The CISG and the UNIDROIT principles of international commercial contracts

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1. Introduction

Imagine the sales law of a national legal system. It might form part of a civil code, or, as in the case of common law systems, it might be set out in a special statute referred to at times as a codification of the law relating to sale. If sale is an integral part of a civil code, it draws sustenance from the whole of that code, in the light of which it may be augmented or interpreted. It is, in other words, an embedded part of a universal private law landscape. The position is more complex for common law systems. In the case of the UK Sale of Goods Act, the underlying common law stands in for the code but there is a degree of detachment of the statute from the common law. It is only if a question concerning a sale contract cannot be resolved within the four corners of the statute that resort may be had to the underlying common law. The underlying common law may not, however, contradict the terms of the statute.[1] Moreover, at this point the meaning of "common law" bifurcates so as to require a distinction to be drawn between common law in its narrower sense, which excludes equity, and equity. Apart from these differences of approach, national sales law have one major thing in common: there is a legal hinterland to which resort may be had to deal with ancillary issues of general contract, property and tort (or delict). National sales laws are not ethereal, located in splendid isolation in some sort of legal cloud.

Contrast this with the CISG, a remarkably successful instrument. As important as the special contract of sale is, there is something of an inversion in creating uniformity here when there is no general foundation on which to set the CISG. It is almost as though the roof of a house is being constructed prior to the walls and foundation. This is not a criticism: the imperative needs of transnational commerce supply a drive for uniformity in the area of sale that cannot wait upon more extended attempts to fashion a body of transnational uniform private law. Efforts are being made at various levels

[1] Sale of Goods Act 1979 (UK), s.62(2) (the 1979 Act is a consolidation of the original Act of 1893 together with later amending legislation).

to bring this about, ranging from assertions that there exists a sort of modern *lex mercatoria*, to private efforts to list fundamental principles of transnational law[2] and onward to restatements of transnational contract law such as the Unidroit Principles of International Commercial Contracts (PICC). In this paper, I shall explore the extent to which the PICC can be prayed in aid of developing the CISG. When I say "developing", I am making the obvious point that the CISG that was created in 1980 is not a static legal artefact but a dynamic vehicle supplemented year on year by implementation and commentary.

Another issue that contrasts national law and uniform law should be appreciated. In the case of a common law statute like the Sale of Goods Act, the dividing line between common law contract and statutory sales law is not a matter of great moment. English courts are used to applying the Sale of Goods Act by analogy,[3] just as Article 2 of the Uniform Commercial Code, at least for teaching purposes, is often taken as a statutory rescript of the general law of contract in the United States. Prior to the introduction of special statutory provision for contracts akin to sale, such as work and materials contracts, English courts applied the same quality standards to materials supplied under such contracts as they did to sale of goods contracts.[4] The CISG is very different because this option is not open. A decision to the effect that Article 3 takes out a certain type of contract from the CISG brings into play the choice of law process and a possible result via national law that would be altogether different from the result that would have been arrived at under the CISG or by an analogical extension of the CISG. The characteristics of a contract that is excluded from the CISG by virtue of Article 3 are not so different from sale contracts as to justify such an outcome.

The character of the PICC should now be addressed before anything further is said about the CISG.

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[2] See K Berger, *The Creeping Codification of the New Lex Mercatoria* (2nd edn 2010).

[3] In more recent times, the need for this has been obviated by the passing of legislation that tracks the solutions of the Sale of Goods Act in relation to related contractual types, e.g. the Supply of Goods and Services Act 1982.

[4] See, e.g., *Young and Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454.

2. The Purpose/Aspirations of the PICC

The PICC is a versatile instrument capable of serving a variety of purposes. It can serve as a source of inspiration in the reform of a country's domestic law of contract[5] and as the applicable law for arbitral,[6] though regrettably not for European judicial,[7] purposes. It has aspirations to be a code in its own right: how else can one explain, for example, its insistence that the implied duty of good faith and fair dealing in Article 1.7 may not be excluded by the parties?[8] Its broad ambitions are evident in the Preamble, where it states that it "may" be applied when contracting parties have agreed that their disputes shall be settled according to "general principles of law, the *lex mercatoria* or the like" or have simply failed to make any provision for an applicable law. Closer to the theme of this paper, the PICC may be used to "interpret or supplement international uniform instruments...or domestic law". It is not unfair to ask whether in this last instance the legislator, whether it is the United Nations or a nation State, might have something to say about the matter. These instruments are not to be supplemented by the PICC purely on the *ipse dixit* of the PICC. That said, there is a space to be filled in the international legal firmament, particularly in the case of contracts that are not governed by the CISG, such as construction, franchising, intellectual property licensing, and various forms of agency contracts. The PICC has been floated to fulfil a need for contracting parties and its true measure of success lies in the extent to which it is adopted in practice, which of course, as even in the case of top-of-the-line manufactured goods, depends upon the vigour and astuteness of the way in which it is marketed. One can sympathise with those who brush aside

[5] e.g., Lithuania: see V Mikelenas, "The Influence of Instruments of Harmonisation of Private Law upon the Reform of Civil Law in Lithuania" (2008) XIV Juridica International 143.

[6] Art 28(1) of the UNCITRAL Model Law on International Commercial Arbitration (1985, revised 2006): "The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute...".

