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*Ethics in the UNIDROIT Principles of International Commercial Contracts*

This is the Published version of the following publication

Gabriel, Henry (2017) Ethics in the UNIDROIT Principles of International Commercial Contracts. *Uniform Law Review*, 22 (1). 132 - 144. ISSN 1124-3694

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# Ethics in the UNIDROIT Principles of International Commercial Contracts

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## Abstract

This article shows how the structure of the UNIDROIT Principles encourages parties toward ethical behavior in their transactions.

## I. Introduction

It may seem odd to look at the UNIDROIT Principles of International Commercial Contracts (PICC) as sources of business and legal ethics. After all, are not the PICC a mere neutral statement of contract law? To a large extent, yes, but that itself is not an ethically neutral proposition.

It has to be appreciated that contract law itself, as well as the PICC, are not really ethically neutral. The PICC are imbued with a strong sense of party autonomy and individual freedom of choice. The PICC assume a competitive market economy.<sup>1</sup> These are ethical choices.

What I intend to show is that the PICC, in fact, deviate to some degree from these major policies of contract law. A close examination of the PICC shows that they actually nudge<sup>2</sup> parties towards ethical behaviour.<sup>3</sup> In international commercial contracts, parties do have several incentives to act ethically. First, it may simply be the right thing to do. Second, it may be expected in the trade; and, third,

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<sup>1</sup> This is stated in the Preamble to the *UNIDROIT Principles of International Commercial Law* (UNIDROIT 2010) (PICC).

<sup>2</sup> Nudge theory (or nudge) is a concept in behavioural science, political theory, and economics that argues that positive reinforcement and indirect suggestions to try to achieve non-forced compliance can influence the motives, incentives, and decision making of groups and individuals, at least as effectively, if not more effectively, than direct instruction, legislation, or enforcement.

<sup>3</sup> Whose ethics? The ethics of the international market place? The ethics of a small minority who think that certain worldwide standards of behaviour should be abided by? It is easy to say that one abhors the violation of basic human rights in the manufacturing of goods and to own an iPhone at the same time. I will speak of ethics in a broad sense, and I do not intend to get into a debate on what does and does not constitute ethical behaviour. See eg Apple, 'Failing to Protect Chinese Factory Workers' <<http://www.bbc.com/news/business-30532463>> accessed 15 February 2017; 'There are more than 1.5 million Workers Making Products for Apple, and Some of Them Are Children.' <<http://qz.com/183563/what-happens-when-apple-finds-a-child-making-your-iphone/>> accessed 15 February 2017.

it may be good for business.<sup>4</sup> These, of course, are not mutually independent reasons. To brand one's goods as 'organic' or 'GMO-free' or 'cage-free' may be an ethical choice on correct behaviour as well as a lucrative selling point that will be reflected in the profits.

There are four sources of law that may contribute to the ethical norms of international commercial transactions. First, there are the substantive rules of commercial law that underlie the transactions, such as the PICC.<sup>5</sup> Second, there are supplementary sources of law that specifically provide ethical norms within the specific type of commercial transaction, such as labour law, environmental standards, and human rights law.<sup>6</sup> Third, there are express terms the parties incorporate into their agreements; and fourth, there are the business and legal customs and practices that bind the parties either by trade usage or by practices between the parties.<sup>7</sup> It is the first, third, and fourth sources of law that I want to discuss today, as these sources derive directly or indirectly from the PICC.

## II. Express terms

We might start with express terms, as this is the most direct way that parties can set out their respective expectations of behaviour. Within the PICC's strong affirmation of freedom of contract,<sup>8</sup> parties can choose virtually any terms to govern the agreement, subject to the restrictions imposed by otherwise governing mandatory law<sup>9</sup> and the obligation of good faith.<sup>10</sup>

This is a matter of party choice, though, and the ability to choose does not necessarily mean that parties will make good or ethical choices.<sup>11</sup> But choice of terms does allow the possibility of imposing ethical behaviour into an otherwise purely economic transaction.

