

THE SOFT LAW APPROACH TO UNIFICATION OF  
INTERNATIONAL COMMERCIAL CONTRACT LAW: FUTURE  
PERSPECTIVES IN LIGHT OF UNIDROIT'S EXPERIENCE

ANNA VENEZIANO\*

I. INTRODUCTION

I am grateful to the organizers of the 2013 *Villanova Law Review* Norman J. Shachoy Symposium for the invitation to contribute to a most interesting symposium on the future of uniform law in the field of international contracts.

This Article is centered on the advantages and disadvantages of different methodological approaches to the development of uniform rules for international trade.

In the following, I will first deal with what has been achieved so far, focusing on the two most successful uniform law instruments in the field of international contract law—namely the United Nations (UN) Convention on Contracts for the International Sales of Goods (CISG)<sup>1</sup> and the International Institute for the Unification of Private Law (UNIDROIT)<sup>2</sup> Principles for International Commercial Contracts (PICC).<sup>3</sup>

Turning to the recent debate on the further development of uniform law for international contracts which is taking place within UNCITRAL and elsewhere, in Part III I will then attempt to give some answers to the question posed by the present Symposium—i.e., “Has the time come for a new global initiative to harmonize and unify international trade?” In doing this, I will be assessing the suitability and the need, at the present stage, to make use of either legislative or non-legislative means to achieve further worldwide harmonization of general contract law.

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\* Professor of Comparative Law, University of Teramo (Italy); Deputy Secretary General, UNIDROIT. The views expressed in this Article are those of the author only and do not necessarily reflect the official position of UNIDROIT.

1. In 1980, the CISG was drafted under the auspices of the UN Commission on International Trade Law (UNCITRAL), which was established in 1966 as a Permanent Commission within the UN General Assembly.

2. See generally *UNIDROIT: An Overview*, UNIDROIT, <http://www.unidroit.org/dynasite.cfm?dsmid=103284> (last visited Apr. 13, 2013). UNIDROIT was founded in 1926 as an auxiliary organ of the League of Nations, and in 1940 became an independent intergovernmental organization whose membership presently encompasses sixty-three states from all five continents. See *id.*

3. See generally INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS (2010). The first edition of the UNIDROIT Principles was published in 1994, the second edition in 2004, and the third edition in 2010. For further discussion of UNIDROIT's PICC, see *infra* notes 4–28 and accompanying text.

## II. WHAT HAS BEEN ACHIEVED THUS FAR

A review of the most successful instruments for the worldwide unification of contract law cannot but start with the CISG. The Convention indeed constitutes an extraordinary achievement not only for the unprecedented width of its scope of application and the high number of states from all continents which participated in the Diplomatic Conference in Vienna,<sup>4</sup> nor just for its subsequent undeniable success in terms of ratifications<sup>5</sup> and its practical application.<sup>6</sup> Perhaps even more significantly, it has played a major role in building a universally shared vocabulary and a common denominator of rules which have since represented the basis for any academic discourse on international contract law, as well as serving as a model for national legislation<sup>7</sup> and international<sup>8</sup> and supranational<sup>9</sup> instruments alike. Last but not least, it has offered the op-

4. See *Legislative History: 1980 Vienna Diplomatic Conference*, PACE L. SCH. INST. OF INT'L COM. LAW, <http://www.cisg.law.pace.edu/cisg/conference.html> (last updated July 13, 2007) (detailing Diplomatic Conference proceedings). The formal development of uniform rules for international sales has a long history and dates back to 1929, when UNIDROIT discussed Ernst Rabel's first proposal. UNIDROIT's work, which concluded with the adoption of The Hague Uniform Laws in 1964, was resumed by UNCITRAL and led to the adoption of the CISG. See generally PETER SCHLECHTRIEM & INGEBORG SCHWENZER, COMMENTARY ON THE UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 1–12 (Ingeborg Schwenzer ed., 2010).

