The law governing international commercial contracts and the actual role of the UNIDROIT Principles

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Abstract
The traditional and still prevailing approach to “nationalize” cross-border transactions and to subject them to the law of a particular country as if they were purely domestic contracts, may be criticized for a number of reasons. The UNIDROIT Principles of International Commercial Contracts – the most important soft law instrument in the field of general contract law, first published in 1994 and now in their fourth edition (2016) – could constitute a valid alternative to the traditional State-law centred conflict-of-laws approach. Yet why is it that, despite the widely acknowledged intrinsic merits of the UNIDROIT Principles, their relevance in practice is still rather limited? The Author, after pointing out that the main reason for the continuing dominance of national laws is the inherent conservatism, coupled with a good deal of provincialism, of the legal profession, shows that nonetheless there exist significant “market niches” that the UNIDROIT Principles may, and actually do, fill with considerable success.

I. Introduction
The present state of the law governing international commercial contracts is hardly satisfactory. Despite the unprecedented growth in the volume of trade and the development of increasingly integrated markets—if not at a global, then at least at a regional, level—cross-border business transactions continue to a large extent to be subject to national laws. Or, to put it differently, disputes arising from these transactions are still generally decided in accordance with the law of a particular country, be it the law of the forum or that of a foreign country, and this not only in court proceedings but also, though to a less extent, in arbitral proceedings. One may ask: what is wrong with that? National laws govern more or less satisfactorily the multitude of domestic transactions entered into every day.
within the boundaries of their respective countries, so why should they not apply likewise to cross-border transactions.

In the following remarks, after a brief description of the most relevant deficiencies of the traditional State law-centred conflict-of-laws approach (II) and of the novelty represented by the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles) (III), I will examine the most significant ways in which the UNIDROIT Principles may be, and actually are, used in practice (IV), focusing on their role as rules of law governing international contracts (1); as a means of interpreting and supplementing international uniform law (2), and as ‘global background law’ used to interpret or supplement domestic law (3). In my concluding remarks, I shall try to explain why, despite the widely acknowledged intrinsic merits of the UNIDROIT Principles, their relevance in practice is still rather limited; yet, at the same time, I shall demonstrate that, notwithstanding the continuing dominance of national laws, there are significant ‘market niches’ that the UNIDROIT Principles fill with considerable success (V).

II. The limits of the traditional state law-centred conflict-of-laws approach

The traditional and still prevailing approach to ‘nationalize’ cross-border transactions—that is, to subject them to the law of a particular country as if they were purely domestic contracts—may be criticized for a number of reasons. To begin with, domestic laws may not only vary considerably in content, but they are often ill-suited for the special needs of international trade. With respect to some domestic laws, it may even be almost impossible to find out what solution they provide for the issue at stake because of the rudimentary character of the legal sources and the difficulty of accessing them. Yet also highly developed legal systems often prove to be outdated. As Sir Roy Goode, one of the most eminent English law professors, observed with respect to the generally highly praised English law:

[when I visit other common law countries, and in particular Canada and the United States, I am immensely impressed with their concern to keep their commercial law up to date... When I return to England I feel... depressed by... our inertia and the belief in the innate superiority of English commercial law... How is it that we feel able to embark on the 21st century with commercial law statutes passed in the 19th?]

Or to quote a similar statement made with respect to Swiss law by Ingeborg Schwenzer, a well-known expert in Swiss law and in international uniform law:

As Switzerland is such a small country, many central questions of contract law have not yet been decided by the Swiss Supreme Court, or if they have been decided, the decision may have been rendered decades ago and is disputed by scholarly writings.

This makes the outcome of the case often rather unpredictable, which is another reason that may well prevent a party from pursuing its rights under the contract.²

Moreover, the very fact that in a given case more than one domestic law may be claimed to apply inevitably raises a problem in the conflict of laws. The uncertainties and inconveniences that derive from this are only too evident. Because of the different national rules of private international law, parties risk remaining uncertain as to the law governing their contract until the competent forum is established. Even then, depending on the conflict-of-laws rules of the forum, the same contract may well be subject to the law of State X or to the law of State Y.³ Moreover, as rightly pointed out, judges, while paying lip-service to the forum’s conflict-of-laws rules, in practice tend to favour in most cases the application of their own domestic substantive law.⁴ Last but not least, even if a judge was prepared to apply a foreign law, it is far from granted that he or she will be in a position to interpret it properly.

