

UNIFICATION OF CONTRACT LAW

Unification of General Contract Law in Africa

The Case of the UNIDROIT Principles of International Commercial Contracts*

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The organizers of this conference kindly invited me to speak on the unification of general contract law and on one specific instrument in this area: the UNIDROIT Principles of International Commercial Contracts ("PICC").¹ I would like to use the 14 minutes allocated to my paper to touch on three issues. First, I will give a short overview of the PICC for those who are not yet familiar with this instrument. Secondly, I will look at the use of the PICC in legal practice. And thirdly, I will assess the potential of the PICC for making a contribution to the unification of general contract law in Africa. Overall, I can afford to be brief and limit myself to introductory comments because Ms Mestre of UNIDROIT will cover much of the ground in greater detail.

A. The UNIDROIT Principles of International Commercial Contracts

I. UNIDROIT

The PICC are a set of contract law rules published by UNIDROIT, the *Institut international pour l'unification de droit privé* or 'International Institute for the Unification of Private Law', an independent intergovernmental organisation. As of 1 January 2011, it had 63 member states from all six continents, including the major trade nations. The involvement of African countries is regrettably modest. Only Egypt, Nigeria, South Africa and Tunisia have so far acceded to the UNIDROIT Statute.²

Article 1 of this Statute calls on UNIDROIT to 'prepare drafts of laws and conventions with the object of establishing uniform internal law'. Thus, for example, UNIDROIT was responsible for drafting the Ottawa Conventions on Interna-

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1 See UNIDROIT International Institute for the Unification of Private Law, UNIDROIT Principles of International Commercial Contracts 2004, Rome, April 2004, available at <www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>.

2 Statute of UNIDROIT, as amended on 26 March 1993, available at <www.unidroit.org/mm/statute-e.pdf>.

tional Factoring and International Financial Leasing³ and the Cape Town Convention on International Interests in Mobile Equipment.⁴ It also participated in the preparation of the Uniform Laws on the International Sale of Goods ('ULIS') and the Formation of Contracts ('ULF')⁵ which ultimately led to the United Nations Convention on Contracts for the International Sale of Goods ('CISG').⁶

II. Content of the UNIDROIT Principles

In 1994, UNIDROIT published the PICC, a codification of the general law of international commercial contracts. The scope of the instrument is not narrowly confined. The notions of both 'international' and 'commercial contract' are to be understood broadly. They potentially include all cross-border transactions in which none of the parties acts as a consumer.⁷ However, the PICC are not concerned with the rules pertaining to specific types of contracts, as is the case, for example, with the CISG. The PICC rather contain provisions on general matters of contract law that occur in all types of contracts, such as formation, interpretation, validity and the remedies for non-performance. A second, revised edition of the PICC was published in 2004. It deals with further areas of general contract law, such as limitation periods and contracts for the benefit of a third party. A third version will be made available later this year. It will cover illegality, conditions, joint and several liability and the unwinding of failed contracts.

The PICC are available in many language versions. They have been produced in the official languages of UNIDROIT (English, French, German, Italian, Spanish), and unofficial translations into twelve further languages exist.⁸

Despite the reference to 'Principles' in their title, the PICC are not confined to spelling out broad and general standards or *principes directeurs*, such as 'good faith and fair dealing'. The majority of the 185 articles are straightforward 'rules' which more or less dictate the outcome of the case at hand in an 'all-or-nothing fashion'.⁹ In this regard, the PICC very much resemble a codification of general contract law as it can be found in national Civil Codes or Contract Law Acts.

The PICC contain two types of provisions. Some of the articles represent 'an international restatement of general principles of contract law'.¹⁰ Where the

3 UNIDROIT Convention on International Factoring Ottawa, 28 May 1988; UNIDROIT Convention on International Financial Leasing Ottawa, 28 May 1988.

4 Convention on International Interests in Mobile Equipment, Cape Town, 16 November 2001.

5 Convention relating to a Uniform Law on the International Sale of Goods, The Hague, 1 July 1964; Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, The Hague, 1 July 1964.

6 Vienna, 11 April 1980, available at <www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html>.

7 R. Michaels, Preamble I, in Vogenauer & Kleinheisterkamp (Eds.), *Commentary on the UNIDROIT Principles of International Commercial Contracts ('PICC')*, Oxford, 2009, paras. 21-28.

