

An Empirical Study of the UNIDROIT Principles – International and British Responses

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I. – INTRODUCTION

The UNIDROIT Principles of International Commercial Contracts (hereinafter: PICC) is intriguing. It aims to overcome the difficulties that national boundaries pose to international commercial contracts, but also, as a non-binding instrument, it challenges traditional methods of harmonisation that are frequently fragmentary and inadequate. Now that the third version of the PICC has been published,¹ the academic attention that the PICC has received is as relevant as ever.

As is the case for many modern legal instruments, this attention has focused on the PICC's impact. The key to successfully influencing the international arena is recognition: "[I]f nobody knows that it is there, the law has little capacity to shape behaviour."² The ICC Uniform Customs and Practice for Documentary Credits (UCP) is a particularly noteworthy illustration of a persuasive instrument at its best, which by catching the attention of the banks, is now involved in most documentary credits globally.³ The PICC's Preamble elects a similar tactic, attempting to seize the interest of key groups, namely legislators, judiciary, academics and the commercial world.

To assess whether the PICC has been successful in this approach, an evaluation of purely theoretical law will not suffice. Four socio-legal projects are noteworthy: firstly, a formal survey was undertaken by UNIDROIT in

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¹ The third version of the UNIDROIT Principles of International Commercial Contracts (2010) was formally adopted by the UNIDROIT Governing Council at its 90th session, held in Rome from 9 to 11 May 2011.

² J. GORDON / A. ROSETT, "United States" in: M.J. Bonell (Ed.), *A New Approach to International Commercial Contracts*, Kluwer Law, London (1999), 388.

³ *Ibid.*, 393.

September 1996, circulating a questionnaire to 1000 individuals who had shown an interest in the PICC. Whilst the responses denoted a great success, these results are somewhat biased, due to having only been sent to interested parties.⁴ Secondly, Gordon and Rosett sent questionnaires to judiciary, practitioners and law schools in Florida. By gathering data only from Florida, this survey is too restricted.⁵ Thirdly, CENTRAL conducted an enquiry on the use of transnational law, including the PICC.⁶ However, this survey failed to provide information as to why the PICC was used, the nationality of the parties, or the types of transaction. Fourthly, Clifford Chance conducted research on the desirability of a European Contract Law.⁷ This survey is not representative, focusing on only 8 EU Member States. Also, the majority of the respondents were large businesses, whereas within the EU 85% are small, 12% are medium, and only 3% are large businesses.⁸ Furthermore, the European Contract Law will be for B2B, B2C, and C2C transactions,⁹ whilst the survey ignored the involvement of consumers. In any case, this survey was researched only within the EU and whilst of interest in respect of attitudes towards harmonisation, does not directly address the PICC.

Accordingly, in order fully to address the behavioural attitudes towards the PICC, I have conducted my own empirical surveys. As I am only at the outset of my legal career in English law, it is of particular interest to conduct a comparison between international and British responses.

II. – THE COMMERCIAL WORLD

To assess the PICC's utility in the commercial world, questionnaires were sent to 500 UK practitioners and 500 practitioners internationally at random, although care was taken to ensure that the participants were at international

4 M.J. BONELL, "The UNIDROIT Principles in Practice", *Unif. L. Rev. / Rev. dr. unif.* (1997), 34.

5 GORDON / ROSETT, *supra* note 2, 407-408.

6 See M.J. BONELL "The UNIDROIT Principles and Transnational Law", 23-42, and K.-P. BERGER *et al.*, "The CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Arbitration", 91-114, both in: K.-P. Berger (Ed.), *The Practice of Transnational Law*, Kluwer Law, the Netherlands (2001).

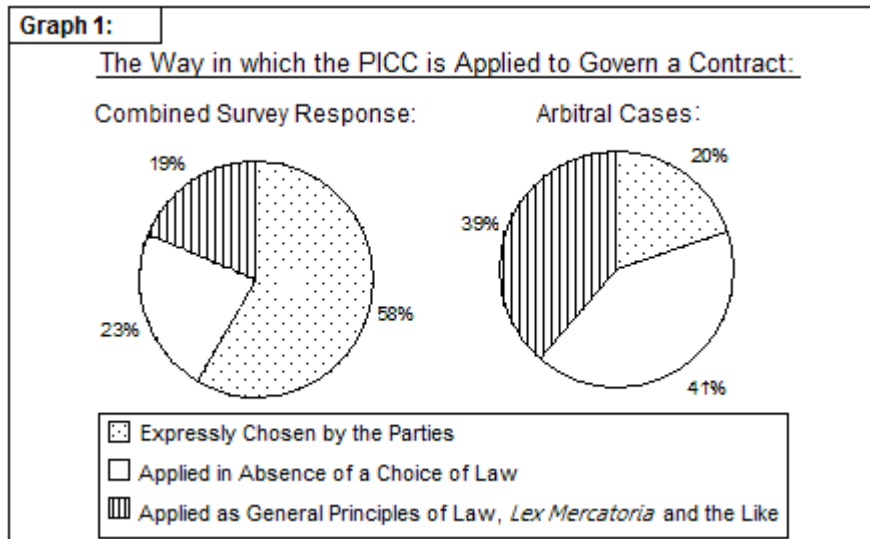
7 S. VOGENAUER / S. WEATHERILL, "An Empirical Contribution to the Debate", in: S. Vogenauer / S. Weatherill (Eds.), *The Harmonisation of European Contract Law*, Hart Publishing, USA (2006), 117.

8 *Ibid.*, 138.

9 Business-to-business, business-to-customer, and customer-to-customer transactions.

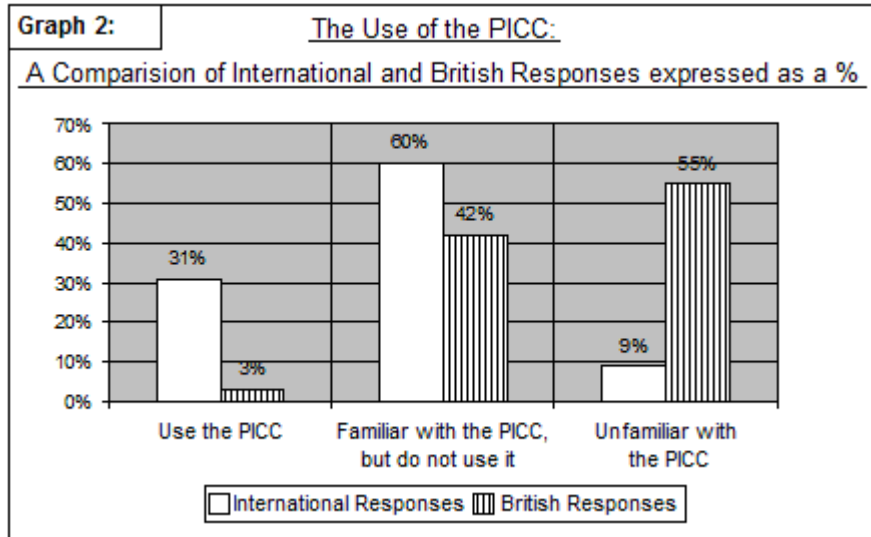
law firms and practised commercial contract law or international arbitration. This should mean that they were aware of, and hopefully employed, the PICC. The response rate was 20% and 14% for the British and international surveys, respectively. These responses illustrate the PICC's application in two ways by practitioners, namely, the use of the PICC as a choice of law governing the contract, and its use as a guide to drafting a contract.

1. The PICC as a choice of law



The Preamble anticipates three ways for the PICC to govern the contract: where it is expressly chosen by the parties; as general principles of law, *lex mercatoria* and the like; and in absence of a choice of law. Graph 1 illustrates the frequency of each of these methods, combining both international and British responses. However, as the British response consisted of only three positive results, published arbitral awards have also been employed. These two sets of data are inconclusive in determining the more popular method of application. The fact that these do not correlate is not necessarily relevant, as these are two entirely independent environments. Furthermore, the survey of awards will not account for awards recently published, contracts which selected arbitration that have not given rise to disputes, disputes that have not

yet reached award stage, or are yet to be published.¹⁰ As no clear majority is evident, it is suggested that all methods are of equal importance, and will be combined in the survey of the utilisation of the PICC generally for the purposes of the commercial survey.



It is paternalistic to restrict parties' choice of law to domestic laws, as it contradicts the notion of freedom of contract. This principle is clearly in sharp contrast in international and British responses. Graph 2 highlights the lack of demand for an instrument such as the PICC in Britain, as over half of the British respondents are unfamiliar with it: "In the last 20 years, I can safely say that I have never heard anyone refer to [the PICC]." ¹¹ This is not only due to lack of knowledge, but also of inclination, as out of the 45% of British practitioners who are familiar with the instrument, only 3% have applied it. Conversely, a far more positive result can be drawn from the international response, as nearly a third of international respondents have actually used it: "[The PICC] provides a simple neutral set of well organised parameters to govern international contracts that are rarely found in domestic legislations." ¹² Furthermore, whilst 60% are

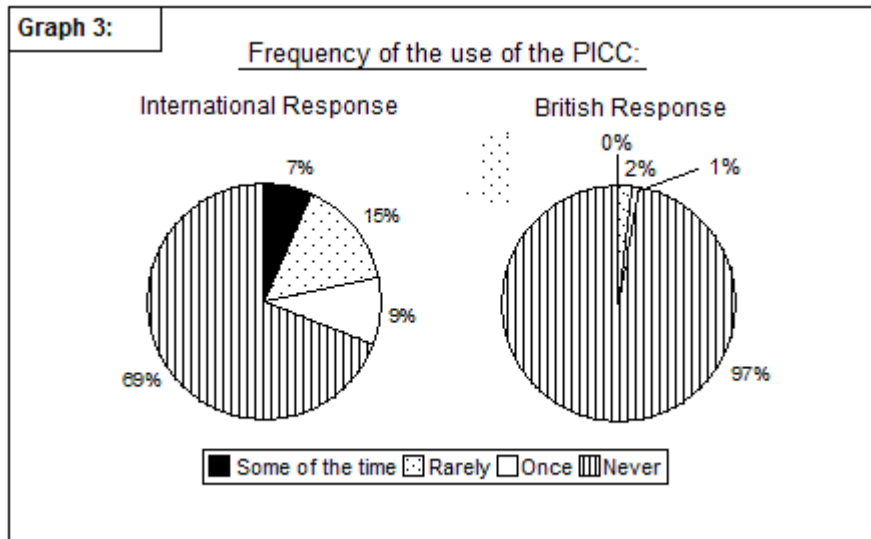
¹⁰ P. MAYER, "The Role of the UNIDROIT Principles in ICC Arbitration Practice", *ICC Supplement* (2002), 105 at 108.