5. At the time of this writing, there are seventy-eight contracting states from all five continents and including most major participants in the world trade. Ratifications have been steadily growing since the CISG's entry into force in 1988. In addition, a number of states have withdrawn reservations made at the outset (e.g., on the requirement of the written form or the exclusion of Part II of the Convention). See United Nations, UNCITRAL DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 436, 445 (2012) [hereinafter UNCITRAL DIGEST], <http://www.uncitral.org/pdf/english/clout/CISG-digest-e.pdf>; Ministry of Commerce, *China Contract Law and CISG Become More Consistent in Provisions on Contract Form and Their Applicability*, PEOPLE'S REPUBLIC OF CHINA, (Feb. 25, 2013), [http://english.mofcom.gov.cn/article/news\\_release/significantnews/201302/20130200038302.shtml](http://english.mofcom.gov.cn/article/news_release/significantnews/201302/20130200038302.shtml).

6. The by-now significant amount of international case law applying the CISG (both by national and by arbitral courts of more than thirty states) is collected in online databases which provide search facilities as well as detailed abstracts in English. See Albert H. Kritzer, *CISG Database*, PACE L. SCH. INST. OF INT'L COM. LAW, <http://www.cisg.law.pace.edu> (last updated Apr. 3, 2013); UNCITRAL DIGEST *supra* note 5; *Welcome to UNILEX*, UNILEX, <http://www.unilex.info/dynasite.cfm?dssid=2375&dsmid=14276>.

7. See Ingeborg Schwenzer & Pascal Hachem, *The CISG—Successes and Pitfalls*, 57 AM. J. COMP. L. 457, 461–63 (2009); Franco Ferrari, *General Report*, in THE CISG AND ITS IMPACT ON NATIONAL LEGAL SYSTEMS 413 (Franco Ferrari ed., 2008).

8. The most notable example being the PICC. See MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 306 (3d ed. 2005) (“[T]o the extent that the two instruments address the same issues, the rules laid down in the UNIDROIT Principles are normally taken either literally or at least in substance from the corresponding provisions of CISG.”).

9. Suffice it to refer, at a legislative level, to the 1999 EC Consumer Sales Directive. International uniform law, including CISG, influenced also the DCFR as

portunity to develop various methods to strive for uniformity in the interpretation by domestic courts and arbitral tribunals in different jurisdictions.<sup>10</sup>

Notwithstanding its merits, however, the CISG also shows the limits of uniformity achieved through legislative means. The need to reach a governmental consensus through the process of negotiating an international treaty reduced the chances of dealing with more controversial subjects such as contracting under standard terms or through an agent, invalidity issues, change of circumstances, pre-contractual liability, stipulated damages, many aspects of restitution, just to mention a few notable gaps. Other provisions are difficult to apply because they were the outcome of a compromise (such as the ones regarding the role of the principle of good faith, the right to specific performance, the relationship between fundamental breach and the seller's right to cure, interest for late payment).<sup>11</sup>

Thus, when UNIDROIT, more than three decades ago, set up a special working group for the development of rules for international commercial contracts in general, it was decided that the innovative approach of a "soft law" instrument should be followed, instead of continuing with the traditional model of a multilateral treaty.<sup>12</sup> The drafters, therefore, opted for a non-binding set of rules, not assisted by force of law nor expected to principally serve the purpose of becoming legislation.<sup>13</sup> They clearly had in mind the example of U.S. restatements of the law, whose

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well as the recent 2011 Commission Proposal for EU Regulation on optional Common European Sales Law (CESL). See PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR) (Christian von Bar et al. eds., 2009); *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final (Oct. 11, 2011). See generally Eric Clive, *Key Concepts in Uniform and Regional Private Law Instruments: An Emerging Consensus?*, 2013 UNIF. L. REV. 1.

