

Soft Law Instruments as Usages of Trade in CISG Contracts and International Commercial Arbitration

Edgardo Muñoz*

In this contribution, the author undertakes the task of determining whether soft law instruments, in particular the UNIDROIT Principles on International Commercial Contracts (the PICC), meet the test required to be considered usages of trade under Article 9(2) of the UN Convention for the International Sale of Goods (the CISG), Article 28(4) of the UNCITRAL Model Law on International Commercial Arbitration (the MAL) and similar provisions. The author concludes that in spite of some case law applying the PICC in that character and the probable overlap between some of their rules and usages of certain trades, the unofficial and organic nature of trade usages requires that the standard of proof of a specific usage be discharged—under CISG or MAL provisions—beyond the mere reference to PICC in toto.

1. Introduction

The use of the UNIDROIT Principles on International Commercial Contracts (the PICC) as trade usages or the like has not yet been analyzed sufficiently in scholarship. Case law and academic contributions exist in which the PICC have been qualified as trade usages in their entirety. In some systems, the PICC are even officially regarded as an expression of business customs. This use of the PICC as usages should be revisited. The PICC may offer reasonable solutions to meet the needs of international trade in the light of the experience of some of the major legal systems. However, the question of whether the PICC are a restatement of international trade usages is more complex to answer.

*Professor of Law, Universidad Panamericana. School of Law. Calzada Álvaro del Portillo 49, Zapopan, Jalisco, 45010, Mexico. Ph.D. (Basel), LL.M. (UC Berkeley), LL.M. (Liverpool), LL.B. (UIA Mexico), DEUF (Lyon), emunoz@up.edu.mx.

In this article, we approach the above question pursuant to two important law provisions referring to the application or consideration of usages in international arbitration and trade: Article 9 of the UN Convention for Contracts for the International Sale of Goods (the CISG) and Article 28(4) of the UNCITRAL Model Law on International Commercial Arbitration (the MAL). The nature of these two provisions differs and also affects the purpose that usages of trade may play under each of them. Article 9 CISG constitutes a substantive law provision applicable to international contracts for sales that fall into the CISG's scope of application. Article 28(4) MAL is part of a conflict of laws provision applicable under national laws which have been modeled by the MAL.

Our analysis takes into account this distinction, as well as the different positions in scholarship writings and case law regarding the concept and application of usages of trade under the above (and similar) provisions. However, our study starts with the PICC themselves and the literature around their interpretation and application. In section 2, we examine whether the PICC constitute trade usages pursuant to their own scope of application rules. We considered that the correct reading of the PICC's Preamble might be the proper starting point to clarifying whether the PICC's drafters conceived their principles as a reflection of usages of trade.

In section 3, we develop an answer with regard to the role of usages under Article 9 CISG, Article 28(4) MAL and similar provisions. Understanding the role of usages of trade is paramount to the question whether the PICC are designed to fulfill such tasks (which takes us back to section 2), and whether they fit within the concept of usages under the same provisions (which also relates to subtitles of section 4 ahead).

In section 4, our analysis compares the characteristic of the PICC *in toto*, and some of their individual norms, against the notion and conditions to qualify as usages of trade under Article 9 CISG, Article 28(4) MAL and similar provisions. This section works as a double-check for the PICC's application in this context; while the PICC may not amount to usages of trade by their own rules (section 2), we should make sure whether they do under the parameters of other substantive law or arbitration provisions.

Finally, in section 5, we review some of the relevant international case law regarding the application of the PICC as usages of trade under Article 9 CISG, Article 28(4) MAL and similar provisions. Consideration of this foreign jurisprudence is required to respect the international origin of both legal instruments and to promote uniformity in their application pursuant to their rules of interpretation in Article 7 CISG and Article 2A MAL. In addition, there is no better way to discern whether the PICC in their entirety, or some of their norms in particular, are to be applied as or be considered usages of trade than to reflect on the reasons provided by different arbitral tribunals and courts on this question.

2. Application of the PICC as usages under their Preamble

The PICC Preamble does not explicitly provide for their default application as usages of international trade. The word “usage” is not found within the rules describing the “Purpose of the Principles.” Nevertheless, the PICC Preamble is worthy of consideration given the inclusion of terminology that has been equal, mistakenly we argue, to the term “usage.” For instance, the Preamble states that the PICC may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like. In that regard, the concept of *lex mercatoria* and “the like” notions will be analyzed in order to assess whether there is room for the application of the PICC as usages under that rule. Study of the PICC Preamble is also important given the overlapping of functions between the PICC’s purposes and the role of international trade usages. For instance, the PICC Preamble contemplates the PICC’s application when the parties have not chosen any law to govern their contract. At a first glance, this provision would entail the possibility of applying the PICC over the default rules in Article 1 CISG and the conflict of laws rules determined by the arbitral tribunal pursuant to Article 28(2) MAL. If that is the case, the default application of the PICC as usages would become less relevant, since the PICC would apply to international commercial contracts missing a choice of law clause. Accordingly, we should also address this question in the paragraphs below. Finally, the PICC could also be

used to interpret or supplement international uniform law instruments. Although the main role of usages is primary to supplement the contract rather than to supplant the applicable law (particularly under Article 28(4) MAL), a gap in both the contract and the law of the merits could trigger the application of the PICC in matters where resort could also be made to international trade usages. For that reason, will also analyze this PICC's function from the usages' perspective.

2.1. The Concept of *Lex Mercatoria* or “the like”

The PICC Preamble states that the PICC may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like. The possibility of applying the PICC as usages will depend on the meaning given to the concepts of *lex mercatoria* and “the like.” The starting point to review the meaning of *lex mercatoria* for the PICC's application should be the PICC themselves. Article 1.6 PICC requires that in their interpretation regard is to be had to their international character and their purposes (some of their purposes are actually stated in the Preamble itself), including the need to promote uniformity in their application. The second paragraph of Article 1.6 PICC requires that issues within the scope of the PICC but not expressly settled by them be, as far as possible, settled in accordance with their underlying general principles.

The concepts of *lex mercatoria* or “the like” are not defined within the PICC; the omission of a definition triggers the interpretation and supplementation principles in Article 1.6. PICC. Whether the absence of definition constitutes a gap or simply a term that deserves further interpretation does not appear to have practical importance in this case. The term may be read in light of the PICC's international character and uniformity purpose (Article 1.6 (1)) or a definition can be drawn from the PICC's underlying principles (Article 1.6 (2)).

Following the mandate in Article 1.6(1) PICC, one may look at the PICC's Official Comments and consider how the *lex mercatoria* and “the like” notions have been interpreted there. Comment 4(b) to the Preamble states that parties “sometimes provide that [the contract] shall be governed by

the ‘general principles of law,’ by the ‘usages and customs of international trade,’ by the *lex mercatoria*, etc.” [emphasis added].¹ The reference to “usages” in the Official Comments for the Preamble could suggest that such term fits within the definition of something “similar to *lex mercatoria*.” The Official Comments criticize the vagueness of such concepts; they advise that explicit reference be made to the PICC.² However, the Official Comments appear to conclude that, despite the uncertainty carried out by the vague reference to *lex mercatoria* or “international usages” in a contract, such might be enough to trigger the PICC’s application by virtue of the Preamble.³

Professor Ralf Michaels, an unofficial commentator on the Preamble, doubts that the PICC can even be considered *lex mercatoria*, “a somewhat vague and very contentious concept.”⁴ For Michaels, the concept of *lex mercatoria* describes a body of non-national and transnational rules created within the realm of businesses, whereas the PICC are drawn largely on state and international law and only to a limited extent on business practices.⁵ In other words, he seems to accept that *lex mercatoria* is made of trade usages, but challenges the fact that the PICC actually represent them as a whole. As he points out, whether the PICC can or cannot be view as an accurate codification of *lex mercatoria* must be determined in each individual rule.⁶

Matthias Sherer, a different unofficial commentator of the PICC, assimilates the term *lex mercatoria* to the concept of “general principles of law,” which is also referred in the same

¹PICC 2016, at 3–4, available at <https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf>.

²PICC 2016, at 4.

³PICC 2016 at 4.

⁴Ralf Michaels, *Preamble I*, in *Commentary on the Unidroit Principles of International Commercial Contracts*, para. 79, at 69 (Stefan Vogenauer ed., 2d ed., Oxford University Press 2015).

⁵Michaels, *supra* n. 5, para. 79, at 70.

⁶Michaels, *supra* n. 5, para. 79, at 70.

PICC Preamble's rule.⁷ Since usages are not mentioned in the Preamble, he advocates that they should be distinguished from principles of law;⁸ suggesting that usages are neither *lex mercatoria* nor the like. He relies on the separate treatment afforded to the term "usages" in Article 1.9 PICC, where they are defined as practices among the parties or actors in the same industry.⁹

Lex mercatoria and "the like" are remarkably wide and imprecise opened-ended terms. However, the specific question whether the term "trade usages" is contained in the notion of *lex mercatoria* or the like could be answered from a systematic-contextual interpretation of the PICC. Under this interpretation rule, which is part of the principles in Article 1.6 PICC, "the position of a provision within a particular Section, Chapter, or the overall structure of the PICC may give an indication of its meaning and scope."¹⁰ As Scherer points out, the term usage is explicitly stated in Article 1.9 PICC.¹¹ The role of this provision is to supplement the contract with additional rights and obligations derived from any usages the parties have agreed upon or are bound to because they are widely known to and regularly observed in international trade by parties in the particular trade concerned.

Two conclusions may be drawn from the contextual reading of the PICC Preamble and Article 1.9 PICC. On the one hand, if the term *lex mercatoria* in the Preamble was to include "usages of trade," then Article 1.9 would not have a reason to exist. By agreeing upon the PICC directly by *lex mercatoria* or the like, in a choice of law clause, the parties would have also chosen to be bound by all trade usages that are applicable to participants in the trade concerned. On the

⁷Matthias Scherer, *Preamble Ii*, in *Commentary on the Unidroit Principles of International Commercial Contracts*, para. 18, at 120 (Stefan Vogenauer ed., 2d ed., Oxford University Press 2015).

