

## Transnational Contract Law: Lando's Contribution and the Way Forward

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**Abstract:** The lecture outlines how Lando's thinking progressed, beginning with Private International Law and moving through the harmonization of European Law to, in the later part of his career, the idea of a Global Code. It considers the extent and form of harmonization that has taken place to date, and then the changes that are taking place in transnational contracting and their implications for both the substance and the form of any future harmonizing measures. The lecture concludes by exploring a possible way forward for overcoming differences between the laws for business-to-business contracts, involving an 'optional' soft law approach under which traders would voluntarily agree to be bound by the chosen soft law principles.

**Résumé:** La conférence décrit l'évolution de la pensée de Lando, en commençant par le droit international privé et en passant par l'harmonisation du droit européen pour aboutir, dans la dernière partie de sa carrière, à l'idée d'un code mondial. Il examine l'étendue et la forme de l'harmonisation qui a eu lieu jusqu'à présent, puis les changements qui ont lieu dans les contrats transnationaux et leurs implications à la fois sur le fond et la forme de toute mesure d'harmonisation future. La conférence se termine par l'exploration d'une voie possible pour surmonter les différences entre les lois relatives aux contrats entre entreprises, impliquant une approche "facultative" de soft law dans le cadre de laquelle les commerçants accepteraient volontairement d'être liés par les principes de soft law choisis.

**Zusammenfassung:** Der Beitrag skizziert, wie sich die Überlegungen von Ole Lando weiterentwickelt haben, angefangen vom Internationalen Privatrecht über die Harmonisierung des Gemeinschaftsrechts bis hin zur Idee eines Globalen Kodex im späteren Verlauf seiner Karriere. Zunächst werden das Ausmaß und die Form der bisherigen Harmonisierung betrachtet und dann die Veränderungen, die sich im transnationalen Vertragswesen vollziehen, sowie ihre Auswirkungen sowohl auf den Inhalt als auch auf die Form künftiger Harmonisierungsmaßnahmen. Der Beitrag schliesst mit der Untersuchung eines möglichen Weges für die Zukunft zur Überwindung der Unterschiede beim Recht für *Business-to-Business*-Verträge. Dieser beinhaltet einen "optionalen" *Soft-Law*-Ansatz, bei dem sich die Unternehmer freiwillig verpflichten würden, die gewählten *Soft-Law*-Prinzipien einzuhalten.

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## 1. Introduction

1. It is an enormous honour to be invited to give the first Ole Lando Memorial Lecture.

2. In 2002 Lando published a wonderful account of ‘My Life as a Lawyer’.<sup>1</sup> He explained that his early dream was to be ‘an eminent economist who would promote economic integration among nations’. He also wrote of his mother encouraging him to speak and write in simple language. Both things had a profound influence on his life’s work, as he sought to make transnational contracting easier. Lando also had a strong belief in freedom of contract, though in what I believe to be a particularly Nordic understanding of the phrase: that contract requires some regulation in order to enhance genuine freedom of the parties.

## 2. Differences between Laws and the Solutions in the PECL

3. By employing a functional method – ignoring differences in terminology and concepts and considering the results reached by each system in the various situations<sup>2</sup> – the Commissions which drafted the Principles of European Contract Law<sup>3</sup> (‘the PECL’) were able to identify many issues on which the different laws of contract across Europe reach broadly similar results. Nonetheless, on a number of issues there are marked differences between the laws, and in particular between the common law and many of the civil law systems. The most obvious examples are that, compared to many civil law systems, the common law systems have only limited liability for breaking off negotiations<sup>4</sup>; do not give relief on the ground of one party’s mistake as to an essential quality of the subject matter of the contract unless the mistake was caused by incorrect information given by the other party<sup>5</sup>; do not recognize fraud by silence, or impose a duty of disclosure except in very closely-defined circumstances<sup>6</sup>; have relatively limited controls over unfair contract

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1 O LANDO, “My Life as a Lawyer”, 10. *Zeitschrift für Europäisches Privatrecht* 2002, p 508.

2 See K. ZWEIFERT & H. KÖTZ, *An Introduction to Comparative Law* (trans. T Weir) (Oxford: Oxford University Press, 3d edn 1998), esp at pp 34-35 and 44.

3 *Principles of European Contract Law, Parts I and II* (O. LANDO & H. BEALE (eds)) (The Hague: Kluwer, 2000) (PECL Pts I & II); *Part III* (O. LANDO, E. CLIVE, A. PRÜM & R. ZIMMERMANN (eds)) (Kluwer 2003) (PECL Pt III).

4 See J. CARTWRIGHT & M. HESSELINK (eds), *Precontractual Liability in European Private Law* (Cambridge: Cambridge University Press 2008); H. BEALE et al., *Ius Commune Casebooks for the Common Law of Europe: Cases, Materials and Text on Contract Law* (Oxford: Hart, 3d edn 2019), Ch. 13.

5 See generally H. BEALE et al., *Ius Commune Casebooks for the Common Law of Europe: Cases, Materials and Text on Contract Law*, pp 524-566.

6 H. BEALE et al., *Ius Commune Casebooks for the Common Law of Europe: Cases, Materials and Text on Contract Law*, pp 566-583. On mistake and non-disclosure generally see R. SEFTON-GREEN (ed.), *Mistake, Fraud and Duties to Inform in European Contract Law* (Cambridge: Cambridge

terms<sup>7</sup>; do not permit either adjustment or termination of the contract when there has been a change of circumstances making performance much more onerous to one party or much less valuable to the other<sup>8</sup>; and, save when the obligation is one to pay money, seldom allow for specific enforcement (enforcement *in natura*).<sup>9</sup> To this list one should add the absence of a doctrine of good faith or similar general principle.<sup>10</sup> This is partly a matter of technique: in a code system judges must base their decision on a provision of the code, and when confronted with a situation that is not explicitly regulated by the code, may base the decision on a general provision such as the rule of good faith, whereas in a common law system judges have an inherent jurisdiction to develop the common law. This has enabled English judges to develop ‘piecemeal solutions in response to demonstrated problems of unfairness’.<sup>11</sup> The fact remains, however, that English law seldom requires a party to act with reasonable consideration of the interests of the other party.<sup>12</sup>

4. The PECL were intended to bridge the gap between common law and civil law<sup>13</sup>; and to provide a workable system of rules. That meant either choosing one approach over another, or finding a compromise that most of the members of the Commission felt they could live with.

5. The source of many of the provisions of the PECL, and the changes that were made as the text was developed in the Draft Common Frame of Reference,<sup>14</sup> the Feasibility Study by an Expert Group convened by the European Commission<sup>15</sup> and

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University Press 2005); H Beale, *Mistake and Non-disclosure of Facts: Models for English Contract Law* (Oxford: Oxford University Press 2012).