By expressly including references to mandatory laws, such as labour and environmental laws, the parties may clarify between themselves what their respective obligations are, but they are not adding any obligations that do not otherwise exist, and, therefore, this does not reflect any specific ethical choice as such. True

<sup>4</sup> This has begun to be acknowledged in the literature on international commercial law. See eg Ingeborg Schwenzer and Benjamin Leisinger, 'Ethical Values and International Sales Contracts' in Ross Cranston, Jan Ramberg and Jacob Ziegel, eds, *Commercial Law Challenges in the 21st Century: Jan Hellner in Memoriam* (Stockholm Centre for Commercial Law Juridiska institutionen 2007) 249–75.

<sup>5</sup> It may be that the PICC (n 1) govern only as terms to an agreement that is otherwise governed by some other law being domestic or international law such as the United Nations Convention on Contracts for the International Sale of Goods (1980) 1489 UNTS 3 (CISG).

<sup>6</sup> These rules may arise both within the context of laws that govern individual transactions (private law) as well as trade agreements among countries that govern all trade between the respective countries (public law).

<sup>7</sup> PICC (n 1) art 1.9.

<sup>8</sup> Ibid art 1.1.

<sup>9</sup> Ibid art 1.4.

<sup>10</sup> Ibid art 1.7.

<sup>11</sup> I do not intend to define what are 'good or ethical choices', and, thus, my discussion on these questions necessarily are rather non-specific.

choices must be expressed by contractual terms that impose obligations that are not already required.

And, for these, the PICC provide a vehicle. But that is all the PICC provide by allowing the parties the freedom to craft their respective agreements. The PICC give a very wide avenue for party choice, but they are primarily ethically neutral about what these choices should be.

### III. Implied terms

The PICC provide for implied terms arising from: (i) the nature and purpose of the contract; (ii) practices established between the parties; (iii) trades usages; (iv) good faith and fair dealing; and (v) reasonableness. It is among these possible implied terms that we may see the PICC nudging parties towards ethical behaviour in their agreements.

#### 1. *Implied terms from the nature and purpose of the contract*

As for implied terms derived from the nature and purpose of the contract, the PICC here envisage terms that are useful and necessary to achieve the purpose of the contract that are not otherwise expressed in the agreement. Thus, for example, a buyer would be expected to provide the necessary facilities to allow a seller to deliver goods.<sup>12</sup> Some of these obligations, such as cooperation,<sup>13</sup> good faith,<sup>14</sup> and best efforts,<sup>15</sup> are terms implied in all contracts by other articles in the PICC.<sup>16</sup> Except for those obligations found elsewhere in the PICC, the implied terms that arise from the nature and purpose of the contract are, as with express terms, ethically neutral.

#### 2. *Practices established between the parties*

The PICC, consistent with most contract law regimes, provide that the agreement may be supplemented by terms based on the practices between the parties.<sup>17</sup> Here, as with many implied terms, the PICC are merely a vehicle to allow party intent to be manifested in the agreement. In this respect, the PICC remain neutral as to the ethical nature of these practices.

Where this becomes relevant for the purposes of our discussion is when the parties have agreed expressly or by their conduct in the past to certain ethical practices, and it is reasonable to interpret their present agreement as having incorporated those terms by the reliance on continued use of the practices.

<sup>12</sup> The example in the comments to this provision is not particularly helpful. It states as obvious a fact that is not obvious and then suggests there is an implied duty of cooperation between the parties. This duty would arise from art 5.1.3, however, and not art 5.1.2(a).

<sup>13</sup> PICC (n 1) art 5.1.3.

<sup>14</sup> Ibid art 1.7.

<sup>15</sup> Ibid art 5.1.4.

<sup>16</sup> These terms will be discussed independently below.

<sup>17</sup> It is not unusual to divide practices between 'course of performance' (the current contract) and 'course of dealing' (prior contracts). This distinction is not relevant for purposes of this article.