[7] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), recital (13) and Arts 2, 3(1).

[8] The interesting question here relates to implied exclusion taking the form of agreed contractual provisions that are judged to be at variance with the good faith standard. Does this practice offend the provision in question? To what extent, also, are the parties free to define good faith and fair dealing for the purposes of their contract?

criticisms of legitimacy and overreach and argue the case for the PICC as something whose validity and utility should be measured by its success in the legal market place.

3. The PICC and Article 7 of the CISG

Let us assume that the road is open to apply the PICC in conjunction with the CISG. There are various points at which the PICC might come into play. The PICC could most obviously supply responses to issues that are excluded by the CISG, notably contractual validity. They could supply, in the case of framework agreements, such as distributorship agreements, that are associated with individual sales, an harmonious applicable law that works in tandem with the CISG when parallel contracts are under consideration. Might one go further and supply them with a role within the CISG?

Article 7(1) of the CISG calls for the Convention to be interpreted in a way that recognises both its international character and the need to promote uniformity in its application and the observance of good faith in international trade. There does not appear to be a great deal of scope for any role to be given to the PICC here. The international character of the CISG is best recognised by courts and tribunals refraining from imposing a domestic view on its provisions and taking note of foreign decisions and writings. This is easier to say than to apply. The same might be said for uniformity of application. The PICC do not add anything here and indeed have adopted a somewhat similar provision for their own internal purposes.[9] As for the meaning of good faith in Article 7(1), there is little to be gained by consulting the PICC, which have a dedicated provision on the contracting parties' duty to act in good faith in Article 1.7. Good faith is notoriously difficult to define and a few of the illustrations raise questions of their own. The real difficulty, however, lies in knowing how good faith can be applied to the interpretation of the CISG itself, which is the role accorded to it by Article 7(1). Traditionally, civil law systems tend towards the teleological and common law systems to the literal. Blind literalism would accord no role at all to good faith in the interpretative process, but a blind disregard of the text itself would give rise to the opposite fault of departing from the rule of law in favour

[9] Art. 1.6.

of unbridled subjective discretion on the part of judge or arbitrator. The key question is how much ambiguity should there be in a text before a role may be accorded to good faith in interpreting it. The PICC do not assist in answering this question.

The PICC may have a greater role to play under Article 7(2). First of all, if one may derive an immanent principle of good faith throughout the CISG, which given the decision not to express such a duty in the text has to be seen as controversial, the PICC might supply examples of the application of good faith. The confidentiality of so many arbitral awards, nevertheless, suggests that any scrutiny of awards for meaningful examples of good faith would produce slim pickings. More broadly, the PICC might supply assistance in deriving other general principles underlying the CISG. Time was at a premium in the treaty-making process that led to the CISG. The need for compromise, sometimes taking the form of a brevity of expression that concealed disagreement – the absence of a reference to implied exclusion in Article 6 and the broad generality of the interest rule in Article 78 are good examples of this – ensured that the CISG suffers at intervals from a degree of vagueness, brevity of expression and omissions. This is how the PICC, assuming the legitimacy of their use, might have a role to play in assisting tribunals to fill gaps in the CISG despite the lack of any particular or general mention of them in the text of Article 7(2).[10] By legitimacy, I especially have in mind the need to demonstrate that for a particular principle, and not for the whole package that we call the PICC, there is a clear causal connection between the principle and the CISG. The time line is not unimportant, in that the CISG preceded the first edition of the PICC, but it may be open to demonstration that the PICC record a rule that precedes both the CISG and the later PICC. Subject to that, except where they would contradict the CISG, the PICC might stimulate the search for unstated general principles in the CISG. The need for such principles to emerge and fill out the CISG is clear: the CISG can be changed only by means of a diplomatic conference. For the CISG, there is no equivalent of the continuing editorial work provided for in the American Uniform Commercial Code.

[10] Art 7(2) requires general principles to underpin the CISG and not be brought in from the outside: U Magnus, "General Principles of UN-Sales Law" (1997) 3 International Trade and Business Law Annual 33, 39.

Without the assistance of the PICC, courts and tribunals would be called upon to perform unaided difficult juristic tasks in discerning underlying general principles. The extensive bank of decisions to date suggests that few of them are equal to the task. In addition, the PICC can be revised at intervals without the elaborate structure of a diplomatic conference. Moreover, they are drafted in much the same way as the Uniform Commercial Code with hypothetical illustrations and comment attached to each Article. This gives them a real measure of accessibility.

4. PICC as International Usage

A question that is not infrequently asked about the PICC, as well as about Incoterms, is whether the PICC can be brought into the fold of the CISG under Article 9(2) as "usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned". This is not an expansive formula, which is hardly surprising given the sensitivities about the imposition of established usage on developing and socialist countries that were manifest in the drafting process.[11] The first and most obvious point to make is that there can be no wholesale incorporation of the PICC in any particular contract, not least because those who drafted the CISG have always made it clear that they selected the best rule and not the most widely observed rule. As the matter was put in the Introduction to the 1994 edition: "[T]he UNIDROIT Principles...embody what are perceived to be the best solutions, even if still not generally adopted". The CISG does not define "usage" but the better view is that it means mercantile conduct and practices.[12] These might include the use of letters of confirmation, the requirement that a buyer demand compensation within a given time shorter than a normal limitation period, and the presence of both seller and buyer when the goods are checked. Moreover, the incorporation of usage via Article 9(2) rests upon the agreement, express or implied, of the parties. The PICC are

[11] See A Garro, "Reconciliation of Legal Traditions in the U.N. Convention on Contracts for the International Sale of Goods" (1989) 23 *International Lawyer* 443.