8 Available at <www.unidroit.org/english/principles/contracts/principles2004/translations/black-letter-main.htm>.

9 For these characteristics of rules, see R. Dworkin, *Taking Rights Seriously*, London, 1977, pp. 22-28.

10 Governing Council, 'Introduction to the 1994 Edition', in *UNIDROIT Principles of International Commercial Contracts 2004*, UNIDROIT, Rome, 2004, p. xiv.

drafters were able to identify a solution to a particular problem that is shared across domestic and international contract laws they restated this rule in one of the articles of the PICC. However, frequently this was not possible because no global 'common core' of solutions could be established. In this event, the drafters either made choices between existing approaches or drew up new rules in order to ultimately adopt what they 'perceived to be the best solutions'.¹¹ In these cases they aimed to strike a balance between the common law and the civil law traditions. As a result, the PICC are widely regarded as providing jurisdictionally 'neutral' solutions.

III. *Legal Nature of the UNIDROIT Principles*

Traditionally, the unification of private law has been pursued by way of concluding bilateral and multilateral international treaties or conventions like the CISG. Such treaties are negotiated by representatives of national governments who must reach unanimity. Once concluded, they are binding on the contracting states.

The PICC follow a different approach. They are designed to be a 'non-legislative means of unification or harmonisation of law'.¹² As such, they were elaborated by an international Working Group that consisted of eminent contract lawyers sitting in their personal capacity, rather than representing their respective governments. There was no attempt by the member states of UNIDROIT to conclude an agreement to be bound by the outcome of these labours. As a result, the PICC are not binding on any of the member states although of course any state may choose to endorse them by way of implementation or promulgation as domestic law.

However, as long as a state refrains from doing so, the PICC do not constitute 'law proper' according to the traditional theory of legal sources that equates law with the rules emanating from the sovereign of the nation state.¹³ They are, as is frequently said, mere 'soft law'.

B. *Use of the UNIDROIT Principles in Practice*

The PICC strive to fulfil two different functions. On the one hand, they can be used as the law applicable to the contract.¹⁴ On the other hand, they have the potential of being a model for law reform.¹⁵

11 *Ibid.*, p. xv. See S. Vogenauer, Introduction, in Vogenauer & Kleinheisterkamp (Eds.), *supra* note 7, paras. 13, 23; See also Michaels, *supra* note 7, paras. 3-4.

12 Governing Council, *supra* note 10; See also M.J. Bonell, 'Unification of Law by Non-legislative Means', 40 *Am. J. Comp. L.* 1992, p. 617.

13 For the classic exposition of the traditional theory, see J. Austin, *The Province of Jurisprudence Determined*, London, 1954, pp. 1-3.

14 Preamble, paras. 2-4.

15 Preamble, paras. 5-7.

I. Law Applicable to the Contract

The parties to a contract can choose to have their transaction governed by the PICC. The obvious advantage is that they submit their agreement to a neutral regime. However, such a 'choice of law' is not accepted by the state courts in most legal systems because the PICC are, as has been seen, not 'law' in the traditional sense.¹⁶ Only the conflicts rules of the Ukraine and the US State of Oregon permit their courts to acknowledge the parties' choice of the PICC. The situation is different if the contract is subjected to arbitration. Most arbitral tribunals, under the applicable arbitration rules, accept a choice of the PICC.¹⁷ If two parties from, say, Cameroon and China, respectively, want to have their transaction governed by the PICC they are therefore be well advised to combine a choice of law clause and an arbitration clause.

II. Model for Law Reform

The PICC can also serve as a 'source of inspiration' in both national and supra-national law reform. In these cases the PICC have the function of a 'background law' which informs those who look out for the most modern regime of contract law for international commercial transactions. These can be legislators and courts which also play a major role in the development (and thus reform) of the law.

