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PECL versus *PICC*: One Up for UNIDROIT

1. The *Principles of European Contract Law* (PECL) and the *UNIDROIT Principles for International Commercial Contracts* (PICC) have a great resemblance. Their structure is more or less the same, the content is often very similar; even the later additions bear some resemblance. This is not surprising in view of the fact that several members served on both Commissions that prepared these documents and that the needs of commerce in Europe (PECL) and the world at large (PICC) are almost identical. Nevertheless – or perhaps because of this – there has always been some competition between the two sets of principles. Especially in the beginning, PICC were very much the stronger of the two. It is PICC that were increasingly being referred to in international arbitration. When this occurred, the Chairman of the Commission that prepared PICC, Joachim Bonell, would immediately bring this fact to the attention of the world community. Bonell's great public relations efforts clearly gave PICC the edge over PECL.

However, fortunes may change. It was the Study Group for a European Civil Code (the Von Bar Commission) that used PECL as the basis of its Draft Common Frame of Reference. PECL suddenly found itself on a path of everlasting glory, serving as the foundation for a European Contract Code. In this project, there was no room for the globally oriented PICC. PECL had equalized the score, even if the prospects of imminent adoption of a European Code seem gloomy.

Recently, however, PICC have regained the lead. This time, the combined efforts of Stefan Vogenauer, Jan Kleinheisterkamp and Oxford University Press have provided the UNIDROIT Principles with a Commentary that will boost its importance. The *Commentary on the PICC*[1] is comparable to Bianca and Bonell's Commentary of the Convention on International Sale of Goods (CISG) in the late 1980s.[2] Like the CISG Commentary, it is an article-by-article comment, written by an international team of researchers, coming from England, France, Germany, the Netherlands, South Africa, Switzerland, Turkey and the United States. But this does not tell the full story. The authors do not hesitate to inform the readers about the background of the principal actors. This, for instance, is the information given as to Joachim Bonell:

> The Chairman of the Working Group was Professor Michael Joachim Bonell, an expert in commercial and comparative law. Bonell, a native of South Tyrolia, had been a consultant with UNIDROIT since 1978 and a member of the Italian

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[1] Stefan Vogenauer & Jan Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford: Oxford University Press, 2009), 131.

[2] C.M. Bianca & M.J. Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Milan: Giuffrè, 1987), 886.

> delegation to the Diplomatic Conference for the adoption of the CISG in 1980. He went on to hold chairs at the University of Camerino (1980–1982), the Catholic University of Milan (1983–1986), and the University of Rome I ('La Sapienza')(since 1986). His appointment as Chairman gave a tremendous boost to the project, and it is fair to say that the PICC are very much the product of his tireless efforts (page 8).

However, basically, it is the commentary itself that will be most useful and, occasionally, controversial. What to say for instance about Stefan Vogenauer's suggestion that in case of linguistic discrepancies between the five official version, it is appropriate to accord more weight to the English and, to a lesser extent, to the French version. According to Vogenauer, this 'follows from an analogy to Article 4.7, according to which in the interpretation of multilingual contracts preference is to be given to "a version in which the contract was originally drawn up"' (page 149).

In general, the commentary is descriptive, as is the case where Ewan McKendrick discusses the question whether PICC's provisions on hardship may be used for the purpose of supplementing the CISG (which makes no provision for hardship). Having first observed that there is a gap in the CISG that may justify resort to PICC, the author then mentions that the predominant view among commentators is that there is no gap on this point in the CISG (page 712). In other places, the authors do not, where necessary, refrain from criticism. Thus, having observed that one of the remedies in case of hardship according to the Official Comment to Article 6.2.3 is renegotiation, McKendrick concludes that it 'is surprising that no express mention is made of these possibilities in the text of Art. 6.2.3 itself' (page 724).