[12] See S Kröll, L Mistelis and P Perales Viscasillas, *UN Convention on Contracts for the International Sale of Goods (CISG)* (2011), Art 9 (Perales Viscasillas).

capable, in my opinion, of providing the best service to the continuing development of the CISG if their validity rules – hardly a matter of usage - could be in some way hitched to the CISG. For the most part, however, validity rules are concerned with the integrity of contractual consent, and are thus anterior to any agreement between the parties about the scope of usage. The PICC cannot be putatively applicable to the issue of consent itself, or even to the process of contractual formation. Unlike the law of a nation State, the PICC cannot be applied as a default applicable law in the judicial process further to the application of choice of law rules.

Looking at the varied content of the PICC, they comprise conventional rules on formation, rules on validity, rules on performance, and rules on remedies. There are also rules on limitations and plural obligors and obligees. Of these, only the rules on performance might fairly be said to be eligible – and even then only on a one-by-one basis – for treatment as agreed binding usage. The opening chapter of the PICC, moreover, contains a number of provisions that may be said to represent codal aspirations, not the least of which, as mentioned earlier, is the rule prohibiting the exclusion of the standard of good faith and fair dealing in Article 1.7.

None of this, so far, addresses the empirical question of how well the PICC are known to traders, and more particularly, to traders in the "particular trade concerned", in the language of Article 7(2) of the CISG. I venture to think that, despite the great success the PICC have already demonstrated in becoming known to arbitrators and scholars, this is a long way short of becoming known to those in any trade. Lawyers are often pulled up short by the ignorance of the law shown by lay people, and are sometimes shocked to know that issues high on their priority list feature lower down on the list of traders. The concern of traders, who frequently do not conclude international sale contracts with lawyers holding their hands, is mainly with doing the deal and hoping that awkward legal issues do not raise their heads in the performance of the contract. This is an impediment to the incorporation of even those PICC rules that are otherwise suitable for incorporation as usage via Article 9(2) of the CISG.

5. Does the CISG Need a General Contract Law?

The major express exclusions from the CISG are property and validity as expressed in Article 4. Although the PICC occasionally stray into issues of property, they add nothing to the proprietary aspect of sale transactions. Validity, of course, is a different matter, where a dedicated chapter in the PICC could render sterling service to the CISG. This will not be true, however, of all of its provisions. For example, given the nature of international contracting, where contracting parties may be expected to have a modicum of substance and sophistication, it is hard to conceive of circumstances where the rule dealing with gross disparity[13] would have any practical application. There is also a provision in the non-performance chapter that one might refer to as quasi-validity, namely, the question of grossly excessive sums stipulated as payable in the event of non-performance.[14] Probably more important is another provision in that same chapter dealing with the exclusion and limitation of liability, requiring that such clauses not be "grossly unfair" if they are to be invoked against the other party.

Before we consider these PICC provisions, it is worth first taking note of the very broad sweep of the opening part of Article 4. Apart from formation, the CISG governs the rights and obligations of the seller and buyer arising from a contract of sale. The scope of the CISG is broader than the scope allocated to sale in some civil codes, so that no practical distinction may be drawn between general contract law and special sales law. Apart from the validity exclusion, the CISG applies to both the general and the specific. It was necessary to do this, for otherwise the specific sale provisions of the CISG would be at risk of distortion at the hands of general contract principles in the various national laws. For example, had there not been inserted a general damages provision in Article 74, there would have been a high risk of different national laws adopting widely divergent approaches to the award of damages, perhaps in some cases demanding fault on the part of the obligor, which would have been destructive of uniformity. Even if express provisions are not available for all contract questions, there is a rich possibility of working the instrument so as to discern the general

[13] Art 3.2.7.

[14] Art 7.4.13.

principles on which it is based, further to Article 7(2), without even calling on the PICC for assistance.[15]

Now, the CISG does not as such recognise the freedom of contracting parties to settle liquidated damages in advance of the breach but, in an instrument as committed as the CISG is to party autonomy, one could hardly say that such freedom is inimical to the CISG. The section dealing with damages, however, contains no hint of any part that the contracting parties themselves might play in the calculation of a damages entitlement, but, if the contract lays down a measure or means of calculation, a contracting party's right to require performance[16] should go a long way towards justifying a clause of this type. And there is, moreover, the general provision that the parties are free to exclude the CISG or modify any of its provisions.[17] In relation to both clauses fixing the amount of damages, as well as clauses limiting or excluding liability, can it be said that these are matters that are governed by the CISG as relating to the rights and duties of seller and buyer? The general language of Article 4 aptly embraces them. The real question, however, is whether the parties are free to set damages at an oppressive level, or oppressively limit or exclude liability. I shall return to this question later.

