

Class

**Unification of Law - Uniform Law  
(Rechtsvereinheitlichung)**

Summer term 2016

# Time schedule of the class

21.04.2016 Basics of unification of law: notion, purposes, history

28.04.2016 Institutions and methods of unification of law

*05.05.2015 Holiday*

12.05.2016 Uniform sales law (CISG) I

19.05.2016 Uniform sales law (CISG) II

**26.05.2016 Uniform law in other parts of the law of obligations**

02.06.2016 Uniform credit security law

09.06.2016 Uniform transport law I + II

*16.06.2016 Seminar*

23.06.2016 Uniform information technology (IT) law

30.06.2016 Approximation of laws in the EU

07.07.2016 Unification of the law of civil procedure

14.07.2016 Unification of insolvency law

# Unification of law in other parts of the law of obligations

- **Overview by legal areas:** general law of obligations, specific obligations: contracts, torts, unjust enrichment, others
- **Overview by types of legal instruments:**
  - **International treaties:** e.g. UNIDROIT Factoring Convention 1988.
  - Secondary **EU law**
  - **Soft law**
  - **General contract terms:** e.g. Incoterms

# Soft law

## in the field of the law of obligations

- „**Principles**“: e.g.
- UNIDROIT Principles of International Commercial Contracts (**PICC**) (1994 – 2010)
- Principles of European Contract Law (1998 – 2002)
- See also DCFR (Draft Common Frame of Reference [of European Private Law]), 2008
- **Model laws**: e.g. OHADA draft Uniform Act on Contract Law 2007



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## UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Last Updated: Friday, 01 August 2014 15:44 | |

At its 90<sup>th</sup> session the Governing Council of UNIDROIT adopted the third edition of the UNIDROIT Principles of International Commercial Contracts ("UNIDROIT Principles 2010"). The UNIDROIT Principles 2010 contain new provisions on restitution in case of failed contracts, illegality, conditions, and plurality of obligors and obligees, while with respect to the text of the 2004 edition the only significant changes made relate to the Comments to Article 1.4.

The new edition of the UNIDROIT Principles consists of 211 Articles (as opposed to the 120 Articles of the 1994 edition and the 185 Articles of the 2004 edition) structured as follows: Preamble (unchanged); Chapter 1: General provisions (unchanged); Chapter 2, Section 1: Formation (unchanged), Section 2: Authority of agents (unchanged); Chapter 3, Section 1: General provisions (containing former Articles 3.1 (amended), 3.2, 3.3 and 3.19 (amended)), Section 2: Ground for avoidance (containing former Articles 3.4 to 3.16, 3.17 (amended), 3.18 and 3.20, and a new Article 3.2.15), Section 3: Illegality (new); Chapter 4: Interpretation (unchanged); Chapter 5, Section 1: Content (unchanged), Section 2: Third Party Rights (unchanged), Section 3: Conditions (new); Chapter 6, Section 1: Performance in general (unchanged), Section 2: Hardship (unchanged); Chapter 7, Section 1: Non-performance in general (unchanged), Section 2: Right to performance (unchanged), Section 3: Termination (containing former Articles 7.3.1 to 7.3.5, 7.3.6 (amended) and a new Article 7.3.7), Section 4: Damages (unchanged); Chapter 8: Set-off (unchanged); Chapter 9, Section 1: Assignment of rights (unchanged), Section 2: Transfer of obligations (unchanged), Section 3: Assignment of contracts (unchanged); Chapter 10: Limitation periods (unchanged); Chapter 11, Section 1: Plurality of obligors (new), Section 2: Plurality of obligees (new).

To facilitate comparison, the new edition contains a [Table of Correspondence](#) of the articles of the three editions of the UNIDROIT Principles.

At its 45th session (New York, 25 June - 6 July 2012) UNCITRAL unanimously endorsed the 2010 edition of the UNIDROIT Principles (cf Report of the United Nations Commission on International Trade Law, [Yearbook of International Law](#), New York, 2012, vol. 6, part 1, (1) (67-117), p. 127).

Search ...