Of course, parties may make use of their right—nowadays generally admitted—to choose the law that should govern their contract. However, unless one of them is in a position to impose its own law—as is certainly the case with the big global players—the parties are usually reluctant to accept the application of the domestic law of the other. If so, they will have to resort to a ‘neutral’ law—that is, the law of a third country—that is foreign to both of them, and to know its content may require time-consuming and expensive consultations with lawyers of the country of the law chosen.

Another way out of the deadlock, of course, would be for the parties to agree to submit the disputes arising from the contract to arbitration and to choose, as they nowadays may according to most of the national arbitration laws, non-State ‘rules of law’ as the law applicable to the substance of their disputes.⁵ Yet, if they do not opt for such a solution, the determination of the applicable law will be left to the relevant conflict-of-laws rules, with all of the uncertainties indicated above. Indeed, not only in court proceedings but also in the case of arbitration absent any indication to the contrary by the parties, the arbitral tribunal is bound to apply ‘the law’—that is, a particular domestic law determined by the conflict-of-laws rules that it considers applicable.⁶

Another possibility for the parties to avoid the application of any domestic law would be to try to lay down in their contract—and, in fact, they do so quite often, especially with respect to complex transactions—a detailed and possibly

⁵ So expressly Article 28(1) of the 1985 UNCITRAL Model Law on International Commercial Arbitration: for further details see infra at p. 11.
⁶ So Article 28(2) of the UNCITRAL Model Law on International Commercial Arbitration.
exhaustive regulation of their rights and obligations so as to avoid to the greatest possible extent any recourse to external sources. Yet, apart from the fact that in so doing the parties often encounter insurmountable difficulties arising from the language barriers between them and the absence of internationally uniform legal terminology on which they can rely, in the case of disputes, even such supposedly self-regulatory contracts or ‘contrats sans loi’ cannot do without a general legal framework to which to resort for their proper interpretation and implementation. Moreover, at least in proceedings before a domestic court, the terms of the contract are binding only to the extent that they do not conflict with the mandatory rules of the otherwise applicable domestic law.

It is true that as of the beginning of the last century and, above all, in the second half of it, States have also been adopting an increasing number of international uniform law conventions in the field of contract law, with a view to eliminating the uncertainties arising out of the coexistence of different national legal systems. Yet, despite some undoubtably successes, the overall results of the unification efforts by legislative means are rather disappointing especially in the light of a cost/benefit analysis.

To begin with, international uniform law conventions often risk remaining a dead letter, either because they have not been ratified by a sufficient number of States or, even if they have entered into force, the parties, sometimes ill advised by ultra conservative lawyers, exclude their application whenever they can.

Moreover, international uniform law conventions are normally rather fragmentary in character, dealing only with the rights and duties of the parties arising from the specific types of transactions covered. Even a comprehensive and worldwide accepted instrument like the Convention on Contracts for the International Sale of Goods (CISG), contains a number of ambiguous provisions and presents

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7 There is as yet no single source of information for all instruments of uniform law. For a compilation of primary materials relating to international trade law accompanied by commentary, see most recently, R. Goode, H. Kronke, E. McKendrick, J. Wool (eds.), Transnational Commercial Law. International Instruments and Commentary, 2nd ed. Oxford 2012.


9 On the reasons why States may be reluctant to ratify uniform law conventions even where they have participated in their preparation see e.g. R. Goode, International Restatements of Contract and English Contract Law, in Uniform Law Review 1997, p. 231 et seq. (pp. 232–233); J. Basedow, Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts, in Uniform Law Review 2000, p. 129 et seq.

10 This holds true also for successful instruments such as the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG), with respect to which it is estimated that e.g. in the United States 55–71% of lawyers ‘typically/generally’ opt out, in Germany around 45%, in Switzerland around 41%, in Austria around 55%, in China 37% or less (cf. Lisa Spagnolo, A Glimpse through the Kaleidoscope: Choices of Law and the CISG, Vindobona Journal of International Commerce Law and Arbitration 2009, p. 135 et seq. p. 135, 135–6).