### 3. Trade usage

Consistent with the general standards of international commercial law, the PICC provide for the incorporation of trade usages into the agreement.<sup>18</sup> Importantly, this includes not only usages for which the parties have agreed,<sup>19</sup> but also those trade usages that are widely known to be regularly observed in the respective industry. In this respect, unless expressly excluded, these usages come in as a matter of law.<sup>20</sup>

The PICC specifically anticipate that trade usages will develop and change over time and that these developments as they occur become part of the fabric of the parties' agreement. This is important in contemporary international trade because of the significant growth of ethical awareness and practices in international trade in such areas as labour and the environment.

Businesses worldwide have responded to increased consumer and commercial concerns over how goods are produced and services rendered, and as standards regarding these practices evolve, the standards will implicitly become part of agreements that are governed by the PICC.<sup>21</sup>

How far this extends is not clear. Thus, for example, if we agree that child labour violates 'customary international law', do we assume that this would constitute a usage 'regularly observed in international trade'? Given the amount of child labour that is actually used in the manufacture of textiles worldwide, to say the non-use of child labour is a standard regularly observed in international trade may be more aspirational than real.

## IV. Ethical obligations derived from the PICC themselves

Internal to the PICC themselves, we can discern in the default rules obligations of good behaviour imposed on the parties that choose to use the PICC.

It is important to keep in mind that this is contract law, and the ethical obligations that the PICC impose are to the parties themselves. Obligations to other parties and society in general may arise from the contract, but these obligations are not created by the PICC.

<sup>18</sup> PICC (n 1) art 1.9.

<sup>19</sup> This agreement may be shown in the current transaction or may be implied by past usage by the parties, which creates the current expectation that it is part of the agreement. Either way, it is assumed that the trade usage is part of the agreement by party agreement and not as a matter of law. See *ibid* art 1.9(2).

<sup>20</sup> MJ Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd edn, Transnational Publishers 2005) 99.

<sup>21</sup> Whether a company that makes a public commitment to abide by broad voluntary initiatives, such as the United Nations Global Compact, has implicitly agreed to abide by the standards in every contract the company enters into is open to debate. See eg Christina Ramberg 'Emotional Non-Conformity in the International Sale of Goods, Particularly in Relation to CSR Policies and Codes of Conduct', Research paper, Stockholm University (2014). This seems to me to be a question of fact to be answered on an individual basis. It is important to keep in mind, though, that PICC (n 1) art 1.9(2) does not require intent by the party to incorporate usages.

## 1. *Freedom of contract*

The starting point for any analysis of party obligations in the PICC must start with the concept of freedom of contract and party autonomy. In common with many legal regimes that govern contract law, one may look at the PICC as embodying two primary policies that transcend other rules contained in the PICC: freedom of contract and good faith.

As for freedom of contract, this not only embodies the freedom to choose to contract<sup>22</sup> but also embodies the freedom to choose what the terms of the contract will be.<sup>23</sup> It is this latter concept that plays off the other provisions in the PICC that may bend parties' behaviour towards ethical norms. In other words, all other provisions must be weighed against the policy that parties to an international commercial contract are free to determine the content of the agreement. To the extent that any other provision of the PICC limits this freedom by directing behaviour, this fundamental policy is restricted.

It must be kept in mind that this policy of freedom to choose the terms of the agreement is itself a statement of ethical norms—the ethics of a 'market oriented and competitive international economic order'.<sup>24</sup> Thus, for example, the PICC are not intended to replicate the ethical underpinnings of a state-controlled economy. Moreover, the PICC are designed with the expectation that they will be used in commercial, and not consumer, contracts. Thus, the PICC are grounded in the ethics of commercial law and not consumer law. This, of course, moderates the expectations of the parties, and, however, we define 'ethical' behaviour in contract law, it certainly must be primarily governed by the reasonable expectations of the parties to the agreement.