7 H. BEALE et al., *Ius Commune Casebooks for the Common Law of Europe: Cases, Materials and Text on Contract Law*, Ch. 21.

8 See B. MARKESINIS, H. UNBERATH & A. JOHNSTON, *The German Law of Contract* (Oxford: Hart, 2nd edn 2006), Ch. 7; H. BEALE et al., *Ius Commune Casebooks for the Common Law of Europe: Cases, Materials and Text on Contract Law*, Ch. 29.

9 MARKESINIS et al., *The German Law of Contract*, pp 392-418; H. BEALE et al., *Ius Commune Casebooks for the Common Law of Europe: Cases, Materials and Text on Contract Law*, Ch. 23.

10 See generally R. ZIMMERMANN & S. WHITTAKER (eds), *Good Faith in European Contract Law* (Cambridge: Cambridge University Press 2000).

11 See the often-quoted dictum of Bingham LJ in *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd* [1989] 1 QB 433, 439.

12 See the definition of ‘good faith’ in the proposed Regulation on a Common European Sales Law (see *infra*, n. 16), Art. 2(b).

13 PECL Pts I & II (*supra*, n. 3), Introduction, xxii-xxiii.

14 *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (München: Sellier 2009).

15 *A European contract law for consumers and businesses: Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders’ and legal practitioners’ feedback* (May 2011).

finally the proposed Common European Sales Law (the ‘CESL’),<sup>16</sup> have been traced in detail by Jansen, Zimmermann and their colleagues in their magnificent *Commentaries on European Contract Laws*.<sup>17</sup> I want to take a different approach which involves identifying the broader differences between the national laws and, later in the paper, asking what has caused them.

6. We can certainly see differences in the kind of reasoning used. The argument that lawyers in England and France have such different mentalities that neither will ever understand the other’s system<sup>18</sup> is surely an exaggeration, but we can see that continental lawyers, especially those from the civilian systems, tend to set more store by principle than do common lawyers, who are renowned for their pragmatism. But there is more. There seem to be significant differences in the ‘overall shape’ and aims of the different laws of contract.

7. A second obvious difference may be the result of an enduring continental legal philosophy that never obtained much purchase in common law: the will theory. French law even after the reforms of 2016–2017 still seems to adhere in principle to the requirement of a subjective agreement; and both French and German law will allow a contract to be avoided on the ground of a ‘*vice de consentement*’.<sup>19</sup> The common law, in contrast, emphasizes the protection of reasonable reliance and relief is not given just because the will of the party seeking relief was defective, but only if that was the result of the other party’s behaviour – illegitimate threat, undue influence, unconscionable advantage-taking or the giving of incorrect information.

8. But there also seems to be a different idea of the roles that contract law and judges deciding contract cases should play. I have read that the Code Napoleon was intended as a guide to citizens as to how they should behave.<sup>20</sup> English law concentrates on disposing of disputes. Civil law judges seem much readier to sanction opportunistic behaviour by one party, and to find ways to relieve parties who were ill-advised or ill-informed than do their common law counterparts, who often reiterate that it is not their task to protect a party who has made an unwise

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16 Proposal for a Regulation on a Common European Sales Law of 11 October 2011, COM(2011) 635 final.

17 N. JANSEN & R. ZIMMERMANN (eds), *Commentaries on European Contract Laws* (Oxford: Oxford University Press 2018).

18 Compare P. LEGRAND, ‘European Legal Systems Are Not Converging’, 45. *International and Comparative Law Quarterly* 1996, p 52; P. LEGRAND ‘Against a European Civil Code’, 60. *Modern Law Review* 1997, p 44. I commented on his views in ‘The Principles of European Contract Law and Harmonisation of the Laws of Contract’, in Andersen, Fejø & Nielsen (eds), *Festschrift til Ole Lando* (1997), p (21), at 37–38.

19 Article 1130 Cciv; §§ 119, 123 BGB.

20 ‘A code, Napoleon stated, which every man could read and understand, would enable every citizen to know “the principles of his conduct.”’: T. HOLMBERG, ‘The Civil Code: an Overview’, [https://www.napoleon-series.org/research/government/code/c\\_code2.html](https://www.napoleon-series.org/research/government/code/c_code2.html) (accessed 16 August 2020).

agreement.<sup>21</sup> Common law judges' instincts are to hold parties to just what they have agreed, and only that – so they will add only terms to fill gaps in the contract if that is strictly necessary in order to make the contract workable.<sup>22</sup> The underlying reasoning seems to be that when it comes to determining the terms of the contract, the parties have a comparative advantage – in other words, that it is better for the parties fix the terms *ex ante* than the court to do so *ex post*. Some of the rules of English law seem so arcane that they must be designed as 'penalty defaults', rules meant to incentivize the parties to draft their own clause in order to avoid absurd results.<sup>23</sup> An example is the rule that a party who is prevented from performing on time by circumstances wholly outside its control is nonetheless liable for the loss caused by late performance. In practice almost every well-drafted contract contains some form of force majeure clause – but the parties have to specify for themselves the circumstances that will give rise to an excuse.

### 3. Private International Law

9. Lando started his career as a legal academic by working in Private International Law. How far can Private International Law reduce the problems caused for transnational contracting by differences between the laws? It is obviously much easier to deal with disputes in transnational contracting if different jurisdictions have uniform rules on which law is to govern the contract. In 1957, when Lando wrote his first piece,<sup>24</sup> Private International Law was still largely based on case law and there were marked differences in approach, both in the extent to which the parties were free to select a law to govern their contract<sup>25</sup> and in how to determine the governing law when the parties had not made a choice.<sup>26</sup> It is clear that Lando thought lack of uniformity was a problem.<sup>27</sup>

10. I am no Private International Lawyer, but it is my impression that Private International Law has come a very long way since 1957. With the Rome I

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21 Perhaps the most famous statement is Lord Nottingham's in *Maynard v Moseley* (1676) 3 Swans 653, 655, 36 Eng. Rep. 1010, 1011: 'the Chancery mends no man's bargain'.

22 Recently re-affirmed by the Supreme Court in *Marks and Spencer plc v. BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72.

23 See I. AYRES & R. GERTNER, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules', 99. *Yale Law Journal* 1989, p 87.

24 O. LANDO, 'Scandinavian Conflict of Law Rules Respecting Contracts – Party Autonomy and Center of Gravity', 6. *American Journal of Comparative Law* 1957, p 1.

25 See O. LANDO, 'The EEC Convention on the Law Applicable to Contractual Obligations', 24. *Common Market Law Review* 1987, p (159) at 169.

26 See e.g. O. LANDO, 'New American Choice-of-Law Principles and the European Conflict of Laws of Contracts', 30. *American Journal of Comparative Law* 1982, p 19.

27 See particularly his contribution to the *International Encyclopedia of Comparative Law* Vol III, *Private International Law*, Ch. 24 *Contracts* (1976).