6. PICC and Interaction with the CISG

Taking those cautionary remarks about the PICC as agreed on board, and mindful of the expansive scope of the CISG further to Article 4, I propose now to address certain provisions of the PICC to see how they interact with provisions of the CISG. It is easy enough to make general statements about the utility and complementarity of the PICC but an attempt has to be made at the concrete level to see how much support the PICC can provide for the CISG.

(a) performance and payment

[15] See below.

[16] Under Arts 46 and 62.

[17] Art 6.

I have long thought that the PICC provisions most likely to constitute usage, and most likely to provide practical assistance in the resolution of day to day problems, are the rules dealing with the modalities of performance. How helpful in fact are they? The CISG does not deal with payment instruments, contenting itself with the buyer's duty to take delivery and pay the price. May the buyer pay by means of a cheque? Payment by cheque amounts to a form of conditional payment,[18] liable to be reversed if the drawee bank dishonours the cheque. It may be doubted, however, that a seller who has parted with control of the goods by delivering them to the buyer in return for a cheque, derives a great deal of comfort from the conclusion that the buyer's payment no longer stands, especially if the buyer is insolvent and the property in the goods has passed upon delivery.[19]

What does the PICC have to say about cheques? They tell us in Article 6.1.7 that payment pay be made by any means used in the ordinary course of business at the place of payment, and, more particularly, that acceptance of a cheque as payment is conditional upon the cheque being honoured.[20] Does this mean that *a* common usage at the place of payment can be enforced by the buyer even if it is not *the* most common usage, and even if it does not provide the seller with the assurance it needs in order to release the goods? If it does, it is hardly a satisfactory rule to be imported into a CISG contract. It means that a seller may have to make delivery in return for payment by cheque, so the onus would be put on the seller to insist in advance on payment by other means. A prudent seller should be alive to this problem, since the risk of a distant buyer's insolvency is not lightly to be entertained.

According to the PICC, the place of payment is presumptively the seller's place of business under Article 6.1.6(a). This is less precise than the CISG which, in Article 57, also establishes the seller's place of business as the place of payment, except in the case where delivery and payment are concurrent, where payment is made at the place where the goods are handed over.[21] Simultaneous performance is a particular,

[18] See PICC Art 6.1.7(2).

[19] Some legal systems will not provide for the property to revert to the seller in such circumstances.

[20] Art 6.1.7.

[21] This is far from perfect for dealing with cases where payment is processed through the banking system.

though far from invariable, feature of sale contracts, so it is no criticism of the PICC, an instrument of general contractual application, that no provision is made for this in regard to the place of payment.[22] The rule in Article 6.1.6(a) is departed from by implication where the seller has made it known that payment may be made into a bank account.[23] The PICC provide for a level of detail absent from the CISG in this respect, more particularly so where they permit the buyer to make payment into any of the disclosed seller's accounts if the seller has not specified the particular account to receive payment.[24] The difficult question of determining when payment is made through the banking system, not touched upon at all in the CISG, receives a response of sorts from the PICC when they assert that payment is made when it is "effective". The devil is in the detail: what does it mean to say that payment is effective? The comment to Article 6.1.8 sets out a dazzling array of possibilities before the concession is made that it is "extremely difficult to establish a definite rule" but that the rule set out might be conducive to arriving at the correct answer in a concrete case.

As far as the currency of payment goes, the PICC fill a gap in the CISG payment scheme in providing that the currency of payment is presumptively the currency of the place of payment.[25] If the parties have nevertheless settled upon a currency other than that of the place of payment, payment may nevertheless be made in the place of payment except where that currency is not freely negotiable or the parties have been insistent that only the nominated currency will do. Moreover, even for this latter exception, the currency of the place of payment will be permissible if it is impossible for the buyer to make payment in the stipulated currency.[26] One may find reasons to criticise these rules – some convertible currencies, for example, have a broader trading spread between selling and buying prices than others – but there is no denying their usefulness to parties to an international sale agreement.

[22] Elsewhere, however, provision is made: see Art 6.1.4.

[23] Art 6.1.8.

[24] Art 6.1.8(1).

[25] Art 6.1.10.

[26] Art 6.1.9.

The PICC also deals with a feature absent from the CISG, namely the attribution of payments where the obligor owes more than one debt.[27] Since the debts in question may derive from multiple sources, not all of which are contracts governed by the PICC, the presence of these provisions, as suitable as they may be in a civil code, is not at all easy to justify in the PICC. The PICC do not even pretend that this rule rests upon the implied agreement of the contracting parties at the time the particular payment is made.

Moving to a more controversial question, there is the subject of interest to consider. Article 78 of the CISG, as is well known, lays down an entitlement to interest in the case of sums that are in arrear, yet does not stipulate the rate or type of interest or the commencement date. Article 7.4.9 of the PICC is more forthcoming. It provides for interest to run from the date that payment is due and also, in allowing for damages where non-payment causes harm to the obligee, implicitly draws a distinction between interest and damages. In paragraph (2) the PICC stipulate:

> The rate of interest shall be the average short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.

There is no mention here, or in the official comment, whether the interest awarded is compounded and, if so, at what rests (or intervals) the compounding takes place. Apart from its particular merits as a rule, the political question thus presented is the effect it will have on a CISG contract where either or both of the contracting parties is resident in an Islamic State that enforces the prohibition on interest (ribā). There were during the conference proceedings in Vienna in 1980 concrete proposals to have a more detailed provision dealing with interest,[28] but it proved impossible to arrive at a consensus when it came to making particular provision for the calculation of interest and in the final stages the current, muted text was preferred. A reference in a CISG

[27] Art 6.1.12.

