

## Contracts Law and its Modern Trends: The Ecuadorian Case\*

El derecho de los contratos y sus tendencias modernas: el caso ecuatoriano

Ruben Méndez Reátegui<sup>a</sup>

Universidad Autónoma de Chile, Chile

Universidad Tecnológica del Perú, Perú

rcmendez@puce.edu.ec

ORCID: <https://orcid.org/0000-0001-8702-5021>

DOI: <https://doi.org/10.11144/Javeriana.vj70.clmt>

Received: 09 September 2020

Accepted: 20 February 2021

Published: 30 December 2021

Francesca Benatti

Università degli Studi di Padova, Italia

ORCID: <https://orcid.org/0000-0002-7594-3199>

Rodrigo Barcia Lehmann

Universidad Autónoma de Chile, Chile

ORCID: <https://orcid.org/0000-0003-1021-446X>

Gonzalo Lascano Báez

Pontificia Universidad Católica del Ecuador, Ecuador

ORCID: <https://orcid.org/0000-0002-0131-6854>

### Abstract:

At the international level, in the area of Contract Law, this article begins with a critical review of the current regulatory scenario in Ecuador and its European counterpart. Then, the article aims to comparatively address the objectives, nature and scope of the UNIDROIT Principles, the PECL and the Pavia Draft. They constitute a modern *lex mercatoria* seeking to go beyond what are the national laws and systems and become the law of business. Above all, the PECL and the DCFR had a crucial indirect effect that influenced jurisprudence and national reforms. Finally, the article identifies the prevailing *ius-privatist* spirit in Europe as a difference, compared to a model like the Ecuadorian, which is committed to the constitutionalization of the private law (civil and commercial) and a strict delimitation of the principle of private autonomy.

**Keywords:** contracts law, civil law, commercial law, normative integration and private autonomy.

### Resumen:

A nivel internacional, en el área de Derecho Contractual, este artículo comienza con una revisión crítica del actual escenario regulatorio en el Ecuador y su contraparte europea. Luego, el artículo pretende abordar comparativamente los objetivos, la naturaleza y el alcance de los Principios de UNIDROIT, la PECL y el Proyecto de Pavia. Constituyen una *lex mercatoria* moderna que busca ir más allá de lo que son las leyes y sistemas nacionales y convertirse en la ley de los negocios. Sobre todo, la PECL y el DCFR tuvieron un efecto indirecto crucial que influyó en la jurisprudencia y las reformas nacionales. Finalmente, el artículo identifica como diferencia el espíritu *ius-privatista* imperante en Europa, frente a un modelo como el ecuatoriano, que apuesta por la constitucionalización del derecho privado (civil y mercantil) y una estricta delimitación del principio de autonomía privada.

JEL CODE: K1, K15.

**Palabras clave:** derecho de los contratos, derecho civil, derecho comercial, integración normativa y autonomía privada.

## Introduction

To what extent and in what way has contract law, as an expression of private law, evolved in Ecuador? With this question, we will begin the article whose first objective will be to describe the current context of Ecuador in private contractual matters and, secondly, to provide light from the review of the most prominent proposals at the international level: the UNIDROIT Principles, the PECL and the Pavia Draft.

### Author notes

<sup>a</sup> Corresponding author. E-mail: [rcmendez@puce.edu.ec](mailto:rcmendez@puce.edu.ec)

Therefore, we foresee that the comparison between Ecuadorian law and the international projects mentioned will allow us to highlight the main differences that not only depend on variations at the level of belief system and social environment but also a choice at the level of public policy design. It is so, given that international projects are focused on the needs of the business world, that is, they incorporate a specific, predictable contract law with uniform rules that are also in line with the demands of a globalized world economy.

Therefore, among the main conclusions of the article, it stands out that Ecuadorian private law is currently characterized by a methodological framework more influenced by neoconstitutionalism. However, it could be beneficial from a systemic and multilevel perspective the legislative and jurisprudential incorporation of legal models established from the international projects previously mentioned. Also, a review of Ecuadorian law is even more critical because of the implications of the process of rivalry (competition) between legal systems, defined based on the "attractiveness" of contract law and its influence on the legal, social and economic development of the country.

## Has contract law recently evolved in Ecuador?

Ecuador still has its first source of the regulation (hardcore) in the Civil Code. Therefore, it is necessary to indicate that the Ecuadorian codification that regulates "private" contractual relations is an adaptation of the Chilean Civil Code (promulgated on December 14, 1855, and in force since January 1, 1857), written by Andrés Bello. In other words, Ecuador represents one of those jurisdictions that have not yet given way to the partial (as is the case of the Peruvian codification in force) or total (as was the case in Italy and Switzerland) unification of civil and commercial legislation (a classic sample of the *lex privata*).

Ecuador's Civil Code and traditional contract law can be cited as examples of "successful" institutional transplants where the difference with the text of the Chilean Civil Code lies in the numbering of the articles.<sup>1</sup>

As for "evolution" understood as "progress" or "advancement" (based on national proposals), it can be stated that, although the Ecuadorian Civil Code has been subject to several official modifications since its creation, these have not profoundly affected the sources of obligations (in general) or the regulation of contracts (in particular).<sup>2</sup> Moreover, there is still the particularity of finding an essential part of the legislative development, focused on discerning aspects related to "contractual typicity", in the Sources section (as opposed to other proposals in force in the region).

Furthermore, the temporary validity of the Ecuadorian Civil Code contrasts with what has happened in the rest of Latin America (except Chile) where the influence of the Italian Codice Civile and other legal instruments has been more evident, manifesting itself through processes that involve the debate and approval of new codifications (e.g., the Peruvian Civil Code in force since 1984). In this line of argument and by way of illustration, it can be seen that in Ecuadorian legislation words such as contract and convention (which are different concepts since the convention is the genus and the contract is the species) are still considered synonymous, as established in Article 1454 of the Ecuadorian Civil Code: "Contract or convention is an act by which one party obligates itself to another to give, do or not do something. Each party may be one or many persons".<sup>3</sup>

Likewise, no distinction is made between the concept of a legal act and that of a legal transaction (based on the establishment of a relationship of gender and species) to refer to the regulation of intersubjective relations of a private nature.