⁸Scherer, *supra* n. 8, para. 21, at 122.

⁹Scherer, *supra* n. 8, para. 21, at 122.

¹⁰Stefan Vogenauer, *Article 1.6 in Commentary on the Unidroit Principles of International Commercial Contracts*, para. 23, at 190 (Stefan Vogenauer ed., 2d ed., Oxford University Press 2015).

¹¹Scherer, *supra* n. 8, para. 21, at 122.

other hand, the mere existence of Article 1.9 confirms that the PICC are not, as a whole, an expression of international trade usages; a specific provision establishing the characteristics and requirements for trade usages to supplement a contract governed by the PICC was necessary because the PICC do not represent trade usages or are, at least, incomplete in that regard.

The above is confirmed by the PICC's Official Comments recognizing that the usages referred in Article 1.9 prevail over the Principles with the only exception being those provisions which are specifically declared to be of a mandatory character.¹² Accordingly, there are grounds to conclude that the terms "*lex mercatoria* or the like" in the Preamble did not intend to afford to the PICC the nature and role of trade usages.

2.2. The "Agreement" requirement

The Preamble requires the agreement of the parties to be bound by *lex mercatoria* or "the like." In our view, this requirement has two implications on the possible definition of such concepts pursuant to a contextual interpretation of the PICC above referred. First, it means that the PICC do not mirror those usages referred to in Article 1.9(2) that could apply even in the absence of agreement by the parties. Second, it means that the PICC could never be applied, as trade usages, even if they would comply with the requirements in Article 1.9(2) because the latter provision does not intend to set the PICC's scope of application; the PICC may apply to transactions falling into the scenarios proposed by the Preamble or into those scenarios contemplated by a system of law.

2.3. The absence of any choice of law applicable to the contract

The PICC Preamble states that they may be applied when the parties have not chosen any law to govern their contract. The Official Comments explain that this is possible pursuant to some conflict of laws provisions in arbitration rules that allow arbitrators to apply "the rules of law which they

¹²PICC 2016, Art. 1.9, Comment 6, at 26.

determine to be appropriate.”¹³ Arbitrators will normally apply a particular domestic law as the proper law of the contract, yet exceptionally they may resort to uniform rules of soft law nature such as the PICC.¹⁴

Against this background, the argument could be made that, irrespective of the definition of *lex mercatoria* and “the like,” the PICC are functionally equivalent to usages because, in the absence of any law chosen by the parties, they could still govern a contract. This argument is flawed for two reasons. On the one hand, the possibility to apply the PICC in the absence of any law applicable by choice of the parties confirms that they enjoy a nature and role that differs from the one that usages have. On this point, the Preamble considers the PICC as an instrument that will govern the contract by virtue of an arbitral tribunal’s or adjudicator’s discretion to select “the rules of law” which it determines to be appropriate,¹⁵ rather than as an expression of binding usages that integrate the contract (*see* section 3 below on the role of usages). This is corroborated by the fact that the same arbitration conflict of laws rules also provide for the consideration of any relevant trade usages, not as something upon which the arbitral tribunal has discretion, but as binding obligation.¹⁶

On the other hand, the PICC could not be applied to CISG contracts or in MAL arbitrations pursuant to this Preamble rule. With regard to their application by state courts, the CISG has its own conflict of laws rule in Article 1(a)(b): the CISG applies to contracts for the sale of goods between parties whose places of business are in different states that are Contracting States, or when the rules of private international law lead to the application of the law of a Contracting State.¹⁷ While the PICC have influenced many domestic laws in CISG

¹³PICC 2016, Preamble, Comment 4, c., at 4.

¹⁴PICC 2016, Preamble, Comment 4, c., at 4.

¹⁵Article 21(1) ICC Arbitration Rules 2021.

¹⁶*See* Article 21(2) ICC Arbitration Rules 2021: “[t]he arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.”

¹⁷Article 1(a)(b) CISG.

Contracting States,¹⁸ they could not be directly applicable under the CISG's scope of application provisions. Similarly, those arbitration laws and rules that follow the wording of Article 28(2) MAL, require that the arbitral tribunal applies the law determined by the conflict of laws rules which it considers applicable; most conflict of law rules refer to the application of national laws,¹⁹ rather than to a national or supra-national rules such as the PICC.²⁰

2.4. Instrument to supplement uniform laws

Paragraphs four and five of the PICC's Preamble state that the PICC may be used to interpret or supplement international uniform law instruments or domestic laws. Based on it, the argument could also be made that the PICC are functionally equivalent to trade usages because of their role in defining and incorporating the rules applicable to the merits. That is, however, not the case at least for the trade usages referred in Article 28(4) MAL. The role of usages under this provision is to interpret and supplement the contract rather than the applicable law determined by the arbitral tribunal (*see* section 3 of this article). The usages under Article 9 CISG may supplement the contract on questions where there is also a gap in the CISG or the otherwise applicable law, but contrary to the PICC, those trade usages

¹⁸Although in some instances it is hard to tell whether the influenced comes from the PICC or the CISG, it has been reported that the contract law of China has the PICC as background, *see* André Janssen & Samuel C. K. Chau, *The Impact of the Unidroit Principles of International Commercial Contracts on Chinese Contract Law: Past, Present and Future*, in *Chinese Contract Law: Civil and Common Law Perspectives* 448–49 (Chen Lei & Larry A. DiMatteo eds., Cambridge University Press 2017). The PICC recently influenced the—2016—new provisions in the French Civil Code and the—2015—Argentine Civil and Commercial Code, *see* Edgardo Munoz & Inés Morfin-Kroepfly, *Argentina Y Francia: Dos Nuevos Modelos De Reforma Para El Derecho Contractual Latinoamericano Influenciados Por La Cisg Y Los Picc*, in *La Compraventa Internacional Y “Cisg”: Una Perspectiva Iberoamericana* 133–57 (Alejandro M. Garro & José A. Moreno-Rodríguez eds, CEDEP & Intercontinental Editora 2019).

¹⁹Michaels, *supra* n. 5, para. 85, at 71.

²⁰Michaels, *supra* n. 5, para. 82, at 71, stating that “paragraph 4 of the Preamble, *would violate traditional choice of law principles*” (emphasis added).

can also apply *contra legem*. The PICC, on the other hand, could not take priority over the CISG or the applicable law express provisions.

Moreover, the CISG, as many national laws, has its own rules of interpretation and supplementation of both the contract and the Convention. Article 7 CISG requires an autonomous interpretation and to fill in internal gaps in accordance with its own principles. Thus, all solutions developed must be based on the Convention itself and resorting to the PICC may violate the autonomy of the Convention.²¹ The PICC were drafted and published in 1994, after the CISG's entry into force.²² Provisions in the PICC were largely based on the CISG and, hence, they may express some of the CISG principles in more detail. However, the PICC include provisions on matters that were expressly or implicitly excluded from the Convention, *e.g.* validity, and that, in some instances, depart from the express provisions of the CISG, *e.g.* hardship remedies under Article 79 CISG (*see* section 4.2.2 of this article).

3. The role of trade usages under Article 9 CISG and 28(4) MAL

The usages of trade have traditionally played a contract's supplementation role. The rules that emanate from the fair dealing and trustworthy behavior among members of a trade community become integral part of their contracts because of that same reason: repetition, general conviction of fairness and observance. The expectation that business should be done in "good faith" and that all usages that emanate from that principle must also govern the traders' contracts has been enacted in different civil codes and statutory laws.²³ In this section, we draw the contours of that role within the framework of the CISG and the MAL.

²¹Ingeborg Schwenzer, Pascal Hachem & Christopher Kee, *Global Sales and Contract Law* para. 3.54, at 45.

²²Schwenzer, Hachem & Kee, *supra* n. 22, para. 3.55, at 45.

²³*See*, for example, Bolivia, Art. 803 Com C; Brazil, Art. 422 CC; Chile, Art. 1546 CC; Colombia, Art. 1603 CC and Art. 863 Com C; Cuba, Art. 6 CC; Ecuador, Art. 1589 CC; El Salvador, Art. 1417 CC; Guatemala, Art. 17 JOL; Mexico, Art. 1796 CC; Paraguay, Art. 715 CC; Peru, Art. 1362 CC; Portugal, Art. 762 CC; Spain, Art. 1258 CC and Art. 57 Com C; Venezuela, Art. 1160 CC.

3.1. In CISG contracts (Article 9 CISG)

The role of trade usages under Article 9 CISG is primary to supplement the content of the contract.²⁴ As Honnold points out, even the most basic patterns of a transaction might not be mentioned in a contract because, for experienced parties, such patterns “go without saying,”²⁵ and their presumed application takes place as usages of the industry.

Article 9 CISG plays no role in recognizing what customary law or *lex mercatoria* constitutes; its role is limited to establishing the application of terms implied by usage to the parties’ relationship.²⁶ That does not mean that the actual existence of usages is not determined by the Convention; usages that comply with the prerequisites of Article 9(2) are meant to exist and be validly incorporated into the contract.²⁷ However, except for allegations of mistake due to lack of knowledge of the applicable usages, which are dealt with by the “ought to have known” in Article 9(2) CISG, the question whether the rules incorporated by such usages are valid in the normative sense falls outside the CISG in accordance with Article 4(a) CISG.²⁸

The wording of Article 9 CISG recognizes also the role of usages as rules applicable to the formation of the CISG contract. On this question, usages under Article 9 CISG could apply *contra legem*. For example, a trade usage in some industries may attach to silence or inactivity the meaning of acceptance of an offer to enter into a contract, which departs from the effect afforded to silence or inactivity in Article 18(1) CISG.²⁹ In addition, some courts have found that usages that are binding on the parties pursuant to Article 9(2)

²⁴Martin Schmidt-Kessel, Article 9, in Peter Schlechtriem & Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* para. 1, at 181 (Ingeborg Schwenzer ed., Oxford University Press 2016); Schwenzer, Hachem & Kee, *supra* n. 22, para. 27.01, at 310.

²⁵John O. Honnold & Harry M. Flechtner, *Uniform Law for International Sales* para. 112, at 167 (Kluwer Law International 2009).