As a final point on freedom of contract, although the parties can express their subjective intent—as will be discussed below—to the extent that the agreement must otherwise be interpreted, the objective standards of (ethical) behaviour are based on the expectations of international agreements, not those expectations of domestic or local transactions.<sup>25</sup>

## 2. *Good faith*

The other primary policy of the PICC that reflects the ethical underpinnings of the PICC is the concept of good faith.<sup>26</sup> Good faith, of course, is a slippery concept, and the only certain thing we can say about good faith is that it represents the absence of bad faith.

Although it has been proclaimed as 'the Magna Carta of international commercial law', the concept of good faith has no fixed meaning in contract law.<sup>27</sup>

<sup>22</sup> As well as the freedom to choose not to contract. Since the PICC govern private contracts, parties have the choice not to contract. This, for example, may not be the case in some public contracts where the government would be obligated to contract to provide some basic services.

<sup>23</sup> Ibid art 1.1.

<sup>24</sup> Ibid art 1.1, comment 1.

<sup>25</sup> Ibid art 4.1.

<sup>26</sup> Ibid art 1.7, comment 1.

<sup>27</sup> KP Berger, *The Creeping Codification of the Lex Mercatoria* (Kluwer Law International 1999) 165.

It certainly does not have the same the meaning and import among the United Nations Convention on Contracts for the International Sale of Goods (CISG),<sup>28</sup> the PICC, and the common law, for example.

I have always found a simple working definition of good faith as that behaviour that is within the reasonable expectations of the other party in the transaction.<sup>29</sup> This provides enough flexibility to capture the essence of the concept.

Within this broad understanding of good faith (and it is a fool's errand to try to pin down too specific a definition), we can see that the PICC do give some specific guidance on good faith.<sup>30</sup> The PICC expressly state a standard of good faith for the conduct of the parties: 'Each party must act in accordance with good faith and fair dealing in international trade.'<sup>31</sup> This obligation exists throughout the whole of the contract, including negotiations. This application of the concept is similar to that taken by many civilian systems but not necessarily that taken by some common law jurisdictions.<sup>32</sup>

Not only is the concept of good faith in the PICC broad in its application, but it also encompasses more than any one jurisdiction's narrow domestic notion of good faith and, instead, covers what would inevitably be at least as inclusive as any single domestic law, in that under the PICC what constitutes good faith must be at least what would be acceptable as a universal standard for international commercial contracts.<sup>33</sup> Thus, the choice of the PICC as the guiding law entails not only the obligation of good faith—an obligation that is present in virtually all contract law—but also a special kind of good faith that is a higher standard than what might be required under a corresponding domestic law.<sup>34</sup>

This can be seen explicitly in the adoption by the PICC of the doctrine of 'abuse of rights', which is a party's malicious behaviour that occurs when a party exercises a right merely to damage the other party or for a purpose other than the one for which it was granted.<sup>35</sup> This limitation on party autonomy is often

<sup>28</sup> The CISG (n 5) does not state a general principle of good faith; however, the CISG does provide for the cryptic rule that, '[i]n the interpretation of this Convention, regard is to be had to...the observance of good faith in international trade' CISG art 7(1). It has been suggested that this language is limited to the interpretation of the contract and not to the parties' conduct; however, the authors of this suggestion themselves express doubt as to this limitation. Peter Schlechtriem and Ingeborg Schwenzer, *Commentary on the UN Convention on the International Sale of Goods* (2nd edn, OUP 2005) 100.

<sup>29</sup> This notion is captured in the provision against inconsistent behaviour. PICC (n 1) art 1.8, and discussed below.

<sup>30</sup> The PICC do not define good faith.

<sup>31</sup> *Ibid* art 1.7(1).

<sup>32</sup> See eg Roy Goode, *The Concept of 'Good Faith' in English Law*, *Centro Di Studi E Ricerche Di Diritto Comparato E Straniero* (International Institute for the Unification of Private Law 1992).

<sup>33</sup> PICC (n 1) art 1.7(1), comment 3; *CME Coopérative Maritime Etaploise SACV v Bos Fishproducts Urk BV* (Netherlands 1997) <<http://www.unilex.info/case.cfm?id=640>> accessed 15 February 2017.