On the other hand, the other classic expression of the regulation of private law, with the incidence in the contractual field in Ecuador, is also constituted by the commercial legislation and is expressed through two normative bodies. The first is the Commercial Code, which establishes in its Preliminary Title (Preliminary Provisions) that:

Article 1.- The Commercial Code governs the obligations of merchants in their commercial operations, and the acts and contracts of commerce, even if they are executed by non-traders.<sup>4</sup>

For interpretative purposes, this article refers to the provisions of Article 3 of the Commercial Code<sup>5</sup> regarding the definition and classification of commercial acts and, finally, to Article 5, which states in its sole paragraph that: "In cases not explicitly resolved by this Code, the provisions of the Civil Code shall apply."<sup>6</sup>

The second body of legislation, which, in a broad sense, affects private contractual relations, is represented by the *Organic Code of Production, Trade and Investment* (COPCI), which in Article 3 (Object) establishes:

The purpose of this Code is to regulate the production process in the stages of production, distribution, exchange, commerce, consumption, management of externalities and productive investments oriented towards the realization of Good Living. These rules also seek to generate and consolidate regulations that enhance, promote and encourage the production of more excellent added value, that establish the conditions to increase productivity and promote the transformation of the productive matrix, by facilitating the application of instruments of productive development, that allow the generation of quality employment and a balanced, equitable, eco-efficient and sustainable development with the care of nature.<sup>7</sup>  
(Underline and bold outside text)

Based on the above, some may consider that in the Ecuadorian case, when we refer to civil codification, the fact of not incorporating later doctrinal contributions or simply projecting its legislative framework based on proposals from other jurisdictions, simply cannot be described as an evolutionary sluggishness, but must be qualified as the result of the prevalence of a legal device that -internally- has been socially efficient in terms of the objective of reducing the *transaction costs* that must be assumed by the users of the system.

It would be the case, then, as inferred from authors such as North<sup>8</sup>, formal *institutions or rules* (in this case, contract rules) appear or change when the social benefits exceed the costs of not having new formulations. Also in the opinion of some, the scenarios of change do not necessarily denote a process of evolution of *the institutional framework* (formal), but rather a context (as has occurred in Latin America) of legislative imposition by the group with the most significant political power, which obeys an implicit logic of concentrated benefits versus diffused costs (among the members of the social fabric), that is, of institutional capture and *State failures*.

However, a broader view of Ecuador's current situation, as a country trying to make the economy more open to the world in an orderly manner and without generating serious real *negative externalities*<sup>9</sup> in its population and based on greater *institutional competitiveness*, is a sufficient reason to consider the introduction of regulatory improvements based on *international experience* (within a framework of the rule of law and justice) such as the UNIDROIT Principles (which, despite being about international commercial contracts, represent a proposal to integrate legal knowledge in civil and commercial contracts).<sup>10</sup>

Finally, it can be stated that Ecuador has maintained a position that in the short term, does not bet on integrating its national legislation related to contract law. It maintains a model where civil and commercial regulation are dissociated (beyond containing a scheme of complementarity at the interpretative level and legal development) by decomposing the latter into two bodies of law. It has been highlighted as "the problem of the autonomy of commercial (or business) law and its codification has become current again also in continental Europe. First of all, the first works for the new Dutch civil code had once again revived the interest in the "form" of the code, to lead us to speak of "Renaissance der Idee der Kodifikation", and this despite the imperfect systematics of the code (in fact, it regulates corporations in the second book dedicated to legal persons, placing, on the other hand, corporations, although with legal capacity, in the discipline of contracts). The merit of having allowed a re-evaluation of the idea of codification was also attributed to the new French commercial code of 2000, despite the correct observation that, in reality, it is only a consolidation of the existing statutes on various subjects: such as company law, bankruptcy law, debt securities, various commercial contracts. However, the different meaning of these codifications was not lacking: the Dutch one, which imitated the Swiss and Italian model, gave impetus to the new series of so-called systems. monist (which

would soon be followed in many Eastern European countries: most recently, the Czech Republic, 2012-2014 and the Hungarian Republic, 2013-2014: it should be noted that in Hungarian civil code companies - including a company in a collective name or SNC and simplified stock companies or SAS (both identified by the acronym in Italian)- they were assigned in Book III, on legal persons); the French one, instead, perpetuates the tradition of the so-called dualistic systems, characterized by the coexistence of civil codes and commercial codes (as still, for example, in Germany and Austria, where the hypothesis of incorporating the subject of the *Handelsgesetzbuch* into the *Zivilgesetzbuch* was recently discussed".<sup>11</sup>

However, this integrationist objective could not be verified under the principle of private autonomy (as advocated by the European integrative codifications that will be analyzed below). It is so, due to the limits imposed by the current *constitutionalization of private law* in Ecuador (institutionalized with the entry into force of the Constitution of Montecristi in 2008). In other words, any process of normative integration must face a scenario where fundamental rights are intervened in areas that have traditionally been sheltered by private autonomy. It has resulted in the explicit and tacit (factual) recomposition of the traditional sources of the law, the adjustment of strategies for its interpretation and the validity of alternative forms of litigation such as oral proceedings.

## The unidroit principles: A necessary revision

Globalization<sup>12</sup> has brought about a profound change in the legal phenomenon: there has been an approximation of rules sometimes imposed by a single coercive actor, sometimes produced by a coherent development, other times adopted by consensus.<sup>13</sup> Among the most exciting aspects of this path, we can mention the development and codification of a modern *lex mercatoria* more adequate to a transnational reality and govern by technology and the market.

The UNIDROIT Principles, in their versions of 1994, 2004, 2010, 2016 constitute an international and intergovernmental initiative that deals with International Commercial Contracts. As a proposal, they are the result of the work of the United Nations agency of the same name (Institute for the Unification of Private Law in Rome), which is committed to unifying private law (civil and commercial), that is, proposing rules whose background is common to most existing legal systems today

From the review *in extenso* of the different versions, it can be established that the UNIDROIT principles introduce general rules and apply them when the parties to the contract have decided that these principles of law should govern the contract, i.e., they consider the validity of party autonomy.