²⁶Schmidt-Kessel, *supra* n. 25 para. 2, at 182.

²⁷Schmidt-Kessel, *supra* n. 25, para. 5, at 183.

²⁸Schmidt-Kessel, *supra* n. 25, para. 14, at 188.

²⁹Ulrich Schroeter, Article 18, in Peter Schlechtriem & Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale*

CISG also prevail over conflicting provisions of the Convention.³⁰ The interplay between usages, the contract and law would work as follows: the contract clauses prevail over conflicting usages, since party autonomy is the primary source of rights and obligations (and as the introductory language of Article 9(2) CISG confirms), while usages prevail over conflicting rules in the CISG.³¹

3.2. In MAL arbitrations (Article 28(4) MAL)

Following Article 28(4) MAL, several arbitration statutes and rules do expressly require arbitrators to consider the usages of trade applicable to the transaction in deciding the parties' dispute.³² The purpose of these provisions might be to emphasize the relevance of trade usages in commercial arbitration only if explicit reference in the applicable substantive norms, such as Article 9 CISG, is made. In line with this approach, the English Arbitration Act deliberately abstained from explicitly making reference to them on the basis that such usages would typically already apply pursuant to the law of the merits; or if that law did not accept the

of Goods paras. 18–19, at 339 (Ingeborg Schwenzer ed., Oxford University Press 2021). In a case decided by the Cour d'appel de Grenoble, France, 21 October 1999, CLOUT case No. 313, it was ruled that a seller could not invoke Article 18 CISG, which provides that silence does not amount to acceptance because the parties had established a practice in which the seller filled the buyer's orders without expressly accepting them.

³⁰See UNICTRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods para. 10, at 66 (2016) (hereinafter "Digest on the CISG"), and case law Oberster Gerichtshof, Austria, 21 March 2000, CLOUT case No. 425; Oberster Gerichtshof, Austria, 15 October 1998, CLOUT case No. 240.

³¹See Digest on the CISG, *supra* n. 31, para. 10, at 66.

³²Eighty states that have enacted legislation based on the MAL and incorporated provisions similar to Art. 28(4) MAL. See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html. Other arbitration laws include the Brazil, Art. 2(2) Arb. Law.; France, Art. 1496 CCP; Italy, Art. 834 CCP; Article 21(2) ICC Arbitration Rules (2021); Article 35(3) Swiss Arbitration Rules 2021; Article 35(3) UNCITRAL Rules 2010; see also Gabrielle Kaufmann-Kohler & Antonio Rigozzi, *International Arbitration: Law and Practice in Switzerland* para. 1.62, at 370 (Oxford University Press 2015); Jean Francois Poudret & Sebastien Besson, *Comparative Law of International Arbitration* para. 694, at 595 (Thomson 2d ed. 2007).

application of usages, the arbitration law should neither do so.³³

However, the nature of Article 28(4) MAL might be that of a true and autonomous “conflict of usages rule” underscoring the importance of achieving commercial outcomes that meet the general expectations in the trade concerned. While this, and similar provisions, do not impose on arbitrators an obligation to give full effect to trade usages, but merely to take them into account,³⁴ the provision stresses that it applies “in all cases.”³⁵ In other words, the consideration of trade usages by arbitrators under the MAL is not subject to their application pursuant to the law of the merits. Their consideration (but not their every time application) is binding because the arbitration laws or rules refer to them.

The role of trade usages in Article 28(4) MAL and similar provisions is also to supplement the contract.³⁶ They are an implicit part of the parties’ contract,³⁷ but they may not override the express terms of a contract.³⁸ Their position vis-à-vis the applicable substantive law will depend upon the provisions in the same law. The need to take them into account is subject to the arbitral tribunal’s obligation to respect and

³³Schwenzer, Hachem & Kee, *supra* n. 22, para. 27.08, and 27.09, at 312 (citing Lord Justice Saville, Departmental Advisory Committee on Arbitration Law 1996 Report on the Arbitration Bill, 13/3 Arb. Int’l 275, 308 (2014)).

³⁴Jason Fry, Simon Greenberg & Francesca Mazza, *The Secretariat’s Guide to ICC Arbitration*, para. 3-782, at 229 (International Chamber of Commerce 2012).

³⁵UNCITRAL Digest of Case Law on the Model Law on International Commercial Arbitration (2012) (hereinafter “Digest on the MAL”), para. 5, at 122. *See also* Pilar Perales-Viscasillas, Article 9, in UN Convention on Contracts for the International Sale of Goods—Commentary para. 17, at 161 (Stefan Kröll, Loukas Mistelis & Pilar Perales Viscasillas eds., Hart Publishing 2011).

³⁶Commenting on Article 35(3) UNCITRAL Arbitration Rules 2010, *see* David D. Caron & Lee M. Caplan, *The UNCITRAL Arbitration Rules—a Commentary* 122, 123 (Philip Alston & Vaughan Lowe eds., Oxford University Press 2013).

³⁷Fry, Greenberg & Mazza, *supra* n. 35, para. 3-781, at 299.

³⁸Paolo Michele Patocchi & Tilman Niedermaier, *UNCITRAL Arbitration Rules*, in *Institutional Arbitration—Article by Article Commentary* para. 668, at 1217 (Rodolf A. Schütze ed., C.H. Beck—Hart—Nomos 2013).

apply the rules of law governing the merits.³⁹ This law could override the application of certain trade usages that would otherwise be relevant for the resolution of the parties' dispute.⁴⁰

4. The concept and the requirements of trade usages under Article 9 CISG and Article 28(4) MAL

As any other soft-law instrument, the PICC see their application triggered by the tacit or implicit agreement of the parties in a contract⁴¹ or by the law selection process performed by the judge or arbitrator according to his/her conflict of laws rules.⁴² In both scenarios, the relevant conflict of laws provisions must recognize the parties' choice or the judge's selection of non-national norms applicable to the merits. This mechanism works every time the PICC are taken to be a reflection of non-national rules of an international character rather than usages of trade.⁴³ Article 6 CISG, Article 28(1) MAL and similar arbitration rules allow the PICC's application on that basis.

There might be a possibility, also, to apply the PICC as us-

³⁹Fry, Greenberg & Mazza, *supra* n. 35, para. 3-781, at 229. *See also* Poudret & Besson, *supra* n. 33, para. 694; Herman Verbist, Erik Schäfer & Christophe Imhoos, ICC Arbitration in Practice 114 (Wolter Kluwer 2016).

⁴⁰Commenting on Article 35(3) UNCITRAL Arbitration Rules 2010, *see* Caron & Caplan, *supra* n. 37, at 122–123.

⁴¹Most countries laws would accept the application of uniform law projects at least as choice of law that incorporates the PICC into the contract by reference, *see* Schwenzer, Hachem & Kee, *supra* n. 22, para. 440, at 63. *See also* arbitrations under Article 28 MAL, Poudret & Besson, *supra* n. 33, para. 691, at 591.

⁴²This is particularly the case where conflict of law rules point to the norm of law that the arbitrator considers appropriate pursuant to the arbitration rules applicable to the proceedings, *see* Schwenzer, Hachem & Kee, *supra* n. 22, para. 4.31, at 60. Article 3 of the Hague Principles on Choice of Law in International Commercial Contracts emphasis party autonomy and allow the choice of non-state law, including the PICC, *see* Article 3: "The law chosen by the parties may be rules of law that are generally accepted on an international, supra-national or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise" *available at* <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135>.

⁴³Schwenzer, Hachem & Kee, *supra* n. 22, para. 4.31, at 60.

ages under the applicable procedural or substantive law. This occurs whenever the law of the merits or the procedural law provisions of the adjudicator equate the PICC to usages of trade under their own system. What matters for the sake of consideration is whether the substantive law provisions, such as Article 9 CISG, or arbitration norms, like Article 28(4) MAL, provide for the application of the PICC as an expression of trade usages applicable to a CISG contract or in a MAL arbitration.

In section 2, we provide arguments and evidence in order to demonstrate that the PICC are not to be applied as usages of trade under their own scope of application rules in the Preamble. In this section, we answer the question whether the PICC might be applicable as trade usages under the CISG's and MAL's provisions.

4.1. Pursuant to Parties' agreement recognized by Article 9(1) CISG

The starting point to determine whether PICC apply as trade usages in a CISG transaction is the contract itself. Article 9(1) CISG states that the parties are bound by any usage to which they have agreed to and by any practices which they have established between themselves. Pursuant to this rule, it is primarily up to the parties to contractually provide for application of certain trade usages and to define their contours. Instruments emanating from commercial chambers or institutions, which compile, draft and regularly update norms that reflect the best business conduct (established as *modus operandi* of the operator of international trade), could fall within the notion of usages agreed by the parties under Article 9(1) CISG.⁴⁴ The most common example are clauses in contracts referring to the application of the trade usages expressed in the ICC rules on documentary credits or bank guarantees known by the acronyms UCP 600 or URDG 758, respectively, the ICC Incoterms,⁴⁵ etc.⁴⁶ Also contract clauses providing for the application of similar terms of an evolving nature such as the Tegermseer's usages

⁴⁴Perales-Viscasillas, *supra* n. 36, para. 15, at 160.

⁴⁵Honnold & Flechtner, *supra* n. 26, para. 114, at 168.

