



CENTRE FOR THE STUDY OF  
EUROPEAN CONTRACT LAW

## **Research Programme 2012-2014**

### **1. Introduction**

The Centre for the Study of European Contract Law (CSECL) was founded in 2006. The present programme is the CSECL's third research programme. Although the main research theme has remained unchanged, the present programme differs from its predecessor in several important respects. First, it accommodates the CSECL's recently established collaboration in a joint research project, together with the Amsterdam Centre for European Law and Governance and the Amsterdam Center for International Law, called the 'The Architecture of Postnational Rulemaking', and prepares for future collaboration in an interdisciplinary UvA research profile that is currently being prepared under the name of 'Transnational Law and Governance'. Secondly, it implements, and specifies for the CSECL, the recently adopted *Model for academic staff performance criteria* that will apply faculty-wide as of 2012. Thirdly, the specific research themes have been revised and partly reshuffled, in response both to the arrival of new staff and to the (in itself quite positive) outcomes of the national research assessment exercise.

### **2. Research theme**

#### *2.1. General theme*

The general research theme of our programme is European contract law. We understand *contract* law here in a wide and functional sense, i.e. the law of

economic transactions. This includes both commercial and consumer contracts, and both general and specific contract law. It also includes the relevant aspects of general patrimonial law and the general law of obligations. Moreover, it includes important aspects of property law and, albeit to a lesser extent, of tort law. Finally, conflict of law rules are also included. *European* law is understood here as the law that is applicable in the European legal space, i.e. the interrelated laws produced by law makers operating at the national level (e.g. the civil code, the common law), the European level (the *acquis communautaire*) and the international level (e.g. the United Nations Convention on Contracts for the International Sale of Goods). Finally, *law* is also understood here in a broad sense including not only 'soft law' but also the 'context' in which the 'black letter' rules operate. As a result, research will often be multi-disciplinary combining insights from comparative legal analysis, legal theory, political theory, economic analysis and other related fields.

## 2.2. *Specific themes*

Over the past two decades, European private law has developed into an established field of academic research. Within that field we aim at innovative specific lines of research. In 2012-2014, the focus will be, in particular, on three specific themes, i.e. 1) EU private law integration and its effects on national private laws; 2) property, publicity, priority; and 3) the legitimacy of postnational private law.

*Theme 1: EU private law integration and its effects on national private laws  
(directed by Aukje van Hoek and Marco Loos)*

This theme deals with the impact of EU law on the national private laws of the Member States. It addresses the interaction between national and EU private law, with regard both to secondary EU law (i.e. directives and regulations) and primary EU law (i.e. the founding Treaties), in particular the internal market dimension. The focus will be mainly, though not exclusively, on the specific areas of consumer law and private international law.

Specific subjects of research include: the divergent interpretation of general clauses and open-textured concepts in contract law, caused in part by the multilingual character of European Union law; the spill-over effects of specific directives and regulations within Member State law; the (non-)compliance of national courts with rulings of the CJEU; the coordination between national private law systems through internal market law and EU private international law; and the consequences of harmonization for the systematic character of private law and for the ideal of codification.

For this research theme, use will be made in the first place of classical legal analysis and comparative legal research, but also of insights from (consumer-) behavioural law & economics and law & language. This theme includes, in particular, the work of Jaap Baaij, Hugh Beale, Diana Dankers-Hagenaars, Bram Duivenvoorde, Aukje van Hoek, Jeroen Kortmann, Candida Leone, Marco Loos, Joasia Luzak, Sacha Tamboer and Gerard de Vries.

*Theme 2: Property, publicity, priority (directed by Arthur Salomons)*

As property law forms no part of the proposed Common European Sales Law, the debate on the harmonization of that part of patrimonial law focuses on the question whether incorporation of proprietary topics at a later stage or in a subsequent or other harmonisation instrument would be a viable and desirable possibility. Within this context, we will focus, in particular, on two topics: 1) justification for proprietary entitlements (acquisition of proprietary entitlements; the shape and extent of the protection of the titleholder and the justification of these entitlements and their protection; and patrimonial responsibility and priority); and 2) apparent entitlement (publicity systems, clearing and settlement; publicity and priority; and good faith purchase protection).

