GRIDLOCK IN INTERNATIONAL COMMERCIAL CONTRACT LAW?

LLM RESEARCH PAPER
LAWS 521
INTERNATIONAL COMMERCIAL CONTRACT

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON
2003
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As a result, all these sets of rules can easily co-exist, without hampering international trade.

The text of this paper (excluding contents page, statistics and bibliography) comprises 15,000 words.
The emergence of three different sets of rules in the area of international commercial contract law created fears that uncertainties in international trade might rise. Parties would be confused, as they did not know which rules apply in relation to their contract.

This paper states that such fears are not justified. It is obvious that the CISG as a binding instrument prevails over the sets of principles. Those can however be used as an important means for the interpretation of the Uniform sales law. Furthermore, parties may use the principles to incorporate them into their contract to overcome the large shortcomings of the CISG. This paper examines different ways of incorporation of the principles into international commercial contracts and evaluates them. With regard to the relationship between the Principles of European Contract Law and the UNIDROIT Principles this paper states that a competition, raising concerns about growing uncertainties in international trade, may only arise in relation to international commercial contracts inside Europe. Still, in most cases outcomes of litigation do not differ depending on which instrument is applied as both sets of principles show great similarities in contents. Where their contents differ, the European Principles prevail clearly, due to their more specialised design. As a result, all three sets of rules can easily co-exist, without hampering international trade.

The text of this paper (excluding contents page, footnotes and bibliography) comprises 15008 words.
I INTRODUCTION

When Ernst Rabel started to work on the draft of an international sales code in the 1920s he set the starting point for more than 70 years of efforts to build a solid foundation for a modern lex mercatoria for the international trading community. A large step towards a uniform trade law has been made in 1980 with the approval of the Convention on the International Sale of Goods (CISG). It is a binding instrument in the heart of international trade, but compromises had to be made to secure its adoption. It contains important gaps and ambiguities. In 1994 the International Institute for the Unification of Private Law (UNIDROIT) presented the “UNIDROIT-Principles of International Commercial Contracts” designed to govern the contracts of international commerce. Three years later the Commission on European Contract Law, also called the Lando-Commission after its founding father Ole Lando, published the first part of the “Principles of European Contract Law (PECL)”, followed by a second part in 1998. The latter instruments are both born out of the need to unify the rules applicable to contracts in international trade. They both pretend to restate the modern lex mercatoria. The preamble of the UNIDROIT-Principles as well as article 1:101 of the PECL state that the principles apply if the parties agree that the contract is to be governed by the “general principles of law”, the “lex mercatoria” or the like.

It has to be mentioned that in the PECL Commission working methods and sources of inspiration resembled those of the UNIDROIT group. Both groups were influenced by the work of each other as well as by the CISG. Great similarities were

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inevitable. The question arises how these similar instruments dealing with similar issues can co-exist. Is there enough room for all of them? What are their respective functions? Will they achieve their objective to promote international trade or will they on the contrary give rise to uncertainties and increase risks of international transactions? In order to answer those questions this paper will first examine the history, the objectives, scope and contents of the particular instruments. Those elements will be compared.

This paper suggests that both sets of principles can easily co-exist with the CISG due to its incompleteness. The CISG as a binding instrument prevails, but the principles serve as an important means of interpretation. Furthermore, parties to an international commercial transaction will profit from incorporating the Principles into their contracts. This paper will try to generate suitable ways of such incorporation.

In its last part this paper will focus on the relationship between the UNIDROIT Principles and the PECL. It will be assessed that there is enough room for both instruments as they focus on different geographical regions and apply to a large extent to different sorts of contracts. Moreover, outcomes of litigation under both sets of rules resemble each other owing to large similarities in contents. In the few cases where outcomes would differ the European Principles will prevail.

II THREE SETS OF RULES OF INTERNATIONAL CONTRACT LAW

In order to be able to explore the relationship of the different sets of rules a closer look shall be had at the objectives and origins of the uniform rules. The paper will examine what their legal nature is and what the reasons were for the emergence of those different instruments in the same area of law. It will be essential to compare their scope and contents. On the basis of those examinations their relationship will be established in the following chapters.


A Reasons for unifying the rules of international trade

Why did so many different sets of rules appear in the area of international trade law? What were the needs for such enormous projects of unification?

With the growth of populations, the improvement of means of transportation and the liberalisation of political systems the amount of international trade has grown over the past centuries. Transport and communications are faster and cheaper than ever. Trade, financial, social and economic policies worldwide became closely linked with each other and have a global dimension.

This process of globalisation cannot be stopped and has to be coped with.

Domestic legal systems are not well adapted to the needs of international business. They are often antiquated. Their applicability is determined by choice of law rules differing from country to country creating a high level of uncertainty concerning the results of litigation. Uncertainties arise whether the particular law applicable will vary according to the forum in which the issue is dealt with. Moreover, even if there is no doubt about the applicable law, costs of determining the substance of that law can be significant. Those uncertainties and potential costs as well as transacting business under unfamiliar laws increase the risks of international commerce and are likely to hamper it.

Thus, a form of unification of law concerning international trade is needed. The question arises which form of unification can be regarded as the most appropriate one.

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1 Unification of domestic laws

The most fundamental form would be the unification of domestic laws. But in practical terms such seems to be impossible at a worldwide level. Experience has shown that even between countries based on similar values and traditions with similar legal and economic systems, as inside the European Union, resistances to legal harmonisation can be impossible to overcome. Even lawyers who studied foreign legal systems and the aims and methods of comparative law and acquired an open mind towards foreign approaches to law struggle to get over the beliefs and dogmas of their own legal system. Moreover, unification in one area of law has direct affects on other areas of law, where resistances might even be stronger than in sales law.

A unification of domestic laws would also demand a uniform interpretation of the uniform rules. Given the different backgrounds of judges this seems to be unrealistic. A common law judge would still tend to create law while a judge from a civil law country would restrict himself to the interpretation of law. It also seems to be unrealistic to have national judges take into account judgments from courts of different jurisdictions. At this stage a unification of domestic laws is not feasible.

2 Harmonisation of choice of law rules

One might also think of harmonising the choice of law rules. An agreement could be reached on the applicable municipal law in the given case. Unification in this field of law is easier to achieve as the participants to such a project do not have to agree on rules which turn upside down their concepts and ideas off contract law. The domestic legal provisions keep their validity. Work has been done in this area already by the 1955 Hague Convention and the 1980 EEC Convention on the Law Applicable to Contractual Obligations (Rome Convention).

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But this approach is not free from problems either. Conflict rules always tend to be uncertain as they search in one way or another for the law most closely connected to the actual case. This concept of the closest connection is very vague; outcomes of litigation are unpredictable. Such unpredictability does not fit the needs of international trade. Furthermore, choice of law rules refer to domestic laws, which are not constructed to cope with the foreign elements included in an international transaction.\textsuperscript{15}

3 Unification of the rules for international trade

An alternative is the adoption of uniform substantive rules designed especially for international trade. States can still apply their traditional domestic rules in most cases. Only when international transactions are concerned the uniform substantive rules will be applied. Avoiding infringements of national sovereignty but still achieving a high level of predictability uniform rules appear to be a good and feasible solution to support international trade. This explains the coming-up of the different sets of rules that this paper is dealing with.\textsuperscript{16}

Each set of rules will be examined closely in the following in order to an appropriate comparison. This comparison will then serve as a basis for the determination of the relationship of the different instruments.


The CISG is probably the best known and most important binding legal instrument in the area of international trade. Currently the contracting states to the convention engage in more than 60% of the world’s external trade.\(^{17}\)

1 Historical development\(^ {18}\)

The history of the convention is relevant for its interpretation. Bearing its origins in mind will help determining its scope and applicability.

Efforts to unify the law on the international sale of goods began in the 1920’s as a reaction to growing concerns about the barriers to international trade caused by national differences in law of contract. It was in 1930 that a committee of representatives of Common law, French, Scandinavian and German legal systems was set up by UNIDROIT, the International Institute for the Unification of Private Law, to draft a uniform law on the international sale of goods. This process, interrupted by the Second World War, led to the Hague conventions on the sale of goods in 1964, called ULIS and ULF. The 1964 Conference was only attended by 28 states, of which 19 were from Western Europe. Although the conventions went into force they failed to achieve wide acceptance, with only seven European and two other countries becoming party to them. In 1966 the United Nations Commission for International Trade Law (UNCITRAL) was established as a Permanent Committee of the United Nations. Facing the low success of The Hague conventions it decided not to promote their acceptance but to prepare a new text dealing with the matter of the international sale of goods.\(^ {19}\) The secretary of UNCITRAL expressed the reasons at that time as following:


\(^{19}\) Ulrich Huber “Der Uncitral-Entwurf eines Uebereinkommens ueber internationale Warenkaufsvertrage” (1979) 43 RabelsZ 413, 414-418.
It became evident [from the comments] that the 1964 Conventions, despite the valuable work they reflected, would not receive adequate adherence. The basic difficulty stemmed from inadequate participation by representatives of different legal backgrounds in the preparation of the 1964 Conventions; despite efforts by UNIDROIT to encourage wider participation these Conventions were essentially the product of the legal scholarship of Western Europe. 20

From 1970 onwards working groups were set up representing the various regions of the world by providing in UNCITRAL’s rules that members were to be divided along particular regional lines. Observers of a number of international organisations supported their work. By 1978 UNCITRAL was able to present a draft convention, which was developed out of the two Hague conventions. The General Assembly of the United Nations convened a diplomatic conference to consider the draft convention. This conference, held in Vienna, voted in favour of the convention in April 1980. The required number of ratifications was achieved in 1986. Therefore the CISG came into force on 1 January 1988. Today there are 62 Contracting States making up two-thirds of all world trade. Amongst them are the most important players in international commerce as the US, the EU without Britain, China and - politically important - Russia. 21

2 Nature and objectives of the CISG 22

The relationship between the sets of rules that are under examination largely depends on their legal nature. A binding instrument for example prevails over a non-binding one. Legal nature and objectives of the CISG are therefore dealt with in the following chapter.