[28] [REF]

dispute to Article 7.4.9(2) is open to criticism on the ground that it undoes a delicate compromise,[29] which invites contracting parties to set their own rate or even, in compliance with a religious proscription, to dispense with it altogether. If the PICC rule were applied in a sufficient number of cases, then a court or tribunal applying the CISG might be under an obligation under Article 7(1) to adopt that that ruling, notwithstanding religious sensitivities about interest. Under Article 78, although this is dealt with in a section apart from damages, interest might be allowed in the form of damages in a way that is inoffensive to religious beliefs. An obligee kept out of his money either has to borrow to cover the payment gap or else loses the opportunity to invest the money, and therefore suffers a loss compensable in damages.

(b) quality and fundamental breach

Apart from Article 35(1), whose focus appears to be on compliance with express quality and related standards laid down in the contract, there is no general provision in the CISG dealing with quality as such. Instead, there are general provisions dealing with fitness for purpose, whether that purpose is the ordinary purpose served by goods of the kind supplied or a purpose particular to the individual buyer. There is no great distinction between a minimum quality standard and a minimum fitness standard. They are two different ways of looking at the goods, the former preoccupied with the goods in the hands of the seller at the point of tender and the latter with the goods in the buyer's hands. That said, if the CISG were to be thought deficient in not having an implied minimum quality standard, the question might arise whether it would be appropriate to supplement the CISG with PICC Article 5.1.6, which lays down a minimum standard of performance "that is reasonable and not less than average in the circumstances". I have long failed to see the point of this provision, and provisions like it in other instruments.[30] Goods may be perfectly fit for the buyer's purpose yet still be below average. In a conference hall brimming with highly intelligent

[29] For an example of the sensitivities at stake, see the Egyptian delegate's comments at the 34th Meeting (3 April 1980), A/CONF.97.c/C.1/SR34, paras 10, 14. See also the Iraqi delegate: ibid, para 20. The preference of delegates from Islamic countries was for a reservation provision, which did not materialise.

[30] Principles of European Contract Law Art 6:108. It is rejected in favour of a reasonable quality standard in the Draft Common Frame of Reference, Art II.-(:108.

delegates, or on a panel of well-qualified speakers, there will be some who are below average. Article 5.1.6 is not apt for supplementing the CISG.

As for fundamental breach, the rule in Article 25 of the CISG has its shortcomings. It is concerned only with the factual consequences of breach. A substantial body of case law supports the view that those consequences have to reach a high level of severity before the breach can be regarded as fundamental.[31] It makes no provision for the perceived importance of particular contract terms or for the particular character of fast-moving markets.[32] Admittedly, contracting parties may make further provision in accordance with Article 6, and there is always the possibility of an established contrary usage under Article 9, but these paths to departure from the text of Article 25 are not easy to follow and amount to considerably less than would be achieved by a more open-ended approach to fundamental breach inviting courts and tribunals to consider a wide range of factors, not all of equal weight and not all consonant with each other on a given set of facts. This is the approach adopted in the fundamental non-performance provision, Article 7.3.1 of the PICC.

Article 7.3.1, if capable of being applied in a CISG case, would do much to redress the deficiencies of Article 25. German courts that have departed from the text of Article 25, albeit for good reasons, in order to reach results that cannot be supported by Article 25,[33] would find a source of legitimacy for their decisions if they could invoke Article 7.3.1. This is because the text of that provision does not refer solely to factual deprivation of benefit but permits reference to other factors as well, including whether the non-performance is intentional or reckless, the degree of detriment that the non-performer would suffer if the contract were terminated, and whether strict

[31] See, e.g., BGH 3 April 1996; Tribunal Cantonal Valais 27 April 2007; OLG Köln 14 October 2002 (avoidance as last resort (or *ultima ratio*)); BGer 18 May 2009.

[32] Unlike ULIS Art 28: "Failure to deliver the goods at the date fixed shall amount to a fundamental breach of the contract whenever a price for such goods is quoted on a market where the buyer can obtain them."

[33] See, eg, OLG Hamburg 28 February 1997 and OLG Düsseldorf 24 April 1997 (both available in translation on the Pace website: http://cisgw3law.pace.edu/cases). For criticism, see M Bridge, "Avoidance for Fundamental Breach under the CISG" (2010) 59 International and Comparative Law Quarterly 911.

compliance is “of essence” under the contract. Apart from the question *how* might the PICC be brought into play, there is the following insuperable obstacle: a reference to whether a term is “of essence” is contradictory of the test for fundamental breach laid down in Article 25. It is not based on the actual consequences of breach in a given case at all. A contractual provision might be “of essence” under the PICC even if the consequences of its non-performance would not justify termination. A test like the one in Article 7.3.1 is, in contrast, perfectly capable of embracing criteria that pull in different directions.