Regulation on the law applicable to contractual obligations<sup>28</sup> and the Rome II Regulation on non-contractual obligations,<sup>29</sup> at least the Member States of the EU have accepted that the parties have a high degree of freedom to choose, and have agreed relatively precise rules for determining the applicable law in the absence of a relevant choice. Possibly it is also more common than it was for the parties to make an express choice, which would reduce the problems. There still seem to be points of uncertainty – for example, over what will be treated as ‘overriding mandatory provisions of the law of the forum’<sup>30</sup> and when a provision of the law specified by the Regulation will be disapplied as ‘manifestly incompatible with the public policy of the forum’<sup>31</sup> – but that is probably inevitable.

11. However, other concerns remain. One is the extent to which courts actually apply foreign law when they are supposed to do so. In English law, for example, the parties must give evidence of what the foreign law is; and in the absence of clear evidence it will be presumed that the foreign law is the same as English law<sup>32</sup> – a convenient rule, but not one that necessarily leads to the accurate application of foreign law. And even if the court is informed of the rules of the foreign law, it may not apply them correctly.<sup>33</sup>

12. Yet more seriously, how well do business people understand foreign law,<sup>34</sup> or what difference it will make if foreign law applies to their contracts? And the same must be asked of lawyers. Not only do many of us, myself included, have limited skills in foreign languages; we also find it hard to grasp concepts that are different to our own and to identify ‘false friends’, concepts that appear familiar but that have different meanings in different systems. It was this kind of problem that led Lando to think of other approaches.

13. Fortunately, in the larger law firms there are more and more lawyers with good language skills and a deep knowledge of different laws, and I am sure that clients of those firms making transnational contracts are well served. But in other

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28 Regulation (EC) No 593/2008 of 17 June 2008.

29 Regulation (EC) No 864/2007 of 11 July 2007.

30 Rome I Art. 9(2).

31 Rome I Art. 21.

32 For example *Dynamit AG v. Rio Tinto Co* [1918] AC 260, 295, 301. See further *Dicey, Morris & Collins on the Conflict of Laws* (London: Sweet & Maxwell, 15th edn 2018), para. 9-025 – which, however, notes both increasing unease over this way of putting it and also (in paras 9-026 – 9-029) that there are situations ‘in which the which the default application of a rule of English law is simply too problematic to be appropriate.’

33 See O. LANDO, ‘Why Codify the European Law of Contract?’, *European Review of Private Law* 1997, p (525) at 527.

34 See O. LANDO, ‘Principles of European Contract Law: an Alternative or a Precursor of European Legislation’, 56. *Rechts Zeitschrift für ausländisches und internationales Privatrecht* 1992, p (261) at 263.

respects changes in the nature of transnational contracts may have made the overall situation worse.

#### **4. Changes in Transnational Contracting**

14. In the mid-20th century, probably most transnational contracting was conducted by specialist import/export firms buying and selling goods. These firms often used industry-wide standard terms and they were ‘repeat players’, who would quickly acquire experience of the likely problems. Moreover, they would have been entering transactions, or series of similar transactions, of considerable value, so that the cost of taking legal advice on the applicable law would not be high relative to the value of the transaction. For this kind of client and transaction, one might think that Private International Law, at least in its modern guise, would provide adequate solutions. But now, and especially since the development of the internet, smaller business and consumers are making transnational contracts, often on a one-off basis and of relatively low value. And the contracts are no longer just for the sale of goods: digital content is often marketed on an international basis, and increasingly services are being marketed across borders.

15. The problems that consumers might have in understanding the effects of contracting under a foreign law are obvious; but the same must be true for small and medium-sized enterprises (‘SMEs’). They are less likely to be sophisticated in the sense of having in-house expertise or experience of transnational contracting. They are likely to be making smaller and less regular transactions, when the relative cost of taking legal advice will be high; so they may well make a rational choice not to obtain it, on the ground that the cost will outweigh the likely benefit. As a result, SMEs are much less likely than larger firms to understand or find out about the effects of contracting under a foreign law. Probably also SMEs are more risk-averse than larger firms, if only because their smaller size makes it harder to cover risks. I would add that the problem is not just about the effect of the foreign law and the associated risks. SMEs are much less likely than larger firms to understand standard contract terms proffered by the other party, particularly if the terms are in a foreign language.

16. So it would be very helpful if transnational contracts could be governed by a single law that is equally accessible to all – and particularly if it could be expressed in simple enough language that business people could understand it, as Lando was always keen to achieve. There are two possible models: a set of non-national rules that can be used as an alternative to national laws; and unification or at least harmonization of national laws.

#### **5. Alternative, Non-national Rules**

17. The first model is represented by the Vienna Convention on the International Sale of Goods of 1980 (the ‘CISG’). Very broadly speaking, the Convention provides a set of rules that will be incorporated into the law of a State adopting the



Convention. If a contract for the international sale of goods is made that is subject to the State's law, or is between parties in different States that have both adopted the Convention,<sup>35</sup> then unless the parties opt out of the Convention,<sup>36</sup> the rules of the Convention will apply instead of the normal, 'domestic' law. Thus the contract will largely be governed by a uniform set of rules that are available in many languages.<sup>37</sup>

18. Getting agreement on the rules of the Convention, and persuading so many States to adopt it, was a remarkable achievement. But the Convention is far from providing a complete solution. In particular, it is limited in its scope, applying only to contracts that are for the sale of goods and between businesses<sup>38</sup>; and some topics are not covered by the Convention, so that they fall to be dealt with by the 'domestic' rules of the otherwise-applicable law. The gaps that seem particularly serious are validity and the control of unfair terms.<sup>39</sup> The CISG Advisory Council and some of the many commentators on the CISG have been creative in seeking to fill the gaps, but to my mind straining interpretation of the text is undesirable; it creates uncertainty as interpretations of the text are likely to differ from judge or arbitrator to another, and there is no single tribunal that can give authoritative rulings.

## 6. Harmonization of National Laws

19. So Lando was more attracted to the other method: unification or harmonization. The PECL were put forward as the basis for harmonization in the sense of 'uniform substantive law rules',<sup>40</sup> 'as the basis for any future European Code of Contracts'.<sup>41</sup>

20. Needless to say, contract law across Europe has not been unified. One can say that Private International Law has indeed been unified within the EU as a result of the Rome I and II Regulations and the Brussels I bis Regulation on Jurisdiction.<sup>42</sup> There has been some harmonization of contract law but it has been fragmentary, dealing only with particular issues or types of contract, and mostly confined to contracts between traders and consumers.

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35 See Art. 1 of the Convention.