The CISG is a treaty between nations. When countries adopt the CISG they make it part of their domestic law. It then is a national law applicable to international commercial contracts. The national legal system decides if the

adoption requires an implementing act. The objectives of the CISG are set out in its preamble:

Considering that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

Being of the opinion that the adoption of uniform laws, which govern contracts for the international sale of goods and take into account the different social, economic and legal systems, could contribute to the removal of legal barriers in international trade and promote the development of international trade.

As we have seen before the main objective of the CISG is to promote the development of international trade. The uniform sales law avoids having parties depend on the choice of law rules. Costs of international transactions (e.g. costs for counseling) are reduced. Through broad contractual freedom (Art. 6 CISG) parties are offered a high level of flexibility. They obtain legal certainty on which rules apply. This last advantage has to be regarded carefully. Although parties under the CISG can be certain on which rules apply, the CISG does not guarantee a uniform application of these rules. Courts in different countries come to different interpretations of the same provisions due to their legal background. A common supreme court does not exist. It is up to the judges to have regard to the convention's international character, as it is pointed out in article 7 (1).

3 Sphere of application of the CISG

It seems necessary to examine the spheres of application of the instruments of international trade that are to be compared in this paper in order to find out where they are overlapping. Only where an overlap occurs it will be necessary to determine their relationship in detail.

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23 For example Germany in 1989 pursuant Art. 59 (2) Grundgesetz; New Zealand Sale of Goods Act 1994
24 Chapter II A.
The scope of the CISG is defined in its art. 1. It applies automatically to a sales transaction if its prerequisites are fulfilled.\textsuperscript{27} The CISG only deals with sales of goods. It does not apply in other areas of international commerce as services or labour. Special rules apply to mixed contracts.\textsuperscript{28} The parties are to have their places of business in different states.\textsuperscript{29} Those different states must either be Contracting States\textsuperscript{30}, or the rules of private international law must lead to the application of the law of a Contracting State\textsuperscript{31}. It follows from the second application provision in article 1 (1) (b) that the CISG can also apply to international sales with countries that did not sign the convention.

The scope of the CISG is limited to the formation of the contract and the immediate sales obligations of seller and buyer including remedies for breach of contract. No matters of tort, passage of title or set-off are included. Article 4 points out that the CISG does not deal with the validity of the contract or with issues of property in the goods sold. The law applicable by virtue of the forum’s private international law rules governs those areas excluded from the scope of the CISG.\textsuperscript{32} A competition with the other instruments this paper deals with can therefore only arise in the field of international commercial sales.

4 Contents of the CISG

Differences in contents have an impact on the relationship of different legal instruments. Where gaps occur in one instrument other instruments can be possibly used as a means of interpretation. Only where the contents varies the determination of the relationship of those instruments becomes relevant in practice.

The convention is divided into four parts. Part One deals with the scope of application and the general provisions. It has already been subject of examination.\textsuperscript{33}

\textsuperscript{28} Article 3 (2) CISG.
\textsuperscript{29} Article 1 (1) CISG.
\textsuperscript{30} Article 1 (1) (a) CISG.
\textsuperscript{31} Article 1 (1) (b) CISG.
\textsuperscript{33} Chapter II B 4.
Part Two lays down the rules governing the formation of the contract for the international sale of goods. It deals with questions as the effectiveness of an offer or an acceptance and the revocability of an offer. Part Three contains the substantive rights and obligations of buyer and seller arising from the contract. The seller has to deliver the goods, hand over any documents relating to them and transfer the property of the goods, the buyer has to pay the price and take delivery of them as required by the contract and the convention. Further provisions concerning remedies for breach of contract, the passing of risk, anticipatory breach and the preservation of goods belonging to the other party can be found here. Part Four contains the final clauses. They concern matters as how and when the convention comes into force and the reservations and declarations that are permitted.34

Resume

To sum up, the CISG is an international treaty in the area of international commercial sales. Contracting countries make it part of their domestic law, it is binding law. In relation to a non-binding instrument it will prevail.

C. The UNIDROIT Principles of International Commercial Contracts

Analogously to the previous chapter on the CISG history, legal nature, scope and contents of the UNIDROIT Principles will be examined in the following in order to form the basis for a successful determination of the relationship of the various sets of rules in international trade.

1. What is UNIDROIT?

UNIDROIT, The International Institute for the Unification of Private Law, is an independent intergovernmental organisation having its seat in Rome. Its purpose is “to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between states and groups of states”. It was set up in 1926 as an auxiliary organ of the League of Nations. Following the

demise of the League it was re-established in 1940 on the basis of a multilateral agreement, the UNIDROIT Statute. It currently has 59 member states including China, France, Germany, Great Britain and the United States. UNIDROIT has prepared over seventy studies and drafts, many of which have resulted in international instruments. At the beginning of a project the Secretariat of UNIDROIT forms study groups to prepare a preliminary draft. To keep politics out of the work each expert in the study group sits in a personal capacity. 

2 History of the UNIDROIT Principles

In 1968 an international colloquium was held in Rome to celebrate the 40th anniversary of UNIDROIT. The participants agreed that further efforts towards the international unification of law had to be taken in order to support international trade. Present instruments as supranational legislation, conventions or model laws usually remained little more than a dead letter or tended to be rather fragmentary. Influenced by the “Restatements of the Law” in the United States the idea was advanced to “restate” the law of international commercial contracts. In 1971 the UNIDROIT Governing Council, the Institute’s highest scientific organ, decided to include such a project in its work programme. A working group was set up. In its work this group tried to undertake a truly international consultation process considering codification and legislation from all over the world. The idea was not to form a new law, but rather to restate the existing law. In 1994 this restatement, including some innovations, was published, being called the UNIDROIT Principles.

3 Legal Nature

The UNIDROIT Principles do not fit into any of the established categories of legal instruments at an international level. As they are to cover the whole area of contract without being conceived in terms of specific types of transactions they are
no model clauses or contract forms. They are neither an international convention nor a uniform law as they lack any binding force as such. Their application depends on their persuasive value.\(^{38}\)

In practice the Principles have been used for four main purposes. They have served as a model in the elaboration of new legislation in the field of general contract law. For example the new Civil Code of the Russian Federation\(^ {39}\) or the new Chinese Contract Law\(^ {40}\) have been inspired by the UNIDROIT Principles.

Secondly, the Principles are used as a guide for the drafting of international commercial contracts. Parties to such a contract are provided with a neutral terminology with a uniform definition. Terms from national legal systems, with implications at least one party might not appreciate, can be kept out. Thirdly, parties might also agree on having their contract governed by the UNIDROIT Principles. They do not have to agree on a domestic legal system unknown to at least one party and they do not depend on the inconveniences following from the choice of a neutral law of a third country. Finally the Principles can serve as a legal basis for the settlement of disputes. They can be invoked in support of arguments developed in the individual statements of claim and defence and are also referred at in arbitral awards\(^ {41}\) and court decisions.\(^ {42}\)


4 Scope and contents

According to its preamble the UNIDROIT Principles are concerned with international commercial contracts. National contracts and transactions in which persons, not acting in the course of their profession, are involved are kept out of its scope.

The Principles are comprised of seven chapters containing a total of 119 articles. Each article contains the “black letter rule” and then a commentary on that article. To promote the international nature of the Principles the commentaries do not contain references to any of the jurisdictions or instruments that were consulted in creating it, except for the CISG. The Principles include provisions about the formation of the contract (Chapter 2) and its validity (Chapter 3). Its interpretation (Chapter 4) and content (Chapter 5) is also object of the Principles. Furthermore, they deal with the matters of performance (Chapter 6) and Non-performance (Chapter 7), including the matters of termination and damages.43

5 Resume

The UNIDROIT Principles are a non-binding set of rules dealing with international commercial contracts of all sorts. They serve as a model law for new legislation and can be used as a guide in the drafting of contracts. Parties can incorporate them into their contract. They serve as a point of reference in arbitral proceedings and in litigation. This paper will prove that beyond that they can serve as a means of interpretation for other instruments in their field of application.

D The Principles of European Contract Law

The Principles of European Contract law are the third set of rules this paper deals with. Similarly to the previous chapters their history, legal nature, scope and contents will be pointed out in order to allow the determination of the instruments’ relationship. Such determination only needs to be done in the areas where the scope

of the instruments overlaps. It only is urgent, where their contents differ. Where a conflict arises the legal nature of the particular instruments is the basis for the establishment of the relationship between the different sets of rules.

1 The Aims and the History of the European Principles

The Member States of the European Union are all market economies; they share a common cultural and political background. Still one can remark striking divergences in their contract laws. Huge differences can be noted between the common and the civil law. Also the law of the civil law nations does not appear to be consistent. This constitutes an obstacle to the Common Market and to international trade in general. It is the aim of the European Community to abolish restrictions on trade within the Community. The uniform conflict of laws rules, laid down in the 1980 Rome Convention, do not solve this problem sufficiently. This is why in 1982 an independent, non-governmental body of experts had been set up to draw up the “Principles of European Contract Law (PECL)”. A first part of the PECL was presented in 1995, including provisions on performance, non-performance and remedies. The revised first and a second part were released in 1999, a third part has been finalised in the years 2001/2002.