The research within this theme will be conducted both from both doctrinal, comparative and theoretical perspectives. The first subtheme will include the work

of Arthur Salomons, Selma de Groot, and Rolef de Weijs, the second that of Dewi Hamwijk and Arthur Salomons.

*Theme 3: The legitimacy of postnational private law (directed by Martijn Hesselink)*

This research theme follows up on a fruitful line of research, running under the 2009-2011 research programme, entitled 'European contract law, social justice and democracy'. Moreover, the present theme is also closely related, substantially and personally, to the joint research project conducted by the CSECL together with the ACIL and the ACELG (directed by Deirdre Curtin, Martijn Hesselink and André Nollkaemper) on 'The Architecture of Postnational Rulemaking'.

Within this theme, we will explore the political-philosophical foundations of postnational private law, by analysing the implications of leading theories of social justice for fundamental questions concerning the Europeanisation and globalisation of private law. We will address the normative question of legitimacy from the perspectives of both law making (democracy) and outcomes (justice). The question is whether there is anything special about postnational private law in this respect: do the private and postnational law dimensions make a difference from a legitimacy perspective?

In particular, we will focus our attention on: the legitimacy potential of fundamental rights and general principles; the legitimacy of expert involvement in the shaping of European private law; the geographical locus where private law should be made (national, European or global); the normative analysis of clashes between different legal orders and legitimation (and its limits) through party autonomy (freedom of contract, choice of law, optional instruments, non-mandatory rules).

In this context, thorough reflection on fundamental questions concerning methodology plays an important role, not only as an indispensable preliminary to high quality research, but also as an object of research, for example in relation to methods of legal comparison and to the idea of a developing common European legal method.

This theme includes, in particular, the work of Marija Bartl, Martijn Hesselink, Josse Klijnsma, Chantal Mak, Marieke Oderkerk and Lyn Tjon Soei Len.

### **3. Aims**

#### *3.1. Scientific excellence*

The research group aims to play a leading role in the academic debate on European contract law. In its first six years, the research group has obtained a good international reputation in the field. The outcome of the national research assessment exercise was satisfactory (score 4.75 out of 5.00). The aim for the next three years is to further improve both our international reputation and our score in the national research assessment exercise. In other words, the aim is scientific excellence. For that purpose, we need to set ourselves ambitious targets.

In 2011, the Faculty adopted a *Model for academic staff performance criteria*, which contains 'standard requirements'. The standard requirement is 90 points per 0.4 FTE every three years. The breakdown of points allocated in the model is as follows:

- 30 points for a high-impact publication (indication; fewer points, or in exceptional cases more, may be allocated depending on the publication)
- 20 points for a 'weighty' publication
- 10 for a 'lighter' publication
- 60 points for monographs of 250 or more pages in refereed funds
- 30 points for editing a book in a refereed fund

- 1-5 points for publication in a professional journal (depending on the importance and length of the publication).

These are minimum requirements, which are mostly of a quantitative nature. In light of its ambitions and its status as a university 'centre of excellence' the CSECL adopts one additional requirement, which is related to the quality of our output: per 0.4 FTE each researcher has to publish two 'high-impact publications' ('A publications') every three years. In other words, any number of 'weighty' or 'lighter' publications - much appreciated as they may be as extra research output - cannot compensate for the absence of two 'high impact' publications every three years. Rather than stimulating the production of larger quantities of publications of modest scientific impact, the CSECL thus underlines its scholarly ambitions by striving for publications of the highest international quality and impact.