11 As of 31 December 2017 the Convention was ratified by 89 States; see the list at http://www.uncitral.org/uncitrал/en/uncitrал_texts/sale_goods/1980CISG_status.htm (last accessed 31 December 2017).
significant lacunae,\textsuperscript{12} which risk to be interpreted and supplemented differently in different countries.\textsuperscript{13}

Nor can the various standard contract forms, trade terms, model contracts, and model clauses, which the interested business circles have been developing since the end of the nineteenth century in response to the inadequacies of national laws, provide a satisfactory alternative.\textsuperscript{14}

These instruments are predominantly issued by individual enterprises or by national trade associations and commodity exchanges operating in the major commercial and financial centres.\textsuperscript{15} Consequently, not only is their content likely to be one-sided, but they are inevitably influenced by legal concepts of their respective countries of origin and normally contain a provision for the application of the law of those countries and/or the settlement of possible disputes on their territory.\textsuperscript{16} Yet, even both in form and substance, truly supra-national or a-national instruments, prepared by international non-governmental organizations offer only a partial solution. This is true in particular of the Incoterms or the Uniform Customs and Practices for Documentary Credits (UCP), which are prepared by the International Chamber of Commerce (ICC) and deal only, though in great detail, with the most common delivery terms and a letter of credit as a particular mode of payment respectively.\textsuperscript{17} But this may also be said of the various model contracts on sales, commercial agency, distributorship,

\textsuperscript{12} For examples of such ambiguous provisions and veritable lacunae to be found in CISG, see M.J. Bonell, An International Restatement of Contract Law. The \textit{UNIDROIT} Principles of International Commercial Contracts, 3rd ed. 2005, pp. 318–325.

\textsuperscript{13} Yet it is fair to say that all in the much feared danger of sharp differences in the interpretation of the CISG by the various domestic courts seems to a large extent to have been avoided also thanks to the vast information on the decisions rendered worldwide provided by specialised and easily accessible data bases, such as CLOUT (www.uncitral.org), UNILEX (www.unilex.info), the Pace Database on the CISG and International Commercial Law (www.cisgw3.law.pace.edu), CISG-online.ch (www.cisg-online.ch), as well other initiatives, such as the UNCITRAL Digest on the CISG offering a compilation of selected cases on single Articles of the Convention or the CISG Advisory Council rendering elaborated opinions on specific topics directly or indirectly relating to the Convention. For a comprehensive analysis of the different approaches followed worldwide in the interpretation of the CISG, see F. Ferrari, Autonomous Interpretation versus Homeward Trend versus Outward Trend in CISG Case Law, in Uniform Law Review 2017, p. 244 et seq.


\textsuperscript{15} Suffice it to mention the numerous standard commodity contracts issued by the long established and prestigious London-based Grain and Feed Trade Association, the Federation of Oil, Seed and Fats Associations, the London Metal Exchange and the Refined Sugar Association, and so on. For a list of similar instruments produced by non-governmental organizations in the United States, see S.C. Symeonides, Party Autonomy and Private-Law Making: The \textit{Lex Mercatoria} that Isnt, Festschrift für Konstantinos D. Karameus, Athens, 2009, p. 1403 et seq.

\textsuperscript{16} Thus, e.g., all standard contracts prepared by the above-mentioned London-based trade associations contain a reference to English law (to the exclusion of uniform law instruments) as the applicable law and to the English courts or arbitration to be held in London for settlement of disputes, regardless of where the parties have their places of business.

\textsuperscript{17} For the latest editions, see Incoterms 2010 and UCP 600.
franchising, construction, joint ventures, and so on prepared by the ICC,\(^\text{18}\) the International Trade Centre (ITC),\(^\text{19}\) the International Federation of Consulting Engineers,\(^\text{20}\) and others. Indeed, these instruments, though more balanced in content on account of their origin, still presuppose a more general regulatory system to refer to for the purpose of settling the questions they do not expressly address and to establish the conditions and limits of their validity.\(^\text{21}\)

III. The Unidroit Principles: A private codification or ‘restatement’ of international contract law

The Unidroit Principles constitute an authentic novelty among the legal instruments applicable to international commercial contracts.\(^\text{22}\) Prepared by a group of independent experts from all of the major legal systems and geo-political areas of the world and finally approved by the International Institute for the Unification of Private Law (Unidroit), an inter-governmental organization with 63 Member States drawn from all five continents,\(^\text{23}\) they represent a private codification or ‘restatement’ of international contract law. First published in 1994 and now in their fourth edition adopted in 2016, they have been welcomed from their first appearance as ‘a significant step towards the globalisation of legal thinking’.\(^\text{24}\) In formally endorsing the Unidroit Principles in 2004, the United Nations Commission on International Trade Law (UNCITRAL) congratulated Unidroit ‘on having made a further contribution to the facilitation of international trade by preparing general rules for international commercial contracts’ and unanimously...
commended ‘the use of the UNIDROIT Principles, . . . as appropriate, for their intended purposes’. 25