⁴⁶Perales-Viscasillas, *supra* n. 36, para. 15, at 160.

for the timber trade, the usages of the Exchange for Agricultural Products of Vienna fall into that category.⁴⁷

Against this background, nothing would prevent parties to a contract from expressly or implicitly agreeing that, in their view, the PICC represent a reflection of usages of trade and from being bound by the PICC in such a character. As one scholar has pointed out, a statutory definition of usages is of no importance under Article 9(1) CISG since the agreement of the parties suffices to afford binding force to certain norms, whether they qualify as usages under the second part of the same provision or not.⁴⁸ Case law cited in the CISG's Official Digest points to the same direction; Article 9(1) CISG does not require that a usage be internationally accepted or widely known in order to be binding under the first part of Article 9 CISG; parties may be bound by local usages to which they have agreed as much as international usages.⁴⁹

A different author advocates that an agreement upon the type of soft law rules referred in the previous paragraphs, which do not achieve a statutory standard of usages, is not an agreement within Article 9(1) but a mere contractual agreement under Article 6 CISG.⁵⁰ The issue whether soft-law instruments are incorporated into a CISG contract as trade usages under Article 9(1) CISG or as terms pursuant to Article 6 CISG is a matter of contract interpretation governed by Article 8 CISG.⁵¹ The answer should depend upon the parties' intent over those terms, as expressed in their contract. In any case, the issue appears to lack practical relevance. Usages recognized under Article 9 CISG prevail over the Convention's provisions to the contrary, but have a second place after the contract (*see* section 3 of this

⁴⁷Schmidt-Kessel, *supra* n. 25, para. 6, at 183–84.

⁴⁸Schmidt-Kessel, *supra* n. 25, para. 6, at 183–84.

⁴⁹UNICTRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods ("Digest on the CISG") para. 4, at 65; U.S. District Court for the Southern District of New York, United States, 10 May 2002, CLOUT case No. 579 available at https://www.uncitral.org/clout/clout/data/usa/clout_case_579_leg-1397.html; Oberster Gerichtshof, Austria, 15 October 1998, CLOUT case No. 240 available at <http://cisgw3.law.pace.edu/cases/981015a3.html>.

⁵⁰Perales-Viscasillas, *supra* n. 36, para. 16, at 160.

⁵¹Honnold & Flechtner, *supra* n. 26, para. 114, at 168.

article). The PICC incorporated into the contract pursuant to Article 6 CISG will also take priority over the CISG provisions but the express terms in the contract will prevail over the PICC.⁵²

4.2. Pursuant to the default rule in Article 9(2) CISG

4.2.1. Concept

As in the PICC themselves (*see* section 2.1 of this article), the term “usages” is not defined in the CISG.⁵³ The lack of definition triggers the interpretation and supplementation principles in Article 7 CISG. Whether the absence of definition constitutes a gap in the Convention or simply a term that deserves further interpretation, it does not appear to have practical importance in this case. The term can be read in light of the CISG’s international character and uniformity purpose (Article 7(1)) or a definition can be drawn from the CISG’s underlying principles (Article 7(2)), or both.

The concept of “usages” should be interpreted without recourse to preconceived notions in domestic legal systems.⁵⁴ CISG commentators define usages as “rules of commerce which are regularly observed by those involved in a particular industry or market place.”⁵⁵ One court interpreting Article 9 CISG stated that usages must be observed in at least one branch of industry.⁵⁶ But the term usages under the Convention is very broad; the distinction between usages and

⁵²Article 6 CISG reads: “The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.” For a different position, *see* Schmidt-Kessel, *supra* n. 25, para. 15, at 188.

⁵³Perales-Viscasillas, *supra* n. 36, para. 20, at 161.

⁵⁴Schmidt-Kessel, *supra* n. 25, para. 12, at 187.

⁵⁵Schmidt-Kessel, *supra* n. 25, para. 12, at 187; for a similar definition, *see* Perales-Viscasillas, *supra* n. 36, para. 22, at 162.

⁵⁶Oberster Gerichtshof, Austria, 31 August 2005, CLOUT case No. 750: “While usages have to be followed at least in certain trade sectors, practices are established between parties.”

customs under many domestic laws is, thus, irrelevant.⁵⁷ In light of the principle of autonomous interpretation of the CISG, it does not matter whether the rules that emanate from some trade usages are also rules of domestic character.⁵⁸

In light of these parameters, one scholar submits that different sources of *lex mercatoria* are encompassed within the definition of usages in Article 9(2) CISG, irrespective of whether they are codified or uncoded, so long as the requirements in the CISG are met.⁵⁹ In section 2.1, we concluded that the concept of *lex mercatoria* in the PICC does not cover “trade usages” in the sense of Article 1.9(2) PICC, which are the type of “usages” functionally equivalent (hence, comparable) with those stated in Article 9(2) CISG. In the next section, we will determine whether, irrespective of the definition of *lex mercatoria* or any *lex mercatoria* character afforded to the PICC by different authors,⁶⁰ the PICC meet the conditions in Article 9(2) CISG for their application as “usages” or not.

4.2.2. Requirements

In order to consider that the parties made a particular usage impliedly applicable to their contract or its formation, Article 9(2) CISG requires that such usage be known or that it ought to have been known by the parties. The requirement

⁵⁷In some legal systems customs had binding character and usages a mere contractual effect, *see* Perales-Viscasillas, *supra* n. 36, para. 20, at 162.

⁵⁸Schmidt-Kessel, *supra* n. 25, para. 12, at 187.

⁵⁹Perales-Viscasillas, *supra* n. 36, para. 21, at 162.

⁶⁰For example, Scherer, *supra* n. 8, para. 21, at 122, advocating that usages should be distinguished from principles of law, suggested that usages are neither *lex mercatoria* nor the like. He relies on the separate treatment afforded to the term usages in Article 1.9 PICC, where they are defined as practices among the parties or actors in the same industry. Michaels, *supra* n. 5, para. 79, at 69, doubting that the PICC can even be considered *lex mercatoria*, “a somewhat vague and very contentious concept.” The concept describes a body of non-national and transnational rules created within the realm of businesses; however, the PICC are drawn largely on state and international law and only to a limited extent on business practices.

“ought to have known” is an objective one.⁶¹ A party who alleges subjective ignorance could not evade the application of usages that it should have known from an objective point of view.⁶² The third sentence of Article 9(2) sheds light on the standard to reach this objective condition: a particular usage “ought to have been known” if it is widely known to, and regularly observed by, parties to contracts of the type involved in the particular international trade concerned. In view of that, the first sentence of Article 9(2) CISG “the parties are considered [. . .] to impliedly made applicable” does not change the objective criteria; it is irrelevant whether a party subjectively intended (or not) to made applicable any usage that complies with the objective requirement.⁶³

Universal knowledge and observance is not required; Article 9(2) CISG confines the scope of this requirement to the majority of the parties in the trade concerned. The “trade concerned” approach follows the purpose of usages under this provision: the binding usages should only be those that rightly supplement the contract at stake, hence, the implied terms should be limited to the assumptions applied in a particular industry. The “regularly observed” requirement, secures the application of rules developed in the state-of-the-art practice.⁶⁴

The above entails that numerous distinctions be made in the assessing the binding character of a usage; depending on the type of goods, the contract and the parties, some usages will reach this category of binding rule while others will fail. Usages do not need to be immemorial or ancestral custom; the requirement of “regularly observe” sets a standard of evidence in its own because the party relying on a usage must demonstrate its “regular,” *i.e.* over the time, binding

⁶¹Schmidt-Kessel, *supra* n. 25, para. 17, at 189.

⁶²Perales-Viscasillas, *supra* n. 36, paras. 24, 25, at 163–64.

⁶³“The commitment of a party to completely unknown usages is therefore possible,” *see* Schmidt-Kessel, *supra* n. 25, para. 20, at 191.

⁶⁴Schmidt-Kessel, *supra* n. 25, para. 17, at 189.

character before the conclusion of the contract.⁶⁵ Finally, the invoked usages must be known and observed “in international trade.” Usages developed locally or regionally may fall into the scope of Article 9(2) CISG insofar that they are clearly recognized and observed also by the particular international community.⁶⁶

The PICC as a whole could not possibly meet the requirements in Article 9(2) CISG. The PICC are not a restatement of international trade usages. The PICC propose reasonable solutions to meet the needs of international trade in the light of the experience of some of the major legal systems.⁶⁷ This PICC’s uniform law nature—the product of comparative law works and discussions—results from their origin and drafting process.⁶⁸ Their main purpose was never to gather the usages known and observed at the time of their codification. Most of the delegates involved in their creation would not have direct knowledge of the relevant international trade usages at the time; they were mostly law academics and there was no consultations with traders.⁶⁹ Compared to the other set of rules such ICC Incoterms or the UCP 600,

⁶⁵Unless the contract has a dynamic reference to usages in force during its performance or duration, *see* Schmidt-Kessel, *supra* n. 25, para. 16, at 189.

⁶⁶Schmidt-Kessel, *supra* n. 25, para. 19, at 190–91.

⁶⁷“The PICC, properly understood, are largely not a restatement of such usages. They draw, to a large extent, on official law and represent a universal restatement, whereas trade usage is typically unofficial and specific to a particular trade,” *see* Michaels, *supra* n. 5, para. 104, at 76–77.

⁶⁸“The drafters drew inspiration from a wide variety of sources. They analysed the contract laws of the major jurisdictions of the world,” *see* Stefan Vogenauer, Introduction, in *Commentary on the Unidroit Principles of International Commercial Contracts* 11, para. 23 (Stefan Vogenauer ed., 2d ed., Oxford University Press 2015) (emphasis added).

⁶⁹“The Working Group was composed of distinguished lawyers representing the major legal systems of the world, but all sitting in their personal capacity [. . .]. All of them were experts in Contract law and international trade. Most of them were academics; only the Australian participant was practitioner [. . .]. However, the Working Group did not adhere to formal consultation mechanisms, such as hearings with interest groups, lobbyists, or other stakeholders,” Vogenauer, *supra* n. 69, para. 18–20, at 8–9.

whose regular updates are expected to incorporate the best and up-to-date practices or conduct developed by a particular traders' community,⁷⁰ the PICC had the purpose of reflecting principles that would last over time, irrespective of their general observance.⁷¹ In other words, the PICC do not have the organic and evolving nature of modern trade usages.