2 Nature and scope of the PECL

Like the UNIDROIT Principles the PECL consist of non-binding rules; they are “soft law”. Their main purpose is to lay the ground for a European Civil Code. They are supposed to state the common core of the contract laws of Europe and to show by their existence that a compromise between the different legal systems of Europe can be reached. Another objective is to provide a set of rules that can be

used as law in Europe. They can be chosen as a law to govern a contract and serve as an inspiration for courts and arbitrators to interpret international contracts.\textsuperscript{46}

Pursuant to article 1:101 the PECL apply to all kinds of contracts: commercial and consumer contracts, international as well as domestic contracts. There are three ways in which they might be applied. They apply if the parties agree to incorporate them into the contract or that their contract is to be governed by them. Secondly they might apply if the contract is to be governed by "general principles of law", the "lex mercatoria" or the like. Last the parties might apply them in absence of a choice of law.

3 Contents of the Principles

No single legal system has been the basis for the PECL; they are the result of a comparative approach used in the work of the commission. The legal systems of the member states as well as legal systems outside the European Union (e.g. the American Restatement on the Law of Contracts, the UNIDROIT Principles and the CISG) were taken into account. The PECL are made up of 134 articles divided into nine chapters. Those include the formation and the validity of the contract and provisions concerning its interpretation. Differently to the CISG and the UNIDROIT Principles a chapter about the authority of agents can be found. Performance and Non-Performance as well as possible remedies are also object of the PECL.\textsuperscript{47}

4 Resume

Like the UNIDROIT Principles the PECL are a non-binding set of rules. They apply to all contracts, commercial and non-commercial, international or domestic, in the European Union. They serve as a support for drafters of contracts and can be used as a point of reference in litigation and arbitration. Their main


A conflict with the other instruments may only occur where their scopes overlap. In such case binding set of rules will prevail over the non-binding principles.

III TRAFFIC JAM IN INTERNATIONAL CONTRACT LAW – A NIGHTMARESCENARIO?

The movement towards unification of the rules of international commerce lead to the emergence of several similar instruments. This development created fears of a further complication of international trade. Parties would have to spend huge amounts of money and time to find out which rules govern their contract. Outcomes of litigation would become even more unforeseeable. Instead of promoting international trade the emergence of new rules would hamper it. This situation would have to be regarded as a “nightmare scenario”.

This paper suggests that no competition, causing uncertainties, arises between the instruments. The CISG prevails over the sets of Principles in owing to its binding nature. However, the Principles serve as a means of interpretation filling up the gaps of the CISG and clarifying uncertainties. Parties to an international commercial sales contract are advised to incorporate the Principles into their contract in order to avoid shortcomings of the CISG. This paper will establish ways in which this can be done most effectively.

With regard to the relationship between the Principles it can be stated that they only have a common field of application as far as international commercial

contracts between European parties are concerned. In this area solutions offered by
the Principles are largely the same due to the very similar contents of both sets.
Where differences occur the PECL will rule out the UNIDROIT Principles as they
show a more specialised design. Thus uncertainties do not rise; international trade is
not hampered, but promoted.

This paper first examines the relationship between the sets of Principles with
the CISG beginning with the UNIDROIT Principles. It will be established under
which circumstances the Principles may be used as a means of interpretation.
Advice will be given how to incorporate the Principles into the contract. In its final
part the paper establishes the relationship between the two sets of Principles.

A The UNIDROIT Principles and the CISG

This chapter will begin the examination of the relation between the two
instruments by a comparison of their legal nature, their scope and contents. Only
where I can state an overlap of their fields of application conflicts might arise, in
other areas both sets of rules can easily co-exist. Where an overlap occurs the CISG
prevails due to its binding nature. But the Principles can be used to interpret its
provisions and to fill up gaps. Furthermore, the Principles may and should be
incorporated into international sales contracts.

1 Origins and scope

The CISG is a convention, binding on the signatory states; the UNIDROIT
Principles are a non-binding set of rules. A comparison is made between “soft law”
and “hard law”. In the case of a conflict judges will be bound by their national law,
in which the CISG has been included. The instruments are not distinguishable
according to their geographical scope; both apply at universal stage. The CISG is

52 Arthur Rosett “National Report of the United States on the UNIDROIT Principles” published in
Michael Joachim Bonell (ed.) A New Approach to International Commercial Contracts. The
UNIDROIT Principles of International Commercial Contracts (Kluwer Law International, The Hague,
1999), 389, 390.
confined to international commercial sales contracts, whereas the UNIDROIT Principles address themselves to all kinds of international commercial contracts.53

One has to bear in mind that the working group for the preparation of the UNIDROIT Principles has not been set up before 1980, the year in which the diplomatic conference voted in favour of the CISG. Thus, as the most important piece of international legislation in this area the CISG was an important point of reference in the preparation of the UNIDROIT Principles.54

2 Comparison of contents

The UNIDROIT Principles aim to restate the present state of the lex mercatoria, part of which is the CISG. Therefore the UNIDROIT Principles should reflect the provisions of the CISG, contradictions should not occur. Indeed, in the preparation of the CISG more compromises had to be made. It was to become a binding instrument, acceptance by as many countries as possible was intended. If no common position could be reached, the issue could not be included. As a result many gaps and ambiguities can be observed.55 More than a third of the conflicts arising under the CISG are due to this incompleteness.56

(a) Formation and validity of contracts

An example of this incompleteness can be found in its part II on the formation of the contract, which is basically restricted to the provisions on the different manners of formation, and on definitions of offer and acceptance. Beyond that the UNIDROIT Principles provide for writings in confirmation57, the

57 Article 2.12 UNIDROIT.
conclusion of contract dependent on agreement on specific matters or in a specific form, for contracts with terms deliberately left open and for contracts including standard terms. It is remarkable that the CISG does not provide for duties of the parties during negotiations, which usually is of higher importance in international trade than in purely domestic relations due to differences in language, cultural differences and the distance between the parties. The UNIDROIT Principles define the parties’ duties during the negotiations precisely. Only in the case of a proposal made not to specific persons but to a general public, the CISG is more precise. Such a proposal is to be considered as an invitation to make an offer, whereas the UNIDROIT Principles leave this question open.

The incompleteness of the CISG becomes even more evident if one compares the different provisions on the validity of contracts. Article 4 (a) of the CISG expressively states that it is not concerned “with the validity of the contract or any of its provisions or of any usage”. In contrast the UNIDROIT Principles comprise a whole chapter on this issue. To sum up the comparison on the formation and validity of contracts, the CISG shows huge gaps in regulating these problems. It stays silent on important issues as the validity of contracts. On the other hand, whenever both instruments regulate an issue no contradictions can be found.

(b) Differences due to the binding nature of the CISG

Differences can be noted in relation to the importance given to the principle of good faith. The CISG only mentions this principle once, stating that “in the interpretation of this Convention regard is to be had to [...] the observance of good faith in international trade”. This formulation is a compromise between the countries voting for the inclusion of this principle in the chapter on the formation of the contract and the countries finding the proposed formulation too vague. According to article 1.7 of the UNIDROIT Principles the parties have to act in accordance with the principle of good faith, no restriction to matters of

58 Articles 2.19; 2.20 UNIDROIT.
59 Articles 2.15; 2.16 UNIDROIT.
60 Article 14 (2) CISG.
61 Chapter 3 UNIDROIT.
62 Article 7 (1) CISG.
interpretation can be found. Furthermore, parties cannot derogate from this obligation;\textsuperscript{64} it is binding in the whole course of the contractual relationship including the negotiations.

Another example, showing that the UNIDROIT Principles are “better and more mature”\textsuperscript{65}, is the provision of article 1.8 (2) according to which usages do not bind the parties whenever their application would be unreasonable. In contrast article 9 (2) of the CISG expressly excludes the validity of any usage from the scope of the convention. Here the UNIDROIT Principles show greater flexibility and allow to adapt the application of usages to the special conditions of a transaction.

The principle of “pacta sunt servanda”, according to which contract should be enforced according to their terms, is regarded as being the fundamental principle of the entire system of the lex mercatoria.\textsuperscript{66} Accordingly it serves as a base for the CISG and the UNIDROIT Principles. In the UNIDROIT Principles restrictions of this general rule are laid down in the section on hardship.\textsuperscript{67} Those rules apply as an exception if “the occurrence of events fundamentally alters the equilibrium of the contract either because of the cost of a parties’ performance has increased or because the value of the performance a party receives has diminished”.\textsuperscript{68} In such circumstances the contract may be renegotiated in order to adjust the provisions of the contract. The revision of the contract due to hardship is not foreseen in the CISG. Article 79 (1) CISG only restricts the liability of a party for non-performance of its obligations in such cases. It can be argued that rules on hardship are not yet established sufficiently in the lex mercatoria to include it in a binding set of rules.\textsuperscript{69} In contrast, the provisions of both instruments resemble each other in cases of force majeure. Here the performance is impossible, whereas in cases of hardship it is still

\textsuperscript{64} Article 1.7 (2) UNIDROIT.
\textsuperscript{67} Articles 6.2.1 – 6.2.3 UNIDROIT.
\textsuperscript{68} Article 6.2.2 UNIDROIT.
possible, but disadvantageous to one party because of events altering the equilibrium of the contract after its conclusion. Article 79 (1) CISG as well as article 7 (1) of the UNIDROIT Principles provide for the non-liability of the party that is hindered to perform. But a difference occurs where the impediment for a party is only temporary. According to article 7.1.7 (2) of the UNIDROIT Principles the excuse for non-performance shall have effect for a reasonable time, while this effect is associated with the time of the impediment under the CISG.\textsuperscript{70}

On other issues the CISG turns out to be ambiguous. Article 14 (1) CISG states that the price was an essential element of a contract. But according to article 55 CISG the absence of an agreement on the price does not lead to invalidity of the contract; the parties are considered to have agreed on the price generally charged at the time of the conclusion of the contract. The latter solution is adapted by the UNIDROIT Principles in its article 5.7 (1), leaving no room for ambiguous interpretation.\textsuperscript{71}

Thus, also beyond the issues of formation and validity the CISG tends to show broad gaps and ambiguities. Questions of hardship are not dealt with. The principle of good faith, occupying an important position in the UNIDROIT Principles, only serves as a means of interpretation in the CISG. It is not clear if the parties have to agree on the price in order to conclude a contract. The UNIDROIT Principles on the other hand are far more elaborate; often they bridge the gaps occurring under the CISG.