10. The question of the uniform interpretation of the CISG has always been one of the most debated among scholars and has found its way even in case law applying the CISG. See Pilar Perales Viscasillas, *Article 7*, in UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 111 (Stefan Kröll et al. eds., 2011). The CISG Advisory Council, an independent commission established in 2001 and composed of well-known experts in the field coming from different jurisdictions, has already published a number of opinions which suggest solutions based on the review and critical assessment of interpretative trends in case law. See *Welcome to International Sales Convention Advisory Council*, CISG ADVISORY COUNCIL, <http://www.cisgac.com> (last visited Apr. 11, 2013).

11. As the drafters of the CISG were well aware. See PETER SCHLECHTRIEM, UNIFORM SALES LAW—THE UN-CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 55, 61, 77 (Peter Doralt & Helmut H. Haschek eds., 1986).

12. The project, initially labeled "Progressive Unification of International Trade Law" and approved by UNIDROIT as early as 1971, was assigned to a special working group in 1980 and assumed its definitive title "Principles for International Commercial Contracts" in 1985.

13. See Stefan Vogenauer, *Introduction*, in COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC) 4 (Stefan Vogenauer & Jan Kleinheisterkamp eds., 2009).

effectiveness in practice is based solely upon their persuasive value for judges and lawyers.<sup>14</sup>

This approach was chosen for a number of different reasons. It was felt that the adoption of the CISG had represented the “maximum that could be achieved at the legislative level”<sup>15</sup> through inter-governmental negotiations. While a conventional text is binding and therefore, at first sight, much stronger than a mere soft law product, it is precisely its binding character which makes it problematic. A “soft law” regulation would not only avoid the pitfalls of the negotiation and ratification process, but also produce a more flexible text, which could be more easily adapted to “take care of problems that later surface.”<sup>16</sup>

This method had the additional advantage of allowing the participants in the working group—composed of renowned international experts with different legal backgrounds and sitting in a personal capacity and not as representative of governments<sup>17</sup>—more freedom in endorsing solutions which, though different from the ones present in their own legal systems, were considered to be either common practice in international transactions or, in some cases, better suited to international commercial contracts. The informal method minimized the political constraints and shifted the focus to the reasonability and economic soundness of the proposed rules.<sup>18</sup> This enabled the drafters to develop over the years a wide set of rules covering virtually all issues which are traditionally ascribed to the general part of the law of contracts and obligations.<sup>19</sup>

Finally, though no less importantly, it was felt that the acceptability of rules concerning international contracts in general should be evaluated first and foremost by the parties to the contract, because contract law for the most part is dispositive.<sup>20</sup>

Clearly, the choice of a non-binding set of rules does not come without costs in terms of both legitimacy and practical impact.<sup>21</sup> Their application depends upon the parties choosing to be bound by them, and, in the absence of such a choice, adjudicators will apply them only if—and

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14. See E. Allan Farnsworth, *Closing Remarks*, 40 AM. J. COMP. L. 699 (1992).

15. See Michael Joachim Bonell, *Towards a Legislative Codification of the UNIDROIT Principles?*, 12 UNIF. L. REV. 233–34 (2007).

16. Farnsworth, *supra* note 14, at 700.

17. See UNIDROIT, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2010 x–xiii (2010) (listing drafters and other contributors).

18. See Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 FORD. L. REV. 281, 284 (1994).

19. General principles, formation, authority of agents, validity (including illegality), interpretation, content, third party rights, conditions, performance, hardship, non-performance, set-off, assignment of rights, transfer of obligations and assignment of contracts, limitation periods, and plurality of obligors and obligees.

20. See ROY M. GOODE, COMMERCIAL LAW IN THE NEXT MILLENNIUM 234 (1998). For a discussion of the merits of an “informal approach,” see KLAUS P. BERGER, THE CREEPING CODIFICATION OF THE LEX MERCATORIA 154 (1999).

21. As clearly recognized by the UNIDROIT Governing Council itself when it approved the new instrument. See UNIDROIT, *supra* note 17, at xxiii.

insofar as—they are persuaded by their intrinsic value.<sup>22</sup> All the more so, since the PICC are not limited to offering a “restatement” of existing practices in international trade, but in some cases introduce innovative provisions.<sup>23</sup>

Almost twenty years after the publication of their first edition, it is fair to say that the PICC, notwithstanding their non-binding nature—or maybe precisely as a consequence of their soft law character—have enjoyed great success when compared with other international uniform law regulations (including the ones which have binding force).