Moreover, in spite of their international title and the worldwide promotion procured by the UNIDROIT, the PICC,⁷² as a set of rules, do not meet the test of international knowledge and observance by a majority in Article 9(2) CISG. This Convention's provision commonly deals with individual rules;⁷³ for instance:

- whether there is a usage that the cost of sacks or bags holding certain commodities is included in the price quoted by sellers;
- whether a specific quality of packaging is required for goods in specific industries;
- whether there is a usage to tolerate weight or quantity discrepancies in the goods of up to 10% +/-;
- whether there is a usage in certain trades that the seller orders and bears the cost of inspection of the goods upon dispatch;
- whether there is a usage that the goods be examined under a given method upon taking delivery by the buyer;
- whether failure by the buyer to react to letters of

⁷⁰“Despite the assertion that the drafter give ‘special attention’ to non-legislative instruments, such as standardized trade terms and model contracts elaborated by international organizations, the influence of such instruments is barely visible, so the PICC do not live up to the claim of being an ‘authentic expression of what is usually called *lex mercatoria*,’” Vogenauer, *supra* n. 69, para. 25, at 12.

⁷¹“The *style of drafting* of the PICC resembles that of the civilian codes, rather than that of the Anglo-American statutes [. . .] They were aimed at formulating rules,” Vogenauer, *supra* n. 69, para. 36, at 17 (emphasis added).

⁷²“Rather than amending the black letter rules of the PICC, the current focus of UNIDROIT seems to be on promoting the use of the PICC in legal practice. One is for UNCITRAL to enact a formal recommendation to draw on the PICC in the *interpretation and supplementation of the CISG*,” Vogenauer, *supra* n. 69, para. 55, at 66 (emphasis added).

⁷³Schmidt-Kessel, *supra* n. 25, para. 16, at 189.

confirmation sent by the seller reflected a usage as to the formation of a contract in some trades;

- whether in certain trade there is an obligation that the seller delivers goods that were produced or harvested pursuant with international ethical standards;
- etc.

Accordingly, it would be necessary to examine whether the requirements are met for each and all of the articles in the PICC in order to conclude that they represent usages in their entirety. There may be an obvious overlap between specific solutions in the PICC and usages of certain trades; nonetheless, the unofficial and specific nature of trade usages requires that the standard of proof be clearly reached by each and every of the articles in the PICC.

Let us take, as an example, the current proposition made by some scholars to apply Article 6.2.3(4) PICC, as an international usage in the sense of Article 9(2) CISG, into a CISG contract affected by hardship.⁷⁴ Economic impossibility or hardship is an issue dealt with in Article 79 CISG.⁷⁵ Ac-

⁷⁴Yesim M. Atamer, Article 79, in UN Convention on Contracts for the International Sale of Goods—Commentary para. 86, at 1091 (Stefan Kröll, Loukas Mistelis & Pilar Perales Viscasillas eds., Hart Publishing, 2011); Peter Schlechtriem & Petra Butler, UN Law on International Sales para. 91, at 204 (Springer 2009).

⁷⁵In addition to CISG AC Opinion No. 7, *see* Ingeborg Schwenzer, Article 79, in Schlechtriem & Ingeborg Schwenzer, Commentary on the UN Convention on the International Sale of Goods para. 31, at 1142 (Ingeborg Schwenzer ed., 4th ed., Oxford University Press 2016); Schlechtriem & Butler, *supra* n. 75, para. 91, at 203; Christoph Brunner, Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration 213 (2008); Atamer, *supra* n. 75, para. 79, at 1088; Honnold & Flechtner, *supra* n. 26, para. 432.2, at 627; Joseph Lookofsky, Understanding the Cism para. 6.32, at 150 (4th ed., Wolters Kluwer 2012); Yasutoshi Ishida, CISG Article 79: Exemption of Performance, and Adaptation of Contract through Interpretation of Reasonableness—Full of Sound and Fury, but Signifying Something, 30/2 Pace Int'l L. Rev. 364, 365 (2018). However, courts have often decided that the equilibrium of the contract was not fundamentally altered. Therefore, the alleged impediment was non-existent. *See* Bulgarian Chamber of Commerce and Industry, 12 February 1998, CISG-online Case No. 436; Rechtbank van Koophandel, Hasselt, 2 May 1995, CISG-online Case No. 371; Tribunale Civile di Monza, 29 March 1993, CISG-online Case No. 102; Cour d'Appel de Colmar, 12 June 2001, CISG-online

cordingly, the majority view, including that of the CISG Advisory Council, considers that there is no necessity to resort to domestic concepts of hardship,⁷⁶ as there is no gap in the CISG regarding the debtor's invocation of economic impossibility.⁷⁷ If the non-performance is due to an impediment that fulfils the conditions set forth in Article 79(1) CISG, first and foremost, the obligor is relieved from its obligation to pay damages during the time such impediment exists.⁷⁸ The same damages' exemption should follow from a court's or arbitral tribunal's determination of hardship. However, the above scholars advocate that Article 79 CISG is not equipped with the proper remedies to address this type of scenario. They argue that, in case of hardship, the

Case No. 694; Hof van Cassatie, 19 June 2009, CISG-online Case No. 1963 granting a right to renegotiate the contract to a seller for a 70% price increase in steel after the conclusion of the contract. These decisions can be found by searching the case number on the CISG-online website at <http://www.cisg-online.ch/>.

⁷⁶Honnold & Flechtner, *supra* n. 26, para. 425, at 615, and para. 432.2, at 627; Schwenger, *supra* n. 76, para. 31, at 1142.

⁷⁷CISG-AC Opinion No. 20, Hardship under the CISG, Rapporteur: Prof. Dr. Edgardo Muñoz, Universidad Panamericana, Guadalajara, Mexico. Adopted by the CISG Advisory Council following its 27th meeting, in Puerto Vallarta, Mexico on 2-5 February 2020, Rule 2; Harry M. Flechtner, The Exemption Provisions of the Sales Convention Including Comments on Hardship Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court, 59/3 Belgrade L. Rev. 97 (2011); taking a different view, *see* Tribunale Civile di Monza, 14 January 1993, CISG-online Case No. 540.

⁷⁸CISG Advisory Council, Opinion 20, 2020, Rule 2; CISG AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG (Rapporteur: Professor Alejandro Garro) 12 Oct 2007, Rule 1, Comment para. 6; Brunner, *supra* n. 76, at 345; Atamer, *supra* n. 75, para.13, at 1060; Schwenger, *supra* n. 76, para. 50, at 1148; Schwenger, Hachem & Kee, *supra* n. 22, para. 45.60, at 663. One author asserts that express exemption to pay damages was not necessary because an impediment under article 79 CISG would fall under the category of unforeseeable damages under 74 CISG, *see* Ishida, *supra* n. 76, at 340. However, Ishida seems to miss the point that the foreseeability requirement in Article 74 CISG regards the damages as a possible consequence of the breach rather than the breach itself or the impediment causing the latter. He also forgets that the CISG remedies system follows the strict liability approach and that Article 79 works as an exoneration of liability rather than a damages' limitation provision.

parties to a CISG contract could claim the contract adaptation before a court or arbitral tribunal, since the remedy is stipulated in Article 6.2.3(4) PICC and that provision is a usage under Article 9(2) CISG.⁷⁹

Such argument can hardly be followed. As mentioned above, Article 9(2) CISG sets forth three main requirements: usages should be 1) known by the parties; 2) observed; and, 3) known in the international trade concerned. Let us start with the last condition. As we know, hardship has as its medieval precursor the canon law doctrine of *rebus sic stantibus*, where an unforeseeable and extraordinary change of circumstances rendering a contractual obligation significantly burdensome was given due consideration in determining liability.⁸⁰ It was not a usage, but actually an expectation developed by the church and an exception to the principle of *pacta sunt servanda* or sanctity of contract followed by merchants that places the burden of such changes in the original contracting conditions upon the obligor.⁸¹ In addition, the *rebus sic stantibus* doctrine was only recently incorporated into different civil codes. The most recent acknowledgement by statute can be found in France. Article 1195 of the French Civil Code (reformed in 2016) allows for the first time private law contract to be modified in case of a

⁷⁹Atamer, *supra* n. 75, para. 86, at 1091; Schlechtriem & Butler, *supra* n. 75, para. 91, at 204.

⁸⁰Konrad Zweigert & Hein Kötz, Introduction to Comparative Law 518 (3d ed., Oxford Clarendon Press 1998): “This doctrine may be traced through the Middle Ages from the Glossators right up to Grotius and Pufendorf; it was accepted in the Codex Maximilianeus bavaricus civilis of 1756 and then in the Prussian General Land Law of 1764.” See also Dubravka Klasiček & Marija Ivatin, Modification or Dissolution of Contracts Due to Changed Circumstances, 34/2 Pravni Vjesnik 27, 29 (2018).

⁸¹In many legal systems this principle has been codified following Art. 1134 of the 1804 French Civil Code (CC), which is now stated in Art. 1103 of the 2016 CC (“Les contrats légalement formés tiennent lieu de loi à ceux qui les ont faits”), Art. 1104 (1) (“Les contrats doivent être négociés, formés et exécutés de bonne foi”) and Art. 1193 of the 2016 French CC (“Les contrats ne peuvent être modifiés ou révoqués que du consentement mutuel des parties, ou pour les causes que la loi autorise”). At the international level, see Art. 6.2.1 UNIDROIT PICC, Art. 6:111(1) Principles on European Contract Law (PECL); Schwenger, Hachem & Kee, *supra* n. 22, para. 45.87, at 668.

change of circumstances.⁸² Before, French law was not favorable to the concept of hardship; the theory of *imprévision* applied to administrative contracts only.⁸³

The second question worth answering is whether the hardship doctrine is uniformly present, *i.e.* known and observed. At the international level, the PICC,⁸⁴ the 1999 Principles on European Contract Law (PECL),⁸⁵ the 2008 Draft of a Common Frame of Reference (DCFR),⁸⁶ as well as the Principles of Latin American Contract Law (PLACL),⁸⁷ expressly provide for exemption of liability in case of a substantial change of circumstances. While all these international instruments broadly concur on the standard and remedies in case of hardship, the instrument that is more related to the trade concerned, *i.e.* international sales, is the CISG, and as we mentioned, it does not contain the remedy of contract adaptation in case of hardship.⁸⁸

Most importantly, neither the standard of hardship nor the remedies afforded for the type of impossibility, are formulated equally around the world's jurisdictions. With regard to twenty seven domestic law provisions compared in this contribution, different notions are used to describe the standard of hardship but none sets a fixed formula: twelve legal systems refer to "excessive onerousness,"⁸⁹ eight use

⁸²Francois Chénéde, *Le Nouveau Droit des Obligations et des Contrats: Consolidations—Innovations—Perspective* para. 25.51, at 142 (Dalloz 2016); Alain Bénabent, *Droit Des Obligations* 253, para. 309 (16th ed., Précis Domat Droit Privé 2017).