¹¹ Partner, *Herbert Smith LLP* (UK).

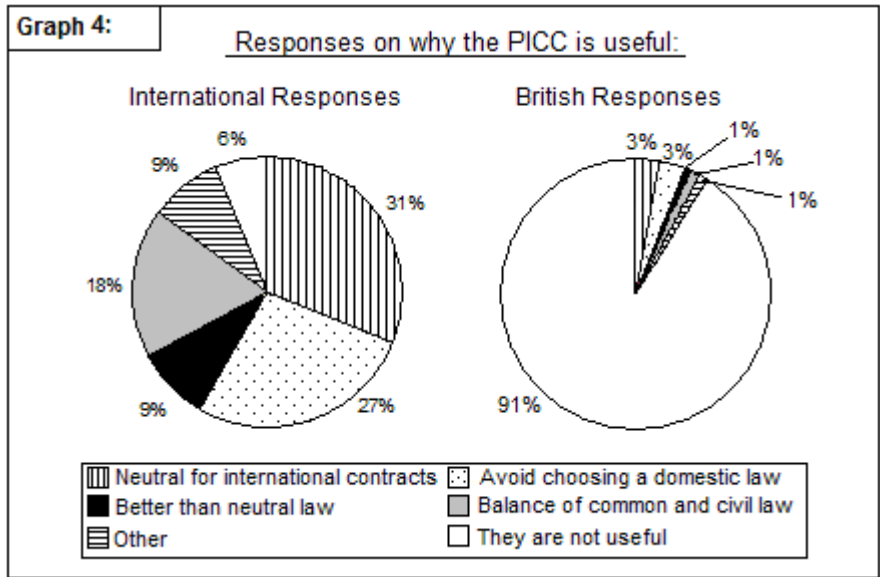
¹² Partner, *Baker & McKenzie LLP* (Chile).

familiar with, but have not employed, the PICC, the majority of these respondents did show an interest in using it, but had not done so thus far mainly due to adhering to their client's wishes.

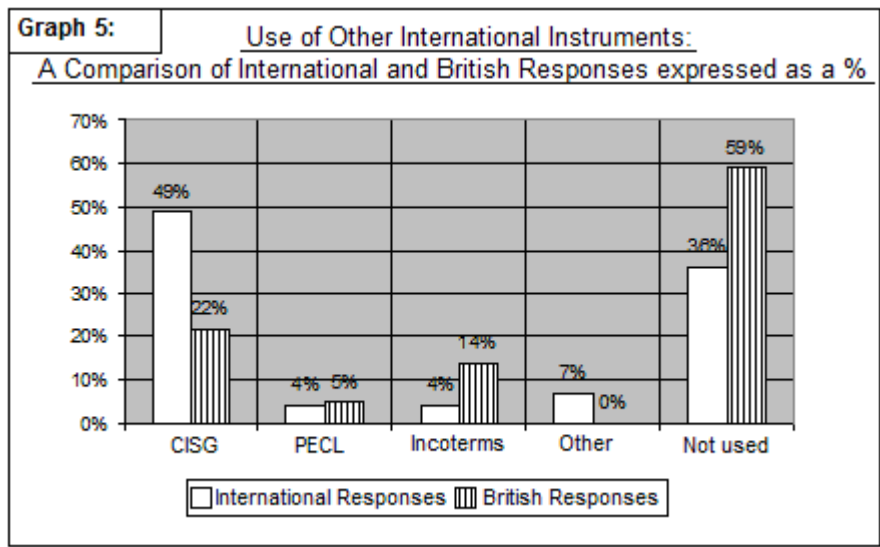
Although none of the respondents stated that they used the PICC "all of the time", Graph 3 illustrates that of the one third of international respondents that have used the PICC, an encouraging number have used it more than once. This illustrates that evidential benefits were proven upon application, warranting further use. Again, the British survey illustrated a dismissive attitude towards the PICC.



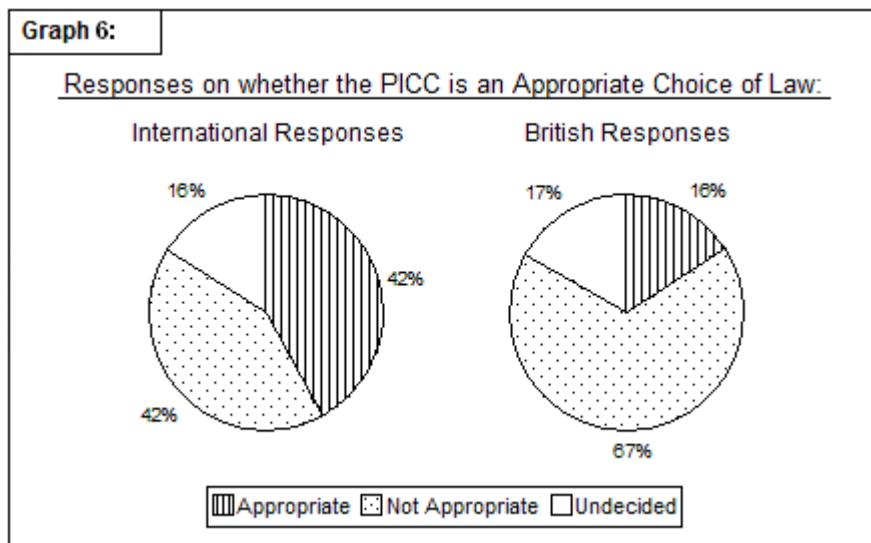
As the application of the PICC is largely the parties' prerogative, for the purposes of this study it was important to determine whether practitioners found the PICC useful, regardless of whether they had actually applied it. Graph 4 sheds light on the respondents' views of the need for the PICC. Again, the British response is largely dismissive. Conversely, the international responses illustrate a variety of benefits of using the PICC, especially due to its independent and neutral nature. Only a very small minority of the international respondents were dismissive.



From the data compiled so far, the British response is far less enthusiastic than the international reaction. It was therefore intriguing to assess whether this attitude was an isolated case and applied only to the PICC, or if this distinction was reflected in opinions of international instruments generally.



Graph 5 confirms an insular attitude of the British respondents towards the use of other international instruments, as well. The majority of the British respondents did not employ other international instruments either, preferring to use English law. Contrastingly, the majority of those in the international survey did employ other instruments. However, a large portion of these employed the 1980 *United Nations Convention on Contracts for the International Sale of Goods* (CISG), which is a mandatory instrument in countries that have become Parties to it.¹³ Therefore, those respondents who were potentially bound to apply the CISG may have distorted the international responses. Yet, the fact that the UK is not a party to the CISG further endorses the insular perspective reflected in this survey.

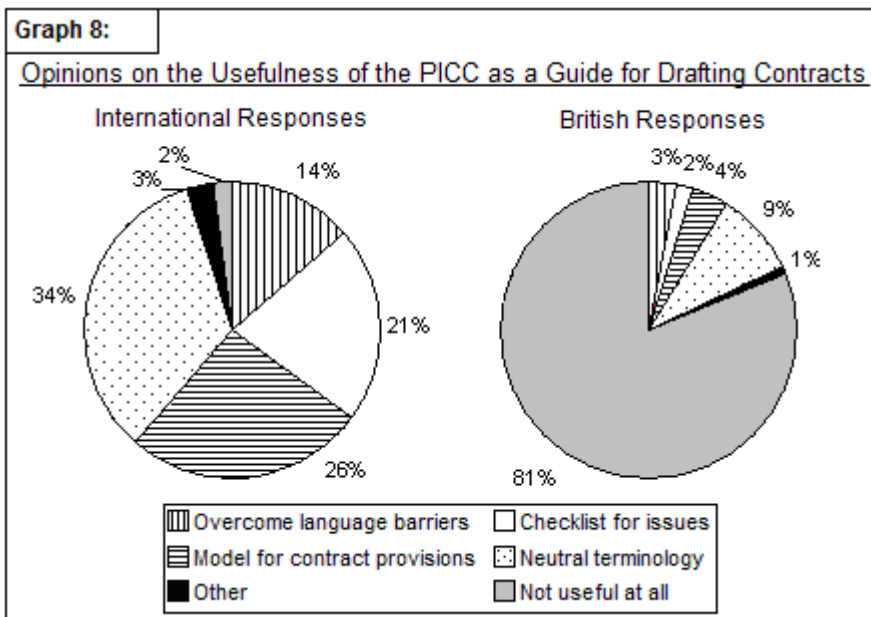
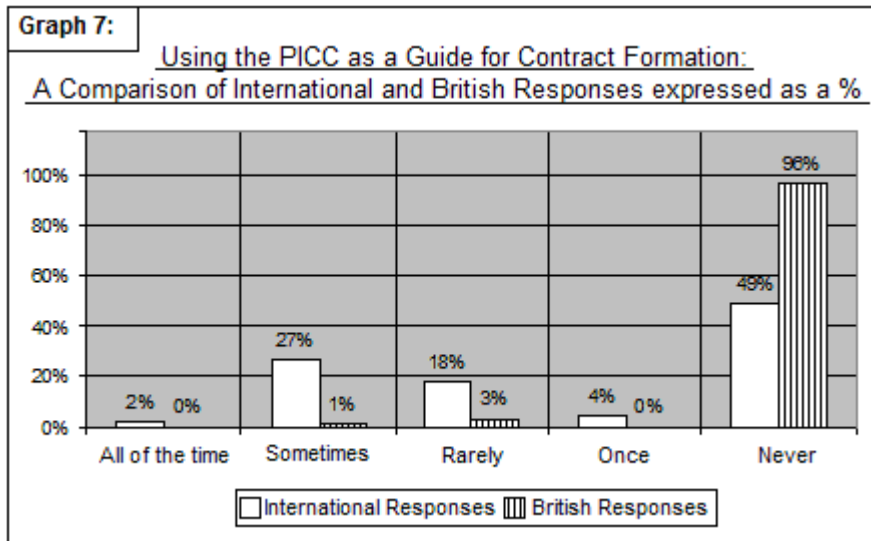


Finally, to better understand the opinions of respondents on International Restatements more broadly, Graph 6 proposes a theoretical question concerning the appropriateness of the PICC as a choice of law. Whilst this is still not the majority, the international responses clearly indicate a more positive view of the PICC.