(c) hardship and *force majeure*

The test for a *force majeure* event that excuses from liability the non-performer is in its fundamental aspects the same under the CISG and the PICC.[34] No more need be said. It is the connection between the concept of hardship and that of *force majeure* that needs to be considered. First of all, a fundamental difference between the way the two concepts operate has to be noted. The obligor invoking *force majeure* is adopting a passive role in requesting that the full rigour of the contract not be imposed upon him. He is requesting relief from the rigour of the contract. On the other hand, the obligor invoking hardship is not seeking to be exempted from the consequences of failing to perform the contract in the same way but seeks instead to have the contract bent to his will so that it serves his purpose. He wants to have the contract modified. It is obvious that hardship will play a greater role in some types of contract than others. Contracts that involve a heavy investment in labour and materials lend themselves to a claim of hardship; a normal, one-shot sale of goods contract does not. If a sale of goods contract, however, calls for long-term supply or for the provision of customised goods, then hardship may come into play. This is because the seller will be keen to recover sunk costs. Although they are different, an intelligent reading of the PICC calls for *force majeure* and hardship to be considered alongside each other, as is explicitly recognised in the comments on the *force majeure* provision of the PICC.[35]

The CISG does not contain a provision dealing with hardship. This prompts a number of questions. First, does the question of hardship go to the rights and duties of seller

[34] Arts 79 (CISG) and 7.1.7 (PICC).

[35] Art 7.1.7.

and buyer under Article 4? Secondly, if the answer is yes, do the general principles on which the CISG is based support the application of a doctrine of hardship? Thirdly, is the failure of the CISG expressly to deal with hardship a gap in the coverage of the CISG, or a positive exclusion of the hardship doctrine from the Convention? Fourthly, if we are looking at an omission rather than a positive exclusion, may the PICC supply a hardship rule further to either Article 7(2) or Article 9(1)?

An answer in the affirmative was given to the first question by the Belgian Cour de cassation in 2009, which concerned a contract for the sale of steel tubes where the cost of steel, for the seller, had unexpectedly risen by 70 percent after the contract date. Building on Article 79 of the CISG and the idea of impediment, reciting the content of Article 7(1) and (2), and taking note of the PICC treatment of hardship, the court, in the most rudimentary way, concluded that the CISG contained a gap in that it did not have a provision to deal fundamental disturbances of the contract balance. The buyer was therefore bound to renegotiate the contract price with the seller. Needless to say, the report says nothing about the seller's ability to hedge against price increases in steel, nor does it explain why the seller had evidently failed to take precautions to secure a source of supply for its steel so that it might commit itself to a sale of steel tubes at a fixed price. Again, the decision does not take issue with arguments in the court below based on provisions of the CISG apparently at variance with the seller's requested renegotiation. The most significant of these is Article 29(1) which, in providing that a contract may be modified by mere agreement, reinforces the *pacta sunt servanda* principle and underlines the importance of freedom of contract. Article 29 supports agreed modification, not imposed modification.

Returning to my four questions, does hardship go to the rights and duties of buyer and seller arising from a contract of sale further to Article 4. The seller's claim appears to concern its sunk, or reliance, investment in the contract. That is an investment it incurred in preparing for performance. It seems clear that this falls within the language of Article 4. Had it been a case of one party profiting from the unfulfilled contract, so as to raise a question of restitution, it could not be denied that this too fell within Article 4.[36] The CISG, whether intentionally or not, does not deal fully with

[36] Art 84 deals with the restitutionary consequences of avoided contracts.

the consequences of impediment in Article 79.[37] The second question is whether the general principles in Article 7(2) support a renegotiation of the contract on the basis of hardship. I find only the most meagre support for this approach in the CISG. Article 29(1), referred to earlier, strongly supports the principle of freedom of contract. The CISG formation rules in general assume that the parties are free agents. There is in the CISG, and unlike the PICC, no general statement of liability for bad faith negotiations,[38] though there is a particular head of liability arising out of irrevocable offers.[39] In sum, I do not believe that there is a gap. Instead, the silence of the CISG is consistent with the implicit rejection of a hardship doctrine. A provision on hardship was at one time under consideration in the 1977 draft but was rejected without reasons being recorded.[40] This is the response to my third question. The consequence of rejection should, in this case, mean that there is no scope for a hardship provision to be brought in as part of the applicable law in accordance with Article 7(2). The fourth question, in consequence, does not come into play. There is simply not enough in the CISG for us to determine that PICC Articles 6.2.1-3 are a useful distillation of a general principle of hardship apt for incorporation in the CISG via Article 7(2). The rules embodied in PICC Articles 6.2.1-3 are not implicit in the text of Article 79 of the CISG. Moreover, any assertion that good faith, if it could be derived as a general principle under Article 7(2), would require the obligee to submit to contractual modification would simply demonstrate that good faith, in meaning everything, would mean nothing. Good faith would mean in some cases that *pacta sunt servanda*. In some cases, it would mean the exact opposite. A legislative text has to have some meaning; visceral, subjective applications of good faith are a denial of the rule of law.

(d) agreed damages and exclusion clauses

Agreed damages and exclusion clauses may be taken together. In the PICC, provision is made for both matters, but not in the validity chapter. It should not, however, for

[37] It does not contain a provision for the division of expenses incurred by one party in making preparations to perform the contract.

[38] Art 2.1.15.

[39] Art 16(2).