The thread of this statement is consolidated if we quote the 2010 version that begins *its Preamble (Purpose of the Principles)* with the following precepts: "These Principles establish general rules applicable to international commercial contracts. These principles should be applied when the parties have agreed to have their contract governed by them".<sup>14</sup>

Therefore, as further reasoning, we can infer that the main distinction between the different versions lies in their *progressiveness*, that is, in showing a development that deepens the notion of general rules and their consequent legal significance. It also applies to other aspects such as validity, for example, when it is explicitly and emphatically stated (as opposed to the previous versions) that: "The provisions of this chapter relating to fraud, intimidation, excessive disproportion, and illegality are imperative."<sup>15</sup>

On the other hand, it can also be presented to them as an excellent example of *soft law*. This statement becomes relevant if we allow ourselves to see in the UNIDROIT principles a set of *quasi-legal* instruments which, although they are not in themselves binding (as they lack normative status), do constitute - clearly - a broad group of recommendations, declarations, among others.

It should be noted that the UNIDROIT Principles were not conceived as contractual clauses - to be considered imperatively for any particular type of convention - but as principles of law in the sense of

Bobbio. Nor do they constitute a form of international convention, i.e., they cannot be approximated as a "supranational law," much less as a uniform body of law for international contracts. Since their formulation, their significance has been in their persuasive force, that is, in their ability to replicate common-sense reasoning that makes "commercial transactions" viable. However, Professor Flores Doña in analyzing the first two versions of the principles presented the following discussion:

It is discussed whether the UNIDROIT Text is a kind of 'codification' (Award 10.022/2000 of the Arbitration Court of the International Chamber of Commerce, quoted<sup>1</sup>) or of 'restatement' (Award 9.797/2000 of July 28 of the International Arbitration Court of the International Chamber of Commerce.<sup>16</sup>

Flores Doña also states that:

The consideration of the Principles as a 'system' is exaggerated and unwise since the incompleteness of their content makes it impossible to resolve all the questions that arise in general contract law, as the technical configuration of the 'legal system' would require.<sup>17</sup>

Finally, it concludes with an opinion with which we preliminarily agree, without altering our judgment on the *principled nature* of the UNIDROIT Principles:

Formally, the legal configuration of the PCUnidroit corresponds technically to that followed by the 'restatements', both because of its autonomous source of production and because of its content integrated by rules of different scope and contractual generality, whose concretion and integration is left to "reasonable" uses and practices. (...) PCUnidroit can be considered a text of superior technical quality to restatements.<sup>18</sup>

The new *lex mercatoria*:

It was born as an independent regulatory system of customary source, although compiled and reorganized by Unidroit, which repeats its legitimacy by the fact that it corresponds to the *opinio iuris* of those who, whatever their nationality, act in international markets. Likewise, there is no doubt that in this system the rules that emerged within the national systems mentioned above have been merged, but it should be noted that these trend lines that have received an unequal degree of development in the different national systems are implemented in a higher degree of completeness in the new *lex mercatoria*.<sup>19</sup>

Although the UNIDROIT Principles still play a niche role concerning national rights, two categories of assumptions are useful and widespread<sup>20</sup>:

- a) between parties in emerging countries in a position of contractual parity with a clear indirect later reflection also on national rights;
- b) in the silence of the contract or where there is a generic reference to the principles of *lex mercatoria*.

Besides, they often have a role in helping to interpret clauses and to provide effective and consolidated solutions in practice. So today, the Principles are presented as a "pragmatic" system of default rules that can be used in combination with other regulations or by themselves, especially in conjunction with the choice of arbitration as a method of dispute resolution. According to Broedermann<sup>21</sup>, they make it possible to exploit a common language regardless of differences in legislation, to reduce the impact of mandatory rules, to exploit flexibility also to adapt clauses to the reality of the individual contract and to save costs and time.

## The principles of European contract law (pecl)

The *Principles of European Contract Law* (PECL) correspond to a set of general rules on the contract and obligations (later adding others on set-off, transfer, prescription and ineffectiveness) that were once elaborated by the Lando Commission and as Redondo Trigo argues: "they represent the result of the work carried out by the European Contract Law Commission, a group of lawyers recruited from all the countries of the European Union, under the chairmanship of Professor Ole Lando".<sup>22</sup> This group of jurists aimed to carry

out a comparative analysis of the legislation of the Member States of the European Union and to identify and develop "fundamental principles" within European Contract Law.

Likewise, as stated by Zenedin Glitz in his work *The Globalization of Contract Law*, this proposal "was presented in the form of articles accompanied by comments and notes on national application".<sup>23</sup> This author also considers that the recommended development model to institute these principles was the *legislative model*. Furthermore, its scope would include consumer contracts (limited to "domestic transactions").

On the other hand, the main objective or fundamental purpose of the PECLs was to provide an "infrastructure on European contract law" that would facilitate the unification of private law as argued by Sánchez Léria. The same author stresses that the specific objectives pursued are:

1. To facilitate cross-border trade within the European Community;
2. Strengthening the European single market;
3. The creation of a bridge between Civil Law and Common Law; and
4. The development of a model for the judicial and legislative development of contract law.<sup>24</sup>

Therefore, they respond, in the first place, to that:

The aspiration to the unity of law (which) has a long tradition in European legal culture, not only legal: just think of Montaigne, Pascal, who mocked the opposing criteria of discrimination of the just by the unjust in force here and there in the Pyrenees, or of Voltaire who, when he travelled, complained about passing from one legal regime to another at every change of horses, but the political, social and cultural conditions in which the great codifications of the last century, which crowned the formation of the nation-states, took place, are not repeatable at the European level.<sup>25</sup>

Also, a revision of the PECLs allows for the establishment that these "will be applied when the parties have agreed to incorporate them into a contract or to submit their contract to them".<sup>26</sup>

Also, in the interest of providing solutions to issues not resolved by the applicable legal system or regulations, its content will be applicable when the parties:

- a) They have agreed that their contract is governed by the general principles of law, the 'lex mercatoria' or have used similar expressions.
- b) They have not chosen any legal system or regulation to govern their contract.<sup>27</sup>

Therefore, they can be chosen by the parties as to the law applicable to the contract, although at the moment this solution, unlike the UNIDROIT Principles, seems to be little used in practice. The vast majority of European lawyers have never incorporated them<sup>28</sup>. There is not only a lack of experience in their use but also the possibility of predicting how they will be used by courts and arbitrators. However, at least theoretically, the doctrine has stressed that they could play a competitive role with domestic laws.<sup>29</sup>

In line with the PECLs, the DCFR developed by the Study Group on a European Civil Code, led by Christian von Bar, should be considered. It serves not only to review the Union's *acquis de Droit* and to improve future European legislation but also aims to be a "toolbox" for the European lawyer and possibly to establish a common contract law. In this perspective, one must read the abandonment of concepts that are difficult to define and that imply considerable ambiguity, such as the object and the cause. It is reputed to be efficient and the only way forward for the construction of a unified European law.