We define a 'high-impact' or 'A' publication as a publication in one of the leading international journals in the field of European contract law. These include the following ones:

- American Journal of Comparative Law
- Common Market Law Review
- European Law Journal
- European Review of Contract Law
- European Review of Private Law
- European Property Law Journal
- Journal of Consumer Policy
- Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law
- Zeitschrift für Europäisches Privatrecht

Of course, also a publication in one of the top general American law journals counts as an 'A' publication. Similarly, an interdisciplinary publication in one of the leading journals in the related discipline counts as an 'A' publication as well. A

publication in a high-quality edited volume published, after peer review, by Cambridge University Press, Oxford University Press, Hart Publishing or an international publisher of equal repute, also counts as an 'A' publication for the purposes of the minimum requirement, but only once every three years. In other words, even a researcher that publishes in high-quality edited volumes has to publish in an A journal at least once every three years.

Pursuant to the Faculty model, the quantitative production requirement for junior researchers is lower, i.e. 60 points per 0.4 FTE every three years, because they have no existing body of research to build upon. We translate this into a requirement for junior researchers during their first three years after having obtained their PhD, be it as a post-doctoral researcher or as an assistant professor (UD), to publish one 'A' publication every three years per 0.4 FTE.

For PhD candidates, our ambition is expressed in the requirement for them to complete their doctoral theses within the agreed three year term. We do not require any other publications from them. Although we certainly stimulate them to pre-publish some of their (preliminary) findings, with a view to 'claiming' their subject (visibility) and training their writing skills (style, focus et cetera), the ultimate decision is with the PhD candidates together with their supervisors.

### *3.2. Societal impact*

In addition, for another part of our research we aim at societal impact, in particular on the European and the national law maker, in the areas affected by European law. Here too, we build on our experience and contacts established under the previous programme. The typical research output here consists of reports, briefing notes and oral presentations at hearings in the European Parliament, for the European Commission, and for the national legislator. Another example is the membership of expert groups.

Obviously, there is a close connection between fundamental and applied research. Indeed, any meaningful input for law makers depends on the knowledge acquired and expertise developed in the context of our fundamental research.

### *3.3. Individual choice, creativity and ownership*

Research programmes should stimulate creativity, certainly not stifle it by being too detailed or rigid. Therefore, we leave as much autonomy as possible to individual researchers in expressing their creativity. It is for them to develop their own research projects, to distribute their research time over different activities such as writing more papers, reports for European institutions, organising conferences, editing volumes et cetera. As long as they meet the general faculty minimum publication requirements and remain within the research theme, the only further limitation to their choices is that they should have two 'A' publications every three years.

There is another dimension to this respect for and belief in the autonomy of individual researchers. By adhering to the highest international standards we avoid the risk of locking talented researchers into idiosyncratic local preferences. Thus, their research achievements remain 'portable' in the sense that they will be easily acknowledged anywhere should the researchers wish to pursue their careers elsewhere.

## **4. Organisation**

### *Research group*

The research group consists of selected senior and junior researchers from the private law department. As of January 1<sup>st</sup>, 2012 the CSECL research group includes the following staff members:

- C.J.W. Baaij LLM, PhD candidate (0,60 fte)
- M. Bartl LLM, Post-doctoral researcher (1,00 fte)
- Prof. H.G. Beale, Professor of Anglo-American contract and tort law (0,08 fte)