[40] A/32/17 Annex I, pars 458-60.

the purposes of the CISG be assumed that these matters cannot be caught by the validity exception in Article 4 so as to be disposed of under the applicable law. Article 7.1.6 of the PICC states that a clause limiting or excluding liability may not be invoked if it would be "grossly unfair" to do so. I do not see how this provision could be brought into the CISG via Article 7(2) since Article 6 states in uncompromising terms that the contracting parties are free to derogate from or vary the effect of any of the provisions of the CISG. A similar, though not quite as forceful, response can be made to Article 7.4.13 of the PICC, which calls for the reduction of agreed sums payable upon non-performance to the extent that they are "grossly excessive". This also founders upon Article 6 to the extent that the parties are varying the effect of Article 74 on the assessment of damages.

Articles 7.1.6 and 7.4.13 amount to public policy statements. One might see some support for the applicable law relying upon the validity exception in Article 4 so as to introduce its notions of public policy, but in what sense can a transnational, disembodied set of principles in the CISG be an expression of any State's public policy? I shall have to be persuaded that there is such a thing as a transnational, stateless body of public policy, though arbitrators keen to expand the boundaries of arbitration and to assert its legitimacy might disagree.

7. PICC as Updating Instrument for CISG?

The CISG was signed at Vienna in 1980 as the culminating event in a very protracted process, going back to the late 1920s if one treats the 1964 Hague uniform laws, as one should, as an interim development in the process that led to the CISG. Concerns have been expressed that the CISG is showing its age. The progress towards a Common European Sales Law (CESL),[41] the final standing of which is far from determined, may be taken as some evidence of a need to update the CISG. I say *some* evidence because the CESL appears to be designed primarily to serve the cause of consumer contracts whilst also adding, as though they were a species of consumer contract, those commercial contracts where one of the parties is a small-to-medium

[41] [REF]

enterprise (SME). Furthermore, some of the differences between the CISG and the CESL appear to reflect a change of philosophy rather than an updating of provisions in the CISG.[42] Certainly, the CESL ventures into an area that was vacated by the CISG and whose omission from the CISG represents one of its greatest shortcomings – contractual validity. Although not the whole of validity is excluded by the CISG – the absence of a required writing, as well as the eschewal of doctrines of cause and consideration, are evidence of some engagement by the CISG with validity – the absence of any treatment in the CISG of provisions dealing with matters such as duress, mistake and excessive penalty clauses is a serious matter. A broad application of, say, the doctrine of *erreur* in French domestic law,[43] as part of the applicable law accompanying the CISG, has the capacity of distorting those provisions of the CISG dealing with performance by seller and buyer. Similarly, the rules on misrepresentation in common law systems, generous in their grant of rescission rights, [44]are capable of undermining the doctrine of fundamental breach with its philosophy of contractual continuance. The validity rules that are part of the applicable law are therefore capable of being destructive of the uniformity won by the CISG. The position might not greatly be improved if the PICC rules on validity could be conjoined with the CISG. For example, avoidance of the contract for mistake depends on an objective standard that the mistaken party would have contracted on materially different terms.[45] This could undermine the more severe fundamental breach test in Article 25 if, for example, a buyer were allowed to assert the mistaken belief that the seller would deliver conforming goods. The reconciliation of validity and performance rules is a problem that is far from having been resolved.

[42] The hardship provision is the best example of this in the PICC.

[43] Code civil Art 1109 (which is interpreted to afford relief for subjective unilateral mistake, though a party at fault may be delictually liable under Art 1382).

[44] A partial inducement by means of a material misrepresentation suffices. A contract may be rescinded on this ground even if, in those cases where the misrepresentation is also incorporated in the contract as a term thereof, the consequences of breach fall far short of the standard required for avoidance under CISG Art 25.

[45] Art 3.2.2.

It is concerns about the potential impact of regional developments, such as the CESL and the OHADA[46] Uniform Act on General Commercial Law, on this existing hard-won uniformity of international sales law that led to the Swiss proposal that the United Nations undertake further work in the area of harmonising international contract law.[47] The potential scope of such a project, of course, goes beyond any measure of sales law supplemented by general contract law. That said, it should be recalled that UNCITRAL gave its endorsement to the 2010 edition of the PICC[48] as "a comprehensive set of rules for international commercial contracts, complementing a number of international trade law instruments, including the United Nations Sales Convention". It further commended the use of the PICC in accordance with the PICC's purposes as stated in the Preamble.[49] The most relevant of these purposes for the moment is the use of the PICC "to interpret or supplement international uniform law instruments". This is hardly the same thing as an incorporation by reference of the PICC in the text of the CISG but it surely is as far as UNCITRAL could have gone in recognising the PICC.

The PICC have the great merit of being developed in a spirit and style very close to those of the CISG. They "follow the solutions found in [the CISG], with such adaptations as were considered appropriate to reflect the particular nature and scope of the [PICC]".[50] The PICC also possess the further merit, as stated earlier, of being open to revision at intervals in a way that the CISG itself cannot be. UNCITRAL has sought to support the continuing development of the CISG by case law means, hence the CLOUT reporting system and the Digest, but its resolute stance of saying nothing that is critical of Contracting States or their courts demonstrates the limits of any action that it might take. UNCITRAL does not issue authoritative pronouncements favouring particular streams of development or seeking to lay down a course of action for courts and tribunals to take. Hence the Digest is purely descriptive. That is left to

[46] L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires.