According to Breccia<sup>30</sup>, both the PECL and the DCFR have not become European contract law, but they have had a very significant indirect effect. They created a common framework for lawyers. They then influenced the reforms of the codes that have taken place and are beginning. It has been noted as "intuitive" that potentially open interpretative influences already exist, although within clear and not confusing limits. It is clear, in fact: that the total agreement between the effective national rule and the European rule information consolidates both; this total discordance requires a general critical examination, even if it does not directly

affect the law of life; this partial correspondence with one of the divergent interpretative lines influences the dissolution of the hermeneutic doubt. Three directions could already be accompanied by significant examples each, and we are all invited to the task of enriching them further based on ongoing investigations and even based on strictly forensic experience.

Thus, Spanish doctrine has highlighted precisely this indirect function by observing how the PECL, the UNIDROIT Principles, and the DCFR have produced significant changes in contract law, albeit through case law. Among the most significant changes in the unification of the hypotheses of default, the adopting objective imputability criteria (the disappearance or weakening of the requirement of fault), the systematization of remedies, the valuation of risk as a central element of contractual liability, and the consideration of the frustration of the objectives of the contract. In Latin America these instruments have inspired a number of professors to propose the Latin American Principles of Contract Law (PLDC).<sup>31</sup>

In addition to these jurisprudential orientations, also in Spain, the need to initiate a reform of the civil code was discussed with the elaboration of two projects, the one of 2009 of the General Commission of Codification and the one of the Association of Professors of Civil Law of 2016 that, although they do not have practical results since they did not become law, they demonstrate the influence in the debate of each legal system of the European principles.

It is interesting to note that this is not exclusively attributable to the Member States. The Moldovan code that came into force in 2019 includes many solutions contained in European projects.

It should be noted that while it is attentive to the needs of international practice, the legislative technique of the PECL and DCFR not only suffers from ambiguity since by adopting general clauses and standards it is open to the intervention of the judge and therefore to the possibility of corrective interpretation which could curb the effectiveness of the PECL and DCFR in international practice and reduce their efforts to standardize national laws.

## The preliminary draft European code of contracts (draft pavia)

The preliminary draft of the European Code of Contracts (Pavia draft) can be described as a private initiative of an international character (although the Italian President sponsored it). In the autumn of 1990, a large group of jurists from various countries met at the University of Pavia (Italy) intending to study the possibility of unifying contract law in Europe.<sup>32</sup>

The model adopted was that of a normative text (after resolving some preliminary aspects and methodological issues). Professor Giuseppe Gandolfi wrote this "code" from Pavia, which is why it is also known as the "Gandolfi Preliminary Project".<sup>33</sup>

The proposal for codification covers matters such as *the general doctrine of contract and contractual obligations* (see Book I, published in 2014 under the title *Code Européen des Contrats*).<sup>34</sup>

The code is written in a legislative style: "contains solutions or rules that express solutions. Therefore, it is a code of rules, not of principles".<sup>35</sup> As Gandolfi himself mentioned an agreement for unification could only be reached through solutions, but not already in the principles, that is, in the rational parameters, in the logical canons that allow the solutions themselves: parameters or canons that have their roots in the traditions certainly not renounceable.<sup>36</sup> It has also been characterized by the incorporation of archetypes from the leading legal traditions.

However, the scholars who have promoted this normative elaboration started from the Italian Civil Code (confluence of the French CC and the German BGB) and the British Contract Code project of Professor Harvey MacGregor.<sup>37</sup> Attention was also paid to the Portuguese Civil Code, the Spanish, the Swiss Code of Obligations, the Dutch, the Quebec, and the Latin American codes, without forgetting the Vienna Convention on International Sales.

## Conclusions

It can be stated that Ecuador still has in the 1861 Civil Code its source of contractual regulation. However, this legal provision should be studied from the provisions of the Commercial Code of 1960 and the COPCI that regulate commercial activity. It means that we are facing a context of "division" of the legislation, that is, an institutional scenario still far from the proposals for unification prevailing in Europe. However, we can see their current political weakness resulting from the difficult moment of European integration. Some authors, however, believe that it is preferable in the long term to take the path of optional tools as the CESL should have been.<sup>38</sup>

Then, the analysis carried out in the preceding sections of the UNIDROIT Principles, the PECLs and the Pavia Draft allows us to infer that we are faced with "three" proposals that share the spirit of the integration of private law. However, they are also initiatives whose nature, scope, objectives, scope and expression of their final proposal are not equivalent. (In all these projects we also see a use of the comparative instrumental method in the search for the best solution). It poses the problem of seeking the "attractiveness"<sup>39</sup> of contract law as a fundamental element. It is known that from the studies of Legal Origins and the Doing Business Report of the World Bank, based on a quantitative method, the need for a competitive contract law has been established. These initiatives must be evaluated because the criteria and parameters used are often incorrect. However, they show a weakening of traditional categories that is overwhelming in many civil law systems.

The importance of attractiveness at the international level is evident in the French reform, which mentions it among the objectives to be pursued. The adherence to some choices of PECL or UNIDROIT principles is perceived in this perspective. It would lead to two results: on the one hand, the parties to an international contract would be able to choose French law as the applicable law; on the other hand, French law would not be perceived as a possible obstacle to investments. However, it should be noted that the activity also depends on the objectives pursued, the social and economic context in which it is inserted.