The UNIDROIT Principles constitute an authentic novelty, first of all, on account of their broad scope. While most international uniform law instruments, be they of a legislative or non-legislative nature, are restricted to particular types of transaction (sales, leasing, carriage of goods by sea, road, or air, and so on) or to specific topics (delivery terms, modes of payment, and so on), the Principles provide a comprehensive set of principles and rules relating to international commercial contracts in general, comparable to the—codified or unwritten—general part of contract law found in domestic law. Indeed, they cover a wide range of subjects such as freedom of contract, good faith and fair dealing and usages, as well as contract formation including contracting on the basis of standard terms, interpretation, validity including illegality, third party rights, conditions, performance, non-performance and remedies, set off, assignment of rights, limitation periods, plurality of obligors and of obligees, and so on.

Yet the UNIDROIT Principles differ from other international uniform law instruments also with respect to their formal presentation. Following the example of the US Restatements of the Law, they are composed of black-letter rules (‘Articles’); in the current 2016 edition, a total of 211 articles divided into 11 chapters—each of which is accompanied by comments and by illustrations largely based on actual cases and intended to explain the reasons for the black-letter rule and the different ways in which it may operate in practice. Sometimes, the comments, which are regarded as an integral part of the Principles, go even further and supplement the black-letter rules.

This is especially the case with the new comments added in the 2016 edition to take into account the characteristics and special needs of long-term contracts. Of the numerous examples, mention may be made, for instance, of Comment 3 to Article 4.3, which states that:

[conduct subsequent to the conclusion of the contract can assist in determining what the parties intended their obligations to be. This may be the case particularly in the context of long-term contracts which involve complex performance and are ‘evolutionary’ in nature, i.e. may require adaptations in the course of performance. Such contracts may involve repeated performance by one party with the opportunity for the other to assert that such performance does not conform to the contract. . . . To avoid any uncertainty as to the effects of subsequent conduct on the content of the contract, the parties may wish to adopt particular mechanisms for possible variations and adjustments of the contract in the course of performance. They may, for instance, provide for the issuance of ‘variation orders’ by one party for acceptance by the other party (e.g. in construction contracts the ‘Employer’ s Representative’ and the ‘Contractor’ s Representative’, respectively), or establish special bodies composed of representatives of both parties or of independent experts (so-called ‘contract management committees’, ‘auditing bodies’ or the like), with the task of monitoring both parties’ performance and possibly also of suggesting adjustments to the contract so as

25 The same endorsement was repeated in 2012 for the 2010 edition and is likely to be adopted also for the current 2016 edition.
to bring it in line with developments. Obviously, the more precisely the parties regulate the procedure for adjustments to the contract, the less relevant any informal conduct of the parties would be to the interpretation of the contract.

Or Comment 4 to Article 7.3.5, which points out that:

[t]he issue of post-termination obligations is particularly relevant for long-term contracts. In relation to surviving provisions, the parties should consider addressing the following issues: which provisions are to survive termination; whether such provisions are binding on one or both parties after termination; how long they survive, who will bear the cost; which remedies are available in case of non-performance, etc. Surviving provisions may be dealt with in various ways: by a general clause stating that all provisions which by their nature are intended to operate even after termination will remain in force; by listing the specific provisions intended to survive; or by stating in the provision concerned that it is to remain in force notwithstanding termination. Contract drafters should pay close attention to the compatibility of the surviving duties with mandatory domestic law (e.g. limitations on prohibitions to compete).

The drafting style of the UNIDROIT Principles resembles that of civilian codes rather than that of Anglo-American statutes. The language is concise and straightforward so as to facilitate comprehension also by non-lawyers and deliberately avoids terminology peculiar to any given legal system, thereby creating a legal lingua franca to be used and uniformly understood throughout the world.26

With respect to their content, the UNIDROIT Principles represent a mixture of both tradition and innovation. In other words, while, as a rule, preference was given to solutions generally accepted at the international level (the ‘common core’ or ‘re-statement’ approach), whenever it was necessary to choose between conflicting rules—as was the case more often than not—what was decisive was not just which rule was adopted by the majority of countries but, rather, which of the rules under consideration had the most persuasive value and/or appeared to be particularly well suited for cross-border transactions (the ‘better rule’ or ‘pre-statement’ approach).27