[47] UNCITRAL, 45th session, New York, 25 June-6 July 2012, A/CN.9/758 (8 May 2012).

[48] And the 2004 edition before it.

[49] Report of UNCITRAL (45th session (25 June-6 July 2012)) A/67/17 para.140.

[50] Introduction to the 1994 edition.

unofficial bodies such as the CISG Advisory Council.[51] The CISG can only be changed by a diplomatic conference, and the one sure thing is that, even if an amended text were so to be produced, the process of securing adhesion would have to start all over again. The likelihood would be, as in the case of the Hague and the Hague-Visby Rules,[52] that there would be old CISG Contracting States and new CISG Contracting States. The history of uniformity in the world of marine cargo claims is not an encouraging one. The PICC are not the product of a diplomatic conference and may be modified with relative ease in the future. Moreover, since are drafted in much the same way as the American Uniform Commercial Code, with official comment and case illustrations, they can guide their own future development in the way that the CISG cannot.

Unless there are political reasons to the contrary, there would be no merit in UNCITRAL developing a general contract code at variance with the PICC. It would be a mere reinvention of the wheel. The joint participation of UNCITRAL and Unidroit in a fourth or further editions of the PICC would be a different matter, but this ventures into political waters where I am not qualified to go and it is not clear whether anything is to be gained from such a collaboration that is not already provided for by UNCITRAL's endorsement of the PICC. In the end, a uniform law is the product of a treaty and there are no short cuts when it comes to the signing and adoption of a treaty.

8. PICC as Residual Applicable Law

It was stated at the outset that the CISG, as a uniform law artefact, exists in a state of self-supporting splendour. It does not have a cognate uniform legal hinterland. So far as it might be coupled with the PICC, the isolation of the CISG can be tempered. Some differences, however, have been noted between the two instruments, so care would have to be taken if they were to be applied together. Apart from this, they represent an harmonious coupling.

[51] See http://www.cisgac.com.

[52] Not to mention the Hamburg Rules and the Rotterdam Rules.

The CISG, as is well known, applies in most cases *proprio motu* in consequence of the dual residence test laid down in Article 1(1)(a). It may also be brought into play as a result of the parties choosing the law of a Contracting State as the applicable law (or having it applied by default as the most closely connected law).[53] As a free-standing instrument, however, the limits on party autonomy in selecting the CISG as applicable to an international sale contract are the same as those that circumscribe the PICC.[54] Before I turn to that, it is worth stating that a choice of the law of a Contracting State under Article 1(1)(b) that brings in the CISG also brings in, as the residual applicable law, the law of that same State. Given the close relationship between the CISG and the PICC, and especially given that the PICC in its iteration tracked the CISG, it is most unlikely that the domestic law residually applicable would be a superior fit with the CISG than the PICC, assuming that the latter could be brought in as the residually applicable law. I now turn to this question.

There are few if any restrictions on the choice of the PICC as the residually applicable law in the case of disputes bound for arbitration.[55] The PICC themselves claim the sovereign right, as it were, to be applied in the cases of an explicit choice, an absence of choice, and also a reference to general principles of law or the so-called *lex mercatoria*. As amenable as arbitrators might be to this demarcation of the territory of the PICC, courts may not be imposed upon in the same way. The Rome I Regulation, for example, as stated earlier, applies to choice of law as between systems of law. As systematic as the PICC may be, they do not constitute a system of law. It is to be regretted that proposals during the drafting stage to have free-standing instruments chosen as the applicable law were later dropped. The relevant text at one time read:

[53] See Art 1(1)(b).

[54] cf Uniform Law on International Sale of Goods Art 4: "The present Law shall also apply where it has been chosen as the law of the contract by the parties, whether or not their places of business or their habitual residences are in different States and whether or not such States are Parties to the Convention dated the 1st day of July 1964 relating to the Uniform Law on the International Sale of Goods, to the extent that it does not affect the application of any mandatory provisions of law which would have been applicable if the parties had not chosen the Uniform Law."

[55] See Art 28(1) of the UNCITRAL Model Law on International Commercial Arbitration (1985, revised 2006).

"The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community."[56] This formula would without any doubt have been apt to give scope to the PICC in the choice of law process. There remains the possibility, however, that contracting parties might incorporate the text of the PICC into their agreement, as noted in recital (13) to the Rome I Regulation: "This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention." The limits of this provision should, however, be noted. The Regulation does not and cannot detract from any controls that the applicable national law might impose upon any text thus incorporated. Moreover, incorporation by reference is very much a matter for the applicable national law and not for a regulation dealing with the conflict of laws. Any incorporation by reference thus could not include rules concerning validity and formation since the process of incorporation presupposes a validly concluded contract.

9. Conclusion

In conclusion, I am far from convinced that the PICC have a substantial role to play in the internal operation of the CISG. Their greatest potential would be to support the CISG by providing rules on validity and by providing, in the case of contracts similar to sale, as well as non-sale contracts concluded between the same parties, an harmonious expression of legal rules and philosophy that is part of the move towards an increasingly globalised legal expression. The CISG and the PICC are tenants in the uniform law building but they are not co-habitants.

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[56] Draft Art 3(2).