36 See Art. 6.

37 See, <https://www.cisg.law.pace.edu/cisg/text/text.html> (accessed 16 August 2020).

38 See Art. 2.

39 See Art. 4: [The Convention] 'is not concerned with: a) The validity of the contract or of any of its provisions....'

40 PECL II (supra n. 3), Preface p xi.

41 PECL II, Introduction, p xxiii.

42 Regulation (EU) 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).



21. The EU legislation on contract law to date has been in the form of Directives. Member States must bring their law into line with Directives but the means of doing so is left to them, so that the implementing legislation may look very different from Member State to Member State. And until recently most of the Directives on contract law have only required minimum harmonization. In other words, Member States are required to give consumers at least the rights laid down in the Directive, but they can maintain existing legislation or introduce new legislation that, even within the scope of the Directive, gives greater protection to consumers than the Directive requires. This was consistent with the aim of encouraging the Internal Market by giving consumers the confidence to actively 'shop abroad' by ensuring that, wherever they purchased goods they would at least have the rights guaranteed by the Directive.

22. After about 2003 it was realized that this approach caused problems for traders. In particular, traders wanting to market their goods or services to consumers in other Member States faced what has been called the 'Rome I problem'. Under the Rome I Regulation the parties to a consumer contract may choose the applicable law; and we can expect that the trader will have a standard contract that will normally provide that the contract will be governed by the trader's law. However, if the trader

- (1) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
- (2) by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities, the choice of law may not have the effect of depriving the consumer of the protection afforded by the mandatory rules of his country of residence.<sup>43</sup>

23. This means that the trader ought to be familiar with the consumer protection rules of every Member State where the trader operates or from which it solicits business. In the case of a trader whose website appears to solicit business from anywhere in the EU, that would mean knowing about local consumer protection in every Member State.

24. The European Commission's first response to that was to move from minimum harmonization to full harmonization, under which the rights given must be no less and no more than set out in the Directive, so that traders would not have to worry that the protection rules in the consumer's country might be different to the rules of the trader's country. In 2008 the Commission proposed a Consumer Rights

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43 Rome I, Art. 6(2).

Directive<sup>44</sup> that would have replaced four existing Directives – to use their colloquial names, the Door-step and Distance Selling Directives, the Unfair Terms Directive and the Consumer Sales Directive.<sup>45</sup> The proposed directive would have included some small elements of additional consumer protection, but the principal change would have been to require full harmonization. The proposal was a failure, in part at least. Member States that give their consumers more than the minimum rights did not wish to take those rights away. The Commission was only able to get the Directive adopted by making a new proposal of much more limited scope, dealing for the most part only with pre-contractual information requirements and with cancellation rights in distance and what are now called ‘off-premises’ contracts.<sup>46</sup>

## 7. ‘Harmonization’ by Optional Instrument

25. Instead the Commission proposed a different kind of measure: a Regulation on a Common European Sales Law.<sup>47</sup> The Commission still referred to it as ‘harmonizing’,<sup>48</sup> but it was harmonization of a different kind, an attempt to use the first model to which I referred. It would have required Member States to allow parties to cross-border contracts<sup>49</sup> for the sale of goods and digital content<sup>50</sup> where one party was a consumer or (in business-to-business (B2B) contracts) one party was an SME<sup>51</sup> to use an ‘optional instrument’,<sup>52</sup> a set of rules covering large parts of the law of contract, instead of the normal national rules of one or other country. It would have worked rather like the CISG: the CESL rules would be a ‘second regime’ within the law of each Member State<sup>53</sup> and, if the parties chose to use them, the rules of the CESL would have governed any issue within its scope. (A difference from the CISG, which applies unless the parties opt out, is that CESL would apply only if the parties ‘opted in’.) This would avoid altering the ‘domestic’ rules of the national law, which would remain as it was for all contracts where the

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44 Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM (2008) 614.

45 Directives 85/577 of 20 December 1985 (‘Door-step Selling’), 93/13 of 5 April 1993 (‘Unfair Terms’), 97/7 of 20 May 1997 (‘Distance selling’) and 99/44 of 25 May 1999 (‘Consumer sales’).

46 Directive 2011/83/EU on Consumer Rights of 25 October 2011. There are a few provisions on other issues, e.g. on delivery and the passing of risk in sales of goods (Arts 18, 20).

47 Proposal for a Regulation of the European Parliament and of The Council on a Common European Sales Law COM/2011/0635 final.

48 Explanatory Memorandum, p 8.

49 Article 4.

50 And related services: Art. 5.

51 Article 7.

52 See Art. 3.

53 See Recital 9.

CESL was or could not be used, but where the CESL was used the national law would be displaced.

26. The displacement would have included any mandatory rules of the law of the country where the consumer is habitually resident. The CESL contained its own set of mandatory rules; and at least for consumer contracts<sup>54</sup> the parties could only adopt the CESL as a whole, so they could not ‘cherry-pick’ and avoid rules that they did not like. Compared to most national laws, the CESL’s rules would have provided a high level of consumer protection. But the trader who used the CESL for cross-border contracts would only have to understand the effects of one set of rules, the CESL rules, since they would be the same everywhere. And it was claimed that this solution avoided the ‘Rome I problem’ – the consumers would still be protected by mandatory rules of the country of their habitual residence,<sup>55</sup> though if the CESL was chosen these would be the mandatory of the CESL rather than of the ‘domestic’ law.

27. This is not the occasion to explore the merits or otherwise of the CESL, or indeed the details of its history.<sup>56</sup> Suffice it to say that although in 2014 the European Parliament approved the measure, subject to many but no fundamental amendments, by a large majority,<sup>57</sup> the proposal ran into strong opposition in the Council of Ministers, and at the start of the Juncker Commission the proposal was withdrawn.<sup>58</sup>

28. I do not know all the reasons for the opposition in the Council. There were some objections to the substance of the rules: for example, the chapter on Restitution was considered too radical<sup>59</sup> and the right to reject non-conforming goods or digital content, without first having to ask for or allow repair or replacement by the trader no matter how much time had elapsed since delivery was thought to be too draconian.<sup>60</sup> There were also doubts over whether the measure

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54 Article 8(3).

55 Explanatory Memorandum, p 6.

56 A brief account is given in H. BEALE, ‘The Story of EU Contract Law – from 2001 to 2014’, in C. Twigg-Flesner (ed.), *Research Handbook on EU Consumer and Contract Law* (Cheltenham: Edward Elgar 2016), p (431) at 459–462.

57 European Parliament legislative resolution of 26 February 2014 on the proposal for a regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011) 0635 – C7-0329/2011 – 2011/0284(COD)).

58 European Commission, Commission Work Programme 2015 Com(2014) 910 final, Annex 2 p.12 The Commission announced that it would forward a modified proposal ‘to unleash the potential of e-commerce in the digital Single Market’. See also the Communication from the Commission, *A Digital Single Market Strategy for Europe*, 2015 COM(2015) 192 final, pp 4–5.