\textbf{(c)} Differences due to the limitation of the CISG to sales contracts

Unlike the CISG the UNIDROIT Principles are not limited to sales contracts. Other transactions, most importantly services, are dealt with in the Principles. Examples of provisions so conceived as to take into account the specific problems connected with these other types of contracts can be found at several places in the Principles. Article 5.3 UNIDROIT imposes the duty of cooperation on the parties. A

\textsuperscript{70} Article 79 (1) CISG.

distinction is made between the duty to achieve a specific result and the duty of best efforts.\textsuperscript{72} Above that the Principles comprise the criteria for determining the kind of duty involved in a given case and for determining the quality of performance.\textsuperscript{73} Only the Principles provide for the right to require performance not only of monetary but also for non-monetary obligations.\textsuperscript{74}

On a few aspects it is the CISG, which is more complete. It includes specific sales provisions not covered by the UNIDROIT Principles relating to the parties’ warranty and delivery obligations\textsuperscript{75} and risks of loss\textsuperscript{76}.

\textbf{3 The relation between the CISG and the UNIDROIT Principles}

To conclude, compromises had to made in the text of the CISG to ensure sufficient support at the Vienna Conference. Hence, it contains gaps and ambiguities.\textsuperscript{77}

Although the UNIDROIT working group comprised members from different legal backgrounds, they turn out to be more complete. The UNIDROIT Principles do not aim to become a binding instrument. As support of governments did not have to be obtained it could afford to address a number of issues that were either excluded or not sufficiently regulated by the CISG. The working group was made up of academics, not bound by directives from national governments and more keen to push forward the development of international trade law. Shortcomings of the convention could be avoided. Further on, the Principles can be adjusted to changing circumstances more easily than the CISG, which needs the consent of all contracting states to be modified.\textsuperscript{78}

Still, a competition is only possible where both instruments overlap. Such can only occur where an international sales transaction is concerned and where the

\begin{itemize}
\item Articles 5.4, 5.5 UNIDROIT.
\item Article 5.6 UNIDROIT.
\item Article 7.2.2 UNIDROIT.
\item Articles 30-44 CISG.
\item Articles 66-70 CISG.
\end{itemize}
parties are situated in contracting states to the CISG. Then, in spite of its
disadvantages, the CISG has to be applied by judges subject to the lex fori due to its
binding nature.\(^79\) State courts are obliged to apply their own national law, including
the CISG and the relevant conflict of law rules. These conflict of law rules restrict
the choice of law applicable to international contracts to the laws of the states
excluding any supra-national or a-national legal system. The Rome Convention for
example refers to the “laws of contracting states”, “foreign law or the “law of the
country with which the contract is most closely connected”.\(^80\)

The CISG deals with questions on its incorporation in its article 5.\(^80\)

In fact, the Principles do not claim to displace other harmonising projects as
the CISG. The form of a restatement was used in order to avoid such confrontation.
They were set up to fulfil functions side by side with the CISG.\(^81\) Where a contract
fits into the scope of both instruments, the UNIDROIT Principles, being more
detailed, are set up to be used as an aid to interpret the CISG.\(^82\) In the application of
domestic statutes one can rely on long established principles and criteria of
interpretation to be found within each legal system. This is different with respect to
instruments as the CISG, which, although formally incorporated into the national
legal systems, have been prepared and agreed upon at international level. Here the
UNIDROIT Principles as an international instrument could be of high value in
resolving ambiguities and filling gaps, which are responsible for more than a third of
the disputes arising under the CISG.\(^83\)

This paper proposes that the Principles can fulfil two main functions besides the
prevailing CISG. First, they can serve as a means of interpretation. Secondly they
can be given effect by incorporation into the contract. Those possibilities will be
examined in the following.

\(^79\) Michael Joachim Bonell *An International Restatement of Contract Law. The UNIDROIT
New York, 1997) 74.

\(^80\) Michael Joachim Bonell *An International Restatement of Contract Law. The UNIDROIT
New York, 1997) 121.

\(^81\) Arthur Rosett “UNIDROIT Principles and Harmonization of International Commercial Contract

\(^82\) Preamble of the UNIDROIT Principles, paragraph 5.

\(^83\) Louis F Del Duca, Patrick Del Duca “Practice Under the Convention on International Sale of
Goods (CISG): A Primer for Attorneys and International Traders (Part II)” (1996) 29 Uniform
It appears to be problematic how and to what extent the Principles may be used as a means of interpretation. This paper proposes that it is inevitable to have regard to the preparatory materials of the CISG in order to find out if a stipulation from the UNIDROIT Principles can be used to fill up a gap or resolve an ambiguity of the CISG.

The CISG deals with questions of its interpretation in its article 7. Regard must be had to its international character, the need to promote uniformity and to the principle of good faith. Those means of interpretation are not very helpful to tide over the shortcomings of the CISG. As an example can serve the conflict between article 14 and article 55, which has been mentioned above. A tribunal that pays regard to the international character of the CISG and puts away its domestic preconceptions will still not be able to resolve the contradicting stipulations on the role of the price in the formation of the contract. Such ambiguities are due to the lack of agreement on those points in the preparatory work leading to the CISG. In fact, it would be easier for a national tribunal if it did not have regard to the convention’s international character but applied the rule governing this question in its national law.

Where no agreement could be reached in the preparation of the CISG, there is no international consensus that a tribunal could follow. The second prescription –the need to promote uniformity- does not help as well.

Such questions, “which are not expressly settled in the Convention are to be settled in conformity with the general principles on which the Convention is based.” The UNIDROIT Principles could facilitate the task of adjudicators to find the criteria according to which the CISG is to be interpreted. In how far the UNIDROIT principles can help solving such difficulties shall be examined in further detail.

85 Article 7 (2) CISG.
(i) The Principles are not a simple restatement of the lex mercatoria

It has been argued that it is very doubtful if the UNIDROIT Principles are of any value as a means of interpretation at all. Contrarily to what had been intended the authors of the Principles did not restrict themselves to restate the established principles of contract law but tried to push the development further. Looking at the minutes of the final meeting of the Governing Council of UNIDROIT, it is very probable that many governments would not have agreed on making the Principles binding. The UNIDROIT Principles do not mirror the existing lex mercatoria. As their stipulations are not generally accepted, they cannot be used to interpret a convention of worldwide applicability.

This statement is convincing insofar as it points out that the UNIDROIT Principles, not being a pure restatement of law, cannot be used as an all-purpose cure for shortcomings of the CISG. However, it cannot be denied that the Principles are of high authority as they were prepared by a representative group of leading experts. The fact that single provisions of the Principles are not acceptable at a worldwide stage does not signify that the Principles as a whole are not a suitable means of interpretation.

(ii) Prevailing opinion: Principles are conditionally suited to interpret the CISG

Michael Bonell, the chair of the working group preparing the UNIDROIT Principles argues in a similar way. According to him the Principles may be used for the proper interpretation of unclear language. Beyond that they are a helpful means to fill gaps in international conventions as long as “the relevant provisions of the UNIDROIT Principles are the expression of a general principle underlying the

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Convention concerned. However, it remains doubtful, when a provision of the UNIDROIT Principles is the expression of a general principle. Clear standards need to be established in order to avoid uncertainties.

This paper supports the idea that provisions of the UNIDROIT Principles have to express a general principle underlying the CISG if they are to be used as a means of interpretation. It proposes as a completion that a provision of the Principles can only be regarded as the expression of a general principle if the particular gap or lack of clarity does not result from differences that are due to different concepts in the members states which the parties could not agree upon.

(iii) Examination by the means of examples

For example, the definition of fundamental breach of contract given by the CISG is very vague. A breach of contract is fundamental if it deprives the other party “of what he is entitled to respect”. 90 On the other side the UNIDROIT Principles present a very sophisticated concept of a fundamental breach. Article 7.3.1 UNIDROIT indicates as further factors to be taken into account whether compliance with the non-fulfilled obligation is of essence under the contract, whether the non-performance is intentional or reckless, whether the other party has reason to believe that it cannot rely on the other party’s future performance or whether the defaulting party would suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.

In the UNCITRAL commission preparing the CISG suggestions for clarification, for example relating to the time of foreseeability, had been made. Parties were not opposed to doing so but just did not consider further clarification as necessary. 91 In this example the shortcoming is due to a simple neglect of the drafters of the convention. The proposals for a specification of the concept of fundamental breach of contract did not come up before the final review of the sales provisions; a clarification was not regarded as necessary. 92 Even if the UNIDROIT

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90 Article 25 CISG.
Principles pushed the development on this aspect further it cannot be stated that concepts necessarily are opposed in the different legal systems. Moreover, taking into account the high authority of the Principles, which were drafted by distinguished experts from the major legal systems, the Principles’ definition can be regarded as a refinement of a general concept acceptable at a worldwide stage. Supporting legal certainty article 7.3.1 of the UNIDROIT Principles can be used to interpret the CISG’s definition of fundamental breach of contract.

Another example of a shortcoming of the CISG is that it does not provide for cases of hardship. Only an impediment excuses a party from performance of its obligations. One could ask the question whether the hardship provisions of the UNIDROIT Principles can be used to expand the meaning of impediment and to include cases of hardship as in fact impediment can have many meanings including hardship. However, the drafters of the CISG could not agree on the inclusion of cases of hardship in the convention. Looking at the UNICITRAL debates one comes to the conclusion that cases of hardship were not meant to be included in the CISG.

