 49, para AG44, n28 (citing PECL); *Martin v EDP* (Case C-227/08) [2010] 2 CMLR 27, para AG51; *Danske Slagterier v Germany* (Case 445/06), para AG94, n57 (both citing DCFR); *Banco Español de Crédito SA v Camino* [2012] 3 C.M.L.R. 25, para. AG4 [citing *The Principles* and their role in the process of harmonisation]
- (c) Law Commission and Scottish Law Commission, *Consumer Redress for Misleading and Aggressive Practices* (LCCP no 199, 2011), paras 11.44-60 [discussing the DCFR].
- (d) Law Commission and Scottish Law Commission, *Consumer Remedies for Faulty Goods* (LCCP no 188, 2008), para 2.58, fn 69 [confirming the influence of the DCFR as an interpretative tool]
- (e) *Yam Seng Pte Limited v International Trade Corporation Limited* [2013] EWHC 111 (QB), [124]; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [39] [illustrating the way in which *The Principles* are being taken into account as a reference point]
- (f) 'European Initiatives (CFR) and Reform of Civil Law in New Member States' in (2008) XIV *Iuridica International*, especially I Kull, 'Reform of Contract Law in Estonia: Influences of Harmonisation of European Private Law' (2008) *ibid*, 122; A Kisfaludi, 'The Influence of Harmonisation of Private Law on the Development of the Civil Law in Hungary', *ibid*, 130; J Rajski, 'European Initiatives and Reform of Civil Law in Poland', *ibid* 151 [confirms the impact of the *Principles* on law reform projects in these countries, with which the authors were all involved]
- (g) France: Ministère de la Justice, *Projet de réforme du droit des contrats* (July 2008) [illustrating the impact of *The Principles* on the revised code under consideration; see also R Sefton-Green, 'The DCFR, the *Avant-projet Catala* and French Legal Scholars: A Story of Cat and Mouse?' (2008) 12 *Edinburgh Law Review* 351].
- (h) Masters in European Private Law, University of Amsterdam, module on European Contract Law: Professor Hesselink's course was based (from 1998) on *the Principles* and then on each new version (the DCFR, and Feasibility Study for the CESL and now the proposed CESL itself) as it became available [indicates impact on the teaching of European Contract Law]
- (i) H Beale, B Fauvarque-Cosson, J Rutgers, D Tallon and S Vogenauer, *Ius Commune Casebooks for the Common Law of Europe: Cases, materials and text on Contract Law* (Hart, 2<sup>nd</sup> ed, 2010)
- (j) Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, 11 October 2011, COM(2011) 635 final [draws on *The Principles* and DCFR]
- (k) S Han, 'Principles of Asian Contract Law: An Endeavour of Regional Harmonization of Contract Law in East Asia' (2013) 58 *Villanova LR* 589 [illustrating the impact of *The Principles* on reform initiatives elsewhere]
- (l) Head of Contract Law Unit at Directorate-General Justice, European Commission [can confirm the impact of *The Principles* and DCFR]
- (m) President of the European Law Institute, and former Vice-President of the European Parliament and of its Legal Affairs Committee [can confirm the impact of *The Principles* and DCFR]