⁸³Bénabent, *supra* n. 83, para. 309, at 253; Jean-Christophe Roda, *Réflexions Pratiques Sur L'imprévision*, in *La Réforme du Droit des Contrats en Pratique* 70 (Mathias Latina ed., Dalloz 2017).

⁸⁴See PICC 2016, Article 6.2.3.

⁸⁵See PECL, Article 6:111, Comment n. 1, 328.

⁸⁶See Study Group on a European Civil Code, *Draft Common Frame of Reference (DCFR) Article III—1:110*.

⁸⁷See, generally, Rodrigo Momberg and Stefan Vogenauer, *The Principles of Latin American Contract Law: Text, Translation, and Introduction*, 23/1 *Uniform L. Rev.* 144–170 (2018).

⁸⁸Schwenzer, *supra* n. 76, para. 5, at 1130.

⁸⁹Argentina, Art. 1091 CCom; Bolivia, Art. 581 CC; Brazil, Art. 478 CC; Colombia, Art. 868 CCom; Croatia, Art. 369 CO; Egypt, Art. 147 CC;

the words “essential,”⁹⁰ “significant,”⁹¹ “substantial,”⁹² or “abnormal”⁹³ change of circumstances; one refers to “fundamental disequilibrium” in performances;⁹⁴ two laws provide that hardship occurs when performance “becomes too burdensome”⁹⁵ and other two when such is “obviously unfair”;⁹⁶ one relies on the notion of “impracticability” of performances.⁹⁷ Only five domestic laws impose a duty to renegotiate the contract;⁹⁸ none expressly states the consequences for its failure. Twenty legal systems grant the remedy of contract adaptation by a court or an arbitral tribunal:⁹⁹ from the latter, all but four also integrate the alternative remedy of avoidance by the same court or tribunal.¹⁰⁰ Five domestic laws contemplate the remedy of contract avoidance alone,

France, Art. 1195 CC; Greece, Art. 388 CC; Italy, Art. 1497 CC; Libya, Art. 147 CC; Paraguay, Art. 672; Qatar, Art. 171 CC.

⁹⁰Russia, Art. 451 CC; Slovenia, Art. 112 CO; The Netherlands, Art. 6:258 CC.

⁹¹Azerbaijan, Art. 422 CC; Germany, Sec. 313; Ukraine, Art. 652 CC.

⁹²Armenia, Art. 467 CC.

⁹³Portugal, Art. 437 CC.

⁹⁴Lithuania, Art. 5.204 CC;

⁹⁵Iraq, Art. 146 CC; Montenegro, Art. 128 CO.

⁹⁶China, Art. 26 PRC and 227-2 CC; Taiwan, Art. 227-2 CC.

⁹⁷United States, Section 2-615 UCC and Section 261 Restatement Second on Contracts.

⁹⁸Armenia, Art. 467 CC; Azerbaijan, Art. 422 CC; France, Art. 1195 CC; Lithuania, Art. 5.204 CC; Russia, Art. 451 CC; Ukraine, Art. 652 CC.

⁹⁹Argentina, Art. 1091 CCom; Armenia, Art. 467 CC; Azerbaijan Art. 422 CC; China, Art. 26 PRC and 227-2 CC; Colombia, Art. 868 CCom; Croatia, Art. 369 CO; Egypt, Art. 147 CC; France, Art. 1195 CC; Germany, Sec. 313; Greece, Art. 388 CC; Iraq, Art. 146 CC; Libya, Art. 147 CC; Lithuania, Art. 5.204 CC; Montenegro, Art. 128 CO; Paraguay, Art. 672 CC; Portugal, Art. 437 CC; Qatar, Art. 171 CC; Russia, Art. 451 CC; Taiwan, Art. 227-2 CC; The Netherlands, Art. 6:258 CC.

¹⁰⁰Except for Egypt, Iraq, Libya, Qatar and Taiwan, the power to adapt the contract goes together with the power to avoid it, *see* Argentina, Art. 1091 CCom; Armenia, Art. 467 CC; Azerbaijan, Art. 422 CC; China, Art. 26 PRC; Colombia, Art. 868 CCom; Croatia, Art. 369 CO; France, Art. 1195 CC; Germany, Sec. 313; Greece, Art. 388 CC; Lithuania, Art. 5.204 CC; Montenegro, Art. 128 CO; Paraguay, Art. 672; Portugal, Art. 437 CC; Russia, Art. 451 CC; The Netherlands, Art. 6:258 CC.

with no reference to adaptation.¹⁰¹ Under five countries' laws, the remedy of contract adaptation and avoidance by a court or arbitral tribunal is subject to the accomplishment of the parties' obligation to have tried to renegotiate the contract first.¹⁰² The remedy of damages exemption is inferred in all of them, irrespective of the avoidance or adaptation obtained by the party affected by hardship. Common law systems do not contemplate the remedy of renegotiation of the contract by the parties or its adaptation by a court or tribunal for the functionally equivalent doctrines of frustration or impracticability. No uniform understanding or expectation regarding the remedies of hardship is found among legal systems.

Moreover, the drafters of the PICC almost exclusively relied on the legislation and case law of Western legal systems, such as the US, England, France, Germany and Italy.¹⁰³ Evidently, the PICC do not aim at conciliating the different approaches to hardship in most world legal systems. In this particular case, the wide codification of hardship rules indicates a lack of unofficial nature expected from usages, and simultaneously, a degree a discrepancy between standards and remedies that one party involved in a CISG contract cannot be expected to know.

In light of the above analysis, the PICC, *in toto*, do not constitute usages under Article 9(2) CISG. An overlap between some PICC's specific provisions and usages may be possible. However, a case by case review pursuant to the requirements in Article 9(2) CISG is necessary. In the case of Article 6.2.3(4) PICC and its remedy of contract adaptation by a third party, the standard of evidence required does not seem to be met; which coincides with some case law which will be discussed further (*see* section 5 below).

¹⁰¹Bolivia, Art. 581 CC; Brazil, Art. 478 CC; Italy, Art. 1497 CC; Slovenia, Art. 112 CO; United States Section 2-615 UCC and Section 261 Restatement Second on Contracts.

¹⁰²Armenia, Art. 467 CC; Azerbaijan, Art. 422 CC; France, Art. 1195 CC; Russia, Art. 451 CC; Ukraine, Art. 652 CC.

¹⁰³Vogenauer, *supra* n. 69, para. 23, at 11.

4.3. Pursuant to Article 28(4) UNCITRAL MAL and similar provisions

The MAL Digest reports that the term “trade usages” in Article 28(4) has been held to include norms contained in published instruments representing best practices and accepted norms of industry or trade. The Digest also refers to a setting aside case against an award before the Supreme Court of Switzerland,¹⁰⁴ where the contract was governed by the laws of that country, but where the arbitral tribunal drew from the practice prevailing under the CISG and the PICC to decide the case. The Supreme Court rejected the challenge against the award, ruling that such references to transnational rules were reasonable especially when the parties have a longstanding international commercial relationship.¹⁰⁵ That being said, the arbitral award reviewed in that case did not apply the PICC as usages under the MAL. The arbitral award was made under the Swiss federal Private International Law Act (PILA),¹⁰⁶ since the seat of arbitration was Zurich,¹⁰⁷ and the arbitral tribunal did not consider the incorporation any of the provisions of the PICC into the contract as usages; it merely interpreted the concept of “material breach” in the parties’ international contract, in light of the concept of “fundamental breach” in Article 7.3.1 PICC.¹⁰⁸

A commentator of Article 23.4 of the DIS Rules 1998¹⁰⁹ suggests that if a law has been chosen by the parties or selected by the arbitrators, this implies consideration of that

¹⁰⁴Federal Supreme Court, Switzerland, 16 December 2009, Decision 4A_240/2009, available at <http://www.swissarbitrationdecisions.com>.

¹⁰⁵UNCITRAL Digest of case Law Digest on the MAL, at 122, para. 7.

¹⁰⁶Article 187 PILA does not have a provision requiring the arbitral tribunal to take into account the usages of trade, see Kaufmann-Kohler & Rigozzi, *supra* n. 33, para. 7.62, at 370.

¹⁰⁷Federal Supreme Court, Switzerland, 16 December 2009, Decision 4A_240/2009, at 3.

¹⁰⁸Federal Supreme Court, Switzerland, 16 December 2009, Decision 4A_240/2009, at 8, 10.

¹⁰⁹Article 23.4 DIS Rules mirrors Article 28(4) MAL stating: “23.4: In all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of trade applicable to the transaction.”

country's prevailing usages, since they are regarded as part of the national law.¹¹⁰ In the same line of argument, a scholar advocates that the usages of trade mentioned in provisions like Article 28(4) MAL, are those which fall into the definition of substantive laws¹¹¹ (for example, Article 9(2) CISG). In both scenarios, the PICC would most likely fail to meet the requirements of national or international trade usages (*see* section 4.2.2).

However, usages under this type of arbitration provisions do not need to meet the specific requirements of the law applicable to the merits in order to be binding; In other words, there is a policy basis for having a broader approach in international arbitration, which from the outset was intended to deal with the affairs of business communities with members from different countries.¹¹² Still, some commentators take Article 1.9(2) PICC and Article 9(2) CISG as guidelines to define what type of usages an arbitrator could take into account according to Article 35(3) UNCITRAL Rules.¹¹³ One author even prefers Article 9(2) CISG over Article 1.9(2) PICC because it expands the scope of relevant usages with the wording "ought to have been known" that is missing in the PICC provision.¹¹⁴ Be that as it may, the PICC, as a whole set of rules, could not fall into the definition of any of these provisions (*see* sections 2.1 and 4.2 above).