The PICC have been particularly successful in influencing national law reform, particularly national legislative measures and drafts.¹⁸ They have made an impact on the Chinese Contract Law Act 1999, the Reformed Russian Civil Code (1994-2001), the new Brazilian Civil Code of 2003 and on the private law reforms of some formerly socialist countries in Central Europe, i.e. Lithuania, Estonia and, perhaps soon, Hungary. The Scottish Law Commission has also drawn on the PICC, as have the French and the Spanish Ministries of Justice in their respective 2009 drafts for the reform of the law of contract or obligations. In common law jurisdictions, such as England, Australia and New Zealand, the PICC have sometimes been referred to in the courts.

Turning to supra-national law reform, the PICC are one of the sources of inspiration for the drafters of a 'Common Frame of Reference' of European contract law. The most important impact on a supra-national level may, however, occur in the context of the OHADA countries. I will turn to this issue in the final part of my paper.

C. Potential of the PICC to Promote the Unification of General Contract Law in Africa

In 2002, the Council of Ministers of the Organization for the Harmonization of Business Law in Africa ('OHADA') requested UNIDROIT to provide them with a

16 For further details, see Michaels, *supra* note 7, paras. 32-87.

17 This is set out in detail by M. Scherer, Preamble II, in Vogenauer & Kleinheisterkamp (Eds.), *supra* note 7, paras. 21-28.

18 For a comprehensive overview, see Michaels, *supra* note 7, paras. 129-139.

draft uniform act of contract.¹⁹ This was prepared by Belgian law professor Marcel Fontaine, a member of the UNIDROIT Working Group on the PICC. He based the draft on the PICC although he made a number of important amendments after consultation with African legal experts. It was published in 2004²⁰ and amended in the following year in order to make it compatible with another draft uniform act (on consumer contracts). Overall, the draft is very similar to the PICC. Professor Michaels counts 161 articles that are identical with provisions of the PICC. 31 articles were reformulated. Only 35 cannot be found in the PICC. They mostly concern areas outside the scope of the PICC.²¹

I understand that the fate of the Draft OHADA Uniform Act on Contracts has still not been decided. In 2007, the Council of Ministers agreed to combine the project with the ongoing harmonisation of the law of proof. Currently, there seems to be another round of consultations, with a decision of the Council expected later this year.

But would a unification of general contract law on the basis of the PICC be desirable in the case of OHADA? The case rests on two assumptions that are commonly made in order to justify the unification of this area of the law: first, unification of commercial law will promote economic development, and secondly, unification of commercial law requires unification of general contract law. If OHADA subscribes to these two assumptions it has to decide whether it prefers a home-grown solution or wants to rely on a set of international model rules. After all, it has been doubted that the Draft Uniform Act is sufficiently sensitive to African traditions. This is usually seen as a drawback because it does not take account of regional peculiarities. It may, however, also be an advantage because relying on a modern international model represents a decisive break with the colonial and customary heritage and might bring Africa in line with the needs and usages of modern international commerce.

If OHADA does indeed want to unify its general contract law on the basis of international model rules the PICC are, it is submitted, currently the best model available. From the perspective of OHADA they present three particular advantages:

- a. If it is true that between commercial parties from countries from the developing world there are often pronounced structural imbalances, then the PICC provide a reasonably balanced framework: although they start from a strong premise of freedom of contract they are, to some extent, concerned about the protection of the economically weaker party.²²

19 The following observations are mostly based on Michaels, *supra* note 7, paras. 123-125 who provides further references.

20 Available at <www.unidroit.org/english/legalcooperation/ohada.htm>; M. Fontaine, 'The Draft OHADA Uniform Act on Contracts and the UNIDROIT Principles on International Commercial Contracts', *U. L. Rev.* 2004, p. 573.

21 Michaels, *supra* note 7, para. 123.

22 M.J. Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*, 3rd edn, Ardsley/New York, 2005, pp. 151-172.

- b. As has been said above, the PICC are available in many different language versions.
- c. The PICC are, as has been mentioned before, jurisdictionally neutral. Therefore they are compatible with jurisdictions outside the French legal tradition, particularly with the common law. It is important to safeguard this advantage and to resist the temptation to 'franglicise' the PICC for the purposes of a Uniform Act, as has apparently been done in the case of sales law.²³

The Draft OHADA Uniform Act on Contracts is ready to be adopted, and it is hoped that the Council will make a decision soon.

23 Cf. the paper by I. Schwenger, *supra* p. 370 *et seq.*