59 See Amendments 223–246 proposed by the European Parliament (supra, n. 57).

60 See e.g. the Law Commission and the Scottish Law Commission, Advice to the UK Government, *An Optional Common European Sales Law: Advantages and Problems* (2011), paras 4.128–4.131.

would work, as the Commission claimed, without any amendment to the Rome I Regulation. In my view, the Commission presented too much too quickly. Rather than first get acceptance of the feasibility of this new form of harmonization and of how it would work alongside the Rome I Regulation, the Commission presented a complete text. The text was not accompanied by any detailed commentary to justify its contents or explain its application. It was much wider in scope than previous legislation, as it would have applied to some B2B contracts as well as to consumer contracts. Lastly, though the CESL was presented as an ‘optional instrument’ that would lie alongside national laws rather than replacing them, it seems there was considerable suspicion that this was just the first step in a process by which the EU intended to replace the contract laws of the Member States by a single, unified law. That was something that many States, particularly the UK, opposed vigorously, as a unified European contract law would almost certainly be very different to English law on many of the key issues.<sup>61</sup>

## 8. New Attempts at Full Harmonization

29. When it withdrew the CESL proposal, the European Commission announced that it would forward a modified proposal ‘to unleash the potential of e-commerce in the digital Single Market’. This has turned out to be an attempt to revive full harmonization. Two new contract law Directives have been adopted and have to be implemented by Member States by 1 July 2021.

30. In very summary terms, the Directive on the supply of digital content and digital services<sup>62</sup> requires Member States to adopt rules that set out consumers’ rights in respect of the timing<sup>63</sup> and the quality of digital content and digital services<sup>64</sup> to be supplied by traders; the consumer’s right to have non-conforming content brought into conformity, or to have the price reduced or to terminate the contract<sup>65</sup>; the obligations of each party in the event that the contract is terminated<sup>66</sup>; and modifications of the content or service.<sup>67</sup> Currently, few Member States have legislation that is specifically designed to cover digital content and so the rights and obligations of the parties are unclear; the new Directive provides a useful set of rules. This is true even in the UK, where the Consumer Rights Act 2015 does have specific provisions on the supply of digital content, as

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61 Other equally persuasive reasons are given by M. KIRÁLY, ‘The Rise and Fall of Common European Sales Law’, in UNIDROIT (ed.) *Eppur si muove: The Age of Uniform Law – Essays in Honour of Michael Joachim Bonell* (Rome: UNIDROIT), p 1862.

62 Directive (EU) 2019/770 of 20 May 2019.

63 Article 5.

64 Articles 6–11.

65 Articles 13–15.

66 Articles 15–16.

67 Article 19.

the Directive applies where the ‘price’ to be paid by the consumer is not in money but consists of personal data,<sup>68</sup> and it deals also with the supply of digital services. The Directive requires full harmonization<sup>69</sup>; on issues of substance, Member States may provide additional protection only on the questions of the remedy when supply of the content infringed a third party’s rights<sup>70</sup> and of time limits.<sup>71</sup> I assume that on this occasion Member States did not object to full harmonization because, not having much by way of existing law, they felt they had little to lose.

31. The new Directive on consumer sales<sup>72</sup> is a very different story. Initially the Commission proposed a measure<sup>73</sup> for online and other distance sales only which would have resulted in full harmonization of the law along more-or-less the lines of the minimum requirements of the existing consumer sales directive. There were objections to both having different regimes for distance and other sales and to the requirement of full harmonization.<sup>74</sup> The Commission responded by submitting an amended proposal<sup>75</sup> that would apply to all sales, but in principle still requiring full harmonization. This formed the basis for the Directive ultimately adopted but there are so many issues within its scope on which Member States may give consumers additional rights or remedies<sup>76</sup> that I can only think of it as full harmonization on what in my country we call ‘the Swiss cheese model’ - full of holes.

## 9. Soft Law Principles

32. We should also consider the use of the PECL as ‘soft law’ applicable to disputes arising from transnational contracts. As things stand, soft law principles like the PECL or the UNIDROIT Principles of International Contracts<sup>77</sup> (‘the UPICC’) cannot replace national law, insofar as courts must apply a national law. At one stage during the discussion that preceded the adoption of the Rome I

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68 Article 3(1); compare Consumer Rights Act 2015, s. 33(1) and (2). However, the Secretary of State is empowered to extend application of the Act to other contracts for the supply of digital content to a consumer: s. 3(5).

69 Article 4.

70 Article 10.

71 Article 11.

72 Directive (EU) 2019/771 of 20 May 2019.

73 Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods of 9 December 2015, COM (2015) 635 final.

74 See Art. 3.

75 COM(2017) 637 final (31 October 2017).

76 See Arts 3(7) (remedies where non-conformity appears within 30 days or for specific kinds of defects, viz hidden defects, see Rec 18); 9 (third party rights); Art. 10 (time limits); Art. 11 (burden of proof); Art. 12 (obligation to notify); Art. 13(6) (extent of consumer’s right to withhold payment and (7) (effect of consumer contributing to non-conformity).

77 *UNIDROIT Principles of International Commercial Contracts* (Rome: UNIDROIT, 4th edn 2016).

Regulation to replace the earlier Rome Convention it was suggested by the European Commission that it should be possible for a contract to be governed by ‘rules of the substantive law of contract recognized internationally or in the Community’.<sup>78</sup> The idea was not adopted,<sup>79</sup> partly because of uncertainty as to which sets of principles would qualify as ‘internationally accepted’ and concerns that they might not be fairly balanced. It has been revived recently by the Hague Principles on the Choice of Law in International Contracts, which specify that principles will qualify only if they are ‘generally accepted on an international, supranational or regional level as a neutral and balanced set of rules’.<sup>80</sup> Whether this innovation of the Hague Principles will command support remains to be seen.<sup>81</sup>

33. There are two things the parties can do. The first is to adopt soft law principles as part of the terms of their contract.<sup>82</sup> This will have the effect of displacing the ‘default rules’ - rules that will apply unless the parties have agreed something different - of the governing national law. The soft law will not displace rules of the national law that are mandatory, and even for business-to-business contracts there are some rules that are mandatory - for example, the parties cannot normally exclude the controls over unfair terms. Secondly, however, if the parties agree that disputes under the contract should go to arbitration, many systems allow them to require the arbitrator to decide the case under non-national rules.<sup>83</sup> So parties can validly agree on arbitration under the PECL, or an arbitrator who is required to apply ‘internationally accepted principles of contract law’ or the like might use the PECL or other soft law principles. The UPICC have quite often been applied by arbitrators<sup>84</sup> but I am not aware of arbitrations that have applied the PECL.

## 10. The Influence of the PECL

34. So to what extent has Lando’s dream been fulfilled? As yet, the PECL have not succeeded in bring us anything like a harmonized contract law, whether that be by

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78 COM(2005) 650 final (2005/0261 (COD), 5.