- Dr. D.L.M.T. Dankers-Hagenaars, Senior researcher (UHD) (0,33 fte)
- B.B. Duivenvoorde LLM, PhD candidate (1,00 fte)
- S. de Groot LLM, PhD candidate (0,00 fte)
- D. Hamwijk LLM, PhD candidate (1,00 fte)
- Prof. dr. M.W. Hesselink, Professor of European private law (0,70 fte)
- Prof. dr. A.A.H. van Hoek, Professor of private international law and civil procedure (0,33 fte)
- J.G. Klijnsma LLM, PhD candidate (1,00 fte)
- Prof. dr. J.S. Kortmann, Professor of European tort law (0,08 fte)
- C. Leone LLM, PhD candidate (1,00 fte)
- Prof. dr. M.B.M. Loos, Professor of private law, in particular European consumer law (0,40 fte)
- Dr. J.A. Luzak, Researcher (UD) (0,50 fte)
- Dr. C. Mak, Senior researcher (UHD) (0,60 fte)
- Dr. A.E. Oderkerk, Senior researcher (UHD) (0,49 fte)
- Prof. dr. A.F. Salomons, Professor of private law (0,50 fte)
- S. Tamboer LLM, PhD candidate/junior teacher (0,60 fte)
- L.K.L. Tjon Soei Len LLM, PhD candidate (1,00 fte)
- Dr. G.J.P. de Vries, Senior researcher (UHD) (0,40 fte)
- Dr. R.J. de Weijs, Researcher (UD) (0,41 fte)

The research leader and director of the CSECL is Prof. dr. M.W. Hesselink; the co-ordinator is Dr. C. Mak; and the management-assistant is Y. ter Horst MA.

#### *Weekly meetings*

The research group has weekly meetings. These are dedicated, in turn, to paper presentations by invited leading scholars from across the world ('CSECL seminars') and presentation and discussion of work in progress of one of the group members ('internal seminars'). In addition, monthly lunch meetings are dedicated to the discussion of recent developments in legislation, case law and literature; each topic is introduced by one of the researchers.

#### *Interaction with teaching*

Members of the research group are also responsible for the Master's programme in European Private Law. In order to promote interaction and to scout talent, we

invite our students to participate in conferences, public lectures and, where possible, research.

## **5. International collaboration**

Members of the research group participate in several international research groups, collaborations and projects including the Common Core Project ('Trento project'); the network on Private Law Theory; and the Ius Commune Research School. In addition, a variety of specific research projects by members of the research group are carried out within the framework of one or more international collaborations.

## **6. Funds**

The research programme is funded, in the first place, by the regular research funds from the University (*1<sup>e</sup> geldstroom*). In addition, in the past the group has been successful in acquiring additional public funding (*2<sup>e</sup> en 3<sup>e</sup> geldstroom*) from the NWO, the HiiL, FP7, and, in particular, European institutions (European Commission, European Parliament,). Our aim for the duration of the present research programme is to increase the relative share of additional public funding (*2<sup>e</sup> geldstroom*).

## **7. Duration**

The programme is meant for 2012-2014. At the end of that period it will be evaluated and, if necessary, adapted, before it will be renewed for another three years.

## **METHODOLOGICAL APPENDIX TO THE CSECL RESEARCH PROGRAMME 2012-2014**

### **Introduction**

The CSECL research programme is based on some more general considerations concerning the nature of research programmes and the choice of research methods. In the present brief statement - a methodological *profession de foi* - we make these underlying considerations somewhat more explicit.<sup>1</sup> They are based on theoretical reflection on the nature of knowledge production, what we learned from our experience with our previous research programmes, and the positive outcome of our last programme's external evaluation.

### **The nature of research programmes**

A research programme is a means to an end, not an end in itself. The aim of any research programme should be, in the first place, to contribute to an increase in the body of scientific knowledge. If that is the aim then a research programme should encourage and facilitate innovative research. This, in turn, means that it should encourage the creativity of researchers, certainly not curb it. In our view, the most effective way for a research programme to contribute to an increase in the body of scientific knowledge is not by formulating in advance detailed research questions and methods which the researchers then seek to comply with as if it were an economic plan. Our view is based on our experience with earlier research programmes during more than a decade,<sup>2</sup> which contained quite detailed research

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<sup>1</sup> See further M.W. Hesselink, 'A European legal method? On European private law and scientific method', *European Law Journal* (2009), 20-45.