¹³ The UK is not a Party to the CISG.

2. The PICC as a guide to drafting the contract

The survey also considered the PICC's application as a guide to drafting contracts.



The use of the PICC as a drafting guide has met with some scepticism, as the PICC does not provide rules for specific types of contract.¹⁴ This is illustrated in Graphs 7 and 8 by the British responses, as an extremely large majority never used it, nor saw any use for it. However, the PICC was created with an exceedingly high level of expertise and provides a “*summa*” of the current understanding of contract law.¹⁵ In other words, this issue is peculiar to Britain; in the international survey, the majority of respondents had used the PICC at some point. International respondents also proposed several benefits of using the PICC in this way, especially its neutral legal terminology and the coherent and clear rules that contractual provisions can be modelled upon.

This is an extremely important method of application as it illustrates the usefulness of the PICC and instils confidence in the parties concerned. In one instance, *Lemire v. Ukraine*, the PICC was used as a guide to drafting a contract by employing the principles as a model contract.¹⁶

Therefore, the PICC has been used successfully in this respect, despite hesitations due to its lack of provisions for specific types of contract. Nevertheless, whilst the international responses are extremely positive, the PICC is yet to fulfil its potential in this area. The British response cannot be concluded as merely a slow uptake, and therefore requires an explanation. Many British respondents justified their scepticism towards the PICC (see *infra*). Their reasoning may also aid in shaping approaches for the PICC in attempting to fulfil its potential.

ANALYSIS

1. The PICC’s incompleteness

Many British respondents argued that the PICC’s dependence on being supplemented by domestic law resulted in inherent problems of incompleteness. This argument has some merit, especially in comparison with English law and other domestic systems, which in the course of long years of application have created detailed rules. Whilst the PICC is of use for simple

¹⁴ R. MICHAELS, “Preamble I”, in: S. Vogenauer / M. Kleinheisterkamp (Eds.), *Commentary on the PICC*, Oxford University Press, Oxford (2009), 78.

¹⁵ P. WIDMER, member *ad honorem* of the UNIDROIT Governing Council, in an e-mail correspondence (16 August 2010).

¹⁶ *Lemire v Ukraine*, ICSID.ARB(AF)/98/1 (2000).

contracts,¹⁷ or contracts in which dispute proceedings are extremely unlikely, it is not autonomous. The 1994 edition did not address issues of agency, limitation of action, assignment of contracts, contracts for the benefit of third parties, set-off, and waivers. Whilst the 2004 edition filled this gap and addressed these issues, other areas were not dealt with, such as the unwinding of failed contracts, authority of the parties, illegality of an agreement,¹⁸ partnership, plurality of creditors and debtors, and tort.¹⁹ In these instances, the applicable domestic law must be resorted to at the inconvenience of the parties. For example, in ICC Case 11018, as neither the PICC nor the Principles of European Contract Law (PECL) dealt with invalidity arising from illegality, French law took a supplementary role.²⁰

However, the merit of this argument is short-lived, as these lacunae are addressed in the new 2010 edition of the PICC.²¹ The unwinding of failed contracts is now covered, dealing with both restitution and unjustified enrichment,²² which previously required an extension to be sufficient for complex problems, as well as provisions that catered to more specific contracts.²³ After being expressly excluded under PICC Article 3.1, illegality has now been addressed. Plurality of obligors and/or obligees, conditional obligations, and an expansion of the rules of restitution have all been addressed and incorporated in the 2010 edition.²⁴ General contract law has now been fully accounted for as well.²⁵

Nonetheless, tort may still be an issue since, although it appears to be addressed by the rules on illegality, in reality it is still absent.²⁶ Also, the

¹⁷ See ICC Geneva 9797 (2000).

¹⁸ J.D.M. LEW, "The UNIDROIT Principles as *Lex Contractus* Chosen by the Parties and Without an Explicit Choice-of Law Clause", *ICC Supplement* (2002), 85 at 90.

¹⁹ H. RAESCHKE-KESSLER, "The UNIDROIT Principles in Contemporary Contract Practice", *ICC Supplement* (2002), 99 at 104.

²⁰ ICC case 11018 (2002).

²¹ For the new provisions, see <<http://www.unidroit.org/english/workprogramme/study050/main.htm>>.

²² See the article by R. ZIMMERMANN reproduced in this issue of *Uniform Law Review*.

²³ RAESCHKE-KESSLER, *supra* note 19, 104; M.J. BONELL, *An International Restatement of Contract Law*, Ardsley, Transnational Publishers (2005), 364.

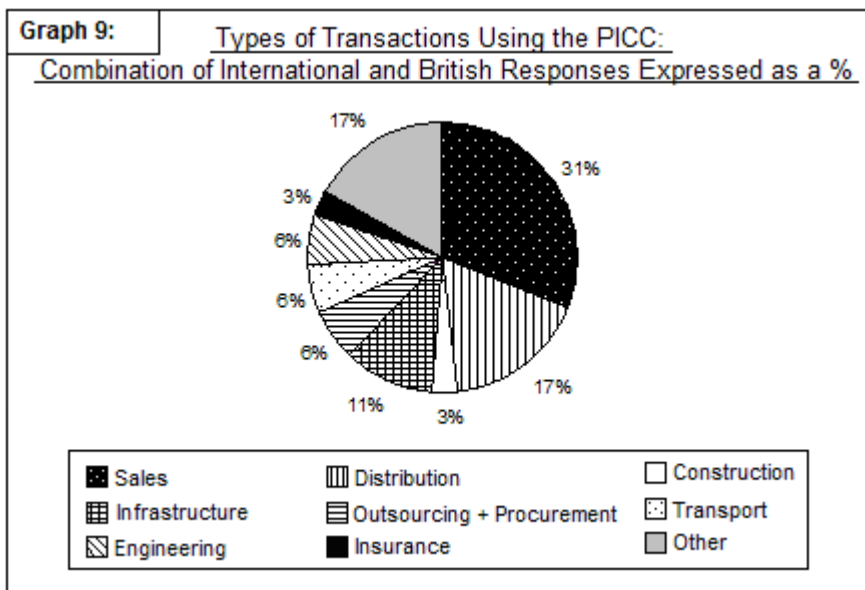
²⁴ BONELL, *supra* note 1.

²⁵ R. Zimmermann, *Rapporteur* on the unwinding of failed contracts for the 3rd version of the PICC, in a telephone interview (1 September 2010).

²⁶ Hilmar Raeschke-Kessler, Observer at the UNIDROIT Working Group, in a telephone interview (9 August 2010).

addition of the remedy of price reduction could be beneficial.²⁷

Aside from the above, few, if any, problems with the 2010 edition should be anticipated – it has now catered for the main general parts of contract law and the needs of the parties. The US Restatement has been used to illustrate the PICC's shortcomings. However, if the PICC maintained the complexity of the US Restatement (which partially influenced the PICC), it would be overly detailed. Whilst complexity is understood by developed systems, less-developed countries would not be able to understand it, denying the PICC's application.²⁸ Therefore, the PICC offers general contract law without impairing its universality: it is equally applicable to any international commercial contract. Graph 9 illustrates that the PICC's generality is to its advantage, being used for a variety of types of transaction.



²⁷ R. ZIMMERMANN, "The UNIDROIT Principles 2004 in a Comparative Perspective", 21(1) *Tulane European & Civil Law Forum* 1 (2006), 30.

²⁸ Professor Sir Roy Goode, Professor Emeritus, in a face-to-face interview (6 August 2010).

Also, whilst it cannot be realistically expected that the PICC will ever be entirely exhaustive since there is no judiciary purely devoted to it, the PICC is increasingly referred to in litigation, rendering it more relevant and concrete.²⁹ Furthermore, as the application of the PICC is subject to the contrary agreement of the parties, the gaps do not pose any substantial threat to its effectiveness.³⁰

2. *Ambiguity and inconsistency?*

Practitioners have voiced concerns with the generality and flexibility of the PICC. Firstly, it is argued that this results in ambiguity. For example, an English company and a French company may have expressly agreed that the PICC will govern their contract. The arbitrator may comply with this request, or instead reject it, and either choose English or French law or apply the CISG in countries that are Parties to the Convention.³¹ Again, practitioners do not want to advise clients to use an instrument whose outcome is unknown,³² and so by applying English law initially, dispute proceedings can be more easily predicted: "Business people want clarity and certainty as far as possible, and the Principles do not, in my view, provide that. Against that background one has to ask the question 'why would anyone use them?' " ³³

Secondly, the PICC's flexibility may result in inconsistent arbitral decisions. In two recent ICC cases (unpublished), while one arbitrator interpreted the parties' choice of the *lex mercatoria* as their authorisation to use both the PICC and the PECL, another arbitrator construed this as intent to apply the PECL in light of the PICC.³⁴ Most arbitrators caution that arbitration creates precedents, and often there are too many contradictions between awards for this to even be possible. This is misguided and should be rectified, as precedents would ensure a reduction in uncertainty.³⁵ Benson has

²⁹ BONELL, *supra* note 1.

³⁰ Pilar Perales Viscasillas, Observer at the UNIDROIT Working Group, in e-mail correspondence (4 August 2010).

³¹ GORDON / ROSETT, *supra* note 2, 411-413.

³² Partner, *Freshfields LLP* (UK) (16 July 2010).

³³ Partner, *Stephenson Harwood* (UK).

³⁴ E. JOLIVET, "The UNIDROIT Principles in ICC Arbitration", *ICC Supplement* (2005), 65 at 68.

³⁵ P.-E. DESSEMONTET, "Use of the UNIDROIT Principles to Interpret and Supplement Domestic Law", *ICC Supplement* (2002), 39 at 45.

suggested that arbitral precedents develop simultaneously with custom³⁶ – Case 9797 is an illustration of trend-setting. Nevertheless, these concerns have been outweighed by the PICC's positive feedback as a clear guide on the path to predictable arbitral decisions.³⁷ For example, vagueness is certainly a concern in countries such as Germany and Spain, which possess a substantive civil code that is 10 times more substantive than the PICC, even without their supplementary commentary.³⁸ If practitioners in these countries are still willing to apply the PICC, the hesitation of British practitioners appears undeserved. Furthermore, the PICC is increasingly employed in arbitration, thereby enhancing its certainty.