79 See Rome I Regulation, Art. 3 and Recital 13.

80 Article 3.

81 For further discussion and references see B. FAUVARQUE-COSSON, ‘New Principles in the Legal World: The Hague Principles on the Choice of Law in International Contracts’, in L. Gullifer & S. Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law* (Oxford: Hart 2014), p (455) at 463-464.

82 See Rome I Regulation, Recital 13.

83 For example UK Arbitration Act 1996 s. 46(1)(b), following UNCITRAL Model Law on International Commercial Arbitration (1985), Art. 28(3).

84 See, [http://www.unilex.info/principles/cases/article/102/issue/1210#issue\\_1210](http://www.unilex.info/principles/cases/article/102/issue/1210#issue_1210) (accessed 16 August 2020).

providing for parties to choose an alternative, European regime or by bringing Member States' contract laws into line with each other. Nor, so far as I know, have they been applied in arbitrations.

35. In many other respects, however, the PECL have been very successful. The PECL are well-known world-wide. They have been consulted extensively in the course of reforming many national laws.<sup>85</sup> They may even be said to have inspired the recent reforms of the French Code civil<sup>86</sup> – both in the sense that the reform process began in part as a reaction to a perceived threat from the European Commission's Action Plan on Contract Law<sup>87</sup> and its proposed Common Frame of Reference, in which the PECL seemed to play a central role, and in the sense that provisions found in the PECL are now reflected in the Code civil.<sup>88</sup> The result has been a degree of convergence between the laws of at least continental jurisdictions. Further, the PECL have provided us with a shared vocabulary, a lingua franca, with which to discuss contractual issues with colleagues from very different legal traditions. And the PECL have engendered enormous enthusiasm: they are widely used in teaching, there have been many translations and they seem to have been influenced the starting of two similar projects elsewhere in the world, the Principles of Latin American Contract Law<sup>89</sup> and the Principles of Asian Contract Law.<sup>90</sup>

36. Lando was also a member of the working group responsible for the UPICC. So were a number of other members of the Commission on European Contract law, and it should come as no surprise that in many respects the texts of the two instruments are similar. Indeed, in at least the chapter on validity it was decided to follow the recently completed UNIDROIT text except where the Commission preferred a different solution. Lando was surely correct to argue that the similarity of the two texts is not a weakness; rather, the similarities mean the two texts

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85 See e.g. 'European Initiatives (CFR) and Reform of Civil Law in New Member States', in XIV *Juridica International* 2008, especially I. KULL, 'Reform of Contract Law in Estonia: Influences of Harmonisation of European Private Law' (2008) II, p 122; A. KISFALUDI, 'The Influence of Harmonisation of Private Law on the Development of the Civil Law in Hungary', II p 130; J. RAJSKI, 'European Initiatives and Reform of Civil Law in Poland', II p 151.

86 See H. BEALE et al., *Ius Commune Casebooks for the Common Law of Europe: Cases, Materials and Text on Contract Law*, p 82.

87 *Action Plan on A More Coherent European Contract Law* COM (2003)final, OJ 2003 C63/1; and *European Contract Law and the revision of the acquis: the way forward* COM(2004) 651 final, 11 October 2004.

88 The influence of the European projects on reform in France is discussed in F. ANCEL, B. FAUVARQUE-COSSON & J. GEST, *Aux sources de la réforme di droit des contrats* (Paris: Dalloz 2017).

89 See R. MOMBERG & S. VOGENAUER (eds), *The Future of Contract Law in Latin America* (Oxford: Hart Publishing 2017), esp Ch. 1.

90 See S. HAN, 'Principles of Asian Contract Law: An Endeavor of Regional Harmonization of Contract Law in East Asia', 58. *Villanova Law Review* 2013, p (589), referring at p 590 to the PECL model.



reinforce each other's authority.<sup>91</sup> And indeed the success of the PECL may have helped the UPICC to become better known, and vice versa.

## 11. The Way Forward

37. But what is the way forward now? Can we ever hope to see the PECL, or indeed the UPICC, used more widely as the basis for legislation or in some other way in solving disputes? I think there are three issues that should be considered. (1) At what type of case should any principles be aimed? (2) What form of instrument should be used? And (3) At what level - European or international - should we try to act?

38. In the area of consumer contracts, I do not detect any enthusiasm at present for a general harmonization of contract law. So I will not say any more about this, save to make the obvious point that the more harmonization there is on particular topics, the less the need for harmonization of the remaining law. Rather, I will concentrate on B2B contracts.

## 12. Different Rules for Different Types of Case

39. On B2B contracts I have to say that my thinking diverges somewhat from Lando's. Lando was in favour of developing a single European contract law. I am not. I believe that there is a good reason for many of the key differences between the laws, and particularly between the common law and the civil law systems, which I described earlier. The rules have developed with different types of case in mind.

40. If you look at the contract cases decided in the higher courts in England - the courts whose decisions are reported and that constitute the common law - it is noticeable that a very high proportion of them are what I call 'heavy commercial cases'.<sup>92</sup> Normally the contracts are 'high value' contracts where large amounts may be at stake. They were often made by sophisticated parties. Frequently the parties are 'repeat players' with considerable experience of the relevant kind of contract. Even if they are not, they may well have taken legal advice before contracting, the value of the contract or series of contract making the relative cost of taking advice worth incurring. And very often the contract was in a volatile market and the real issue is whether a party who will be left 'out of the money' because the market has shifted against them can escape from the contract and throw the loss back on the other party. In such cases, uncertainty as to the outcome of the case will encourage

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91 O. LANDO, 'Principles of European Contract Law and UNIDROIT Principles: Moving from Harmonisation to Unification?', 1-2. *Uniform Law Review* 2003, p (123) at 124.

92 See H. BEALE, 'The Impact of the decisions of the European courts on English contract law: The Limits of Voluntary Harmonisation', 18. *European Review of Private Law* 2010, p 501.

litigation,<sup>93</sup> so it may be better to have clear rules that will give fairly predictable outcomes<sup>94</sup> than to have flexible standards that enable the court to do ‘justice’ on the particular facts but which will lead to less predictable results.

41. I have not seen figures on the types of case that routinely come to the higher courts in the continental jurisdictions. But my guess is that these courts are dealing with a much higher proportion of cases involving small businesses and even private individuals. The main reasons for this concentration on heavy commercial cases may be, first, the high cost of litigation in England and, secondly, the English legal profession’s deliberate attempt to bring international legal business to London by ‘selling’ English law as the law of choice and English courts as ideal tribunals to decide disputes.<sup>95</sup> There is no doubt that this concern over contract law as an export commodity has influenced statute law. When the Unfair Contract Terms Act 1977 was adopted there was a deliberate decision that it should not apply to either international supply contracts or contracts that are subject to English law only because the parties have chosen that law to govern the contract.<sup>96</sup>

The Law Commissions reported that:

“The effect of imposing our proposed controls in relation to those contracts might well be to discourage foreign businessmen from agreeing to arbitrate their disputes in England ...”<sup>97</sup>

42. It seems to me that the common law of contract has also been heavily influenced by the nature of the cases that are coming before the courts. Equally I would expect that developments in jurisprudence and doctrine in contract law in the civil law systems, and ultimately the direction taken in reforms of legislation, will reflect the nature of the contract cases that are coming before the courts.