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International Institute for the Unification of Private Law

**UNIDROIT**  
**PRINCIPLES**

**OF INTERNATIONAL COMMERCIAL CONTRACTS**

**2010**



**OHADA** Organisation pour l'Harmonisation en Afrique du Droit des Affaires



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### CCJA

Cour Commune de Justice et d'Arbitrage  
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- » Procédures simplifiées de recouvrement et des voies d'exécution
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#### Agenda des Formations

Agenda 2013 Pratique et contentieux du Droit OHADA (pour 3 pays de la Zone Afrique de l'Ouest : Burkina Faso, Mali, Niger)

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# OHADA UNIFORM ACT ON CONTRACT LAW

## PRELIMINARY DRAFT

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Catholic University of Louvain (Belgium); member of the UNIDROIT Study Group for the  
Preparation of the *Principles*

at the request of the International Institute for the Unification of Private Law (UNIDROIT)

to be submitted to the OHADA Permanent Secretariat  
September 2004



# Structure of the PICC

Preamble

Chapter 1: General provisions

Chapter 2

Section 1: Formation

Section 2: Authority of agents

Chapter 3

Section 1: General provisions

Section 2: Ground for avoidance

Section 3: Illegality

Chapter 4: Interpretation

Chapter 5

Section 1: Content

Section 2: Third Party Rights

Section 3: Conditions

Chapter 6

Section 1: Performance in general

Section 2: Hardship

Chapter 7

Section 1: Non-performance in general

Section 2: Right to performance

Section 3: Termination

Section 4: Damages

Chapter 8: Set-off

Chapter 9, Section 1: Assignment of rights

Section 2: Transfer of obligations

Section 3: Assignment of contracts

Chapter 10: Limitation periods

Chapter 11, Section 1: Plurality of obligors

Section 2: Plurality of obligees

# PICC – an Overview

- Legal nature: soft law made by UNIDROIT 1994 – 2004 - 2010
- Origin
- Contents: 211 articles, covering all major areas of general contracts law (including „general obligations law“)
- builds upon CISG, but modification and subject matter enlargement
- unites Continental and Common Law traditions
- Official languages: English and French
- Practice of application: see database [www.unilex.info](http://www.unilex.info)
- Model function of PICC: e.g. PECL, OHADA draft model contract act, DCFR

# Comparison of structure: PICC and CISG

Preamble

Chapter 1: General provisions

Chapter 2 Formation and authority of agents

Chapter 3 General provisions, avoidance, illegality

Chapter 4: Interpretation

Chapter 5 Content, third party rights, conditions

Chapter 6 Performance and Hardship

Chapter 7 Non-performance

Chapter 8: Set-off

Chapter 9 Assignment of rights, obligations and contracts

Chapter 10: Limitation periods

Chapter 11 Plurality of obligors and obligees

- **Part I:**
  - Sphere of application
  - General Provisions
- **Part II: Formation of the Contract**
- **Part III: Sale of Goods (Art. 25–88):** General provisions – obligations of seller (+ rights of buyer) – obligations of buyer (+ rights of seller) – passing of risk – provisions common to seller and buyer (eg damages)
- **Part IV: Final Provisions (Art. 89–101)**

# Some basic provisions of PICC

- **ARTICLE 1.1 (Freedom of contract)** The parties are free to enter into a contract and to determine its content.
- **ARTICLE 7.1.1 (Non-performance defined)** **Non-performance** is failure by a party to perform any of its obligations under the contract, including defective performance or late performance.
- **ARTICLE 7.2.2 (Performance of non-monetary obligation)** Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless (a) performance is **impossible** in law or in fact; (b) performance or, where relevant, enforcement is **unreasonably burdensome** or expensive;
- **ARTICLE 7.1.7 (Force majeure)** (1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
- **ARTICLE 7.3.1 (Right to terminate the contract)** (1) A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a **fundamental non-performance**.
- **ARTICLE 7.4.1 (Right to damages)** Any non-performance gives the aggrieved party a right to damages ...

# Comparison of some provisions: PICC and German law

Preamble

Chapter 1: General provisions

Chapter 2 Formation and Authority of agents

Chapter 3 General provisions, avoidance, illegality

Chapter 4: Interpretation

Chapter 5 Content, third party rights, conditions

Chapter 6 Performance and Hardship

Chapter 7 Non-performance

Chapter 8: Set-off

Chapter 9 Assignment of rights, obligations and contracts

Chapter 10: Limitation periods

Chapter 11 Plurality of obligors and obligees

- Sphere of application: BGB/HGB
- **Book 1: General Part (1 – 240):**
- Persons
- Things
- Legal transactions: declarations of will (including form, substantive validity including avoidance), conclusion of contract, representation etc.
- Periods of time
- Limitation
- Exercise of rights
- Security
- **Book 2: Law of Obligations**
- **General part, 240 – 432, e.g. good faith 242, damages, performance, impossibility, default, damages for violation of obligation, contractual obligations, consumer contracts, mutual (reciprocal) contracts, general contract terms, set-off, transfer of claims and debts, plurality of obligors and obligees**
- **Particular obligations, 433 – 853**

# Typical issues (1)

- **Applicability of the PICC:** *see Preamble*
- **Interpretation of PICC:** Art.1.6.
- **Basic principles:** freedom of contract, no form requirement, pacta sunt servanda, observance of mandatory rules, and good faith: Art.1.1., 1.2, 1.3., 1.4, 1.7. (see also Art.3.1.2 no form)
- **Conclusion of contract:** Art.2.1.1 – 2.1.22 (including offer and acceptance, culpa in contrahendo, standard terms)
- **Validity of the contract:** Art.3.1.4 – 3.2.17 (avoidance), 3.3.1 (illegality)
- **Interpretation of the contract:** Art.4.1. – 4.9., see also Art.5.1- 5.2.