3. *Civil law v. common law*

Another response to the British survey was that the PICC is viewed as “a civil lawyer’s dream and a common lawyer’s nightmare”:³⁹ “[The PICC] is completely irrelevant and worthless. [It is] the product of civil law systems.”⁴⁰ Notoriously, there are difficulties in codifying civil and common law.⁴¹ Initially, common lawyers’ perception of civil law was described as “inquisitorial” and in return, civil lawyers viewed common law as unscientific and based on illogical instinct.⁴² The legal terminology differs, and whilst the concept of “trial” is widely known and referred to by common lawyers, it holds no substance for civil lawyers.⁴³ Another example is that in civil jurisdictions, the use of appeals is integral to dispute proceedings, whereas common law employs them on a more occasional basis.⁴⁴

The British respondents used the differences between the PICC and common law as a justification for their dismissal of it. This is also illustrated by the relatively poor uptake of the system in the United States: Rosett and

³⁶ B.L. BENSON, “The Spontaneous Evolution of Commercial Law”, 55(3) *Southern Economic Journal* (1989), 644 at 658.

³⁷ BONELL, *supra* note 23, 179.

³⁸ Partner, *Freshfields LLP*, *supra* note 32.

³⁹ H.R. DUNDAS, “Negotiating in ‘Good Faith’”, at <www.davewaddell.co.uk/hrd/art/aiton-98.doc> (7 August 2010).

⁴⁰ Partner, *Towers & Hamblins LLP* (UK).

⁴¹ H. GUTTERIDGE, *Comparative Law*, Wildy, London (1971), 163.

⁴² S. GOLDSTEIN, “On comparing and unifying civil procedural systems”, in: R. Cotterrell (Ed.), *Butterworth Lectures 1994*, Butterworths, London (1995), 1.

⁴³ *Ibid.*, 3.

⁴⁴ GOLDSTEIN, *supra* note 42, 5.

Gordon's practitioners' survey of 100 members of the Florida Bar Section on International Law and 24 members of the Section Executive Committee concluded that 50% of the 30% who knew of the CISG had actually used it, whereas only 15% had knowledge of the PICC, with only 1 who had used it and 2 who had seen it in form contracts.⁴⁵ Rosett and Gordon's judicial survey to 100 judges in civil matters in the Florida Circuit Court found that whilst 40% had dealt with international contract issues, none had used the CISG or PICC.⁴⁶

The most frequently raised difference, both in the survey conducted and by commentators, is the PICC's observance of good faith and fair dealing as a fundamental obligation under Article 1.7, which is reflected either directly or indirectly throughout the PICC.⁴⁷ Most civil law countries adhere to the duty of good faith, employing it as an overarching principle.⁴⁸ However, common law systems do not uphold a general duty of good faith. Yet, this does appear to be changing in some common law jurisdictions, and in America, although it does not extend to pre-contractual negotiations, a duty of good faith has been recognised.⁴⁹ The Australian case of *Hughes Aircraft Systems International v. Aircservices Australia*⁵⁰ has also shown a change in attitude, stating that the principle of good faith is fundamental and should be adhered to.⁵¹ Whilst the implementation of the Unfair Terms in Consumer Contracts Regulations 1994 has inserted a duty of good faith for consumer contracts into English law, the notion of a general duty is still rejected, not only due to upholding English precedent,⁵² but for practical reasons.⁵³ Firstly, the duty is too open-ended and ambiguous for English law, where legal predictability is more desirable in commercial disputes. Secondly, a general duty removes the task of the courts to allocate and determine risk, placing it upon the parties instead.⁵⁴

45 GORDON / ROSETT, *supra* note 2, 407-408.

46 *Ibid.*, 408.

47 *E.g.*, Arts. 1.9(2); 2.1.15; 3.10; 4.1(2), etc., refer to good faith.

48 O. LANDO, "Out on a Limb" – provided personally by the author, 3.

49 R. GOODE, "International Restatements of Contract and English Contract Law", *Unif. L. Rev. / Rev. dr. unif.* (1997), 231, 238 – *i.e.*, US Restatement, s. 205; UCC, s. 1-203.

50 [1997] 76 FCR.151.

51 G.A. MOENS *et al.*, "Australia", in: Bonell, *supra* note 2, 26.

52 *Campbell Discount v. Bridge* [1962] AC 600.

53 LANDO, *supra* note 48, 4.

54 GOODE, *supra* note 49, 239-240.

Other conflicts are also apparent. Firstly, the PICC permits pre-contractual negotiations to influence contract interpretation.⁵⁵ English law rejects this. In *Chartbrook Limited v. Persimmon Homes Limited*,⁵⁶ Lord Hoffmann stated that the PICC reflects the French rules on contractual interpretation, which are different and irreconcilable with English law. Secondly, unlike English law, the PICC has no requirement of consideration or intention to create legal relations.⁵⁷ Thirdly, with regard to hardship and force majeure, the former addressed in PICC Article 6.2, this has no parallel in English law, and is also alien to many legal systems.⁵⁸ Comments have ranged from “appreciation to outright criticism.”⁵⁹ With regard to force majeure, PICC Article 7.1.7 allows non-performance of the specific obligation that has been impeded rather than terminating the entire contract as is done under the English doctrine of frustration.⁶⁰ Furthermore, unlike the “all or nothing” approach of the frustration doctrine in English law, PICC Article 6.1.11 permits re-negotiation of the contract terms where the equilibrium of the contract has been affected by certain events.⁶¹ Fourthly, the use of the civil law “*Nachfrist*” in PICC Article 7.1.4 and 7.1.5, which permits the breaching party to remedy the breach (if not a fundamental breach) after the date on which performance was due, where it is appropriate and where notice has been provided to the injured party, is alien to the common law lawyer.⁶² Fifthly, PICC Article 7.2.2 provides for specific performance to be the primary remedy in the case of breach of the contract, as well as recourse to a judicial penalty in default of performance under Article 7.2.4. This follows civil law traditions; under English law,⁶³ it is an extraordinary remedy, with the primary remedy for breach being damages.⁶⁴ Sixthly, English law does not yet provide authority to request adequate assurance that the performance will be carried out.⁶⁵ This is, however, provided by PICC Article 7.3.4. Finally, PICC Articles 5.4 and 5.5

55 PICC Art. 4.3.

56 [2009] UKHL 38; [2009] AC 1101 at 1119-20 [para. 39].

57 M. FURMSTON, “United Kingdom”, in: Bonell, *supra* note 2, 384.

58 *Ibid.*, 385.

59 A.G. DOUDKO, “Hardship in Contract”, *Unif. L. Rev. / Rev. dr. unif.* (2000), 483 at 485.

60 GOODE, *supra* note 49, 244.

61 *Ibid.*, 243.

62 MOENS *et al.*, *supra* note 51, 45.

63 Sales of Goods Act 1979, s.52.

64 GOODE, *supra* note 49, 241.

65 *Ibid.*, 240-241.

adopt the French distinction between a duty to achieve a specific result and a duty of best efforts, which is virtually unknown in English law.

There are also outright contradictions with civil law, for example “gross disparity”, which is similar to the common law doctrine of unconscionable conduct. It is noteworthy that the PICC even extends this application, as in Australian case and statute law under Part IVA of the Commonwealth Trade Practices Act 1974 this doctrine only provides for consumer protection law.⁶⁶ Other conflicts that can be illustrated are the judicial penalty payable to the obligee and the indexation of damages to be paid in instalments.⁶⁷

Therefore, an empathetic perspective can be adopted, as applying unknown principles is daunting, especially for lawyers who practise such an old, established law. Nevertheless, these differences cannot be considered as detrimental to English law, or to any other common or civil law system. Comparative procedural work illustrates that many of the differences between common and civil law are illusory.⁶⁸ To an extent, English law was never fully segregated from European continental law. Hence impressions of civil law are evidential in English law.⁶⁹ For example, the English law’s doctrine of consideration is a variant of the medieval “*causa*” doctrine.⁷⁰ Furthermore, academics and the judiciary have instilled civil law into their commentary. Concerning judicial pioneers of this approach, Lord Mansfield used continental sources substantially.⁷¹ Several English academics promoted comparative study, such as Lawson, Hamson, and Thomas who endorsed its importance with Roman law, French law, and mixed legal systems respectively, using it to improve English law.⁷² In other words, due to historical connections and the fact that both systems are aimed at achieving conflict resolution,⁷³ the differences are not disagreements of fundamental rights and obligations but are largely procedural and could be easily equated, if necessary. The Canadian

⁶⁶ MOENS *et al.*, *supra* note 51, 34-36.

⁶⁷ J. BASEDOW, “Germany”, in: Bonell, *supra* note 2, 144.

⁶⁸ GOLDSTEIN, *supra* note 42, 1.

⁶⁹ R. ZIMMERMANN, “Roman Law and the Harmonisation of Private Law in Europe” in: A. Hartkamp *et al.* (Eds.), *Towards a European Civil Code*, Kluwer Law, Amsterdam (2004), 34.

⁷⁰ *Ibid.*, 38.

⁷¹ ZIMMERMANN, *supra* note 69, 37.

⁷² J.W. CAIRNS “Development of Comparative Law in Great Britain”, in: M. Reimann / R. Zimmermann (Ed.), *The Oxford Handbook of Comparative Law*, Oxford University Press, New York (2008), 164-167.

⁷³ GOLDSTEIN, *supra* note 42, 13.