<sup>34</sup> The standard in the PICC may be consistent with some civil law jurisdictions but conversely higher than that of some common law jurisdictions.

<sup>35</sup> PICC (n 1) art 1.7, comment 2.

acknowledged in civil law systems but is somewhat unknown in the common law.<sup>36</sup>

Most importantly, the concept of good faith (actually ‘good faith and fair dealing’)<sup>37</sup> is an objective standard.<sup>38</sup> *AS SUCH, THE MINIMUM STANDARD OF GOOD FAITH IS THAT WHICH A REASONABLE PARTY IN AN INTERNATIONAL COMMERCIAL CONTRACT.* This places a floor on the type of behaviour in the negotiation, formation, and performance of the contract that the parties can expect from each other. In other words, a party’s subjective notion of good faith cannot be behaviour below this objective standard. This is the place where the two major concepts of the PICC meet: good faith and freedom of contract. Good faith cannot be disclaimed under the PICC, and, therefore, to the extent that these two concepts collide, good faith trumps the parties’ freedom of contract.

Within this broad concept of good faith, the PICC contain some rules that are specific applications of good faith—applications that channel ethical behaviour in contracting.

### 3. *Inconsistent behaviour*

An unremarkable, but necessary, limitation on behaviour is the prohibition against ‘inconsistent behaviour’, a sub-set of requirement of good faith.<sup>39</sup> It is unremarkable in that it is a concept recognized by most legal systems. In civil law, it is the concept of *venire contra factum proprium* or *theorie de l’apparence*. In common law, it is equitable estoppel. It is a necessary provision because, although it does not encourage ethical behaviour, it sets a bar to certain types of prohibitive behaviour.

Inconsistent behaviour is prohibited because it violates the internal ethics of contract. I am bound to a contract because I voluntarily choose to be bound and because I believe the benefits of the agreement are worth the risks. In order for this system to work, both parties have to rely on the counter parties to act in a way that is consistent with the expectations the counter party has created. That is the ethical structure of contract law. The prohibition against inconsistent behaviour may not be the basis for fair labour conditions or environmentally friendly production, but it is necessary for the law of contract—which is the underlying basis for international trade itself.

### 4. *Cooperation*

The PICC specifically require cooperation between the parties when this is reasonably necessary to bring about the contract performance.<sup>40</sup> As with the prohibition against inconsistent behaviour, the doctrine of cooperation is a sub-set of

<sup>36</sup> Bonell (n 20) 133.

<sup>37</sup> PICC (n 1) art 1.7: ‘Each party must act in accordance with good faith and fair dealing in international trade.’

<sup>38</sup> Bonell (n 20) 131.

<sup>39</sup> PICC (n 1) art 1.8.

<sup>40</sup> *Ibid* art 5.1.3.



good faith.<sup>41</sup> Where the doctrine of ‘inconsistent behaviour’ prohibits certain conduct, the doctrine of cooperation requires certain behaviour.

As with good faith in general, the purpose of requirement is to bring about the reasonable expectations of the parties that are created by the agreement. This is the basis for the provision on surprising terms as well.<sup>42</sup>

What do these provisions on inconsistent behaviour, cooperation, and surprising terms have to do with ethics? What the provisions do, as with the general concept of good faith in the PICC, is to set an objective standard of party expectations that govern the permissible behaviour of the parties. This sets a floor for party behaviour. In other words, a contracting party under the PICC cannot go below those objective reasonable expectations that we assume parties have in an international commercial contract. This is not an insubstantial standard of behaviour.

## 5. *Illegality*

The working group for the 2010 PICC started out with a mandate to provide rules to govern illegality. The working group debated at great length—for several years—about the scope of the provisions. In the end, the working group could not find the correct balance for a rule on illegality that would be useful and universal. This, of course, is an area where the underlying contract prohibition varies greatly among domestic laws.