The European vision of contract law has not directly influenced the current system of regulation of private contractual activity either. However, the permanent interaction between Ecuador and its European peers represents the perfect space to introduce mechanisms of regulatory improvement. These should be based on a different proposal than the prevalence of private autonomy as a fundamental principle, as the constitutionalization of private law (civil and commercial) prevails locally as an approach to the generation and application of formal rules. However, we can underline how this distance between the international model and that in force in individual states is felt not only in Ecuador but also in numerous European systems, such as Italy. The contractual model which has imposed itself in commercial practice is strongly influenced by the common law model, with a long, specific and detailed style that tries to regulate any possible eventuality by minimizing the spaces for intervention by the judge. Meanwhile, national jurisprudence seems, above all through general clauses and principles, to invoke a growing role, also imposing a constitutional reading of the law. For instance, the Italian decisions on the "concrete cause" are emblematic of this interventionism that seems to be far from the predictability desired by the business world.<sup>40</sup>

We are faced with a complex contractual practice in which different influences flow together with the needs pursued by the specific contract into texts that will be interpreted by judges or arbitrators, often of different nationalities. The difficulty of tracing clauses born in other traditions back to the civil law model has led to the doctrine of "alien contracts". It is evident, however, that current international contractual practice aspires to separate itself from national systems by creating autonomous and self-sufficient contracts. Here we see the tragic antinomy observed by Natalino Irti of our era "which seems, on the one hand, closed sovereignties in defined territorial areas, in places circumscribed by borders, and on the other hand endless extensions of "techno-economics". The antinomy between the territoriality of government and the spatiality

of the regulated, that is, the old coexistence of politics, law, and economy. These projects wanted to mitigate the distance.<sup>41</sup>

In referring to the UNIDROIT Principles, we must emphasize their essence as an international and intergovernmental initiative dealing with Commercial and International Contracts. Therefore, it is a development whose main feature aims at integrating the primary expressions of the *lex privata*, i.e., to civil and commercial law. On the other hand, both the PECL and the Pavia Draft do not specifically pursue the same integrationist objective, insofar as these proposals do not constitute developments that expressly aim at unifying civil law and commercial law, even though in the case of the PECL the main objective has been to provide an infrastructure on European contract law. It is also not the case of the Pavia Draft, despite having started from legal provisions (codifications) such as the Italian or Swiss one, which also pursues the integration between civil and commercial law. Let us recall that the priority of the Gandolfi Draft was to study the possibility of unifying contract law in Europe.

Finally, both the PECL and the Preliminary Draft of Pavia assume a legislative or codified model. It is not the case of the UNIDROIT Principles (studied based on their three versions) which express a progressive development and have reached a greater significance in areas such as interpretation (by going beyond mere "recommendations" and constituting a practical example of soft law).

The circulation of these projects, together with the contractual clauses developed by the ICC, has led to the acceptance of common solutions. A significant example is found in the discipline of hardship. The UNIDROIT Principles set out their consequences in Article 6.23: 1. In case of hardship, the disadvantaged party has the right to request renegotiations. The request shall be made without undue delay and shall state the reasons on which it is based. (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance. (3) If an agreement is not reached within a reasonable time, either party may apply to the court. (4) If the court finds difficulties, it may, if reasonable, (a) terminate the contract at a date and on terms to be fixed; or (b) adapt the contract to restore its equilibrium.<sup>42</sup> A similar rule is found in the PECL and was accepted in the Dutch, Romanian and French codes. The Italian reform project also foresees it.

We must consider how contract law today lives in a legal pluralism in which national and international solutions confront and influence each other. It is an osmotic relationship that mutates both. This is why, concerning the European context, some authors have compared the present moment with that of the *ius commune* in which local and commercial customs lived alongside Roman, canon, rural and feudal law<sup>43</sup>. Without a doubt, the experiences underlying the UNIDROIT Principles, the PECLs and the Pavia Draft constitute an enormous challenge for the codifier and the national legislator. Above all, because harmonization efforts are also found in Latin America with two projects, the GADAL and the Principles of Latin America Contract Law<sup>44</sup>. However, a careful doctrine<sup>45</sup> has identified a difference, while the first is characterized by greater attention to Latin American reality as shown by the role of good faith in a solidarity version, the second looks at the market with more excellent favor. It is part of a more significant line of continuity with the Unidroit Principles. As in the latter case, good faith is also that of international trade and business practices and serves to protect economic operations.

In particular, according to Momberg the "PLACL should be applied by judges and arbitrators for the interpretation - and eventually supplement - of the uniform or internal law applicable to the case, becoming a kind of Latin American *lex mercatoria*. The availability of a set of regional principles could be an incentive for the courts to use a more "familiar" instrument on which to base their decisions ...Another way to implement the PLACL into the domestic law is designating them, by the parties, as the applicable law. Logically, this is also recognized by the PLACL, which states in their art. 1 (Scope of application) "(2) These Principles apply when: a) The parties subject themselves to them, in part or in full. b) The parties have agreed that their contract be governed by general principles of law, the *lex mercatoria*, or the like"<sup>46</sup>.

It should be noted that the Principles encounter the same obstacles as all forms of soft law: a lack of legitimacy, the difficulty of being accepted by parties and lawyers as *lex contractus*, the need to mediate between tradition and innovation. So they did not abolish the cause: “why reject a tradition and a decanted explanation of this element of the contract? Why resort to an explanation through another element, such as the object or other notions unknown to our laws, and forget what has been advanced and applied through the notion of cause? What reason is there to exclude a word “loaded with social experience”? Through this expression we Latin American jurists communicate, understanding more or less the same thing once pronounced. In no case should it be excluded.”<sup>47</sup> But at the same time they introduce new solutions that are accepted in international practice such as extrajudicial termination by notification. A more conscious balance of interests seems to have been achieved than in European projects. Only time will tell, however, whether the Principles' challenge will be met and whether they will succeed in establishing themselves as a model of *lex mercatoria* and as a decisive influence in Latin America.