A notorious ambiguity in the CISG results from the contradiction between article 14 and 55 on the role of the price in the formation of the contract. According to article 14 a valid offer necessarily includes a provision how the price can be determined. Such is not essential according to article 55. In absence of a provision the parties are considered to have made reference to the price generally charged at the time of the conclusion of the contract. The discrepancy results from different approaches in common and civil law countries. Article 55 was adopted as a compromise solution in the final stages of the Vienna conference. The contradicting provisions lead to a deadlock. No compromise solution seems to be possible. The approaches how to reconcile both provisions are numerous, no clear answer can be given. The CISG is at risk to be interpreted in a non-uniform way.

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93 Article 79 CISG.
94 Articles 6.2.2; 6.2.3 UNIDROIT.
depending on the fact if the adjudicator comes from a common law or civil law background.  

It is argued that article 5.7 (1) of the UNIDROIT Principles might be a useful guide for interpretation leading to the same solution as article 55 of the CISG. As in the situation related to hardship the contracting states could not agree upon the same concept. The concepts that the experts sitting in the UNIDROIT group elaborated are not widely acceptable. The will of the contracting parties not to be bound cannot be overruled by a non-binding set of rules. 

Here, the UNIDROIT Principles do not express a general principle. The meaning of article 79 cannot be extended by recourse to the UNIDROIT Principles. Articles 14 and 55 of the CISG cannot be reconciled by simply applying the solution proposed by article 5.7. (1) of the UNIDROIT Principles. 

(iv) Resume 

To resume the examination of the question to what extent the UNIDROIT Principles can serve as an aid for the interpretation of the CISG it has to be pointed out that in cases of shortcomings of the CISG it is not possible to simply apply the solution found in the UNIDROIT Principles. 

The CISG became a binding instrument because the contracting states could agree on its provisions. Where such an agreements could not be reached, gaps occur. Only where such gaps were not intended by the contracting states one can think about filling them up by using the UNIDROIT Principles as an aid. It has to be shown that the relevant provisions of the UNIDROIT Principles are the expression of a general principle underlying the CISG. If gaps were intended it has to be respected that no agreement could be reached. The contracting states did not want to 

be bound in this respect. It is not acceptable to bypass this will of the member states
to the convention by adding solutions from a different legal instrument, even if those
solutions seem to be sensible. The CISG may only be revised in the formal process
foreseen; a “silent “ revision is not legitimate.\(^{101}\) Gaps are to be filled by the
domestic law as indicated by the general rules of private international law.\(^{102}\)

(b) Express incorporation of the UNIDROIT principles into a contract\(^ {103}\)

The use of the UNIDROIT Principles, as a means of interpretation is limited
because the will of the contracting states needs to be observed. This paper suggests
that stronger influence can be given to the Principles by incorporation into the
contract, which usually would be governed by the CISG.

Technically this is possible by using article 6 of the CISG, which allows
parties to exclude the Convention wholly or in part. In view of the more
comprehensive and elaborate nature of the UNIDROIT Principles the parties might
wish to apply them at least in addition to the CISG.\(^ {104}\) Beyond the filling up of gaps
of the CISG the role given to the UNIDROIT Principles by including it into the
contract expressively is to govern issues outside the scope of the CISG. Those
would otherwise fall into the sphere of application of domestic law, which is
generally not suitable for international commercial transactions.

As such incorporation appears to be feasible in different ways, each of those
possibilities will be examined in turn. When examining the different models of
incorporation of the UNIDROIT principles in a contract one has to consider that
such constructions demand that the parties to an international commercial contract
address choice of law issues. However, this is not the case in great parts of
international commercial life. It is an objective of this paper to make parties ware of
the need to address such issues in their contract. This task is to be facilitated by

\(^{101}\) Articles 39 et seqq. of the Vienna Convention on the law of Treaties (1969) available at
\(^{102}\) Article 7 (2) CISG.
\(^{103}\) Jacob S. Ziegel The UNIDROIT Principles, CISG and National Law (Presentation at a seminar on
the UNIDROIT Principles at Valencia, Venezuela, 1996) 6 available at
\(^{104}\) Michael Joachim Bonell An International Restatement of Contract Law. The UNIDROIT
Principles of International Contract (2nd ed., Transnational Publishers, Inc., Irvington-on-Hudson,
New York, 1997) 82.
developing reasonable ways of introducing the UNIDROIT Principles into international commercial sales contracts. For this purpose the different possibilities to incorporate the Principles into the contract will be examined.

(i) First of all the parties might agree that the UNIDROIT Principles shall be used as a mechanism to interpret the contract and the parties’ obligations hereunder as long as the Principles are consistent with the provisions of the CISG. Such a contractual obligation only points out of what is laid down in article 7 (2) of the CISG already. It does not attain a lot except for making parties, judges and arbitrators aware of the existence of the unacquainted Principles.

(ii) Beyond that, the contract can provide that the CISG and the UNIDROIT Principles shall govern it. Such a provision can be interpreted as a way to import the UNIDROIT Principles as a means to interpret the CISG and to fill its gaps. Again, such clause does not change the legal situation, it only draws the attention of the concerned parties to the Principles.

(iii) Parties can change the legal situation if they can agree to exclude the CISG and simultaneously to have the contract governed by the UNIDROIT Principles. The latter part of such clause appears to be problematic. The contracting parties are not able to sever themselves from domestic law. Judges are bound by their lex fori. The prevailing view is that the municipal law does not accept a non-binding set of principles as capable of constituting the proper law of the contract. According to this view only genuine legislative acts can govern a contract. The rules for arbitrators are more liberal. Legislation on arbitration usually points out that the parties’ freedom of choice of law includes rules of law of a


supranational character. Parties are generally free to authorise the arbitrator to decide “ex aequo et bono”, giving him large discretion on which rules to apply. If parties intend to incorporate the UNIDROIT Principles they should include an arbitration clause into their contract. Moreover, before invoking the UNIDROIT Principles it has to be decided if a binding contract exists at all. It remains doubtful if the question of the existence of the contract will be decided under the applicable domestic law or if the UNIDROIT Principles shall govern this question already. The latter is probably what the parties intended. In practice the reason for parties to exclude the CISG is generally that they fear the application of a new and unfamiliar instrument. It is unlikely that they will replace it by an even more unfamiliar instrument as the UNIDROIT Principles.

(iv) A shortcoming of choosing the latter solution would be that the parties deprive themselves of the benefit of distinctive sales provisions included in the CISG but not in the UNIDROIT Principles. Examples are the provisions relating to the parties’ warranty and delivery obligations and risks of loss that are not covered in the Principles. Therefore, if the parties decide to have their contract governed by the UNIDROIT Principles it is advisable not to exclude the provisions of the CISG completely but to invoke it to fill gaps in the UNIDROIT Principles. The parties can benefit from the more elaborate rules of the Principles and retain the specific sales features provided in the CISG. Of course the parties are free to establish rules governing problems of the specific transaction.

(v) It remains arguable what will happen if the parties agree to have their contract governed by the UNIDROIT Principles without excluding the application of the CISG expressively. This situation might emerge when either the parties are not aware of the existence of the CISG or do not know that their contract falls within

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109 Articles 30-44 CISG.

110 Articles 66-70 CISG.
the scope of application of the CISG.\footnote{111} In this specific, but not improbable, situation one could argue that the parties excluded the application of the CISG tacitly. Such would be the solution if the parties referred to the law of a non-contracting state.\footnote{112} On the other hand one has to bear in mind that the degree of incompatibility between the UNIDROIT Principles and the CISG is smaller than between the CISG and domestic laws. They resemble each other in large parts apart from their difference in scope and share the same international origin. The assumption that by making reference to the UNIDROIT Principles the parties exclude the application of the CISG completely goes too far. In such cases it has to be assumed that within the limits of party autonomy provisions of the UNIDROIT principles will prevail over their conflicting counterparts in the CISG. However the CISG continues to govern the contract as the applicable law.\footnote{113} It cannot be assumed that the parties wanted to exclude the specific CISG provisions on international commercial sales contracts, which are not addressed in the UNIDROIT Principles. Otherwise domestic law would govern those issues.

(c) Resume

As long as the contracting parties make no choice of law clause or make one including the CISG, it will be the CISG and not the UNIDROIT Principles that applies in the jurisdictions of the contracting states to the convention. Here the CISG is part of the obtaining domestic law. Under such circumstances the UNIDROIT Principles may only have some, but not a profound influence as a means of interpretation.

Further influence can only be achieved by expressive choice of law clauses. The UNIDROIT Principles can well govern issues outside of the scope of the CISG, which otherwise would fall into the sphere of application of domestic law. The UNIDROIT Principles should gain influence in the future as a point of reference in the revision of the CISG. In this case the more complete and elaborate provisions of the UNIDROIT Principles should serve as model. Already a large influence of the Principles can be observed in the preparation of new or revised civil codes or contract laws.

B The European Principles and the CISG

Again the relationship between a binding convention and a non-binding set of rules is object of examination. One can assume that the relation between those instruments is very much the same as the relation between the UNIDROIT principles and the CISG. Furthermore, it shall be analysed what the impact of a possible transformation of the PECL into a binding instrument would be.

1 Legal nature, scope and contents in comparison

In order to establish, what the relationship between the PECL and the CISG is, their scope, legal nature and contents need to be compared.