The publishers' work is impeccable. As is customary in English publications, there is a 16-page list of abbreviations, a 40-page table of transnational instruments, a 44-page table of cases, the full text in the five official languages of UNIDROIT (English, French, German, Italian and Spanish), a 110-page comparison with international uniform conventions (basically CISG and the agency convention, as well as PECL), a 50-page chapter-by-chapter bibliography and a 69-page index.

It will be difficult for the PECL group to catch up with this magnificent work – difficult, but not wholly impossible. Why not start work on a similar PECL Commentary? There are two great university towns in England. Whenever the publishers in one of these have taken up a project, those in 'the other place' may well be willing to begin another boat race.

2. This issue of *European Review of Private Law* (ERPL) contains no case note. Unfortunately, because as Hein Kötz has observed, case notes are the trademark of this review. We find it increasingly difficult to find colleagues who will first provide an abstract of a case from one of the EU Member States and then invest a certain

amount of time in assembling notes from various jurisdictions. Readers who might be willing to give this a try are kindly requested to contact the Board of Editors.

3. The absence of case notes is, we hope, offset by a fair number of articles. Good faith and reasonableness have long been considered 'legal irritants' by common law lawyers, but these notions have increasingly conquered Europe. Directives, PECL, the Draft Common Frame of Reference, all make use of such open norms. Is this not threatening the European harmonization process because of the wholly different way in which national lawyers may apply these notions? This is the issue that Stefano Troiano looks into in his article.

4. Last year, Jeroen Kortmann gave his inaugural lecture at the University of Amsterdam. We are glad to publish his provocative text, or a text with at least a provocative title: 'The tort law industry'. This refers to the fact that 'whereas in the past the tort process was driven by individual victims of wrongful conduct, these days it is more and more common that lawyers or third party investors are in the "driver's seat"'. Fortified by punitive damages, class actions and popular actions (such as the American *False Claims Act*), the instrumentalist view, according to the author, is gaining control. Kortmann criticizes this development with four arguments. In his view, we should go back to basics, the compensatory principle. This does not mean that collectivization should also be abolished: 'the introduction of more effective measures of collective redress deserves serious consideration, *not* as an enforcement tool, but as a mechanism to ensure compensation'.

5. Common law and civil law and never the twains shall meet. Well, this is precisely the question that Ivan Sammut deals with in his paper, in which he analyzes the role that comparative law can play. The problem is exacerbated by the differing views as to a European Civil Code, as is set out by the author.

6. This year, the Common Core of European Private Law project met for the fifteenth time in Torino. Nik de Boer challenges the theoretical foundations of the project, which is based on the writings of 'the two Rudis': Rodolfo Sacco and Rudi Schlesinger. We invited one of the 'Trentino's' – the term was coined by Günther Frankenberg when the project still met in Trento – to write a reply but so far did not receive this.

7. The process of European harmonization is often met with some hostility by law and economics authors. Or rather, these authors point to the small impact of regional legal differences on trade or to the stifling of new developments by unification. Michael Schillig argues that law and economic arguments nonetheless are legitimate and even indispensable in the present debate.

8. ERPL does not carry many articles on intellectual property, although this surely is private law. It therefore is good that Allard Ringnalda brings us up-to-date with his overview of global, European and domestic developments. He illustrates these with the example of orphan works. Many books carry warnings that the publishers have done their best to locate all copyright holders, and if they have not succeeded, will everyone please respond.

9. Olha Cherednychenko is developing into a frequent contributor to this review. In this issue, she addresses the conflict between private law and securities regulation. The leading role of private law in the relationship between investment firm and client has increasingly been challenged by securities regulation, as embodied in the 2004 Markets in Financial Instruments Directive (MIFID). This, however, according to the author, has not led to the total eclipse of private law in this area.

10. This issue of ERPL concludes with a book review by Christine Budzikiewicz, in German. It is the only non-English contribution to our trilingual law review. The shortage of contributions in French and German is a matter of concern for us.

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Co-Editor-in-Chief