## References

- B. Wauters, *Ius commune and Contract Law*, in *Uniform Rules for European Contract Law?* F. De Elizalde, Ed., 37-51 (Hart Publishing, Oxford, 2018).
- C. De Cores & G. Gandolfi, Código Europeo de Contratos de la Academia de Pavía (Ed. Reus, 2009).
- C. Pizarro, *Un vistazo general a los principios latinoamericanos de derecho de los contratos*, Revista de Derecho Privado, 35, July 2018, At. 351-368.
- C. Vattier Fuenzalida, *El derecho europeo de contratos y el anteproyecto de Pavía*, Anuario de Derecho Civil, tomo LXI, fasc. IV (2008). <https://n9.cl/chmye>
- D. North, Structure and Change in Economic History (Publisher W. W. Norton & Company, 1981).
- E. Broedermann, *The UNIDROIT Principles of International Commercial Contracts 2016, a Bridge Over Troubled Waters-an Overview of the UNIDROIT Principles from the Perspective of a Long Time User*, Tulane Journal of International and Comparative Law, 2019. <https://ssrn.com/abstract=3491669> <http://dx.doi.org/10.2139/ssrn.3491669F>.
- E. Zenedin Glitz, La globalización del derecho contractual (M. Noel Antas, Trad., Ed. Classica, San Pablo, 2012).
- F. Galgano, La globalizzazione nello specchio del diritto (Il Mulino, Bologna, 2005).
- F. Piraino, *Critica della causa al servizio dell'adeguatezza del contratto. Il caso dell'assicurazione della responsabilità civile con copertura claims made*, Journal Europa e Diritto Privato, 2019, At. 1045-1132.
- F. Redondo Trigo, *De los principios Lando al marco común de referencia del derecho privado europeo. Hacia un nuevo ius commune*, Conferencia pronunciada en la Real Academia de Jurisprudencia y Legislación, Anuario de Derecho Civil, tomo LXIII, fasc. IV (2010). <https://n9.cl/q8no6>
- F. Viglione, *Lo sviluppo attraverso il diritto ai tempi della crisi: teorie comparatistiche nella costruzione di un ordine giuridico globale*. Comparazione e Diritto Civile 1-22 (2012). <https://n9.cl/22mq>
- G. Gandolfi, *Per l'unificazione del diritto in Europa: il codice europeo dei contratti*, in J. Adame Goddard, coord., Derecho privado. Memoria del Congreso Internacional de Culturas y Sistemas Jurídicos Comparado (Universidad Nacional Autónoma de México, 2005). <https://archivos.juridicas.unam.mx/www/bjv/libros/4/1590/22.pdf>
- G.B. Portale, *Dal codice civile del 1942 alle ri(codificazioni): la ricerca di un nuovo diritto commerciale*, Rivista del Diritto Commerciale, 1, 2018.
- H. Beale, *The Role for European Contract Law: Uniformity or Diversity?* in *Uniform Rules for European Contract Law?* 9-34, F. De Elizalde, Ed. (Hart Publishing, 2018).
- H. MacGregor, Contract Code. Proyecto redactado por la Law Commission inglesa (J. M. De la Cuesta Sáenz y C. Vattier Fuenzalida, trad., Editorial Bosch) (1996).
- I. De La Maza Gamurri & A. V. Olivares, *The Principles of Latin American Contract Law (PLACL) A Presentation on the Essential Components*, ZEuP: Zeitschrift für europäisches Privatrecht, 2, 2020, At. 418-455.

- J. Balmaceda Hoyos, *La venta internacional de mercaderías* (Thomson Reuters, 2018).
- L. Mengoni, *L'Europa dei codici o un codice per l'Europaen Castronovo*, in A. Albanese, A. Nicolussi, coords., *Scritti I. Metodo e teoria giuridica* 319-331 (Milano, 2011).
- M. Grondona, *L'armonizzazione del diritto contrattuale latinoamericana: premesse per una discussione*, in *Il contratto apolide*, in M. Foglia, 175-197 (Ed. Jura, Edizioni ETS, Pisa, 2019).
- M. J. Bonell, *The law governing international commercial contracts and the essential role of the Unidroit Principles*, 23 *Uniform Law Review*, 1, 2018, At. 15-41.
- M. R. Ferrarese, *Il diritto al presente. Globalizzazione e tempo delle istituzioni* (Il Mulino, Bologna, 2002).
- M. S. Flores Doña, *Los principios UNIDROIT como derecho universal de la contratación internacional*, Ponencia presentada en el Congreso Internacional: contratación y arbitraje mercantil internacional (2009). [http://eprint.s.ucm.es/9556/1/PC\\_Congreso\\_Rioja2009\\_Eprint.pdf](http://eprint.s.ucm.es/9556/1/PC_Congreso_Rioja2009_Eprint.pdf)
- M. Shapiro, *The globalization of law*, *Indiana Journal of Global Legal Studies*, 1, 1993, At. 37-64.
- N. Bobbio, *Contributi ad un dizionario giuridico* (Giappichelli, 1994).
- N. Irti, *Diritto senza verità* (Laterza, Roma-Bari, 2011).
- National Assembly of Ecuador. Law, R. O. 351 of 2010. Organic Code of Production, Commerce and Investments (COPCI). December 29 of 2010.
- National Assembly of Ecuador. Law, R. O. 497 of 2019. Código de Comercio (Commercial Code). May 29 of 2019.
- National Congress of Ecuador. Code 10, R. O. 46 of 2005. Civil Code, June 24 of 2005.
- O. Lando & H. Beale, Eds., *Principles of European Contract Law 1-93* (Kluwer Law International, La Haya, 2000).
- P. Sirena, *La scelta dei PECL come legge applicabile al contratto*, in M. Foglia, Ed., *Il contratto apolide* 139-152 (Jura, Edizioni ETS, Pisa, 2019).
- R. Momberg, & S. Vogenauer, Eds., *The Future of Contract Law in Latin America: The Principles of Latin American Contract Law* (Bloomsbury Publishing, 2017).
- R. Momberg, *Harmonization of contract law in Latin America: past and present initiatives* 209-223 (*Latin American Legal Studies*, 2018).
- R. Sánchez Léria, *Los requisitos para la perfección del contrato en el moderno derecho contractual europeo. Especial consideración a la desaparición de la causa*, *Revista para el Análisis del Derecho InDret*, 3, 2014, At. 1-32. [http://www.indret.com/pdf/1068\\_es\\_.pdf](http://www.indret.com/pdf/1068_es_.pdf)
- S. Vogenauer, *Introduction*, in S. Vogenauer, Ed., *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press, 2015).
- U. Breccia, *Principles, definitions e model rules nel "comune quadro di riferimento europeo"*, in *I contrattib* 95-104 (European Law Publishers, 2010).
- UNIDROIT, *Principios UNIDROIT sobre los contratos comerciales internacionales 2010*. (2010). <https://www.unidroit.org/spanish/principles/contracts/principles2010/blackletter2010-spanish.pdf>
- UNIDROIT. *Member States / Etats Membres* (2017). <http://www.unidroit.org/about-unidroit/membership>
- V. De Lorenzi, *Clausole claims made, interesse meritevole di tutela, causa concreta e vuoti di copertura assicurativa*, *Rivista Assicurazioni*, 4, 2020, At. 481-565.