In contrast to the CISG the Principles are non-binding, aiming to restate the existing lex mercatoria. Their scope is larger in so far as they include all kinds of contracts - domestic and international, commercial and non-commercial. The CISG concentrates on the international sale of goods. On the other hand the field of application of the PECL is smaller as they are primarily designed for the European

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market, whereas the CISG applies globally.\textsuperscript{117} It has been proved above that the CISG comprises large gaps and ambiguities. Only by leaving problems undecided, where no agreement could be reached among the parties to the Convention, its adoption could be ensured. The drafters of the non-binding PECL could progress further, irrespective of a need for worldwide agreement. Moreover, perceptions of what a contract law should look like are more similar inside the European Union than at a worldwide stage.

Therefore, with the exception of a few specific sales provisions, the PECL are more complete and elaborate. Examples are numerous and have been pointed out before. The provisions of the PECL on the formation of the contract are more detailed.\textsuperscript{118} While the CISG excludes questions of validity of a contract from its scope, the PECL include a whole chapter on this aspect.\textsuperscript{119} The PECL deal with questions of the authority of agents.\textsuperscript{120} Beyond a simple excuse for non-performance in cases of impediment of the performance, the PECL also regulate situations of hardship.\textsuperscript{121}

\section*{Determination of the relation}

Summing up, where their fields of application overlap the relation between the PECL and the CISG is the same as the one between the UNIDROIT Principles. Again, a binding and a non-binding instrument are compared. Though the non-binding instrument’s content is more detailed and elaborate, the binding instrument, the CISG, prevails. However, the PECL can serve as a means of interpretation helping to overcome the gaps and ambiguities of the CISG. They are of high academic authority. Furthermore, parties can agree to incorporate them into their contract. Here it is advisable to choose the Principles as the governing, but use the CISG’s specific sales provisions to fill gaps and to include an arbitration clause.

\begin{enumerate}
\item \textsuperscript{118} Chapter 2 PECL.
\item \textsuperscript{119} Chapter 4 PECL.
\item \textsuperscript{120} Chapter 3 PECL.
\item \textsuperscript{121} Article 6.111 PECL.
\end{enumerate}
The PECL are set up to become part of a future European codification of civil law. If this happened, the relationship between the PECL and the CISG would have to be reviewed. In fact, the relationship would be less complicated as the CISG includes conflict provisions in regard to other codifications.

According to its article 90 the CISG “does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.” In intra-European sales of goods the PECL would be the applicable law. However, the parties would be free to incorporate for example the specific sales provisions of the CISG into their contract. Parties are even free to exclude the application of the PECL.122

C The Principles of European Contract Law and the UNIDROIT Principles

The results of the work of the Lando-Commission and the UNIDROIT group bear strong resemblance to each other. At a first glance it is astounding that such similar sets of rules have been produced simultaneously.

Furthermore, the question arises how two instruments showing such likeness can co-exist. Parties might have to choose between the different sets of rules. Where no such choice is made, it might be uncertain which law governs a contractual relation. Such a competition can only be avoided if the borderlines between the instruments, drawn by their different scopes, can be regarded as sufficiently clear and exact.

122 1.102 (2) PECL.
1 Reasons for the development of two similar instruments

The elaboration of two resembling sets of rules is reasonable at a second view.  

In the seventies pursuing a project on uniform rules in the field of international commercial contracts had to be regarded as extraordinarily ambitious. Preceding projects, as The Hague Uniform Sales Laws, had failed to obtain broad support. Solely a small number of states from Western Europe adopted them. Universal projects in confined fields of law, as the work of UNCITRAL leading to the adoption of the CISG, had just begun. It was doubtful if the work of UNIDROIT would be successful. A comparable project at European level seemed more promising. Here, similar economic and political environments could be found. The fundamental views on how contract law should be formed did not differ to the same extent. Thus, it made sense to set up the Lando Commission.

At the time the UNIDROIT Principles had gained more and more support much work had already been put into the preparation of the European Principles. The project could only be abandoned if it had to be regarded as completely useless. Such was not the case. Due to the homogeneity of the member states a project inside the European Union could comprise a larger scope. UNIDROIT had to confine the scope of its principles to international commercial contracts. Differences in other fields of contract law turned out to be too large to allow unification at a worldwide level. Indeed, the commission preparing the PECL could include domestic and non-commercial contracts in their work. Moreover, within a Single Market a distinction between domestic and non-domestic contracts would not be appropriate.

2 Two similar instruments in the same area of law – a “nightmare scenario”? 

The emergence of these similar instruments has been characterised as a “nightmare scenario” creating confusion among the participants in international

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Parties now have the choice between two sets of principles, the CISG, and several domestic laws. This makes a choice of law very complicated. Furthermore, both sets of principles apply if parties refer to the general principles of law, the lex mercatoria or the like. In such a case it cannot be foreseen how a judge or arbitrator will decide in future litigation. This competition of instruments, originally set up to enhance international trade by reducing its uncertainties, is in fact counterproductive. It is stated that drafters of the Principles seem to act primarily in order to perpetuate their own reputation leaving aside the interests of international trade. According to one scholar the drafters resemble doctors using their lingo for not allowing you to understand how severe your disease is. In more moderate tones it has been argued that the upcoming competition between both sets of principles calls for a harmonisation of both instruments. Otherwise uncertainties in international trade would rise, international trade would be hampered instead of being promoted.

This paper disapproves of those views. It argues that the scope of both instruments only overlaps in small parts. Where it does overlap results are the same for the most part. Contents differ only in relation to situations where only one of the sets of rules is applicable, for example, where consumer contracts are concerned.

In order to support this thesis it will be argued as follows.

First, there is only a small field where a competition might arise. The Principles only overlap in the areas of commercial and cross-border transactions.

Secondly, both instruments pretend to restate the existing lex mercatoria, there are only very few contradictions. The outcome of litigation does rarely differ depending on which instrument applies. Where the outcome is very similar or the same anyway, uncertainties do not arise.

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Finally, in the few cases where the outcomes of litigation differ uncertainties do not arise either. Because of their more specialised design the PECL clearly prevail over the UNIDROIT Principles. In order to substantiate these positions scope and contents of both sets of rules need to be compared closely.

(a) Overlap of both instruments

It has been pointed out that a competition between the sets of rules can arise in areas where their scopes overlap. Here parties might be uncertain about which rules are applicable and what the outcome of litigation would be. Thus, a fruitful coexistence of the two instruments can only be affirmed if clear and exact borderlines can be drawn between their different scopes. There should not be any uncertainties on which set of rules was applicable in a certain case.

This paper will find that the instruments overlap in the field of commercial, cross border transactions in the European Union only. In practice, the European Principles will not be used in commercial relationships where a Non-European party is involved.

(i) Differences in scope

The UNIDROIT Principles are applicable in all international, commercial transactions, whereas the European Principles include non-commercial and domestic contracts. They are designed primarily for the use inside the European Union, but apply nevertheless where the parties explicitly choose the Principles to govern their contract\textsuperscript{127} or where they make reference to the “lex mercatoria”, the “general principles of law” or the like.\textsuperscript{128} Moreover, they may apply when the parties “have not chosen any system or rules of law to govern their contract”.\textsuperscript{129}

Hence, there is an overlap between the instruments as far as international commercial contracts are concerned. Though the European Principles are primarily

\textsuperscript{127} Article 1.101 (2) PECL.
\textsuperscript{128} Article 1.101 (3) a PECL.
\textsuperscript{129} Article 1.101 (3) b PECL.
designed for exclusively European relationships, they may apply outside Europe as well. No overlap exists relating to non-commercial and purely domestic contracts.

(ii) Application of both instruments depending on who takes part in the transaction

Thus, the European Principles may be used to govern international commercial relationships outside Europe. However, this paper suggests that in practice an overlap with the UNIDROIT Principles only occurs as far as purely European transactions are concerned. There are basically three different categories in which it might be doubtful which set of principles applies. First of all there are international commercial contracts in which no European party takes part. Other relationships might include Europeans as well as non-Europeans. The last category is made up of contracts only involving Europeans.

Having regard to contracts not involving Europeans one has to bear in mind that the PECL are “are designed primarily for the use in the member states of the European Community”. They take into account the special, very homogenous conditions inside the Single Market. Therefore the UNIDROIT principles, having a less specialised design, will prevail outside the European Community. They are set up “to establish a balanced set of rules designed for the use throughout the world”. This thesis can be supported by examples from legislation outside Europe, where the UNIDROIT Principles and not the PECL, often served as a model. The new Civil Codes of the Russian Federation, the Chinese Contract Law and drafts for the revision of the CISG have been mentioned above, further examples are Israel or New Zealand. In the rare cases where the Principles have been used in

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julisprudence reference has been made to the UNIDROIT Principles and not the PECL.135

The second category is made up by contractual relationships between European and Non-European parties. Here, the Non-European party will usually insist of the application of a neutral law to govern the contract, the UNIDROIT Principles will prevail over the PECL. Arbitrators and judges will prefer the application of the UNIDROIT Principles instead of the European Principles, which present themselves as a “European lex mercatoria”.136 Although information is meagre, evidence can be found in more than 40 arbitral awards137 as well as in jurisprudence138. According to those decisions the UNIDROIT principles reflect general legal rules and principles enjoying wide international consensus, applicable to international obligations. They conclude that international commercial contracts therefore shall be interpreted in accordance to the UNIDROIT Principles.

The third category of international contracts refers to transactions within the European Common Market. All contracts of international and commercial nature in this region fall into the scope of the PECL as well as of the UNIDROIT Principles.139 Parties, judges and arbitrators will apply the instrument that fits their needs the best.

135 Brown Boveri (Australia) Pty Ltd v Baltic Shipping Co (T Andezhba Krupskaja) [1989] 1 Lloyds Rep 518 ((Sup Ct (NSW)) Kirby, P.)