More than three hundred decisions rendered worldwide and referring one way or the other to the PICC are recorded;<sup>24</sup> their actual number, however, is likely to be higher, due to the fact that the majority of cases involving the PICC are decided by arbitral courts which tend to abide by a policy of confidentiality.

While it is true that the number of reported instances where parties have expressly opted in favor of the PICC or where arbitral courts have applied the PICC as the rules of law governing the substance of the dispute is still relatively limited,<sup>25</sup> their mere existence is already proof of the importance of the PICC, especially taking into account the traditional resistance of parties and their counselors against adopting new regulations.<sup>26</sup> Of particular interest in this respect are the cases where the PICC are invoked as constituting an authoritative expression of general principles of law, *lex mercatoria*, or the like. Even more interesting, however, is the circumstance that in half of the collected decisions the PICC are cited by either arbitral tribunals or, increasingly, domestic courts, as an aid to interpret or supplement the applicable domestic law (including CISG). This is particularly the case when the issue under consideration is disputed under the applicable law and the adjudicator refers to the PICC in order to support the adoption of one of the possible solutions, as being better suited to international transactions.<sup>27</sup>

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22. See Bonell, *supra* note 15, at 237.

23. See Vogenauer, *supra* note 13, at 6.

24. See UNILEX, *supra* note 6. At the time of this writing, 308 cases are reported, of which 167 are arbitral awards and 141 are domestic court decisions.

25. However, by now that number is not less than 1/6 of all reported cases.

26. See Michael Joachim Bonell, *Model Clauses for Use of the Unidroit Principles of International Commercial Contracts in Transnational Contract and Dispute Resolution Practice* (Feb. 2013), available at <http://www.unidroit.org/english/documents/2013/study50/mc/s-50-mc-01rev-e.pdf>. UNIDROIT has recognized the need to facilitate the choice of the PICC by the parties in the contract. A restricted Working Group was set up with the aim of preparing “Model Clauses for Use of the UNIDROIT Principles of International Commercial Contracts in Transnational Contract and Dispute Resolution Practice.”

27. See Ralf Michaels, *Preamble I*, in COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC) 65 (Stefan Vogenauer & Jan Kleinheisterkamp eds., 2009) (analogizing function of PICC to traditional functions of US Restatements).

Finally, though the PICC are not primarily aimed at becoming binding legislation, they have been expressly used as a model for contract law reforms in many national jurisdictions around the world as well as international regulations.<sup>28</sup>

### III. IS THERE A NEED TO DRAFT A NEW INTERNATIONAL INSTRUMENT ON GENERAL CONTRACT LAW?

I will now turn to the question posed by the present symposium on the desirability of a new international instrument concerning international trade law, with particular regard to general contract law.

The question is prompted by a recent proposal by the Swiss government requesting that UNCITRAL take action to explore the possibility of preparing a new instrument in the area of contract law.<sup>29</sup> The proposal, starting from the perceived need to further the uniformity of the law of international sales, urges UNCITRAL to “undertake an assessment of the operation of the [CISG] and related UNCITRAL instruments” and to “discuss whether further work both in these areas and in the broader context of general contract law is desirable and feasible on a global level.”<sup>30</sup>

Because the proposal leaves open the issues of the precise scope as well as of the precise nature of the instrument which could be envisaged, I will first address the “desirability and feasibility” of a new binding international regulation in the form of a convention covering issues of *general contract law*, and then consider the merits of other possible approaches, again regarding *general contract law*.