Other authors arrived to the same result but under different reasons: the PICC do not represent the usages that arbitrators should take into account because they are rather categorized as general principles of law that were codified

¹¹⁰Ulrich Theune, The DIS Rules, in *Uncitral Arbitration Rules*, in *Institutional Arbitration—Article by Article Commentary* para. 200, at 257 (Rodolf A. Schütze ed., C.H. Beck—Hart—Nomos 2013).

¹¹¹Kaufmann-Kohler & Rigozzi, *supra* n. 33, para. 7.61, at 370.

¹¹²Commenting on Article 35(1) UNCITRAL Rules, which mirrors Article 28(4) MAL, Thomas H. Webster, *Handbook of UNCITRAL Arbitration* para. 35–84, at 591, and para. 35–85, at 592 (2d ed., Sweet & Maxwell 2015).

¹¹³Webster, *supra* n. 113, paras. 35–86, at 592; Caron & Caplan, *supra* n. 37, at 122, n. 73.; Clyde Croft, Christopher Kee & Jeff Waincymer, *A Guide to the Uncitral Arbitration Rules* para. 35.21, at 401–02 (Cambridge University Press 2013).

¹¹⁴Webster, *supra* n. 113, paras. 35–90, at 592.

without having been universally recognized.¹¹⁵ Unlike the latter, usages are habitual conduct and practice, notably contractual, generally followed in a commercial field and that acquire binding force because of the recognition given by substantive law.¹¹⁶ Additionally, the unofficial commentary on the ICC Arbitration Rules 2012 defines “usages”—in Article 21(2) of said rules¹¹⁷—as custom or understanding in a given trade or industry.¹¹⁸ The emphasis is placed on the general understanding of implied terms in a traders’ community, because their means of evidence are trade publications and guidelines and/or witness expert testimony.¹¹⁹

The above elements point to one conclusion: the PICC, as a set of rules, should not be considered by arbitral tribunals as trade usages under Article 28(4) MAL. Some provisions in the PICC may mirror the habitual conduct generally followed in a commercial field or the understanding regarding certain obligations or implied terms in a given industry, *i.e.* a relevant usage to the transaction. However, as in the case of Article 9(2) CISG, the determination of whether a specific PICC provision amounts to a usage and to be considered by an arbitral tribunal should be made on a case by case basis. The PICC do not evolve as a trade practice would do and are not followed by merchants as part of their daily negotiation standards or conditions for trade. The PICC, *in toto*, are law principles or a-national norms that arbitrators could apply as such under the applicable arbitration law or institutional rules; nevertheless, the basis for their application should not be their categorization as trade usages under Article 28(4) MAL.

¹¹⁵Poudret & Besson, *supra* n. 33, para. 692, at 592.

¹¹⁶Poudret & Besson, *supra* n. 33, para. 694, at 594.

¹¹⁷Article 21—Applicable Rules of Law “2 The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant **trade usages.**”

¹¹⁸Fry, Greenberg & Mazza, *supra* n. 35, para. 3-782, at 229.

¹¹⁹Advocating for similar means of evidence under Article 35(3) UNCITRAL Rules, *see* Patocchi & Niedermaier, *supra* n. 39, para. 667, at 1217.

5. Case law of state courts and arbitral tribunals applying or considering the PICC as usages of trade

In the previous section, we concluded that the PICC do not represent trade usages in their entirety under Article 9(2) CISG or Article 28(4) MAL. The same conclusion has been reached by some courts and arbitral tribunals. Still, case law exists in which the PICC have been qualified as a trade usage *in toto* or some of its provisions in particular. In this section, we analyze some cases where arbitral tribunals have been called to decide whether the PICC should be applied to the dispute before them as usages of trade pursuant to the above referred provisions.

5.1. Under Article 9(1) CISG

In a case known by the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, the contract provided an agreed sum in case of breach of contract.¹²⁰ Following respondent's breach, claimant sought payment of the agreed sum. respondent asked the arbitral tribunal to reduce its amount. Since the CISG did not contain express provisions on such possibility, the arbitral tribunal decided to applied the PICC as a reflection of international usages pursuant to Article 9(2) CISG, without furnishing further reasoning. Although reference was made to the subsidiarily applicable national law, the decision was made on the basis of Article 7.4.13 PICC, and the amount claimed was reduced to fifty percent from the amount originally claimed.¹²¹

Article 7.4.13 PICC states that “[w]here the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual harm.” The second paragraph of this provision, which was relied up on by the above arbitral tribunal in its decision, establishes that “the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation

¹²⁰Tribunal of International Commercial Arbitration at the Russian at the Russian Federation Chamber of Commerce and Industry, 5 June 1997, CISG-online No. 1247.

¹²¹See also Saidov, Cases on CISG Decided in the Russian Federation, 7/1 Vindobona J. Int'l. Com. L. & Arb. 59, 60 (2003).

to the harm resulting from the non-performance and to the other circumstances.”

In our view, the functions of agreed sums, including penalty clauses, varies so much around the world’s legal systems that it could hardly be concluded that Article 7.4.13 PICC represents a widely known and regularly observed standard to assess the effect and validity of any agreed sum in case of breach and that it constitutes an assumption made by parties in any trade. A number of legal systems considered these agreed sums as a means of securing performance of a party’s obligation.¹²² The function may also be to compensate losses caused by breach of contract.¹²³ In common law countries, agreed sums are generally viewed as a mechanism to liquidate losses, *i.e.* the sum agreed must be a genuine pre-estimate of the loss incurred, because parties are not allowed to compel each other to perform the contract by threatening what is perceived as punishment.¹²⁴ Yet, agreed sums could have the purpose of limiting liability.¹²⁵

The power to reduce the amount agreed and the standard required for such modification will also depend upon the emphasis placed by each legal system regarding the function of agreed sums. In some common law countries, like United States, Canada and Australia, an agreed sum that works as a penalty, rather than an estimated loss, for breach, is struck out of the contract.¹²⁶ In England, however, the same type of clause could be enforceable by a court up to the amount that

¹²²See, e.g., Armenia, Art. 369(2) CC; Belarus, Art. 310 CC; Brazil, Art. 409 CC; Chile, Art. 1535 CC; and similar examples of the civil law systems cited by Pascal Hachem, *Agreed Sums Payable upon Breach of and Obligations* 45, n.8 (*in* 7 *International Commerce & Arbitration Law*, Ingeborg Swenzer ed., Eleven International Publishing 2011).

¹²³Hachem, *supra* n. 123, at 47.

¹²⁴Hachem, *supra* n. 123, at 36, 61.

¹²⁵Hachem, *supra* n. 123, at 46.

¹²⁶That seems to be the case in the United States under the U.C.C. § 2-718(1), as well as in Canada under *Elsley vs. J.G. Collins Insurance Agencies*, [1978] 2 S.C.R. 916 (Can.), cited in Hachem, *supra* n. 123, at 81, 82.

represents the actual loss.¹²⁷ In civil law countries like Japan, and others influenced by the first versions of the French Civil Code, the judge must neither reduce or increase a sum payable upon breach of contract agreed by the parties.¹²⁸ Some countries like the Czech Republic, Latvia and Slovenia have no specific rules on reduction of agreed sums.¹²⁹ In other jurisdictions, the standards for reduction vary between “manifestly disproportionate,”¹³⁰ “grossly excessive,”¹³¹ “unreasonable”¹³² agreed sums, to mentioned a few examples. The issue whether a judge may reduce an agreed sums *ex officio* or *ex parte* is not uniform either among the world’s legal systems.¹³³ Finally, while agreed sums in case of breach may be often included in international contracts by traders in different industries, their regulation in statutory law and case law has existed since Roman law times.¹³⁴ It can hardly be concluded that Article 7.4.13(2) PICC, in particular the possibility to reduce grossly excessive agreed sums, can be integrated as usages into a contract governed by the CISG. The issue whether a judge or arbitrator might exempt a party from honoring an agreed some due to hardship should be decided in light of the requirements and the standard in Article 79 CISG.¹³⁵

A different arbitral tribunal constituted under the same

¹²⁷ See *Johnson v. Johnson*, [1989] 1 WLR 1026 (UK), at 1041, cited in Hachem, *supra* n. 123, at 82.

¹²⁸ Japan, Art. 420(1) CC; the French 2016 CC now states in Article 1231-5: “[. . .] Néanmoins, le juge peut, même d’office, modérer ou augmenter la pénalité ainsi convenue si elle est manifestement excessive ou dérisoire. [.]”

¹²⁹ Hachem, *supra* n. 123, at 117.

¹³⁰ See France Art. 1231-5 CC; Italy, Art. 1384.

¹³¹ See Algeria, Art. 184(2) CC; Cambodia, Art. 403(3) Draft Civil Code; Egypt, Art. 224(2) CC.

¹³² Estonia, Art. 162 Law of Obligations; Georgia Art. 420 CC; the Netherlands. Art. 6.94(2) CC.

¹³³ Naming some different specific examples, see cited in Hachem, *supra* n. 123, at 125–26.

¹³⁴ Hachem, *supra* n. 123, at 125–26.

¹³⁵ Schwenzler & Muñoz, Duty to Renegotiate and Contract Adaptation in Case of Hardship, 24/1 Uniform L. Rev. 149–74, 170 (2019).

Russian arbitration rules also found that, in light of the CISG's silence regarding penalty clauses, the PICC were applicable in order to fill the gap. The recourse to the PICC was justified on the ground that they reflect usages of which the parties knew or ought to have known and which are widely known to in international trade and are therefore applicable according to Art. 9(2) CISG.¹³⁶ The arguments furnished in the previous paragraph and section 4.2 above, also applied to this case.