<sup>2</sup> Amsterdams Instituut voor Privaatrecht, Onderzoeksplan 2001-2003, onderzoeksprogramma's 'Europees Privaatrecht' en 'Internationaal Handelsrecht'; Amsterdams Instituut voor Privaatrecht, Onderzoeksprogramma 2003-2006 'Vorm en Inhoud in het Europese Privaatrecht. Een onderzoek naar formele en materiële aspecten van de dynamiek van Europeanisering van het privaatrecht in Nederland'; Centre for the Study of European Contract Law, Research programme 2006-2009, 'European Contract Law'.

questions and specific output targets and were rather rigid and prescriptive. Time and again we found good reasons - developments in the field, changing object, new insights and ideas of our own – to do something different from what we had planned. We firmly believe that our results are better than they would have been had we faithfully stuck to our original research questions. Therefore, the success of a research programme is not a function of the degree to which it manages to provide answers to questions as they were originally formulated.

Rather, what a research programme should do is to generate creative research activity that would not exist without it. In our view, legal research can benefit immensely from the interaction between different researchers working on related topics. This leads to new ideas, perspectives and questions. Therefore, in our view the main key to a successful research programme is that it should bring together a group of creative researchers who mutually provide each other with a stimulating research environment. The difficulty lies in finding the right balance between a sufficiently common object of research (which allows for high-level discussions among experts) and a sufficiently diverse group (which brings new perspectives to one's own questions). We have tried to achieve this by organising the interactions within our group on the two levels of a general research theme and three more specific research themes, and by alternating, for our weekly seminars, internal and external speakers (the latter often on a broad range of subjects sometimes only loosely related to European contract law). Similarly, we have sought to find the right balance between leaving enough space for new ideas and for responding to new developments in the field, on the one hand, and trying to provide the programme with a minimum of operationality (which allows for the subsequent evaluation of the achievement of our aims), on the other.

Thus, in addition to valid institutional reasons (in particular our University's requirement of a research programme approved by the *Wetenschapscommissie*, and the fact that national research assessment exercises (*onderzoeksvisitatie*s) evaluate research programmes and not, as in the United Kingdom, individual researchers), we believe that there is also an important substantive reason to take

research programmes seriously. If properly formulated, research programmes can provide a research group with a more defined sense of purpose, without inducing individual researchers to mere compliance instead of sparking new ideas.

## **Methodology**

As a research group, we are committed to four main convictions regarding methodology.

First, the choice of method is closely related to the choice of research question. Normative questions cannot be answered with empirical research, quantifying questions ('to what extent ...?') should be avoided unless quantitative data are expected to be obtainable, legal comparison does not in itself provide an answer to normative questions (eg concerning best solutions) et cetera. There is no natural or logical order between the choice of question and the choice of method. Once the research question is formulated then the available method(s) for answering the question will logically follow. However, there is nothing against first developing and refining a certain research method or analytical tool and then asking oneself what should be the next interesting research question to which the method can be applied. Moreover, the research question and method may well be further refined, dialectically, on the basis of their mutual consideration.

Secondly, although in certain contexts (especially doctoral theses) methodological choices must be made explicit, lawyers do not have to succumb to method anxiety and burden all their publications with repetitive statements of their methods. One must make sure that one's methods are sound but in 'normal science' (Kuhn) there is no need to tell everyone about them all the time. How to present one's research findings is primarily a matter of the tradition in a given field and of personal style. In the fields of European private law and private law theory, journal articles usually do not contain explicit statements of method.

Thirdly, since methods of legal research and methods of law making are closely related many of the questions that we are most interested in (both in our theoretical and in our policy oriented research) are questions relating to legal methods. This means that our theoretical interest concerning fundamental questions, on the one hand, and our practical aim to contribute to European private law making, on the other, often converge into methodological questions: Is functional legal comparison, as a basis for law making, normatively neutral? Is methodological nationalism bad? What does it mean to regard sales law exclusively as a tool for economic growth? Is a common European legal method developing today in Europe? These are some of the questions that members of our group recently have been concerned with.

Finally, we are committed to methodological pluralism in the sense that we see no a priori reason not to use a certain research method if it can contribute to finding convincing answers to our questions and if we possess the right skills and experience to make proper use of these methods.