Federal Law – Civil Law Harmonisation Acts Nos. 1 and 2, enacted in 2001 and 2004 respectively, have shown that equilibrium can be achieved.⁷⁴ As Canada is largely comprised of common law jurisdictions, with only Quebec being a civil law system, past tendency has been to instil Canadian legislation with purely common law terminology and procedures. This Act has aimed at addressing the distortion, codifying the Civil Code of Quebec with other federal legislation.⁷⁵ Accordingly, common and civil law are not as opposite as we think, and in fact exist much closer together on the spectrum. The PICC has achieved an extremely feasible balance between the two: “The PICC was a genuine effort to find common ground. It has substantial similarities with both systems. The problem is that we always spot the unfamiliarities first.”⁷⁶ It is generally complementary to civil law systems. Regarding civil legal systems, the German report concludes that most of the PICC provisions can be found in either the Civil Code; Commercial Code; or the Act on the Regulation of the Law of General Conditions of Contract.⁷⁷ Equally, Michaels notes that the PICC has been heavily influenced by common law, as well as the UCC.⁷⁸ The Australian report also recognises a good balance between the two.⁷⁹

If anything, the PICC provides up-to-date rules from which English law could benefit and be modernised. Also, there are provisions that are relatively similar: for example, most of PICC Chapter 2 on formation largely applies the English techniques of offer and acceptance, although there are two exceptions under Article 2.15 (Negotiations in bad faith) and Article 2.22 (Battle of the forms).⁸⁰ Chapter 3 is also largely identical.⁸¹ Additionally, despite concerns on first inspection about some PICC provisions, in practice they are not substantially different from English law. For example, PICC Article 7.2 employs the phrase “rights to performance”, which refers to specific performance in English law.⁸² English lawyers should not focus on the differences between the PICC

⁷⁴ See <<http://www.canlii.org/en/ca/laws/stat/sc-2004-c-25/latest/sc-2004-c-25.html>> (9 August 2010).

⁷⁵ W. TETLEY, “Mixed Jurisdictions (Part II)”, *Unif. L. Rev. / Rev. dr. unif.* (1999), 877, 891.

⁷⁶ ZIMMERMANN, *supra* note 25.

⁷⁷ BASEDOW, *supra* note 67, 144.

⁷⁸ MICHAELS, *supra* note 14, 32.

⁷⁹ MOENS *et al.*, *supra* note 51, 54.

⁸⁰ “Battle of the forms” is unknown to English law.

⁸¹ FURMSTON, *supra* note 57, 383.

⁸² *Ibid.*, 383.

and English law, but instead realise the opportunity that the PICC offers for progress.

4. *The British mindset*

Consequently, the British practitioners' concerns do not correlate with the meagre application of the PICC in Britain – they are excuses rather than substantive problems. A more likely reason is the British mindset in respect of harmonisation mechanisms. As Graph 4 illustrated, whilst only 6% of international respondents failed to see a use for the PICC, 91% of the British respondents drew this conclusion. Furthermore, Graph 5 showed that this dismissive attitude is not confined to the PICC, but extends to international instruments more generally. Gutteridge argues that Britain has shown support for harmonisation and international instruments such as the Brussels Conventions on Maritime Law, and the Hague Rules on the Liability of Ship-owners 1921.⁸³ Britain certainly makes a contribution to harmonisation by organising seminars and attending diplomatic conferences, committing to Organisations such as UNCITRAL, ICC and UNIDROIT, and by providing excellent academics and practitioners as members of working groups and as rapporteurs.⁸⁴ However, Gutteridge's argument is outdated, as Britain either does not adopt the resulting instruments, or ratifies them too late to become a leader in the instruments' application:⁸⁵ “[Britain makes] a major input into the fashioning of international instruments of different kinds but all too often walk[s] away from the finished product.”⁸⁶ For example, Britain has abstained from becoming a Party to the Hague Conference's private international law Conventions. Similarly, the 2001 *Cape Town Convention on International Interests in Mobile Equipment* has now been ratified by 37 States, including the US, as well as by the EU, whereas Britain is only just initiating possible ratification.⁸⁷ Finally, the UK took 17 years to ratify the 1958 *New York Convention on the Enforcement of Arbitral Awards* (New York Convention).

83 GUTTERIDGE, *supra* note 41, 162.

84 R. GOODE, “Insularity or Leadership”, 50(4) *International and Comparative Law Quarterly* (2008), 751, 755.

85 *Ibid.*, 751.

86 GOODE, *supra* note 84, 751.

87 GOODE, *supra* note 28.

By being the 48th nation to adopt it, any substantial power to influence the project was lost.⁸⁸

Gutteridge has proposed that Britain cannot act independently due to its close connections with other English-speaking countries.⁸⁹ This is misguided, as is illustrated by the CISG, which Britain is unlikely ever to ratify. In fact, the CISG had been scheduled to be introduced years ago as a Private Members Bill. However, the Law Lord who was due to introduce it fell ill and was never replaced.⁹⁰ Now, the Department of Trade and Industry has stated that ratification would only occur if “a crowd should appear in the streets outside the Ministry crying ‘give us the Vienna Convention’.”⁹¹ Conversely, all the other major trading countries are now Parties to it. India is actually waiting for the UK to ratify it so that it can do so as well. If anything, Britain is ignoring what its partners want.

These trends demand explanations as to why Britain resists change. The UK has pleaded lack of space on the legislative agenda.⁹² However, it is evident that it is not time, but inclination, that is lacking: for example, surely space has been available to ratify the CISG in the past 30 years?

Rather, it is the British mentality, an inclination to dispute whether harmonisation is even necessary. In Clifford Chance’s survey, 97% of the UK respondents said that they would prefer to use their own domestic law.⁹³ They use the UK and USA as illustrations of single markets that function perfectly, despite the diversity in laws of Scotland, Northern Ireland, England and Wales, and the US Federal states, respectively. Rather, it is argued that there are more significant barriers to trade such as language, culture and currency.⁹⁴ However, the US and the UK share common ground as to language and culture, yet their markets do not function in the same way in the international arena, or as that of the EU, for example.⁹⁵ Other criticisms made

88 GOODE, *supra* note 84, 756.

89 GUTTERIDGE, *supra* note 41, 164.

90 GOODE, *supra* note 28.

91 FURMSTON, *supra* note 57, 380.

92 GOODE, *supra* note 84, 757.

93 Vogenauer / Weatherill, *supra* note 7, 121.

94 E. MCKENDRICK, “Harmonisation of European Contract Law”, in: Vogenauer / Weatherill, *supra* note 7, 22.

95 *Ibid.*, 24-25.

by the UK judiciary include Mr Justice Hobhouse likening international instruments to Esperanto, as idealistic, deficient systems.⁹⁶

McKendrick has dismissed these objections to harmonisation, arguing that Britain is simply nationalistic.⁹⁷ Domestic law is part of a nation's heritage, a cultural illustration of a country's past.⁹⁸ Unsurprisingly, many countries are unwilling to abolish parts of their history and identity: "We should be profoundly grateful for this diversity. We can learn far more from these diverse systems than we could have ever have derived from a single monolithic regime." ⁹⁹ This will undoubtedly be more evident in Britain, as English law dates back centuries. It has developed through its own experiences, making it original and unique, being classified as "an autochthonous national achievement". ¹⁰⁰ This cultural identity would be lost if this was replaced. Accordingly, Britain is entrenched in national preferences, such as its choice to maintain sterling rather than switch to the euro, and its largely poor attempts to embrace other languages.

However, a British practitioner's mindset is more than an emotional attachment – it also reflects a fear of the unknown: "It is better; it seems, to belong to the priesthood and conform to its rituals than to carry the cross for justice and relevance in the law." ¹⁰¹

This mindset also finds expression in parochialism. We hold on to the conventional wisdom that English law is superior: "[The PICC] have little merit when compared to the depth and sophistication of English contract law ... the Principles are a nightmare. I would forget about the Principles." ¹⁰² English law is often assumed to be the governing law, and London is frequently selected as the hub of international litigation.¹⁰³ A section of the High Court, the "commercial bar" was created specifically for international commercial

⁹⁶ B. NICHOLAS, *"The United Kingdom and the Vienna Sales Convention"* (1993), at <<http://www.cisg.law.pace.edu/cisg/biblio/nicholas3.html>> (8 August 2010).

⁹⁷ MCKENDRICK, *supra* note 95, 19.

⁹⁸ O. LANDO, "European Contract Law and the Lex Mercatoria", in: J. Basedow et al., *Private Law in the International Arena*, TMC Asser, The Hague (2000), 395.

⁹⁹ Lord GOFF, "Coming Together – the Future", in: B.S. Markesinis, *The Clifford Chance Millennium Lecture*, Hart Publishing, Oxford (2000), 239.

¹⁰⁰ ZIMMERMANN, *supra* note 69, 34.

¹⁰¹ Citing Thomas Lord BINGHAM, "A New Common Law for Europe", in: Markesinis, *supra* note 100, 308.

¹⁰² Partner, Hogan Lovells International LLP (UK).

¹⁰³ Lord GOFF, *supra* note 100, 244.

transactions. This has been overwhelmingly popular, with 50% of the cases before it having one party that is not British, and 30% having two foreign parties in 1993.¹⁰⁴ It was due to this dominance that Mr Derek Wheatley Q.C. opposed the ratification of the CISG,¹⁰⁵ and it is why many practitioners are now strongly of the view that English law is, and will remain, the superior choice of law: “[Displacing English law internationally] is like saying Esperanto will be the new international language – you can invent a language and have academic debate about how easy it is to learn but it will not displace the English language.”¹⁰⁶

However, this superiority is an insular perspective. Continental lawyers and academics are cautious about applying English law. As Ole Lando argues: “I have great admiration for the common law approach to legal problems, but their very casuistic methods leads to a great amount of uncertainty.”¹⁰⁷ As little as 15 years ago, English law and English courts were always used. Instead, today, due to the growth of arbitration, English law and ICC arbitration, for example in Paris, are used.¹⁰⁸ The forum is changing, and English law may not always have a permanent position in the international arena. Indeed, 12 years ago, in ICC arbitration it was recorded that both Swiss and French law were applied more frequently than English law.¹⁰⁹ Today, largely due to the New York Convention, North American law is used as much as, if not more than, English law. In Brazil, straight-forward translations of American contracts have been made and are used extensively.¹¹⁰ To address this, Britain is undertaking self-preservation. At a conference in Oxford, Bénédicte Fauvarque-Cosson reported a barrister’s comment that it would be “an important professional fault to advise a party to use the PICC.”¹¹¹ By maintaining the wide use of English law, business is being provided to practitioners and the judiciary. This is well illustrated by the 2001 Cap Gemini Report, in which the Lord Chancellor stated that by the end of

104 NICHOLAS, *supra* note 97.

105 *Ibid.*

106 Partner, *Herbert Smith* (14 July 2010).

107 Ole Lando, member of the UNIDROIT Working Group, in a telephone interview (4 August 2010).

108 *Supra* note 107.