The idea of drafting a legislative instrument at a global level for international commercial transactions in general has already been authoritatively suggested in the past.<sup>31</sup> It was prompted by the desire to enhance the effectiveness of existing uniform law and to overcome the more obvious disadvantages of an opt-in uniform regulation such as the PICC. This view was radically opposed on the grounds that contract law is essentially ruled by party autonomy and legislation should only intervene in those sectors where mandatory provisions or debated policy choices are concerned.<sup>32</sup>

I would like to respectfully disagree with both positions. While I am personally not against the idea of developing a binding set of rules for international contracts as a matter of philosophy, my perplexity regards the advisability of such an overambitious endeavor at the present stage. As

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28. See BONELL, *supra* note 8, at 268.

29. See UNCITRAL, *Possible Future Work in the Area of International Contract Law: Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law*, U.N. Doc. A/CN.9/758 (May 8, 2012).

30. *Id.*

31. See generally Ole Lando, *CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law*, 53 AM. J. COMP. L. 379 (2005).

32. See Roy Goode, *Rule, Practice and Pragmatism in Transnational Commercial Law*, 54 INT'L COMP. L.Q. 539, 553 (2005).

mentioned above, all those who are familiar with the process of going through governmental experts' sessions first, and a diplomatic conference afterwards, are fully aware of the difficulties that arise in this connection. It is a costly and burdensome procedure, which is further complicated by the possibility of introducing reservations in order to reach consensus, and by the need to obtain ratifications afterwards. I suspect that if governments are involved, the resistance to depart from domestic law will be even greater for a project regarding the veritable "core" of domestic private law concepts such as the general law of contracts. Even if limited to cross-border transactions, it would still involve a dramatic change in national legal systems.

By expressing my strong doubts concerning the feasibility of a binding instrument covering general contract law I do not mean, however, to summarily dismiss also the idea to prepare a so-called "Global Commercial Code," which was discussed some years ago at the prompting of then-UNCITRAL Secretary Gerold Herrmann.<sup>33</sup> The PICC could well constitute the "general part" of such a compilation of existing uniform law instruments and be used as a point of reference to develop binding rules regarding international contracts not yet covered by an international convention.

If the proposal to draft an international convention covering general contract law is in my view overambitious, I must admit that I find the possible alternative solution of developing a set of non-binding rules on general contract law even more difficult to accept from a substantive point of view. At the very least, it would appear to be unwise to duplicate efforts at a global level and start developing yet another set of non-binding rules with a potentially universal application on the same issues already addressed by the PICC. The very success of the latter does not seem to warrant a reopening of the same issues within another global forum. All the more so, as both the 2004 and the 2010 editions of the PICC have been endorsed by UNCITRAL and their use commended "as appropriate, for their intended purposes."<sup>34</sup>

A more fruitful course of action, in my opinion, would be to enhance the future development of uniform law for international trade through a better understanding and coordination of the existing instruments. In this regard, the efforts of scholars in introducing international instruments in their teaching materials, in disseminating information, and in offering authoritative interpretation cannot but continue to play a central role. An equally important element is the furthering of the cooperation among international organizations in order to promote a coherent and

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33. See Bonell, *supra* note 15, at 237.

34. UNCITRAL, U.N. Doc. A/62/17 (June 25–July 6, 2012); UNCITRAL, 62d Sess., Supp. No. 17 at ¶¶ 209–13 (2008); UNCITRAL, U.N. Doc. A/67/17 (June 25–July 6, 2012); 67th Sess., Supp. No. 17 at ¶¶ 137–40 (2008) ("[The General Assembly] commends the use of the 2010 edition of the UNIDROIT Principles of International Commercial Contracts, as appropriate, for their intended purposes.").

rational employment of the (unfortunately increasingly scarce) resources devoted to the development of uniform law.<sup>35</sup> To further this aim, UNIDROIT will continue to be open to cooperation with UNCITRAL and other international organizations.

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35. For more discussion of the different modalities of cooperation among inter-governmental organizations, see José Angelo Estrella Faria, *Future Directions of Legal Harmonisation and Law Reform: Stormy Seas or Prosperous Voyage?*, 14 UNIF. L. REV. 21 (2009).