43. So if we are to press for either harmonization or ‘optional instruments’ for transnational business contracts, what type of case should the rules be aimed at, and what sort of rules should be adopted? I would argue that we should not try to devise rules for transnational contracts between larger and more sophisticated

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93 See G. PRIEST, ‘Breach and Remedy for the Tender of Non-conforming Goods’, 91. *Harvard Law Review* 1978, p 960.

94 A preference shown by the English House of Lords in *Bunge Corpn v. Tradax SA* [1981] 1 WLR 711, where a clause requiring the buyer under an FOB contract to give 15 days’ notice of the readiness to load of the chosen vessel was interpreted as being ‘of the essence’, so that when the buyer failed to give the notice promptly the seller could terminate the contract whether or not the delay caused the seller any loss.

95 See H. KÖTZ, ‘The Jurisdiction of Choice: England and Wales, or Germany?’, 6. *ERPL* 2010, p 1243.

96 See ss 26 and 27.

97 Law Commissions, *Exemption Clauses Second Report* (Law Com No 69, Scot Law Com No 39, 1975), para. 232.

businesses. For sales contracts, the CISG is adequate: they can take advice as to the effects of the ‘gaps’ in its coverage. Alternatively, and for other types of contract, they can take advantage of the freedom of choice now allowed by Private International Law to choose a law that suits their needs, whether it be a common law system such as English or New York law, or a civil law system. It is very interesting to have at least anecdotal evidence that a very large German firm instructs its staff now to use Swiss law for export contracts, apparently to avoid the risk that the firm’s contract terms might be held to be unenforceable under the German law’s controls over standard terms.<sup>98</sup>

44. What we should aim for is a set of contract rules that are suitable for dealing with disputes between SMEs. First, SMEs are unlikely to have any understanding of the effects of adopting a foreign law to govern their contracts; so they will benefit more from harmonization or optional instruments than will larger firms. Secondly, SMEs are also unlikely to have in-house expertise or to be able to afford legal advice. Therefore even if they try to read the other party’s standard terms, they are unlikely to understand their effects. So it would be important to include controls over standard terms – at least a provision to prevent the use of ‘surprising clauses’, and possibly controls over their substance. Also, SMEs may not ‘ask the right questions’ before making a contract, so a law for their disputes should include provisions on relief for mistake as to the facts and a duty of disclosure. Lastly, given that SMEs are less likely than larger, more experienced businesses to anticipate and guard against opportunistic behaviour by the other party, it would probably be sensible to include a general provision enabling the courts to sanction bad behaviour, such as a provision requiring good faith and fair dealing. In other words, SMEs need a relatively protective law. I think this should be aim of any future work.

### 13. The Form of Instrument

45. What form of instrument should we aim at? Not at unification: not only does there seem to be no appetite for it at within the EU but for reasons I have given, I do not think complete unification is desirable. Larger businesses can choose the law that suits them best, and they may wish to choose less or more protective systems. SMEs can of course do the same but, because they are less likely to be in a position to make an informed choice, they are the ones who we should aim at; and their needs are different from those of larger businesses.

46. Within the EU it would in principle be possible for Member States to agree that States whose law does not already have sufficiently protective rules will adopt them as a special regime for SMEs, but in political terms this approach seems wholly unrealistic. The alternative, adoption of an optional instrument, has been

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98 §§ 307, 310 BCB.

tried and failed. True, a new proposal could be presented in a better fashion; and it is possible that there would be less opposition after Brexit, though the UK government was not the only opponent of the CESL. However, after the withdrawal of the CESL proposal I cannot see any chance of an EU optional instrument on contract law being proposed or adopted for many years to come.

#### 14. European or Global?

47. This brings me to the question of level. I think the way forward for those of us who believe that there should be a uniform set of rules available for transnational contracts is to focus not on the EU but at the international level. As Lando pointed out,<sup>99</sup> the problems are global; and at the international level there cannot be the same fear of ‘creep’ towards unification. There seem two possible ways forward. One is by revision and extension of the CISG. The other would be through the use of soft law – most obviously, the UPICC.

#### 15. Revision and Extension of the CISG

48. Revision and extension of the CISG, so that it would cover more subjects and include contracts for the supply of services, was proposed to UNCITRAL by the Swiss in 2012,<sup>100</sup> but after some discussion<sup>101</sup> it appears to have been shelved.<sup>102</sup> It was argued that there was no need for any extension or revision, as the parties could supplement the CISG by adopting the UPICC.<sup>103</sup>

49. That response seems to raise problems. First, as we saw earlier, soft law cannot replace national law except as part of the contract. It can be used in arbitration, but arbitration is expensive compared to court proceedings in many countries, and is often conducted on a confidential basis, so that there is little published case law. Secondly, how can soft law provide the protection that SMEs need when it is not mandatory? The UPICC contain many of the rules that I think SMEs need – for example, while there is no provision enabling a court to invalidate unfair terms on the ground of their unfairness in substance, there is a ‘surprise

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99 For example O. LANDO, 1-2. *Uniform LR* 2003, p (123) at 132.

100 Possible Future Work in the Area of International Contract Law: Proposal by Switzerland on Possible Future Work by UNCITRAL in the Area of International Contract Law UN Doc A/CN.9/758 (2012).

101 See Report of the UN Commission on International Trade Law, 45th Session, 25 June–6 July 2012, paras 127–132, UN Doc A/67/17, GAOR, 67th Session, Supp No 17 (2012); 46th Session, 8–26 July 2013, para. 314, Doc A/68/17. The papers presented at a symposium are contained in 58 *Villanova LR* 2013(4) (pp 497–772).