109 ICC, “1999 Statistical Report”, 11(1) *ICC Bulletin* 1 (2000), 7.

110 L. GAMA Jr, PUC-Rio, member of the UNIDROIT Working Group, in a Skype interview (21 August 2010).

111 D. FAUVARQUE-COSSON, *PICC Rapporteur*, in a telephone interview (4 August 2010).

2000, UK legal services gained about £800 million p.a. in invisible earnings. Clearly, any alternative contract law to English law would undoubtedly result in a reduction in this income.¹¹²

Another paradigm to this mindset is that despite being highly respected, academic doctrine has never been a source of law. Although academics have freedom as to the scope, time period, and opportunity for reconsideration of their work, they lack the focus achieved through judicial decision-making, which has short timeframes and obligations to discuss precedents. Academics will tend to succumb to untested assumptions instead.¹¹³ Hence, English judges are inclined to treat academic ideals as no more than a starting point: "A crumb of analysis is worth a whole loaf of opinion."¹¹⁴ This sheds light on the icy welcome afforded the PICC.

Accordingly, the British mindset encompasses a parochial attitude, fuelled by fears of the unknown, of losing national identity, of losing income from the application of English law, and by an element of derogation towards academic practice. Britain is trapped in an insular perspective, becoming increasingly isolated. Furmston argued back in 1999 that Britain might finally have the right attitude to accept the PICC, and the idea that harmonisation is possible, and preferable.¹¹⁵ 11 years have now passed since he made this statement, yet little has changed. Despite being a major trade player, Britain is now reluctant to send an academic or Government official to take part in international negotiations. Due to financial constraints, a principal at best is sent, resulting in Britain's exclusion from contributing at all during negotiations.¹¹⁶ The commercial realities of isolation that Lord Justice Steyn suggested would encourage ratification in 1991¹¹⁷ now need to be realised. Britain's refusal to participate in the harmonisation process will deter few, if any, countries. That process will continue without it, to the detriment of British trading interests¹¹⁸ and resulting in the decline of English law and the use of London as a centre of commercial arbitration.¹¹⁹ For every contract governed by

¹¹² MCKENDRICK, *supra* note 95, 20.

¹¹³ Lord GOFF, *supra* note 100, 243, fn.9.

¹¹⁴ *Ibid.*, 243.

¹¹⁵ FURMSTON, *supra* note 57, 386.

¹¹⁶ GOODE, *supra* note 28.

¹¹⁷ NICHOLAS, *supra* note 97.

¹¹⁸ GOODE, *supra* note 28.

¹¹⁹ LANDO, *supra* note 108.

English law, there are increasingly other contracts governed by another domestic law, or by supranational rules. Also, English law is in dire need of reform itself (see *infra*). Therefore, a pessimistic view must be taken for the PICC. The fate, in Britain, of the CISG, an international treaty drafted by Government representatives, leaves little hope for an academic project on contract law.¹²⁰

SUMMARY

To conclude on the PICC's impact on the commercial world, given that the PICC relies purely on persuasion, it has been particularly successful. The responses received from the international survey illustrate the PICC's overwhelming success, especially as practitioners are usually conservative and typically would not apply an innovative international instrument.¹²¹ Mayer denies any such positivity of the PICC being applied to govern the contract, pointing to the fact that of the 600 ICC awards rendered in 1999-2000, only 14 applied the PICC.¹²² However, Bonell disregards this, arguing that the PICC has done stunningly well in relation to other international instruments. For example, the CISG took eight years to come into force and be applied, and a further four years to gain its first 100 instances of application.¹²³ Furthermore, the rate of the PICC's application has greatly increased since then. The UNILEX database currently contains 266 cases that have referred to the PICC in some way, either in courts or arbitral tribunals.¹²⁴ 156 of these cases are arbitral awards, 85 of which rendered by the ICC. 56 of these cases used the PICC to govern the contract, although 5 cases rejected such use.

This growth is further illustrated by the UNIDROIT Secretariat's questionnaire in 1996, which concluded that 27.3% of the respondents had used the PICC. As noted, their research was confined to those who had expressed an interest in the PICC – 31% of the international survey used the PICC, which was free of any bias. This shows substantial growth. This response to the international survey can therefore be viewed as a resounding success.

¹²⁰ FURMSTON, *supra* note 57, 380.

¹²¹ M. PERTEGÁS, Observer at the UNIDROIT Working Group, in a telephone interview (27 August 2010).

¹²² MAYER, *supra* note 10, 106.

¹²³ M.J. BONELL, "UNIDROIT Principles 2004", *Unif. L. Rev. / Rev. dr. unif.* (2004) 5, 16.

¹²⁴ <www.unilex.info>, last consulted 11 September 2011.

There is no doubt that the PICC is an illustration of academic excellence, gaining worldwide recognition and formal endorsement. Despite being somewhat delayed, the 2004 edition was formally endorsed by UNCITRAL in 2007 at its 40th Session.¹²⁵ UNIDROIT was congratulated on its continued efforts to facilitate international trade, and it was stressed that the PICC “provided a comprehensive set of rules for international commercial contracts.”¹²⁶

However, in comparison to the success of the UCP in terms of practical application, there is certainly room for improvement as far as the PICC is concerned. The PICC is on the traditional path taken by any new legislative instrument: ideas are created by experts, then analysed by academics, and then applied by practitioners. Practitioners are always more hesitant as certainty is essential when advising on legal action; they will wait for academic analysis and judicial precedents. They tend to be more conservative, failing to recognise the merits of a new instrument when a good, coherent system is already available at home. Graph 2 showed that over half the British respondents had not even heard of the PICC. Even those that are familiar with the PICC seem to perceive its application as the law governing the contract as risky,¹²⁷ preferring it to be supplemented by an applicable law. Furthermore, Graph 6 illustrated a substantial number of respondents, both internationally and in Britain, who were undecided on using the PICC as a choice of law. Clearly, then, the PICC has yet to fulfil its potential. Whilst its success internationally has been very promising so far, it is also thought-provoking, as an appropriate approach to promoting the PICC needs to be found. Several mechanisms should be employed to translate the PICC’s academic endorsement into practical application. To begin with, a target group needs to be found. For the UCP, the banks were the target, being used as a stepping-stone and making it incredibly successful. The PICC for its part should target small and medium-sized enterprises (SMEs), since the PICC is more beneficial to such businesses, helping them to avoid exploitation by dominant parties’ choice of domestic law. The PICC is even more favourable to weaker parties than neutral laws such as Swiss law, which can be somewhat callous, for example in its limitation periods.¹²⁸ However, larger

¹²⁵ See <<http://www.uncitral.org>> (last consulted 11 July 2010).

¹²⁶ General Assembly, 62nd Session, Report of UNCITRAL on the work of its fortieth session A/62/17 (Part I), paras. 209-213.

¹²⁷ Even Working Group members – e.g., Gama, *supra* note 111.

¹²⁸ WIDMER, *supra* note 15.

businesses' choice of domestic law will be more difficult to shift, as domestic law tends to be advantageous to them. An important group to target are the Embassies' commercial and trade attachés for their role in assisting SMEs, in particular, in their trade with other countries. This assistance will include trade fairs and export assistance (including financial) in an effort to expand the SMEs' trade beyond their domestic markets. These Embassy departments should be targeted to promote the PICC as a fairer way to trade. With an Embassy's support, the SMEs may have a better chance of securing a fairer governing law rather than succumbing to the dominant party's choice.

Secondly, the PICC needs to be promoted in model contracts and rules. The Chinese European Arbitration Centre (CEAC), recently established in Hamburg to deal with Chinese-European trade disputes, within its arbitration rules expressly refers to the PICC in its Model Choice-of-Law Clause as the law governing the contract.¹²⁹ Article 14 of the 1999 Model Contract for the International Commercial Sale of Perishable Goods states that for issues not provided for in the contract, [the contract] shall be governed by (in descending order of precedence) the CISG, the PICC, the applicable law, or the domestic law of the seller's place of business.¹³⁰ The PICC is also expressly mentioned in several model agreements for guidance on interpreting and supplementing the contract, *i.e.*, Article 24.1.A of the ICC Model Commercial Agency Contract; Article 24.1.A of the ICC Model Distributorship Contract – Sole Importer – Distributorship; and Articles 23 and 31 of the 2004 ITC Contractual Joint Venture Model Agreements.¹³¹ Finally, the PICC are also expressly referred to in the membership terms of CONVISINT,¹³² which state that the agreement is to be made in accordance with the PICC, except for the *contra proferentem* rule in PICC Article 4.6.¹³³ Being used in model contracts is an impressive achievement and will aid the PICC in becoming an indispensable tool in international contractual relations.¹³⁴

¹²⁹ UNIDROIT *Annual Report* (2009), 16, at <www.unidroit.org/english/documents/2009/ag65-02-e.pdf> on (18/07/2010), 16. To access the clause: <<http://www.ceac-arbitration.com/3-CEAC-Choice-of-Law-Clause.47.0.html#c68>> (6 August 2010).

¹³⁰ BONELL, *supra* note 124, 11.

¹³¹ H. KRONKE, "The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond", 25 *Journal of Law and Commerce* (2005-2006), 451, 454.

¹³² An electronic marketplace for suppliers set up by DaimlerChrysler, Ford, General Motors, Nissan, Peugeot and Renault.

¹³³ BONELL, *supra* note 124, 10.

¹³⁴ F. BORTOLOTTI, "Reference to the UNIDROIT Principles in Contract Practice and Model Contracts", *ICC Supplement* (2005), 57 at 64.

Thirdly, there is a need to address the British mindset. Whilst reasons for its superiority are dwindling, English law is nevertheless popular. The benefits of the PICC need to be advertised to convince British practitioners to apply it. Other countries will then be encouraged to follow, especially those that typically impersonate English law both in theory and in practice, for instance India.

Fourthly, the PICC is praised for its transparency. The text of the PICC, the cases, as well as a bibliography of articles referring to it are all set out on UNILEX,¹³⁵ and this needs to be used to its advantage. Lectures and forums available on the internet would be particularly beneficial in spreading awareness and enhancing understanding. The internet provides an easily accessible, flexible, multi-lingual, delocalised tool that is imperative to harmonisation.¹³⁶

Finally, arbitrators are an asset to the PICC by encouraging the choice of the PICC in settling the dispute,¹³⁷ and by employing it when there is a conflict or absence of choice of law.¹³⁸ This avenue of encouragement needs to be expanded.