Certainly, had the working group been able to craft rules regarding the effect of illegality on international commercial contracts, the PICC would include a strong statement about the acceptable ethics in international trade. What the PICC actually say in the provisions on illegality is that the contract is unenforceable to the extent that its terms violate otherwise applicable mandatory rules of law.<sup>43</sup> This, however, does nothing more than reiterate the point already in the PICC that otherwise mandatory rules of law govern where there is a conflict between the terms of the agreement and the mandatory law.<sup>44</sup> In other words, the PICC do not contain a rule on illegality.

One should not read into this that the drafters were not concerned with questions of illegality. Instead, what the drafters concluded was that no jurisdiction would likely defer to its own jurisdiction’s law on matters of public policy in favour of a soft law instrument such as the PICC. Questions of illegality will be covered by the law—just not by the PICC.

## 6. *Ethics and the question of risk allocation*

I have discussed in other contexts the underlying ethics to contracting in the PICC themselves. There is one last subject that I think is worth considering—that is, the

<sup>41</sup> That this is an application of the doctrine of good faith is made clear in the comments to this article.

<sup>42</sup> Ibid art 2.1.21.

<sup>43</sup> Ibid art 3.3.1.

<sup>44</sup> Ibid art 1.4.

question of risk allocation as an essential aspect of international commercial contracts and contracts in general.

Because most contracts do not openly expose the gambling nature of their existence, we rarely think of contracts in those terms. But that is, in a sense, what all contracts are: a bet, a hedge. One party assumes a certain risk in exchange for something else. Each party assumes that what is given up—the performance—is worth the return performance.

In its pure form, which exists neither in the PICC nor any other contract regime, a party assumes the risk of performance or has to pay the price of non-performance. That is basic contract law. That is a fundamental rule of contract law. That is, in essence, the ethics of contract law. This is acknowledged in the PICC: the ethics of a ‘market-oriented and competitive international economic order’.<sup>45</sup>

However, as I mentioned, no system applies this rule of ‘perform or pay’ in its pure form. To do so would be unfair. But unfair, as every contract lawyer knows, means being outside the allocated risks the parties have assumed. Fairness is understood within the context of contract law and not as an abstract proposition in itself.

Thus, we describe the circumstances where parties can avoid performance without sanctions as those in which the risk of the problem has not been allocated in the agreement.<sup>46</sup>

To understand this notion of fairness in a contract law regime, one needs to look at the bases for which the law allows parties to avoid performance without sanction. We are, of course, examining the default rules. Risk allocation is one area where parties are generally free to establish their own bases of performance.<sup>47</sup>

It is worth exploring the bases for non-performance without sanctions in the PICC to understand how this broad notion of fairness is understood in the PICC. This is certainly a consideration parties look to in order to determine the applicability of the PICC to their respective transactions.

The most obvious example of a risk generally thought to be outside allocation of risks between the parties is *force majeure*. The PICC provide that ‘[n]on-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract’.<sup>48</sup>

That the PICC provide for *force majeure* is unremarkable. It is common in most laws.<sup>49</sup> Consistent with other laws, the fundamental principle here is an unallocated risk.<sup>50</sup> This is not part of the calculus the parties consider as part of their

<sup>45</sup> Ibid art 1.1, comment 1.

<sup>46</sup> Of course, there is the obligation for mutual restitution of benefits conferred, but this is not a sanction. This is merely the restoration of the status quo.

<sup>47</sup> Ibid art 7.1.6.

<sup>48</sup> Ibid art 7.1.7.

<sup>49</sup> See eg CISG (n 5) art 79; UCC paras 2–615.

<sup>50</sup> The standards for what constitutes *force majeure* or ‘impossibility’ vary greatly among different legal systems. It is not my intent here to get into a discussion of those differences. The one point I wish to make is about the unifying element of all laws: that being the unallocated risk.

bargain. Therefore, enforcement in the face of *force majeure* is unfair (within the concept of fairness in contract law).