## Typical issues (2)

- **Specific performance:** Art.7.2.1 and 7.2.2.
- **The concept of non-performance:** Art.7.1.1., for fundamental non-performance, see Art.7.3.1. (termination)
- **Damages:** Art.7.4.1 (in case of any non-performance, which is not excused: force majeure), 7.4.2 et seq. (amount of damages)

# Some provisions (as an example)

## Preamble:

- These Principles set forth general rules for international commercial contracts.
- They shall be applied when the parties have agreed that their contract be governed by them.
- They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like.
- They may be applied when the parties have not chosen any law to govern their contract.
- They may be used to interpret or supplement international uniform law instruments.
- They may be used to interpret or supplement domestic law.
- They may serve as a model for national and international legislators.



# Comparison of some provisions (1): **Interpretation of PICC and CISG**

## **Interpretation of CISG**

**Art. 7 (1)** In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

**Gaps of CISG Art.7 (2)** Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

## **PICC - Article 1.6 (Interpretation and supplementation of the Principles)**

(1) In the interpretation of these Principles, regard is to be had to their international character and to their purposes including the need to promote uniformity in their application.

(2) Issues within the scope of these Principles but not expressly settled by them are as far as possible to be settled in accordance with their underlying general principles.

# Comparison (2): Form of contract

## CISG

### Form of contract

**Art. 11** A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

**Art. 13** For the purposes of this Convention "writing" includes telegram and telex.

## PICC

### Form of contract

#### Article 1.2 (No form required)

Nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form. It may be proved by any means, including witnesses.

#### Article 1.11 (Definitions)

In these Principles

- "writing" means any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form.

# Comparison (3): Offer and acceptance

## CISG

### Offer and acceptance Art.16

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

## PICC: Offer and acceptance

### Article 2.1.3 (Withdrawal of offer)

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

### Article 2.1.4 (Revocation of offer)

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before it has dispatched an acceptance.

(2) However, an offer cannot be revoked

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

# Comparison (4): **Good faith**

## **CISG**

### **Chapter II GENERAL PROVISIONS**

#### **Article 7**

(1) In the interpretation of this Convention, regard is to be had to its international character and ...the **observance of good faith in international trade.**

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the **general principles on which it is based** or ...

## **PICC - Article 1.7 (Good faith and fair dealing)**

**(1) Each party must act in accordance with good faith and fair dealing in international trade.**

**(2) The parties may not exclude or limit this duty.**

### **Article 2.1.15 (Negotiations in bad faith)**

(1) A party is free to negotiate and is not liable for failure to reach an agreement.

(2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.

(3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

# Comparison of some provisions (5)

## Interpretation of contract

**Article 8 (1)** For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew ...what that intent was.

**(2)** If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

## Interpretation of contract

### **Article 4.1 (Intention of the parties)**

- (1) A contract shall be interpreted according to the common intention of the parties.
- (2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

# Comparison of some provisions (6):

## Specific performance

### CISG

#### Chapter I GENERAL PROVISIONS

**Article 28** If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

### PICC

#### Article 7.2.1 (Performance of monetary obligation)

Where a party who is obliged to pay money does not do so, the other party may require payment

#### Article 7.2.2 (Performance of non-monetary obligation)

Where a party who owes an obligation other than one to pay money does not perform, the other party may require performance, unless

- (a) performance is impossible in law or in fact;
- (b) performance or, where relevant, enforcement is unreasonably burdensome or expensive;
- (c) the party entitled to performance may reasonably obtain performance from another source;
- (d) performance is of an exclusively personal character; or
- (e) the party entitled to performance does not require performance within a reasonable time after it has, or ought to have, become aware of the non-performance.

# Comparison (7): **Mistake**

## **Article 3.2.1 (Definition of mistake)**

Mistake is an erroneous assumption relating to facts or to law existing when the contract was concluded.

Compare  
with BGB  
Section 119  
et seq.

## **Article 3.2.2 (Relevant mistake)**

(1) A party may only avoid the contract for mistake if, when the contract was concluded, the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would not have concluded it at all ..., and

- (a) the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or
- (b) the other party had not at the time of avoidance reasonably acted in reliance on the contract.