## Notes

- \* Research article. This journal article is associated and supported by the Universidad Autónoma de Chile, Chile (Facultad de Derecho). Línea de Investigación "Reforma del Estado". Prof. Gonzalo Lascano Bález participated as member of the GIDE Research Group from Pontificia Universidad Católica del Ecuador, Ecuador (Project UIO- SF1810 - CONTRACTS AND BREACH IN ECUADOR, CHILE AND PERU/CONTRATOS E INCUMPLIMIENTO EN ECUADOR, CHILE Y PERÚ). The authors thank Mrs. Lissangee García Mendoza and Mrs. Fernanda Macías Mero for her research assistance.

- 1 —understanding the aspect of temporal duration as the decisive factor in deciding on the effectiveness, efficacy and efficiency of a legal device.
- 2 For a better understanding of what has happened in the Ecuadorian case, in terms of contract law, it is necessary to review the definition of the concept of obligations regulated by Article 1453 of the Civil Code (2005). It establishes “Obligations arise from the actual agreement of the will of two or more persons, as in the case of the contracts or conventions; either from a voluntary act of the person who binds himself, as in the acceptance of an inheritance or legacy and all quasi-contracts; or as a consequence of an act that has inferred injury or damage to another person, as in crimes and quasi-felonies; or by the provision of the law, as between parents and children of the family” (italic outside text).
- 3 Civil Code. Code 10. Law R. O. 46. Art. 1454. June 24, 2005 (National Congress of Ecuador).
- 4 Commercial Code. Law R. O. 497. Art. 3. May 29, 2019 (National Assembly of Ecuador). It is necessary to indicate that Ecuadorian legislation maintains a degree of conceptual synonymy between the concepts of act and contract of commerce without alluding to differences in degree and species-genus.
- 5 Id.
- 6 Id.
- 7 Organic Code of Production, Commerce and Investments [COPCI]. Law, R. O. 351. Art. 3. December 29, 2010 (National Assembly of Ecuador).
- 8 D. North, *Structure and Change in Economic History* (Publisher W. W. Norton & Company, 1981).
- 9 Organic Code of Production, Commerce and Investments [COPCI], op. cit. Art. 1. December 29, 2010 (National Assembly of Ecuador).
- 10 Currently both Ecuador and Peru are not members of UNIDROIT. The International Institute for the Unification of Private Law.. Member States/Etats Membres (2017). <http://www.unidroit.org/about-unidroit/membership>
- 11 B. Portale, Dal codice civile del 1942 alle ri(codificazioni): la ricerca di un nuovo diritto commerciale, *Rivista del Diritto Commerciale*, 1, 2018, pp. 25-44.
- 12 M. R. Ferrarese, *Il diritto al presente. Globalizzazione e tempo delle istituzioni* (Il Mulino, Bologna, 2002).
- 13 M. Shapiro, *The globalization of law*, 1, *Indiana Journal of Global Legal Studies*, 1, 1993, At. 37-64.
- 14 UNIDROIT, *Principios UNIDROIT sobre los contratos comerciales internacionales 2010* (2010). <https://www.unidroit.org/spanish/principles/contracts/principles2010/blackletter2010-spanish.pdf>
- 15 Id., chapter 3.
- 16 M. S. Flores Doña, *Los Principios UNIDROIT como Derecho universal de la contratación internacional*, in *Ponencia presentada en el Congreso Internacional: Contratación y arbitraje mercantil internacional* (2009). [http://eprints.ucm.es/9556/1/PC\\_Congreso\\_Rioja2009\\_Eprint.pdf](http://eprints.ucm.es/9556/1/PC_Congreso_Rioja2009_Eprint.pdf)
- 17 Id.
- 18 Id.
- 19 F. Galgano, *La globalizzazione nello specchio del diritto*, 9 (Il Mulino, Bologna, 2005).
- 20 M. J. Bonell, *The law governing international commercial contracts and the essential role of the Unidroit Principles*, 23, *Uniform Law Review*, 1, 2018, At. 15.
- 21 E. Broedermann, *The UNIDROIT Principles of International Commercial Contracts 2016, a Bridge Over Troubled Waters-an Overview of the UNIDROIT Principles from the Perspective of a Long Time User*, *Tulane Journal of International and Comparative Law*, 69 (2019), pp. 1-77. <https://ssrn.com/abstract=3491669> or <http://dx.doi.org/10.2139/ssrn.3491669>
- 22 F. Redondo Trigo, *De los Principios Lando al marco común de referencia del Derecho Privado Europeo. Hacia un nuevo ius commune*, *Conferencia pronunciada en la Real Academia de Jurisprudencia y Legislación, Anuario de Derecho Civil*, tomo LXIII, fasc. IV (2010). <https://n9.cl/q8no6>
- 23 F. E. Zenedin Glitz, *La globalización del derecho contractual* (M. Noel Antas, Trad. Ed. Classica, San Pablo) (2012).
- 24 R. Sánchez Léria, *Los requisitos para la perfección del contrato en el moderno derecho contractual europeo. Especial Consideración a la desaparición de la Causa*, *Revista para el Análisis del Derecho InDret*, 3, 2014, At. 1-32. [http://www.indret.com/pdf/1068\\_es\\_.pdf](http://www.indret.com/pdf/1068_es_.pdf)
- 25 L. Mengoni, *L'Europa dei codici o un codice per l'Europaen Castronovo*, in *Scritti I. Metodo e teoria giuridica*, 319-331, 329, (A. Albanese, A. Nicolussi, coords., Milano, 2011).
- 26 O. Lando & H. Beale, eds., *Principles of European Contract Law 1-93* (Kluwer Law International, The Hague, 2000).
- 27 Currently both Ecuador and Peru are not members of UNIDROIT. The International Institute for the Unification of Private Law.
- 28 S. Vogenauer, *Introduction*, in S. Vogenauer (ed.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press, 2015).
- 29 P. Sirena, *La scelta dei PECL come legge applicabile al contratto*, in *Il contratto apolide*, 139-152, 139 (M. Foglia, ed., Jura, Edizioni ETS, 2019).
- 30 U. Breccia, *Principles, definitions e model rules nel “comune quadro di riferimento europeo”*, in *I contratti* 95-104 (2010).