102 See I. SCHWENZER, ‘Global Unification of Contract Law’, 21. *Uniform LR* 2016, p 60.

103 See M. DENNIS, ‘Modernizing and Harmonizing International Contract Law: The CISG and the UNIDROIT Principles Continue to Provide the Best Way Forward’, 19. *Uniform LR* 2014, p 114.

clause' provision and it is arguable that for SMEs that should give adequate protection<sup>104</sup> - what the SME will be most concerned about is that there are 'no nasty surprises' in the terms to which it is signing up. But the risk is that a sophisticated party dealing with an SME might purport in general terms to 'adopt' the UPICC but in its standard terms exclude particular provisions in the UPICC that it finds inconvenient - like the 'surprise clause' article itself. In other words, the more sophisticated party might 'cherry pick'. The CESL proposal contained a provision to prevent this happening, at least in consumer contracts.<sup>105</sup> For B2B contracts the CESL appeared to allow parties to choose which provisions to incorporate, though that may have been the result of a mistake in drafting.<sup>106</sup>

## 16. Adoption of Soft Law Principles

50. If protection can be given only by legislation, there might seem to be an insuperable problem in using soft law to give SMEs the assurance they need that the protections apparently provided by the soft law principles - for example, the unfair terms provision of the PECL<sup>107</sup> or the 'surprise clauses' provision of the UPICC<sup>108</sup> - will in fact operate. But I believe there is a possible way forward that does not require legislation. There is nothing to prevent a trader from making a binding agreement to abide by the ostensibly 'mandatory' rules of the soft law. A trader dealing with an SME could, for example, commit itself contractually to adopting the UPICC as a whole. It would be agreeing, therefore, that it would not claim that a clause formed part of the contract if the clause was surprising and had not been adequately brought to the other party's attention before the contract was concluded. A trader could equally adopt the PECL and thus permit its standard terms to be challenged on the ground that they are unfair in substance. And this can be done without the need for complex clauses that the SME would need to read. It would suffice that there is an explicit statement that the terms of the contract are subject to the relevant soft law principles. It could even be done by means of a logo on the trader's terms or website.

51. The trick is to get SMEs to ask the trader with whom they wish to contract to agree to this. For if SMEs did ask, the trader counterparty might well find it in its own interests to offer to use the UPICC or the PECL, as a way of securing the

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104 I discuss which form of control is more appropriate for B2B contracts in "'Surprising" or "Unfair"? Controls over Standard Terms', in UNIDROIT (ed.), *Eppur si muove* (supra, n. 61), p 975.

105 See supra, n. 54.

106 Commission officials told me that they thought Art. 8 does not allow a business, even in a B2B contract, to exclude the rules which CESL states are mandatory: see H. BEALE, 'A Common European Sales Law (CESL) for Business-to-Business Contracts', in L Moccia (ed.), *The Making of European Private Law: Why, How, What, Who* (München: Sellier 2013), p (65) at 75.

107 PECL Art. 4:110.

108 UPICC Art. 2.1.20.

SMEs' business. The trader might face an additional risk through using the soft law principles to supplement its standard terms rather than just its national law, e.g. the risk that one of its terms would be found surprising or unfair, but the additional risk might be compensated by the extra business. Traders would be particularly likely to offer the assurance of the 'soft law logo' if SMEs were willing to pay a small premium, representing the additional cost to the trader, in order to get this form of 'contractual insurance'.<sup>109</sup>

52. Platforms might also have a role to play here. Many small transnational contracts will be made via 'market-place' platforms that bring together sellers and buyers and enable them to contract easily with each other. Platforms often dictate the terms of the contracts made between the trader and the consumer. If platforms could be encouraged to require their trader sellers to incorporate the soft law principles into their contracts and to use the relevant logo, contracting would be quickly be transformed.

## 17. Problems with the Soft Law Solution

53. The voluntary use of soft law principles such as the UPICC for transnational contracting where one or both the parties is an SME is not a perfect solution. Some national mandatory rules go further than the soft law principles, and might invalidate terms that would be valid under the UPICC. For example, in some systems a contract may still be set aside because of gross disparity between the values of the performances (*laesio enormis*).<sup>110</sup> English law still treats penalty clauses as invalid.<sup>111</sup> A number of laws have controls over the substantive fairness of terms that were not 'standard' but were negotiated.<sup>112</sup> So a trader who agrees to use the UPICC would still sometimes need to consider also the national law that governs the contract. But the number of instances will be much reduced, particularly if one of the national laws that contains few additional protections were chosen as the governing law.

54. The number of instances would be reduced still further if the parties also agreed that disputes arising out of the contract should go to arbitration, since as we saw earlier, arbitrators are not required to apply national law. True, there might

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109 See H. Beale, in *The Making of European Private Law: Why, How, What, Who*, pp 73-74.

110 For example Austrian ABGB §§ 934, 935; Hungarian CC Art. 6:98, Gross disparity in value. See H Kötz, *European Contract Law* (Oxford: Oxford University Press 2nd edn 2017), pp 111-112.

111 Even though the Supreme Court has recently held that clauses requiring a party in breach to pay a sum that more than a pre-estimate of the loss and is intended to deter breach are valid in some circumstances: see *Cavendish Square Holding BV v. Makdessi* and *ParkingEye Ltd v. Beavis* [2015] UKSC 67, discussed in detail in *Chitty on Contracts* (London: Sweet & Maxwell 33rd edn 2018), Vol.I, paras 26-190 - 26-244.

112 For example UK Unfair Contracts Terms Act 1977, ss 2, 6 and 7.

still be cases in which the arbitrator would feel obliged to apply the national rule as an ‘overriding mandatory rule’ of the national law<sup>113</sup> or as ‘public policy’ of the forum,<sup>114</sup> but that would be quite rare.

55. Arbitration might bring another advantage. It might be possible to organize that disputes should go to a single arbitral body. This could also be done by contract, referring all cases to a non-statutory, international body. This could publish its decisions (if necessary in an anonymized format); and these would give guidance on interpretation of the soft law principles.

## 18. Conclusions

56. Lando achieved an enormous amount. His principal aim, a single law of contract, may not be achievable but, at the international level and for B2B contracts at least, there may be a way forward that would make use of the soft law principles of the kind that he created or contributed to. This would not be through legislation or new international conventions, but by encouraging traders to make use of freedom of contract to give ‘contractual protection’ to SMEs who want it. Protection against surprising or possibly unfair terms seems particularly important. With that protection, an SME’s decision not to incur the trouble of trying to read and understand the other party’s standard terms and conditions would no longer constitute a potential trap.

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113 For example, the provisions of the Unfair Contracts Terms Act 1977, as s. 27(2) provides that the Act has effect notwithstanding any contract term which applies or purports to apply the law of some country outside the United Kingdom, where the term appears to the court, or arbitrator or arbiter to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of the Act.

114 In the drafting of the UNCITRAL Model Law (supra, n. 83) it was proposed to require arbitrators deciding on the basis of non-national rules (which falls within the phrase ‘*ex aequo et bono*’) to ‘observe those mandatory provisions of law regarded in the respective country as ensuring its (international) order public’ (First Secretariat Note, A/CN.9/207, para. 90), but apparently this was not adopted because of the difficulty of developing a comprehensive definition of the mandate of arbitrators authorized to decide *ex aequo et bono* (First Working Group Report, A/CN.9/216, para. 86); see H. HOLTZMANN, *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (‘s Gravenhage: Kluwer 2015), p 771.