### **An illustration**

For theme 3 of our current programme, 'The legitimacy of postnational private law', which is the successor of the theme 'European contract law, social justice and democracy' and which aims at contributing to the fields of private law theory and European legal theory, the research methods we use derive predominantly from political philosophy.<sup>3</sup>

In the past, we have conducted political analyses of contract law rules in terms of an autonomy-solidarity continuum, an analytical tool first developed by Duncan Kennedy and adapted and further refined for European private law by Hesselink,<sup>4</sup>

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<sup>3</sup> For an overview of different political philosophical perspectives (utilitarian, liberal, communitarian, libertarian, and citizenship) on European contract law see M.W. Hesselink, 'Five political ideas of European contract law, *ERCL* (2011), 295-313.

<sup>4</sup> M.W. Hesselink, 'The Politics of a European Civil Code', 10 *European Law Journal* (2004), 675-697; M.W.

Van Zelst<sup>5</sup> and Mak.<sup>6</sup> Oderkerk has written extensively on methods of legal comparison and of legal interpretation,<sup>7</sup> and recently has analysed the use made for rule drafting purposes of the functional method of legal comparison.<sup>8</sup> Currently, Tjon Soei Len adopts the capabilities approach of Nussbaum and Sen,<sup>9</sup> Klijnsma follows Rawls' justice as fairness,<sup>10</sup> while Hesselink works in line with Habermasian reconstruction.<sup>11</sup> In each case, the analytical tool is developed, explained and presented in great detail and depth.

This example illustrates, we hope, that a research programme is not the right place for meaningful methodological considerations. First, because a research programme is necessarily general and therefore cannot adequately discuss the methods adopted in specific research projects. Secondly, a research programme lacks the space for any serious in-depth discussion of the details, merits and potential weaknesses of the method that was chosen or developed. Finally, the research programme is prospective and static while methods develop continuously and are constantly refined and improved during the research: hopefully new

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Hesselink, *CFR & Social Justice* (Munich: Sellier, 2008).

<sup>5</sup> B. van Zelst, *The Politics of European Sales Law* (Alphen a/d Rijn: Kluwer Law International, 2008).

<sup>6</sup> Ch. Mak, *Fundamental Rights in European Contract Law; A comparison of the impact of fundamental rights on contractual relationships in Germany, the Netherlands, Italy and England* (Alphen a/d Rijn: Kluwer Law International, 2008).

<sup>7</sup> See e.g. A.E. Oderkerk, *De preliminaire fase van het rechtsvergelijkend onderzoek*, Nijmegen 1999, and A.E. Oderkerk 'Een lappendeken van interpretatiemethoden in de context van het Ontwerp Boek 10 BW - De invloed van Europeanisering en internationalisering van het IPR', *NIPR* 2010, 437.

<sup>8</sup> A.E. Oderkerk, 'The CFR and the Method(s) of Comparative Legal Research', *ERCL* 2007, 315-331

<sup>9</sup> L. Tjon Soei Len, 'European contract law and the capabilities approach: on distributive responsibility for contract Law', in: N. Weidtmann, Y.M. Hölzchen, B. Hawa (eds.), "The capability approach on social order" (Münster: LIT Verlag, 2012), 132-148.

<sup>10</sup> J.G. Klijnsma, 'SMEs in European Contract Law: A Rawlsian Perspective', Centre for the Study of European Contract Law Working Paper no. 2010/05, available at [ssrn.com/abstract=1678622](http://ssrn.com/abstract=1678622).

<sup>11</sup> M.W. Hesselink, 'How Many Systems of Private Law are There in Europe? On Plural Legal Sources, Multiple Identities and the Unity of Law' L. Niglia (ed.), *Pluralism and European private law* (Oxford: Hart Publishing, forthcoming 2012).

avenues and methodological innovations will be found as soon as the new programme is formulated and adopted.