138 Boveri v. Baltic Shipping, above, 518 Kirby P.

(iii) Resume

As a result, in practice the two sets of principles might only overlap in international commercial transactions inside the European Union. Taking into account the high significance purely European cross border transactions have, the question if the instruments can easily co-exist in such cases needs to be answered. It now has to be examined if outcomes of litigation would be different depending on which instrument is applied in the particular case. Only then uncertainties would rise, international trade could be hampered and the catastrophic forecasts mentioned above would be justified.

(b) Outcome of litigation and arbitration

One has to compare the contents of the two sets of rules closely in order to determine what the outcome of litigation or arbitration would be. Only if differences can be spotted, it would have to be established if one of the instruments is likely to prevail or if confusion in European commerce will rise.

This paper suggests that the contents of both instruments resemble each other to a high degree. Where differences can be spotted they are in most cases due to the different scope of the instruments. For example, the PECL include several provisions to protect consumers. As the UNIDROIT Principles do not apply when consumers are party to a transaction, those differences do not come to bear in cases where both instruments are applicable. Different outcomes therefore only occur in very few cases. Here the PECL will prevail due to their more specialised design.

(i) Similarities

Both instruments share the same legal nature, as they are both non-binding restatements of law. The question if there are similarities beyond that shall be object of closer examination.

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1. Preparation and Origins

Experts sitting in their personal capacity took part in the construction of both documents. Indeed, the membership of the Lando-Commission was restricted to lawyers from the member states of the European Community. The same sources of inspiration were used in the work of the two commissions; the Commission on the preparation of the PECL did not confine itself to the laws of Europe. Furthermore, both commissions knew of the work done by the other and used the work of each other as a source of inspiration.

The structure of both instruments is comparable. They are drafted in the style of civil law codes. Their articles are commented. Admittedly the UNIDROIT Principles differ from the PECL, as there are no notes identifying the sources of inspiration used and a description how the issue is dealt with in the different legal systems accompanying them. As the laws of some countries inevitably played a more important role in the preparation, the UNIDROIT commission did not want emphasise this fact.

2. Similarities in contents

As both sets of rules were prepared using the same methods, sources of inspiration and by a resembling group of people it is no surprise to find large similarities regarding their contents. About seventy of the articles of the UNIDROIT Principles correspond to provisions in the PECL.\footnote{Michael Joachim Bonell “The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the same Purposes?” (1996) 26 Uniform Law Review 229,232.}

Similarities are obvious with regard to the Preamble and the General Provisions. Articles 1 and 2 of the Preamble of the UNIDROIT Principles and the provisions on the non-exigency of form, on mandatory rules and on the exclusion or modification by the parties find counterparts in the PECL.\footnote{Articles 1.2; 1.4; 1.5. UNIDROIT.} The same can be said concerning the chapter on formation with regard to the manner of formation and the issue of offer and acceptance.\footnote{Articles 2.1 – 2.11 UNIDROIT.} Specific problems found a solution in both
instruments as specific form requirements, negotiations in bad faith, the duty of
confidentiality and the battle of forms.\textsuperscript{144}

Most divergences are the result of the different scope of both instruments.

Similarities proceed in the chapter on validity. This can be stated on the
provisions on the validity of mere agreement, the definition of mistake and the
relevance of a mistake, the error in expression or transmission, fraud and threat,
gross disparity, third persons, confirmation, the issue of avoidance, the mandatory
character of the provisions and on unilateral declarations.\textsuperscript{145}

The same can be said of the chapter on interpretation and content relating to
the articles on the intention of the parties, the interpretation of statements and on
other conduct, relevant circumstances, reference to contract or statement as a whole,
the terms to be given effect, linguistic discrepancies, the cooperation between the
parties, the determination of the quality of performance and on a contract for an
indefinite period.\textsuperscript{146} Also the chapter on the way in which obligations under a
contract have to be performed is formed out in parallel way.\textsuperscript{147}

Furthermore similarities occur in the final chapter on non-performance. This
chapter constitutes when a party has failed to perform its obligation and the damages
that result from such non-performance.\textsuperscript{148}

(ii) Divergences

Origin and contents of both principles show great similarities. In order to
examine if there is room for both of them, divergences need to be pointed out.
There are provisions in each of the instruments that deal with the same issue, but
differ in contents. Other provisions do not find a counterpart at all.

\textsuperscript{144} Articles 2.13; 2.13; 2.15; 2.16; 2.22 UNIDROIT.
\textsuperscript{145} Articles 3.2; 3.5; 3.6; 3.8 – 3.17; 3.19; 3.20 UNIDROIT.
\textsuperscript{146} Articles 4.1 – 4.5; 4.7; 5.3; 5.6; 5.8 UNIDROIT.
\textsuperscript{147} Articles 6.1.1; 6.1.4 – 6.1.6; 6.1.11 – 6.1.13 and the articles on hardship 6.2.1; 6.2.3 UNIDROIT.
\textsuperscript{148} Articles 7.1.1 – 7.1.3; 7.1.5; 7.2.1 – 7.2.3; 7.3.1 – 7.3.4; 7.3.5 (2)(3); 7.4.1 – 7.4.3; 7.4.5 – 7.4.8;
7.4.12; 7.4.13 UNIDROIT.
1. Divergences due to different policies\textsuperscript{149}

Most divergences are the result of the different scope of both instruments. While the UNIDROIT Principles are intended to serve as "general rules for international commercial contracts"\textsuperscript{150}, the PECL concentrate on "contract law in the European Community"\textsuperscript{151}. Thus, the UNIDROIT Principles apply to international and commercial contracts. The PECL on the other hand focus on all kinds of contracts as long as they keep the limitation to the member states of the European Union. In difference to the UNIDROIT Principles they apply to non-commercial and domestic contracts as well. This can be ascribed to the fact that they are supposed to prepare the path for a uniform European Civil Code. Three groups of differences between the two legal instruments appear due to the their different scope of application.

Firstly, the PECL apply to domestic contracts as well, while the UNIDROIT principles concentrate on the field of international trade. Due to this difference in scope the parties have, according to the PECL the "duty to act in accordance with good faith and fair dealing"\textsuperscript{152} in general terms, whereas the UNIDROIT Principles make reference to "good faith and fair dealing in international trade"\textsuperscript{153}. Domestic concepts of good faith are not to be taken into account when interpreting contract clauses and parties' behaviour in contracts of international trade. Regard must be had to the conditions of international commerce.\textsuperscript{154} A similar concept can be found concerning the application of usages. According to article 1.104 (2) PECL the parties to a contract are bound by any usage, which would be considered generally applicable by persons in the same situation in the Parties. In contrast only usages that are "widely known to and regularly observed in international trade by parties in

\textsuperscript{150} Preamble of the UNIDROIT Principles.
\textsuperscript{151} Article 1.101(1) PECL.
\textsuperscript{152} Article 1.201 PECL.
\textsuperscript{153} Article 1.7 UNIDROIT.
the particular trade concerned” apply to contracts governed by the UNIDROIT Principles.\textsuperscript{155}

It has been shown earlier on that the UNIDROIT Principles apply to commercial contracts only, while the PECL address themselves to transactions between merchants and consumers as well. Various divergences originate from this fact, as the PECL do not expect that the parties to the contract have the same bargaining power. For example, according to both sets of rules additional or modified terms contained in writings in conformation become part of the contract if they do not materially alter the contract or the recipient objects to them without undue delay. However, the PECL confine the application of this provision to situations where both parties are professionals.\textsuperscript{156} Likewise, a rule a written contract including a merger cannot be contradicted or supplemented by prior statements or agreements according to the UNIDROIT Principles. According to the PECL this rule only applies where the merger clause has been individually negotiated.\textsuperscript{157}

Further differences rooting from the different scopes appear concerning the incorporation of standard terms. The PECL, aiming to protect consumers, state that such terms are only binding if the party invoking them has taken appropriate steps to indicate them to the other party. Under the UNIDROIT Principles standard terms can be incorporated by mere reference. The general rules on formation apply in this case.\textsuperscript{158} Furthermore, consumers are protected under the PECL as they provide for avoidance of the contract or of individual terms in cases of substantive unfairness. This is, according to article 4.110 the case if “contrary to the requirements of good faith and fair dealing a significant imbalance in the parties’ rights and obligation arises under the contract”. The UNIDROIT Principles allow the striking out of individual terms only where both element of procedural and substantive unfairness appear.\textsuperscript{159} Such is the case if, “at the time of the conclusion of the contract, the contract or term gave the other party unjustifiably an excessive advantage by its exploitation of a bargaining handicap of the first party”.

\textsuperscript{155} Article 1.8 (2) UNIDROIT.
\textsuperscript{156} Article 2.12 UNIDROIT. Article 2.210 PECL.
\textsuperscript{157} Article 2.17 UNIDROIT, Article 2.105 (1) PECL.
\textsuperscript{158} Article 2.104 PECL, article 2.19 UNIDROIT.
\textsuperscript{159} Article 3.10 UNIDROIT.
One can observe that the orientation on consumer contracts made the drafters of the PECL balance parties' interests and regulate certain legal questions in more detail compared to the UNIDROIT Principles. Notwithstanding the question if the PECL will practically be imposed on consumer contracts this constitutes an advantage of the PECL.\(^{160}\)

The third group of differences finds its origin in the fact that the UNIDROIT Principles have a worldwide sphere of application, whereas the PECL focus on trade between the member states of the European Union. For example, the UNIDROIT Principles have to take into account that there are countries in the world whose economy does not permit the adoption of a freely convertible currency. Under the PECL a monetary obligation expressed in a currency other than that of the place for payment may always be paid in the currency of the place for payment at the current rate of exchange, unless the parties have made a deviant stipulation. According to the UNIDROIT Principles the payment has to be made in the currency on which the parties agreed not only when expressively fixed in the contract but also when the currency of the place for payment is not freely convertible.\(^{161}\)

Similarly, according to both instruments payments may be made in any form used in the ordinary course of business. Due to its global scope the UNIDROIT Principles have substantiate this provision by the term “at the place of payment” as business practices differ in the various regions of the world.\(^{162}\)

A more profound difference can be noted concerning the purposed use of both principles. Both are applicable if the parties expressively referred to them or if they intended their contract to be governed by the “general principles of law”, the “lex mercatoria” or the like. Furthermore they apply where the issue raised cannot be settled in accordance with the law otherwise applicable. Besides that the UNIDROIT Principles can be used as to interpret and supplement existing international instruments and as a model for national and international legislators.\(^{163}\)

In contrast to that the PECL “will assist both the organs of the Communities in


\(^{161}\) Article 7.111 (1) (2) PECL, article 6.1.9 (1) UNIDROIT.

