

UNIDROIT Principles on International Commercial Contracts (PICC)

International Commercial Arbitration and International Sales Law

Anastasiia Rogozina, LL.M., К. Ю. Н.

C is a wheat processor with the place of business in M. R is a company with a place of business in D. The parties concluded a contract for delivery of wheat under a condition of no partial shipments. The contract was based on the Standard Conditions providing for partial shipments. C bears the costs of shipment.

The country D introduced export licenses due to flooding. R has applied for an export license, and was allowed to export 80% of the amount required under this contract and some contracts with the 3rd parties. R asked C to accept a partial delivery. C refused to allow a partial delivery and thereby adapt the contract. R notified C that he is not going to deliver to C at all, but rather to the 3rd parties, even before the delivery was due. The price for wheat increased in the meanwhile.

Did C breach the contract by non-allowing a partial delivery and paying only for a portion of the goods?

Did R commit a fundamental breach of the contract?

CISG

Art. 60 the buyer shall take reasonable steps to enable delivery and take possession of the goods (under the terms of the contract)

Art. 54 the buyer's obligation to pay the price

Art. 49 (1) (a) the buyer may declare the contract avoided if the failure by the seller amounts to a fundamental breach

Art. 45 a breach of contract occurs when the seller "fails to perform any of his obligations under the contract or this convention"

Art. 25 a breach of contract is fundamental if it results in such detriment to the other party as "substantially to deprive him of what he is entitled to expect under the contract" unless this detriment was not foreseeable.

CISG

Art. 72

- 1) if prior to the date for performance it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided
- 2) if time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

Art. 51

- 1) if the seller delivers only a part of the goods, it restricts the remedies to declare a contract avoided.
- 2) the buyer may declare the contract avoided in its entirety only if the failure ... amounts to a fundamental breach of the contract

Art. 64 (1) (b) the seller may declare the contract avoided if the buyer does not within the additional period of time fixed by the seller ... perform its obligation to pay the price or take delivery of the goods

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Official languages

English (black-letter)

English (integral)

French (black-letter)

French (integral)

Italian (black-letter)

Preparatory Work

Order Form

Cases

Bibliography

Conferences and Seminars

History and Legal Nature

First ed. 1994:

- formation
- validity
- interpretation,
- terms and performance of contracts, and
- remedies for non-performance.

Second ed. 2004:

- authority of agents
- contracts for the benefit of 3rd parties
- set-off
- limitation periods
- assignment and transfer

Third ed. 2010:

- illegality
- conditions
- the plurality of parties
- restitution

Fourth ed. 2016:

- long-term contracts

Contents (2016)

PREAMBLE

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CHAPTER 2: FORMATION AND AUTHORITY OF AGENTS

CHAPTER 3: VALIDITY

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CHAPTER 5: CONTENT, THIRD PARTY RIGHTS AND CONDITIONS

CHAPTER 6: PERFORMANCE

CHAPTER 7: NON-PERFORMANCE

CHAPTER 8: SET-OFF

CHAPTER 9: ASSIGNMENT OF RIGHTS, TRANSFER OF OBLIGATIONS, ASSIGNMENT OF CONTRACTS

CHAPTER 10: LIMITATION PERIODS

CHAPTER 11: PLURALITY OF OBLIGORS AND OF OBLIGEES

Scope of application

ARE APPLICABLE: the parties agreed on them

MAY BE APPLIED:

- the parties agreed that their contract is governed by general principles of law, the *lex mercatoria* or the like
- the parties have not chosen any law to govern their contract

MAY BE USED:

- to interpret or to supplement international uniform law or domestic law
- to adopt them as national or international law.

4 Model Clauses

Limits to application of PICC

- any types of commercial contracts, including sales,
- any cross-border (but also national, if agreed) contracts,
- not consumer contracts

Not covered:

- capacity,
- immorality,
- transfer of title

Principles on which PICC are based

- freedom of contract, BUT: mandatory provisions
- pacta sunt servanda
- party autonomy
- freedom of form Art. 1.2, Art. 2.1.18, Art. 1.11 definition of writing
- favor contractus
- good faith
- observance of mandatory rules Art. 1.4

Good faith and fair dealing

- no limitation of GF & FD (Art. 1.7)
- party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party, in particular, without intention to enter into agreement (Art. 2.1.15)
- Where the parties have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied. Appropriate terms are determined on the basis of GF & FD (Supplying an omitted term (Art. 4.8)
- Implied obligations stem from GF & FD (Art.5.1.2)

Mandatory rules & mandatory provisions

- are external to the PICC
- national, international or supra-national origin

the effects of infringement are to be found in the mandatory rule.

Otherwise: the parties have the right to exercise reasonable remedies, considering the purpose & sanctions of the infringed rule, the category of protected persons, the seriousness of the infringement, etc. (Art.3.3.1)

- are in the PICC
- good faith, validity, the right to avoid a contract, reasonable price determination, statute of limitations etc.

The parties may exclude ... these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided in the Principles (Art.1.5)

Interpretation of statements & contracts

Separate rules for contracts and statements (Art. 4.1, 4.2)

Contract: common intention of the parties

Relevant circumstances (Art. 4.3):

- the nature and purpose of the contract
- the meaning commonly given to terms and expressions in trade concerned

Interpretation of statements & contracts

Additional rules:

- reference to contract or statement as a whole (Art. 4.4)
- all terms are to be given effect (Art. 4.5)
- contra proferentem rule: **if contract terms supplied by one party are unclear, an interpretation against that party is preferred (Art. 4.6)**
- linguistic discrepancies (Art. 4.7)
- supplying an omitted term (Art. 4.8)

Contract formation

Additional rules:

- conclusion of contract might be dependent on agreement on specific matters or in particular form
- special rules on standard terms - provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party
 - surprising rules have to be expressly accepted
 - in a conflict between standard and non-standard terms the latter prevail
 - in a conflict between standard terms of two parties – battle of the form

Interrelation between CISG and PICC

1. General principles on which the Convention is based Art. 7(2)

Fundamental breach Art.7.3.1 (2): not only substantially deprives, but also

- if strict compliance was of the essence under the contract
- when the non-performance was intentional or reckless
- the trust in the non-performing party's ability for future performances was destroyed
- the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated

2. Trade usages widely known in international trade

Content (obligations of the parties)

express and implied obligations

- (a) the nature and purpose of the contract;
- (b) practices established between the parties and usages;
- (c) good faith and fair dealing;
- (d) reasonableness.

duties to achieve a specific result and of best efforts

- (a) how obligation is expressed in the contract;
- (b) price and other terms of the contract;
- (c) the degree of risk normally involved in achieving the expected result;
- (d) the ability of the other party to influence the performance

Specific performance

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.

Grounds for avoidance

- Mistake
- Fraud
- Threat
- Gross disparity: the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to
 - (a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill, and
 - (b) the nature and purpose of the contract.

Exemptions: hardship

occurrence of events fundamentally alters the equilibrium of the contract due to a change in costs of performance, and the events

(a) occur or become known to the disadvantaged party after the conclusion of the contract;

(b) could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

(c) are beyond the control of the disadvantaged party; and

(d) the risk of the events was not assumed by the disadvantaged party.

leads to a duty to renegotiate the contract (Art.6.2.3) but no right to withhold performance.

the Principles encourage negotiation between the parties to the end of continuing the relationship rather than dissolving it