In an ICC arbitration with seat in Zurich, the sole arbitration issued a Partial Award on jurisdiction and applicable law upholding the application of the CISG as part of Swiss law for international sales and the PICC as trade usages referred to in Article 9(2) CISG.¹³⁷ The sole arbitrator reasoned that as for the applicability of the "PICC and other trade usages and practice—failing any express reference to it in the Contracts—they shall be taken into account to the extent they may be considered as an expression of a sort of consolidated set of usages, and principles of law followed by players in the international business arena.¹³⁸ In this respect, the tribunal stated, they will likely be of use not only having in mind art. 17.2 of the ICC Rules, but also in identifying the rules directly binding the parties as per art. 9.1 CISG [. . .] and 9.2 CISG."¹³⁹ Our comment about this decision is that there may have been a different valid reason to decide that the PICC would apply to that specific case. However the PICC can hardly be considered, *in toto*, as an expression of a sort of consolidated set of usages followed by players in the international business arena for the reason already stated (*see* section 4.2 above).

5.2. Under Article 28(4) MAL and similar provisions

There are multiples cases in which the PICC, as a set of rules, or some of their individual provisions have been

¹³⁶ Arbitral Award, 5 June 1997, International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, abstract available at <http://www.unilex.info/principles/case/669>.

¹³⁷ ICC Arbitration No. 13919 EC/2007.

¹³⁸ ICC Arbitration No. 13919 EC/2007.

¹³⁹ ICC Arbitration No. 13919 EC/2007.

considered (or not) as relevant trade usages by arbitrators.¹⁴⁰ Their consideration has resulted from arbitration rules or laws that, similarly to Article 28(4) MAL, direct the arbitral tribunal to take the usages of trade into account in the resolution of the dispute. In this section, we analyze some of these cases.

In an *ad-hoc* arbitration seated in Buenos Aires, an arbitral tribunal decided to apply the PICC—notwithstanding the fact that both parties had based their claims on specific provisions of Argentine law—since they constituted usages of international trade reflecting the solutions of different legal systems and of international contract practice, and as such, according to Article 28(4) MAL, they should prevail over any domestic law.¹⁴¹ The decision is incorrect from two viewpoints. On the one hand, “usages” should not be defined as solutions of different legal systems harmonized in a set of rules (*see* majority view’s definition about this concept in section 4.3 of this article). On the other hand,

¹⁴⁰The UNILEX website contains over 15 abstracts from arbitral awards where this has taken place: Arbitral Award, November 1996, ICC International Court of Arbitration, seat Paris, Case No. 8502; Arbitral Award, 5 June 1997, International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, Case No. 229/1996; Arbitral Award, July 1997, ICC International Court of Arbitration, seat Paris, Case No. 8873; Arbitral Award, 10 December 1997, Ad hoc Arbitration, seat Buenos Aires; Arbitral Award, March 1998, ICC International Court of Arbitration, seat Rome Case No. 9029; Arbitral Award, February 1999, ICC International Court of Arbitration Case No. 9479; Arbitral Award, 27 July 1999, International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation; Arbitral Award, 2000, ICC International Court of Arbitration, Case No. 10021; Arbitral Award, October 2000, ICC International Court of Arbitration, Case No. 10022; Arbitral Award, 6 November 2002, International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation; Arbitral Award, 2003, ICC International Court of Arbitration, Case No. 11265; Arbitral Award, 2003, ICC International Court of Arbitration, Case No. 11256; Arbitral Award, 2004, ICC International Court of Arbitration, Case No. 12446; Arbitral Award, 12 November 2004, International Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation; Arbitral Award, 2007, China International Economic and Trade Arbitration Commission; Arbitral Award, 23 January 2008, Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce.

¹⁴¹Arbitral Award, 10 December 1997, Ad-Hoc Arbitration, seat Buenos Aires, abstract available at <http://www.unilex.info/principles/case/646>.

considering the implied agreement that the parties reached when they based their submissions on Argentine law, the PICC should not have been applied over the applicable law (see the role of usages under Article 28(4) MAL in section 3.2 of this article).

As a different ICC Tribunal put it:

[. . .] although the UNIDROIT Principles constitute a set of rules theoretically appropriate to prefigure the future *lex mercatoria* should they be brought into line with international commercial practice, at present there is no necessary connection between the individual [provisions of the] Principles and the rules of the *lex mercatoria*, so that recourse to the Principles is not purely and simply the same as recourse to an actually existing international commercial usage.¹⁴²

The same arbitral tribunal further held that in the context of Article 834 of the Italian Code of Civil Procedure, which mirrors Article 28(4) MAL, “[i]nternational commercial usages are of strictly interpretative and integrative value, to the extent that there are gaps in national regulations that could usefully be filled by the aforesaid usages [. . .].”¹⁴³ The arbitral tribunal concluded that the doctrine of gross disparity and hardship (invoked by Respondent), as dealt with in the PICC, could not be applied beyond the limits of or with effects different from the applicable substantive law;¹⁴⁴ a conclusion we also reached in section 4.2.2 of this article.

In an ICC arbitration case with seat in Paris, a tribunal considered that the application of the relevant trade usages was consistent with Article 13(5) of the ICC Rules and with the arbitral practice and decided that provisions of the CISG or the PICC evidenced admitted practices under international trade law.¹⁴⁵ The arbitral tribunal then decided to award damages on the basis of Article 76 CISG and Article

¹⁴² Arbitral Award, March 1998, ICC International Court of Arbitration, seat Rome Case No. 9029, abstract available at <http://www.unilex.info/principles/case/660>.

¹⁴³ Arbitral Award, No. 9029, *supra* n. 142.

¹⁴⁴ Arbitral Award, No. 9029, *supra* n. 142.

¹⁴⁵ Arbitral Award, November 1996, ICC International Court of Arbitration, seat Paris, Case No. 8502, published in the ICC International Court of Arbitration Bulletin, Vol. 10, No. 2, Fall 1999, abstract available at <http://www.unilex.info/principles/case/655>.

7.4.6 PICC, which allow the calculation of losses as the difference between the contract price and the relevant market price. In our view, there are more elements against the application of the CISG and the PICC as trade usages than in favor of in this case. Most of their provisions are anchored in what already existed in domestic laws. Their uniform character is not enough to fulfill the requirement of general knowledge and observance by international traders and that is expected from usages. Assuming that traders may have some knowledge of some of the provisions in these instruments from their own national laws, the solution in Article 76 CISG or Article 7.4.6 PICC is not followed in many legal systems.¹⁴⁶

In a different case decided by an ICC arbitral tribunal with seat in Paris, one of the parties requested the renegotiation of the contract invoking hardship according to Articles 6.2.2 and 6.2.3 of the PICC.¹⁴⁷ According to that party, although the contract contained a choice of law clause in favor of Spanish law, the PICC were applicable as they represented genuine trade usages which the arbitral tribunal had at any rate to take into account under Article VII of the 1961 Geneva Convention on International Arbitration and Article 13(5) of the ICC Arbitration Rules. In deciding about the applicability of the PICC, the arbitral tribunal held that in order to arrive at that conclusion one must prove that the rules invoked by that party, in particular those on hardship, correspond to an established usage, to which parties to international trade felt bound, without express provision to that regard in their contract. However, the tribunal held that even if there was a tendency in some branches to often stipulate hardship clauses, the fact remained that, in the practice of businesses, the possibility to rebalance a contract by a third party as provided under Article 6.2.3 PICC

¹⁴⁶See Schwenger, Hachem & Kee, *supra* n. 22, para. 44.240, at 628, observing that the abstract calculation of losses is particularly prominent in the English model of common law. However, most civil law jurisdiction follow the concrete calculation model based in the existence of a substitute transaction.

¹⁴⁷Arbitral Award, July 1997, ICC International Court of Arbitration, seat Paris, Case No. 8873, *see abstract and full text in French available at <http://www.unilex.info/principles/case/641>*.

remained an exception. Accordingly, the provisions of the PICC on hardship did not correspond, at least at that time, to current practices in international trade. This decision furnished similar arguments for the inapplicability of Articles 6.2.2 and 6.2.3 of the PICC as usages of trade, as those made in section 4.2.2 of this article.

In an unpublished ICC Award No. 11256/MS, the arbitral tribunal found that Article 17(2) of the ICC Arbitration Rules (“the arbitral tribunal shall take account of the provisions of the contract and the relevant trade usages”) did not affect its conclusion that the PICC should not apply to that case.¹⁴⁸ The tribunal cited the ICC award of 1999, Case No. 9029, where it was held that “recourse to the Principles is not purely and simply the same as recourse to actually existing internationally commercial usage.”¹⁴⁹ The tribunal further held that the PICC propose reasonable solutions to meet the needs of international trade in the light of the experience of some of the major legal systems but do not generally reflect the trade usages referred to in Article 17(2) of the ICC Rules of Arbitration. The tribunal also cited renowned arbitrator Juan Fernández-Armesto, according to whom “. . . all rules contained in the principles do not per se meet the traditional test required for usages to be accepted as source of law (*repetition*’ and *opinio iuris*’).”¹⁵⁰ There is obviously some overlap as specific solutions of the PICC could correspond to usages of certain trades. The emphasis put on good faith by the principles is an example of such; but the principles and the trade usages have completely different natures.¹⁵¹

6. Conclusion

The PICC are not an expression of trade usages. The PICC

¹⁴⁸ Arbitral Award, International Chamber of Commerce, No. 11256 (2003).

¹⁴⁹ Arbitral Award, International Chamber of Commerce, No. 9029 (1999), 10:2 ICC IC Arb. Bull. 78. Also cited Fouchard, Gaillard, Goldman on International Commercial Arbitration 846 (Kluwer Law International 1999).

¹⁵⁰ Juan Fernández-Armesto, Observations on the Separate Arbitral Award in SCC case 117/1999, 2002:1 Stockholm Arbitration Report 71, 71–82 (2002).

¹⁵¹ Arbitral Award, International Chamber of Commerce, No. 11256 (2003).

propose reasonable solutions to meet the needs of international trade in the light of the experience of some of the major legal systems. However, not all PICC provisions meet the test required for usages to be accepted as source of law under Article 9 CISG, Article 28(4) UNCITRAL MAL or similar provisions. There may be an obvious overlapping between specific solutions in the PICC and usages of certain trades. Nonetheless, the unofficial and specific nature of trade usages requires that the standard of proof of a specific usage under the above CISG or UNCITRAL MAL provisions be discharged beyond the mere reference to the PICC *in toto*.