\(^{162}\) Article 6.1.7 UNIDROIT, article 7.110 PECL.

\(^{163}\) Preamble to the UNIDROIT Principles, paras. 5 and 6.
drafting measures and the courts, arbitrators and legal advisers in applying Community measures”. Another difference arises due to the fact that in East-West and North-South trade transactions and their performance quite often demand public permissions, while this rarely occurs within the Common Market of the European Union. Hence, only the UNIDROIT Principles include provisions dealing with such situations, providing criteria for determining which party is obliged to apply for the permission, what this party needs to do to fulfil its duty and what the consequences of a refused permission are. Thus the PECL show gaps concerning several aspects that might be useful at a universal stage. This does not constitute a disadvantage, as they do not aim to be applied outside Europe.

2. General divergences

A few discrepancies between both instruments cannot be explained by differing policies. According to article 1.9(2) of the UNIDROIT Principles a notice becomes effective when it reaches the addressee; the party giving notice has to take the risk that it might not reach its addressee. Under the PECL some of the risk is transferred to the addressee. Article 1.303 (4) states that a delay or inaccuracy in the transmission of the notice or its failure to arrive does not prevent it from having effect as long as it was properly dispatched or given. It is given effect from the time at which it would have arrived in normal circumstances. As another example one can refer to article 2.18 of the UNIDROIT Principles stating that a contract in writing, which contains a clause requiring that any modification needs to be in writing, may not be otherwise modified, whereas such a clause under the PECL constitutes a presumption to this effect only.

Important may become the different provisions on hardship respectively change of circumstances. In difference to the PECL the respective provisions of the UNIDROIT principles only apply “when the events are beyond the control of the

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164 Articles 6.1.14-6.1.17 UNIDROIT.
165 Article 2.106 (1) PECL.
166 Articles 6.2.1-6.2.3 UNIDROIT.
167 Article 6.111 PECL.
More importantly however the results provided for in the two instruments differ to a remarkable extent. According to the PECL the parties have to renegotiate in order to adapt or terminate the contract where its performance becomes excessively onerous. If a party refuses to negotiate contrary to good faith and fair dealing a court may award damages to the other party. The UNIDROIT Principles do not provide for a duty to renegotiate but entitle the disadvantaged party to request such process.

Various other examples could be given. The UNIDROIT Principles make termination dependent on the parties, whereas automatic termination is foreseen in the PECL. Only the PECL presume, that the parties empowered the judge to appoint a third person to determine a price. Several provisions appear in one but not in the other instruments. There are not necessarily any reasons of policy for those differences. The UNIDROIT provisions for the freedom of contract, the binding character of a contract, on the conflict between standard terms and non-standard terms, on partial performance or on interest in damages do not find a counterpart in the PECL. On the other hand some of the provisions of the PECL do not appear in the UNIDROIT Principles. Examples are the articles on reasonableness, imputed knowledge and intention, intention, sufficient agreement, unilateral determination by a party, the determination by a third person, performance by a third person or on a contract to be performed in parts. This list of examples is not exhaustive; several other ones could be given.

(iii) Resume

Wherever the UNIDROIT Principles are more detailed it concerns provisions that do not have any effect on the European Market. Examples are the provisions relating to public permissions or to not freely convertible currencies. In most cases where the PECL are more elaborate transactions including consumers are concerned. As the UNIDROIT Principles do not deal with such non-commercial contracts, this
fact does not result in different outcomes of litigation. Outcomes differ at a few points, as the question if renegotiation can be demanded in cases of hardship or when a notice becomes effective.

As a result, a different outcome of litigation depending on which set of principles is applied only occurs in very few cases. Hardship provisions for example apply as an exception where the equilibrium of the contract is fundamentally altered. Generally the disadvantaged party has to observe the contract even if its performance becomes more onerous.

However, wherever such differences can be noted they have a high impact on the particular case. The question who bears the risk that a notice reaches its addressee can decide if a contract has come to existence or if has been avoided. Likewise, the question if a contract is adapted or terminated due to changing circumstances is essential in a contractual relationship. Thus, even if different outcomes are rare, they are of considerable significance. In such situations an adjudicator has to decide, which instrument he or she should apply.

(c) The outcome of the competition

Even if a competition between various drafts is, as any competition, stimulating, it must not lead to confusion of adjudicators and parties taking part in international commerce. Uncertainties, hampering international trade, can only be avoided if one of the instruments clearly prevails over the other where a competition arises. As both sets of rules do not possess any binding force, the rule of lex specialis derogat generali is not applicable. However, the idea that the more specialised rule stands up to the more general one may have an impact on the question that needs to be answered here. It can be assumed that at the European stage the PECL will prevail over the UNIDROIT Principles due to their more specialised design.

At this point the two instruments need to be evaluated. Three main advantages of the PECL over the UNIDROIT Principles obtrude.\(^{176}\)

First, the PECL deal with more issues, its provisions re elaborated in a more detailed way. For example, the PECL deal with the issue of authority of agents extensively, whereas the issue is expressively excluded from the scope of the UNIDROIT Principles.\(^{177}\) They even deal extensively with the questions of indirect representation.\(^{178}\) Moreover, the Lando-Commission tackled questions of interest on interest, assignment of claims, assumption of debts, plurality of debtors and creditors, prescription and discharge, which did not find the attention of the group preparing the UNIDROIT principles.\(^{179}\)

The second advantage originates in the inclusion of consumer contracts in the PECL. Without touching the problem that such a wide application will face difficulties with regard to its practical imposition, it is already the consideration of the weaker position of the consumer, which is of high value. Taking this into account, the drafters of the PECL were forced to balance the interests of the parties more evenly.

Thirdly, the PECL might be included in a future European codification of contract law. It is just the lack of this prospect, which made the drafters of the UNIDROIT Principles decide to create a non-binding set of rules instead of a draft convention. Besides all differences Europe shares a common legal tradition and the economic and cultural environment in its member states are comparable.\(^{180}\) The Common Market and the economic integration including the Euro demand a uniform legal framework. This development finds the support of the European


\(^{177}\) Chapter 3 PECL
\quad Article 3.1 (b) UNIDROIT.

\(^{178}\) Chapter 3 Section 3 PECL.


Institutions. The situation is different at the universal stage, where the most successful instrument of unification, the CISG, is limited in scope and where reservations are numerous. A treaty going any further is not foreseeable.

Taking into account the advantages the PECL offer compared to the UNIDROIT Principles it seems very likely that at the European stage the PECL will prevail over the UNIDROIT Principles in the present situation. This is certainly true for contracts between merchant and consumers that are not dealt with outside the PECL.

This could change in the unlikely, but still imaginable case that the UNIDROIT Principles were transformed into an international convention whereas the PECL remained non-binding. In such a case the UNIDROIT Principles would govern any contract without a differing choice of law clause as soon as it is in its scope. But even under those circumstances the PECL would continue to govern contracts of purely domestic nature or between merchants and consumers. More likely is the adoption of the PECL as part of a uniform European Code of Private Law. As such a code would necessarily be restricted to the member states of the European Union the UNIDROIT Principles would still be applicable outside Europe. No competition would arise.

182 Articles 1 – 5 CISG.
183 Article 92 CISG.
To sum up, both sets of principles can well co-exist due to their differences in scope. Where they might be in conflict, in the case of international commercial contracts inside the European Union, it is very likely that the PECL will prevail, as they are better adapted to this very homogenous market. No uncertainties arise as a result of the existence of both instruments.

IV CONCLUSION

The CISG is the only one of the three instruments dealt with in this paper with binding character. Wherever it applies it prevails over the non-binding principles. The principles however, being more complete and elaborate than the CISG, can serve as a useful instrument to evade the shortcomings of the Uniform Law. They can help to fill its gaps and to reconcile its ambiguities. Such use as a means of interpretation however can only be made if the principles reflect a general principle underlying the CISG on the point in question. As a main criterion to establish where the principles express such general principle serve the preparatory materials of the CISG. Shortcomings on a particular point must not be due to different concepts in the legal systems of the contracting states. Parties to international commercial transactions are advised to incorporate the principles, combined with an arbitration clause into their contracts. Thereby they ensure to have their contractual relation governed by a very convenient set of rules, avoiding shortcomings of the CISG or domestic laws. In the case of international commercial sales the specific sales stipulations of the CISG should be used, which cannot be found in the sets of principles.

Having regard to the relation between the sets of Principles it can be said that in practice a competition may only arise as far as international commercial contracts inside the European Union are concerned. Such competition will not have a high impact, as the contents of the principles resemble each other to a large extent. Where differences occur it is assumed that the PECL will prevail due to their more specialised design.
BIBLIOGRAPHY

I Textbooks


Articles


III  Case Law

Brown Boveri (Australia) Pty Ltd v Baltic Shipping Co (T Andezhba Krupskaia) [1989] 1 Lloyds Rep 518 (Australia Supreme Court of the New South Wales Court of Appeal) Kirby, P.


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