The PICC push this notion of fairness beyond the inability to perform to something less tangible—to ‘hardship’.<sup>51</sup> Hardship occurs when ‘the cost of a party’s performance has increased or because the value of the performance a party receives is diminished’.<sup>52</sup> Noting that this is an extraordinary remedy that would rarely be available, it is still a possible basis for excused non-performance.<sup>53</sup> As with *force majeure*, the essential element of hardship is that the event that caused the hardship is outside the allocated risks and, as such, is not deemed to be part of the agreement. Also, as with *force majeure*, it is not an unusual remedy. It is well recognized in civil law and in the common law as legal impossibility (impracticability) and frustration of purpose.<sup>54</sup>

Likewise, we can explain the various equitable grounds for avoidance—mistake,<sup>55</sup> error,<sup>56</sup> fraud,<sup>57</sup> threat,<sup>58</sup> and gross disparity<sup>59</sup>—as articulations of the concept that objectively reasonable people did not enter into a contract assuming the risks of the agreement under these circumstances.

The PICC attempt to capture the ethics of contract in international commercial transactions and not the expectations of any particular domestic law. To the extent that the drafters of the PICC are accurate in reflecting these expectations, then these limitations on the obligation to perform are appropriate, even if they do not reflect a particular domestic law. It is worth noting, however, that what makes these provisions acceptable to many is the very fact that they are familiar concepts in other laws, both domestic and international.

This brings me to my final point about risk allocation and the ethics of the contract rules. A recent potential addition to the PICC is an article on the ‘right to terminate for a compelling reason’.<sup>60</sup> The new right would not merely excuse performance, as with *force majeure*, but would actually terminate the contract. The essence of this right would be to allow one party to unilaterally terminate the contract for some ill-defined ‘compelling reason’ based on some also ill-defined notion of a ‘breakdown of the relationship’ between the parties.

A bit of history is in order here. This concept was originally introduced 10 years ago when the work on the 2010 PICC began. It was quickly dismissed as being an inappropriate concept for a set of rules that are designed for universal application in international commercial contracts. It is now being reintroduced in what is

<sup>51</sup> PICC (n 1) arts 6.2.1–3.

<sup>52</sup> Ibid art 6.2.2.

<sup>53</sup> Ibid arts 6.2.1, 6.2.2.

<sup>54</sup> See I Schwenzer, P Hachem, and C Kee, *Global Sales and Contract Law* (OUP 2012) 666.

<sup>55</sup> PICC (n 1) arts 3.2.1, 3.2.2.

<sup>56</sup> Ibid art 3.2.3.

<sup>57</sup> Ibid art 3.2.5.

<sup>58</sup> Ibid art 3.2.6.

<sup>59</sup> Ibid art 3.2.7.

<sup>60</sup> This would be ibid 6.3.1. UNIDROIT, Study L- Doc 135 Rev (2016).

intended to be a minor set of amendments for long-term contracts. It is presently getting the same very negative reception it received ten years ago and for the same reason—that is, that this concept does not reflect the normal expectations of parties in international commercial contracts. It is outside the allocation of risks that parties expect in their respective agreements.

Here is the lesson. Those rules of contract law that reflect what parties expect in international agreements are accepted in the PICC. Those rules that do not reflect these expectations are dismissed. This process, over a 30-year period, has resulted in a set of legal rules that reflect the ethics of international transactions in a ‘competitive market economy’.

## V. Damages

It is worth dwelling briefly on the question of damages. If we assume that the failure to meet ethical standards in a contract is a breach of the agreement, do the PICC provide for damages, and, if so, what damages?

While there may be some argument as to whether the failure to meet ethical obligations is a breach of the obligation to deliver conforming goods under Article 35 of the CISG,<sup>61</sup> this would not appear to be a point of debate under the PICC: ‘Non-performance is a failure by a party to perform any of its obligations.’<sup>62</sup>

If the breach results in direct economic harm—in other words, if the value of the performance is less than what was promised—then the aggrieved party would be entitled to the value of this loss.<sup>63</sup> If the breach results in consequential economic harm, such as loss of profits,<sup>64</sup> this would also be recoverable damages under the PICC.<sup>65</sup> As with all damage claims under the PICC, the damages would have to meet the tests of certainty<sup>66</sup> and foreseeability.<sup>67</sup> But these are common measures of damages from normal contractual breaches.