- 31 Specifically, as Pizarro points out, the principles will be the fruit of the work of civil law professor from Argentina, Brazil, Uruguay, Chile, Colombia, Paraguay, Guatemala and Venezuela. In addition to the Universities attached to the project, it was generated under the auspices of the Foundation pour le Droit Continental. C. Pizarro, *Un vistazo general a los Principios Latinoamericanos de Derecho de los Contratos*, Revista de Derecho Privado, 35, July of 2018, At. 351-368.
- 32 In this vein, Vattier Fuenzalida states: “These jurists agreed to form a permanent working group which, under the name of Academy of European Iusprivatists and based in Pavia, was formally constituted in 1992. The Academy is made up of more than a hundred jurists from the different countries of the European Union and Switzerland, many of whom are of great prestige, such as the late F. Wieacker, A. Trabucchi & A. Tunc, or the Spanish J. L. de los Mozos, G. García Cantero y A. Luna Serrano, The first of whom held the presidency until his unexpected and regrettable death. C. Vattier Fuenzalida, *El derecho europeo de contratos y el anteproyecto de Pavia*, Anuario de Derecho Civil, tomo LXI, fasc. IV (2008). <https://n9.cl/chmyc>
- 33 However, the activity was also supported by Cambridge professor Peter Stein. In the coordination of the coding (which has been going on for more than twenty-five years), Professor Carlos de Cores has also participated.
- 34 C. De Cores & G. Gandolfi, *Código Europeo de Contratos de la Academia de Pavia* (Ed. Reus, 2009).
- 35 G. Gandolfi, *Per l’unificazione del diritto in Europa: il codice europeo dei contratti*, in *Derecho privado. Memoria del Congreso Internacional de Culturas y Sistemas Jurídicos Comparado*, J. Adame Goddard, Coord., Universidad Nacional Autónoma de México (2005). <https://archivos.juridicas.unam.mx/www/bjv/libros/4/1590/22.pdf>
- 36 Id., 359-360.
- 37 H. MacGregor, *Contract Code. Proyecto redactado por la Law Commission inglesa* (J. M. De la Cuesta Sáenz y C. Vattier Fuenzalida, trad., Ed. Bosch) (1996).
- 38 H. Beale, *The Role for European Contract Law: Uniformity or Diversity?*, in F. De Elizalde, *Uniform Rules for European Contract Law?* 9-34, 33-34 (Ed., Hart Publishing, Oxford, 2018).
- 39 F. Viglione, *Lo sviluppo attraverso il diritto ai tempi della crisi: teorie comparatistiche nella costruzione di un ordine giuridico globale*. *Comparazione e Diritto Civile* 1-22, 1 (2012). <https://n9.cl/22mq>
- 40 F. Piraino, *Critica della causa al servizio dell’adeguatezza del contratto. Il caso dell’assicurazione della responsabilità civile con copertura claims made*, *Journal Europa e Diritto Privato*, 1045-1132, 1045 (2019); V. De Lorenzi, *Clausole claims made, interesse meritevole di tutela, causa concreta e vuoti di copertura assicurativa*, *Rivista Assicurazioni*, 4, 2020, At. 481-565, 485.
- 41 N. Irti, *Diritto senza verità* 118 (Laterza, Roma-Bari, 2011).
- 42 This mechanism originates from Article 50 CISG, as a price reduction (*actio quanti minoris o aestimatoria*). J Balmaceda Hoyos, *La venta internacional de mercaderías* (Thomson Reuters, 2018).
- 43 B. Wauters, *Ius commune and Contract Law*, in *Uniform Rules for European Contract Law?* 37-51, 51, in F. De Elizalde, Ed. (Hart Publishing, Oxford, 2018).
- 44 R. Momberg & S. Vogenauer, Eds., *The Future of Contract Law in Latin America: The Principles of Latin American Contract Law* (Bloomsbury Publishing, 2017); I. De La Maza Gamurri; A. V. Olivares, *The Principles of Latin American Contract Law (PLACL) A Presentation on the Essential Components*, ZEuP: Zeitschrift für europäisches Privatrecht, 2, 2020, At. 418-455.
- 45 M. Grondona, *L’armonizzazione del diritto contrattuale latinoamericana: premesse per una discussione*, in M. Foglia, Ed., *Il contratto apolide*, 175-197 (Jura, Edizioni ETS, 2019).
- 46 R. Momberg, *The Principles of Latin American Contract Law: Nature, Purposes, Projections* 215 (Latin American Legal Studies, 2018).
- 47 C. Pizarro, *Un vistazo general a los principios latinoamericanos de derecho de los contratos*, Rev. Derecho Privado, 2, 2018, At. 355; I. De La Maza Gamurri & A. V. Olivares, *The Principles of Latin American Contract Law (PLACL) A Presentation on the Essential Components*. ZEuP: Zeitschrift für europäisches Privatrecht, 2, 2020, At. 418-455.

Licencia Creative Commons CC BY 4.0

*How to cite this article:* Ruben Mendez Reategui, Francesca Benatti, Rodrigo Barcia Lehmann & Gonzalo Lascano Báez, *Contracts law and its modern trends: The Ecuadorian case*, 70 Universitas (2021), <https://doi.org/10.11144/Javeriana.vj70.clmt>