(2) However, a party may not avoid the contract if

- (a) it was grossly negligent in committing the mistake; or
- (b) the mistake relates to a matter in regard to which the risk of mistake was assumed or, having regard to the circumstances, should be borne by the mistaken party.

## **Article 3.2.11 (Notice of avoidance)**

The right of a party to avoid the contract is exercised by notice to the other party.

# Comparison of some provisions (8):

## Mandatory Rules I

### PICC -- Article 1.4 (Mandatory rules)

Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supra-national origin, which are applicable in accordance with the relevant rules of private international law.

### Compare Art.9 Rome I Regulation: Overriding mandatory provisions

1. **Overriding mandatory provisions** are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.
2. Nothing in this Regulation shall restrict the application of the **overriding mandatory provisions of the law of the forum**.
3. Effect may be given to the **overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed**, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.



# Comment Art.1.14 PICC

## 1. Mandatory rules prevail

Given the particular nature of the Principles, they cannot be expected to prevail over applicable mandatory rules, whether of national, international or supranational origin. In other words, mandatory provisions, whether enacted by States autonomously or to implement international conventions, or adopted by supranational entities, cannot be overruled by the Principles.

## 2. Broad notion of “mandatory rules”

The mandatory rules referred to in this Article are Predominantly laid down by specific legislation, and their mandatory nature, may either be expressly stated or inferred by way of interpretation. However, in the various national legal systems restrictions on freedom of contract may also derive from general principles of public policy, **whether of national, international or supranational origin** (e.g. prohibition of commission or inducement of crime; prohibition of corruption and collusive bidding; protection of human dignity; prohibition of discrimination on the basis of gender, race or religion; prohibition of undue restraint of trade; etc). For the purpose of This Article the notion of “mandatory rules” is to be understood **in a broad sense**, so as to cover both **specific statutory provisions** and **general principles of public policy**.

## 3. Mandatory rules applicable in the event of mere incorporation of the Principles in the contract

## 4. Mandatory rules applicable if the Principles are the law governing the contract

## 5. Recourse to the rules of private international law relevant in each individual case.

# Comparison (8a): **Mandatory rules II**

## **PICC Article 3.3.1 (Contracts infringing mandatory rules)**

(1) Where a contract infringes a mandatory rule, whether of national, international or supranational origin, applicable under Article 1.4 of these Principles, the effects of that infringement upon the contract are the effects, if any, expressly prescribed by that mandatory rule.

(2) Where the mandatory rule does not expressly prescribe the effects of an infringement upon a contract, the parties have the right to exercise such remedies under the contract as in the circumstances are reasonable.

(3) In determining what is reasonable regard is to be had in particular to:

- (a) the purpose of the rule which has been infringed;
- (b) the category of persons for whose protection the rule exists;
- (c) any sanction that may be imposed under the rule infringed;
- (d) the seriousness of the infringement;
- (e) whether one or both parties knew or ought to have known of the infringement;
- (f) whether the performance of the contract necessitates the infringement; and
- (g) the parties' reasonable expectations.

Compare  
with BGB  
Section 134.

## **Article 3.3.2 (Restitution)**

(1) Where there has been performance under a contract infringing a mandatory rule under Article 3.3.1, restitution may be granted where this would be reasonable in the circumstances.

# Example

Ship producer P (in France) and buyer B (Russia) conclude a contract on the construction and delivery of a warship. For disputes they agree on arbitration at the Stockholm Chamber of Commerce. According to the contract disputes are to be resolved on the basis of the Unidroit Principles of International Commercial Contracts. After the conclusion of the contract the United States of America passes for political reason a weapons embargo against Russia. The embargo also covers the planned warship contract with the French producer.

B claims performance of the contract by P. P feels in a dilemma between the claim of the Russian buyer and the US embargo.

Legal analysis?

# Solution of the case

- **Claim of buyer (claimant) against producer (defendant) can be grounded on contract**
- PICC applicable?
- Valid contract
- Conclusion of contract, Art.2.1.1
- Validity of contract
- **Form**, Art.1.2. *National form requirements as overriding mandatory provisions, Art.3.3.1, Art.1.4?*
- **Illegality**, Art.3.3.1: *US embargo as overriding mandatory provision, Art.1.4? Cf. Art.9 Rome I Regulation?*
- Claim for specific performance: contract in conjunction with Art.7.2.2
- „Impossible“ or „unreasonably burdensome“?
- *Hardship*, Art.6.2.1 – 6.2.3

## Hardship, Art.6.2.3 (Effects of hardship)

- (1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.
- (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.
- (3) Upon failure to reach agreement within a reasonable time either party may resort to the court.
- (4) If the court finds hardship it may, if reasonable,
  - (a) terminate the contract at a date and on terms to be fixed, or
  - (b) adapt the contract with a view to restoring its equilibrium.