How far do the PICC intend damages to extend? The PICC expressly provide for non-pecuniary damages.<sup>68</sup> What do these include? The PICC, unlike the CISG,<sup>69</sup> provide, in Art. 7.4.2(2), for personal injury damages.<sup>70</sup> The comments to this article suggest that beyond physical injury, these damages also include non-physical harm to persons, such as loss of reputation.<sup>71</sup>

<sup>61</sup> See Schwenger (n 4) 266–68.

<sup>62</sup> PICC (n 1) art 7.1.1.

<sup>63</sup> *Ibid* art 7.4.2.

<sup>64</sup> Eg, the inability to resell or otherwise dispose of goods.

<sup>65</sup> *Ibid*.

<sup>66</sup> *Ibid* art 7.4.3.

<sup>67</sup> *Ibid* art 7.4.4.

<sup>68</sup> *Ibid* art 7.4.2 (2).

<sup>69</sup> CISG (n 5) art 5. Of course, it is not the policy of the CISG to forbid personal injury awards. The policy is to defer to the otherwise applicable domestic law.

<sup>70</sup> PICC (n 1) art 7.4.2 (2).

<sup>71</sup> *Ibid* art 7.4.2(2), comment 5.

Although this comment gives examples of the loss of reputation to an individual, one may assume that this would logically extend to the loss of reputation and goodwill of a company that might occur—for example, if the breaching party supplied goods that did not meet certain labour or environmental standards and the knowledge of this harmed the aggrieved party's reputation.

I am not unmindful here, though, that this may be more theoretical than practical given the almost universal exclusion of consequential damages in international commercial contracts. In other words, these are damages that would arise by default under the PICC and, therefore, could easily and likely be contracted around. Even so, the default rule would provide for these damages unless the parties expressly excluded them. By choosing this as the default rule, the PICC have expressed a policy of providing for this broad scope of recovery.

Because the measurement of damages for ethical breaches raises significant questions of valuation and, as with all damages, the aggrieved party would have to prove the loss with relative certainty,<sup>72</sup> this is the issue that the parties may well want to resolve in advance with a liquidated damages clause.<sup>73</sup>

As for non-monetary remedies, the parties may consider expressly providing for termination of the agreement for non-performance of a term imposing ethical standards of performance. This would avoid the factual question of whether the non-performance constitutes a 'fundamental non-performance',<sup>74</sup> questions of 'adequate assurances',<sup>75</sup> and other issues that may have to be resolved before there is a final determination of the respective rights of the parties.

## VI. Conclusion

Ethics and the PICC is a broad subject and, broadly conceived, constitutes two separate questions. First, how do the PICC encourage terms that reflect ethical behaviour the production and delivery of goods and services in international commercial trade? The second question is how the PICC encourage ethical behaviour in contracting itself.

As to the first question, the PICC are primarily a vehicle to allow the parties to craft their agreements in any way they wish with the utmost amount of autonomy. In this respect, the question of whether the parties will direct or encourage ethical behaviour is a determination that is not controlled by the use of the PICC. To the extent that there is a gap for implied terms to inform the agreement, if the more noble aspects of human interaction have become part of the fabric of international commerce, the PICC would provide the basis for these to be incorporated as a matter of law.

<sup>72</sup> Ibid art 7.4.3.

<sup>73</sup> The damage provisions in the PICC are, as with most provisions in the Principles, default rules, and be contracted around, for example, by a liquidated damages clause.

<sup>74</sup> Ibid art 7.3.1.

<sup>75</sup> Ibid art 7.4.3.

As to the second question, the PICC are specifically drafted to reflect the contractual expectations in international commercial contracts. This contracting has its own ethical standards of behaviour. Whether the PICC have the proper balance will be determined over the years by whether parties choose to use them.