III. – THE JUDICIARY AND ARBITRATORS

The Preamble advocates the use of the PICC to interpret and supplement both domestic laws and international uniform law instruments.¹³⁹ As it is impossible for a drafter to account for every issue that may arise in using a given set of rules, an aid is vital.¹⁴⁰ The PICC offers subsidiary rules when the domestic law is silent or unclear, or where it requires modernisation to be effectively applied in the international arena which is not its typical habitat. In addition, as an inventive manifestation of preferable solutions, the PICC has been used for interpretation where judicial precedence is lacking for international rules such as the CISG. It can also be employed to interpret and

¹³⁵ S. VOGENAUER, "Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts", 6(2) *European Review of Contract Law* (2010), 143, 183.

¹³⁶ K.-P. BERGER, "European Private Law, Lex Mercatoria and Globalisation", in: A. Hartkamp et al., *supra* note 69, 53.

¹³⁷ N. BROWER / J.K. SHARPE, "The Creeping Codification of Transnational Commercial Law", 45 *Virginia Journal of International Law* (2004), 199 at 221.

¹³⁸ *Ibid.*, 208.

¹³⁹ See PICC, Preamble.

¹⁴⁰ M.J. BONELL, "Unification of Law by Non-Legislative Means", 40(3) *American Journal of Comparative Law* (1992), 617 at 627.

supplement contractual provisions, although this is more rare.¹⁴¹ Internationally in this application, the PICC has been flourishing. This will not only be beneficial to its reputation as a problem-solving mechanism, but will also cause the PICC increasingly to be referred to in cases and awards, thereby enhancing its clarity.

The British response

The favourable international response raises the question as to whether English courts are as dismissive of the PICC as British practitioners. Bonell argues that there has been an apparent change in attitude on the part of the judiciary:¹⁴² English courts are increasingly starting to use other States' laws, including those of jurisdictions outside the common law, to solve difficult problems. For example, in *Henderson v. Merritt*,¹⁴³ Lord Goff used both the French doctrine of *non-cumul* and the corresponding German law in considering the possibility whether a claim in both tort and contract could be brought simultaneously. In *ProforceRecruit v. Rugby Group*,¹⁴⁴ Lady Justice Arden referred to the PICC and CISG as a favourable alternative to traditional methods of English law on the admissibility of extrinsic evidence when interpreting a contract. Although this was only *obiter dictum*, it does illustrate a change in attitude, especially as this was a purely domestic case and required no referral to international instruments.¹⁴⁵

More recently, in *Chartbrook v. Persimmon Homes*,¹⁴⁶ the question arose as to whether the traditional rule that evidence of pre-contractual liability cannot be used for interpreting the contract should be maintained, with the Court of Appeal taking an unorthodox approach. The arguments of Thomas J in *Yoshimoto v. Canterbury Golf International*,¹⁴⁷ CISG Article 8 and PICC Article 4.3 were referred to by Lawrence Collins LJ to illustrate that the exclusion should stand, but that it should be flexible where cautious use of the pre-contract material would enable the court to arrive at a meaning of the

141 ICC case 11880 (2004).

142 BONELL, *supra* note 1.

143 [1994] 3 All ER 506.

144 [2006] EWCA Civ.69.

145 M.J. BONELL, "The UNIDROIT Principles and CISG", *Unif. L. Rev. / Rev. dr. unif.* (2006), 305 at 306.

146 [2008] EWCA Civ 183.

147 [2001] 1 NZLR 523.

contract which accorded with the ascertainable intention of the parties. However, this was rejected when the case reached the House of Lords, which upheld the traditional approach and concluded that the PICC was incompatible with English law.

English courts' responses to the PICC are certainly more positive. This may be due to the changes in the judiciary, as the House of Lords has been modernised to become the Supreme Court of England, with Law Lords that are viewed as more pioneering and open-minded to change.¹⁴⁸ The fact that the success of the PICC in this regard is shared internationally and in English courts is a triumph.

IV. – LEGISLATORS

When trying to improve national laws, it is not surprising that legislators look to other laws or legal rules that have proved successful for inspiration. For example, Mexico's new law for non-possessory security interests in moveable property largely reflects US, and partially Canadian, law.¹⁴⁹ Yet, the domestic laws being used as examples may not be up-to-date or sufficient in themselves, and the new legislation will reflect any socio-political compromises that may have had to be made.¹⁵⁰

The PICC, being independent of any State influence, can offer a better model.¹⁵¹ By providing succinct, practical provisions that are readily accessible and offer the best up-to-date solutions, it is ideal for countries intent upon harmonisation and wishing to take an active role in the international arena.¹⁵² Moreover, the PICC has vast amounts of literature and case law dedicated to it and at the disposal of any country wishing to base its legal reforms on the PICC.¹⁵³ Many countries, as well as regional and international bodies, have used the PICC in this way, some even prior to their initial adoption, such as the new Dutch Civil Code and the new Civil Code of Quebec.¹⁵⁴ Of particular

148 RAESCHKE-KESSLER, *supra* note 26.

149 S. GOPALAN, "The Creation of International Commercial Law", 5 *San Diego International Law Journal* (2004), 267 at 283.

150 *Ibid.*, 284.

151 See PICC, Preamble.

152 M. FONTAINE, "The Draft OHADA Uniform Act on Contracts and the UNIDROIT Principles of International Commercial Contracts", *Unif. L. Rev. / Rev. dr. unif.* (2004), 573, 576.

153 *Ibid.*, 577.

154 BONELL, *supra* note 4, 37.

note is OHADA's draft Uniform Act on Contracts, which effectively replicates most of the PICC's provisions in a legislative format.¹⁵⁵

The British response

Again, attention must be drawn to the British response. As English contract law is uncodified, the PICC could easily be distilled into judicial contract law, as has occurred in Denmark. As previously discussed, the English judiciary has started to employ rules from other domestic and international systems. However, statutory reform is desirable. Irrespective of whether the PICC is used as a model, English law needs modernisation and codification: "Our commercial legislation, like our water pipes, our railways and our underground, suffers from under-investment and patchwork adjustments which in the end cost more than if we had done a proper job."¹⁵⁶ Britain relies too heavily on its judicial excellence. Goode has met commercial judges who argued that a code was not necessary, failing to realise the amount of work and consolidation that is put into a case by barristers before it ever reaches the courts.¹⁵⁷ Aside from minor changes, Britain's commercial laws have not substantially changed for decades. For example, the Bills of Sale Acts 1878-1891, the Bills of Exchange Act 1882, the Factors Act 1889 are still in place, and the Sales of Goods Act 1979 is broadly similar to the 1893 Act.¹⁵⁸

Professor Goode has advanced the idea of a UK Commercial Code to codify and enhance rules on a selection of topics that should be addressed, in particular: general principles for commercial contracts; the sale of goods; personal property security law; investment securities law; rules on electronic funds transfers; and laws on suretyship guarantees.¹⁵⁹ Such a code is certainly a ticking bomb – its necessity will soon be realised. However, in the meantime, the country's laws are becoming increasingly antiquated, requiring piecemeal adaptations that to some extent result in more confusion. A written code will also refresh and extend the popularity of English law amongst foreign parties as it will be modernised and consolidated into rules that are easier to understand. This needs to be addressed imminently.

¹⁵⁵ MICHAELS, *supra* note 14, 70-71.

¹⁵⁶ GOODE, *supra* note 84, 758.

¹⁵⁷ GOODE, *supra* note 28.

¹⁵⁸ GOODE, *supra* note 84, 759.

¹⁵⁹ *Ibid.*, 761-762.

V. – THE ACADEMIC WORLD

Academics typically “carry the torch” for legal instruments. They analyse the benefits and pitfalls of the instrument, so that practitioners can either readily apply it, or hesitate before doing so.

The PICC has been the subject of numerous seminars for current lawyers and others expressing an interest. The German Institution of Arbitration hosted a seminar on the PICC in January 2010.¹⁶⁰ Before that time, in June 2008, the Sydney Centre for International Law had also hosted a seminar on the PICC, focusing more specifically on Australia.¹⁶¹ The PICC was also one of the main aspects of two master courses on international commercial contracts held by Professor Bonell in Paris and Fribourg in 2009.¹⁶² On review of the British response, the academic community has also been extremely positive towards the PICC. For example, the XVth International Congress of Comparative Law held in Bristol in 1998 included a special session dedicated to the impact of the PICC in different countries.¹⁶³

Attention should be given to those now at universities who may become academics, lawyers, arbitrators or judges in the future. This group is more likely to be flexible and open to change. The Preamble of the PICC mentions the possible use of the PICC as teaching material in the universities. ¹⁶⁴ In this respect, international figures are encouraging: back in the 1996 UNIDROIT study, 95 universities globally taught the PICC,¹⁶⁵ and this has increased over the years. Other methods to educate young academics about the PICC have been used: e.g., the University of Buenos Aires hosts an international arbitration competition annually, and for the last three years the topic has been the PICC. The University of Columbia has also used the PICC as a theme for a scholarly competition.¹⁶⁶

To discover the British response to the PICC in further education, I sent a survey to British university law schools, obtaining a 23% response rate. Graph

¹⁶⁰ Seminar details at: <<http://www.unidroit.org/english/news/calendar2010-e.pdf>> (8 August 2010).

¹⁶¹ Seminar details at: <http://sydney.edu.au/law/LPD/docs_pdfs/2008/UNIDROIT_Principles25062008.pdf> (1 July 2010).

¹⁶² UNIDROIT, *supra* note 130, 16.

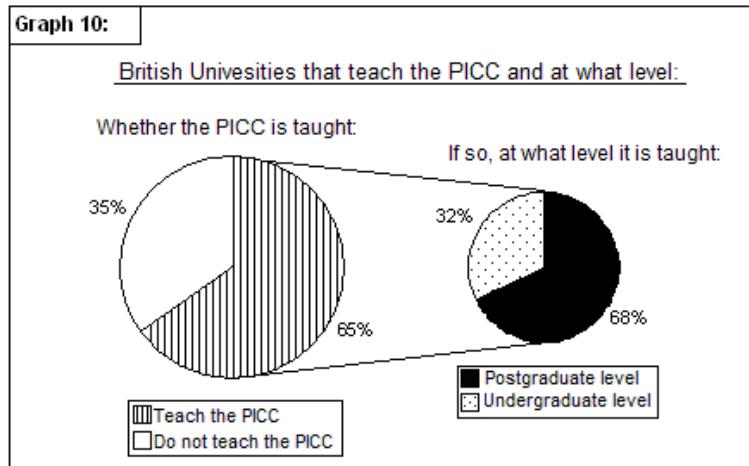
¹⁶³ BONELL, *supra* note 124, 7.

¹⁶⁴ See PICC, Preamble.

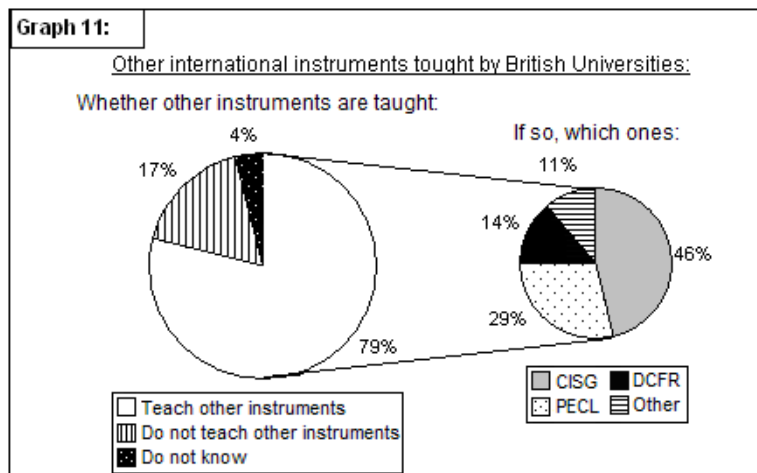
¹⁶⁵ BONELL, *supra* note 4, 36.

¹⁶⁶ Partner, *Baker&McKenzie* (Chile), in a telephone interview (8 July 2010).

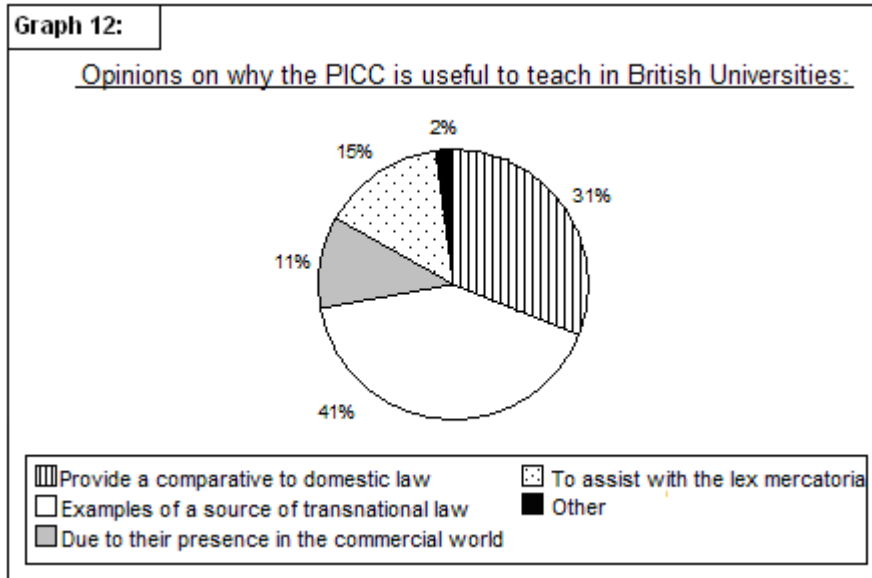
10 shows that a majority do teach the PICC. However, this is largely at postgraduate level, which means that not all law students are being automatically taught about the PICC.



Graph 11 illustrates the use of other international instruments as a teaching mechanism. A larger majority of the survey taught other instruments, particularly the CISG. This is extremely positive, as even though all those that taught the PICC also taught the CISG, the PICC is employed more than the other instruments specified. Furthermore, as the CISG is a binding Convention, its presence in legal education is unsurprising.



This response is certainly promising. However, this success could be because the PICC is included in textbooks, leaving little flexibility as to whether to teach the PICC or not. This was shown in Rosett and Gordon's survey in six law schools in Florida, which concluded that both the CISG and PICC would be taught only when it had been included in the casebooks.¹⁶⁷ Nonetheless, as illustrated in Graph 12, all the respondents to the British survey indicated that the PICC is useful to teach.



Both the international and British responses are extremely positive with regard to the academic world, although the result might be even better were PICC to be included in more undergraduate course material. This positive development must now be mirrored in the commercial world. Teaching the PICC is necessary not only for academics, but for practitioners and judges as well.

¹⁶⁷ GORDON / ROSETT, *supra* note 2, 405-406.

VI. – OTHER USES

The Preamble is inspirational, and not exclusive. Other uses can be suggested.

1. *E-commerce*

Some US Courts have confirmed that arbitration can be used for e-commerce disputes, and hence, so can the PICC. There is no obstacle to applying the PICC to B2B transactions, but B2C transactions, being consumer transactions, are more problematic, demanding a higher level of protection than the PICC provides. Nonetheless, the PICC may be useful for these transactions also, as e-commerce is poorly regulated.¹⁶⁸

2. *Backup provisions*

The PICC may be of use when arbitral tribunals choose not to apply a law and use the contractual terms. In cases where the contractual provisions do not provide for all scenarios, the PICC could be used as a backup.¹⁶⁹

3. *Public international law disputes*

It is rare for the PICC to be invoked in claims based on public international law. However, if a State is sued as a participant in international commerce, commercial law alone can be relied upon. Public international law and international commercial law are not as diverse as is typically thought.¹⁷⁰

4. *Domestic contracts*

The PICC certainly caters for the international arena, providing provisions on holidays and time zones, for example.¹⁷¹ Even so, the application of the PICC to a purely domestic contract is not prohibited – it is the parties' prerogative.¹⁷² Whilst, unsurprisingly, none of the British responses to the survey indicated a use of the PICC for domestic contracts or considered it to be of use in any way, Graph 13 illustrates that 6% of the international survey had used it more than once. Whilst this was a small minority, and only ever

¹⁶⁸ DESSEMONTET, *supra* note 35, 39.

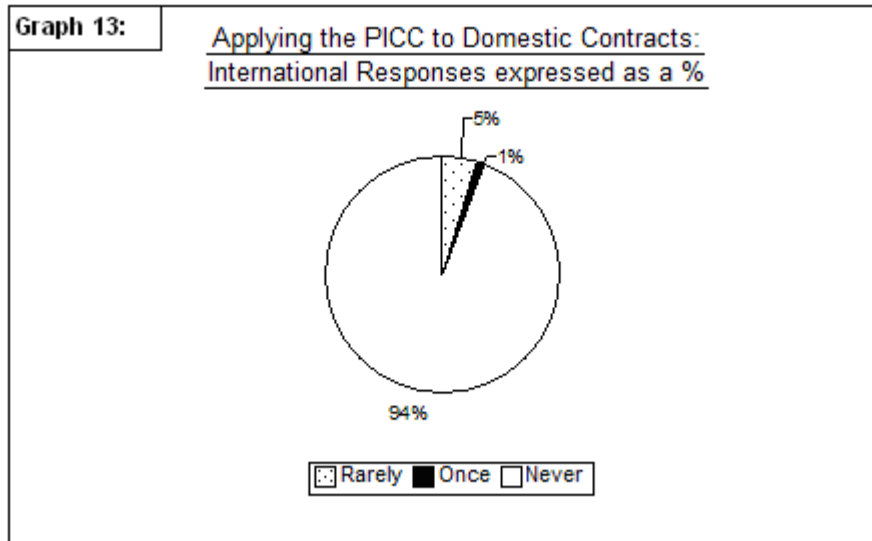
¹⁶⁹ M. SCHERER, "Preamble II", in: Vogenauer / Kleinheisterkamp, *supra* note 14, 101.

¹⁷⁰ *Ibid.*, 102.

¹⁷¹ PICC Art. 1.12(2) and 1.12(3), respectively.

¹⁷² MICHAELS, *supra* note 14, 34.

occasional at best, it does show that the PICC can be used successfully for domestic contracts. This may develop further in the future.



Furthermore, international responses indicated that the PICC did provide a variety of uses when applied to domestic contracts, namely a gap-filling purpose, as well as improving domestic law and aligning it to international standards.

5. *Mediation*

Despite not having any specific rules tailored towards ADR, the PICC as a model envisages a baseline of what is considered to be fair, and so does have a limited use in mediation.¹⁷³

VII. – CONCLUSION

As a persuasive instrument, the PICC has been incredibly successful. It offers succinct rules that have been widely approved and adopted by key groups internationally. Generally, the most successful function of the PICC is to act as a supplement to domestic or international rules.¹⁷⁴ Yet, internationally,

¹⁷³ *Ibid.*, 79.

¹⁷⁴ GAMA, *supra* note 111.

particularly in Europe where unification is greatly encouraged, the PICC has been a tremendous success in all methods anticipated in the Preamble. The British response has been less favourable, distorting any success that the PICC may have had due to an insular attitude of self-preservation. Nonetheless, elements of positivity can still be drawn from this: it illustrates that these are inherent characteristics in Britain, rather than problems with the PICC. It is also noteworthy that the British attitude is more confined to practitioners, as the judiciary and academics in Britain have started to become part of the PICC movement. Furthermore, educational institutions appear to be encompassing the PICC, which will result in the young practitioners of the future having an understanding.

With regard to practitioners globally, whilst an improvement has been recorded, the PICC's application must be further encouraged. This is achievable in several ways, primarily by gaining the attention of SMEs and by continuing to encourage arbitrators and organisations to use the PICC in tribunal awards and as model rules, respectively. Furthermore, the use of the PICC in university education is essential. It is young practitioners, if any, who are likely to support the PICC as, generalisation though this may be, the older a practitioner is, the more tradition is entrenched. Therefore, the inclusion of the PICC in university courses must be encouraged, particularly at undergraduate level, so as to ensure that all law students have a chance to be taught it, rather than just those who choose to go on to postgraduate level. Seminars and other methods of education also need to be provided to practitioners, judges, arbitrators and the business world – if they do not know of the PICC, they are not going to apply it. Other improvements can also be made: a judicial system dedicated to the PICC will enhance the clarity of the system, encouraging its practical application to develop precedents.

A conclusion will nevertheless be made on a positive note. The PICC still has ample potential, but has certainly exceeded expectations so far. Gopalan argues that before the PICC, harmonisation seemed unattainable: "For decades despite lofty ambitions there was nothing but paralysis."¹⁷⁵ The PICC has the potential to alter this.



¹⁷⁵ GOPALAN, *supra* note 149, 270.