Without entering into an in-depth analysis of which provisions of the UNIDROIT Principles are innovative and which are not, suffice it to mention that there are provisions that, while quite familiar to civil law systems, are unknown to common law systems and vice versa.28 Examples of the former are the provisions on the duty to act in good faith in general and the (pre-contractual) liability for negotiating in bad faith; on the relevance, for the purpose of interpretation, of the conduct of the parties prior and subsequent to the conclusion of the contract; and on the enforceability of penalty clauses. Examples of provisions new to civil law systems are those

26 For numerous examples of such approach, see M.J. Bonell, An International Restatement of Contract Law, cit. pp. 65–68.
28 See more in details M.J. Bonell, An International Restatement, cit., pp. 48–49 (‘Tradition v. Innovation’), pp. 50–52: ‘Rules designated to meet the special needs of international trade practice’), pp. 52–56: ‘Rules reflecting the different socio-economic conditions in the various parts of the world.’  

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on avoidance for defects in consent and on termination for non-performance by mere notice; on exemption clauses; and on that which excludes the remedy of specific performance where the innocent party may reasonably obtain performance from another source. Needless to say, the dichotomy between common law and civil law systems is also not strict in this context, given the considerable differences between, for example, the US and English contract law and, within the civil law systems, those between the Romanistic and German legal traditions.

Only a small number of provisions represent a novelty for both civil law and common law systems, and their rationale again lies above all in the special needs of cross-border business transactions. This is particularly true of Article 3.1.2, according to which the mere agreement of the parties is sufficient for the valid conclusion or modification of the contract without any further requirement such as ‘consideration’ or ‘cause’; of Articles 6.2.1–6.2.3 on hardship, especially with respect to the right of the disadvantaged party to request renegotiation of the contract; and of Article 7.1.4, which grants the non-performing party the right to cure non-performance even after termination of the contract by the aggrieved party. Another provision of this kind, originally proposed by the Working Group for inclusion in the 2016 edition of the UNIDROIT Principles as particularly suitable for the special needs of long-term contracts, would have been the provision on termination for compelling reasons, but, unfortunately, the proposal was rejected after a lengthy discussion by the majority of the UNIDROIT Governing Council.

Significantly enough, most of the innovative provisions of the UNIDROIT Principles have generally received quite positive comments, and, in some cases, they have even prompted the national lawmakers to reform their own domestic laws. Thus, for instance, the 2008 French reform of the law on limitation periods in private law relationships (now Article 2224 of the French Civil Code) was inspired by the provisions on limitation periods in the UNIDROIT Principles, and, even more importantly, the 2016 Reform of the French Law of Obligations, again following the approach adopted by the Principles, no longer requires a ‘cause’ for the valid conclusion of contracts and expressly admits contract renegotiation and adaptation in case of hardship.

On the whole, it is fair to, to quote Justice Finn of the Federal Court of Australia, ‘the Principles contain much that is recognizable in many legal systems of the world even when it does not fully accord in its detail with the law of any particular country’. In other words, there are relatively few provisions of the UNIDROIT Principles that openly conflict with existing domestic laws, while, for the most

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29 The text of the provision as proposed by the Working Group read as follows: ‘(Termination for compelling reason) (1) A party may terminate a contract to be performed over a period of time on notice to the other party with immediate effect if there is compelling reason for doing so. (2) There is compelling reason only if, having regard to all the circumstances of the case it would be manifestly unreasonable for the terminating party to be expected to continue the contractual relationship.’ Cf. UNIDROIT 2016, Study L Doc. 135 rev., January 2016 Annex 10.


part, they are perfectly consistent with almost all of them and, in a number of cases, represent a useful clarification or complement.

Yet what are the potentialities of the UNIDROIT Principles in the international contract and dispute resolution practice, and how much are they used in reality?

IV. The actual role of the UNIDROIT Principles in international contract and dispute resolution practice

1. The UNIDROIT Principles as rules of law governing international commercial contracts

One may think of a variety of situations in which parties—be they powerful ‘global players’ or small or medium businesses—are unable or unwilling to agree on a particular domestic law as the law governing their contract and end up by not making any choice as to the applicable law or by referring for that purpose to no better defined ‘general principles of law’, ‘generally accepted principles of international commercial law’, the ‘lex mercatoria’, or the like. In both cases, the result can hardly be considered to be satisfactory. Not in the first case because the determination of the applicable law would be left to the relevant conflict-of-laws rules with all of the inconveniences indicated above. And not in the second case because it would be up to the adjudicating body to determine in each given case what was the precise meaning of such vague formulas, with the result that the solution finally adopted would be rather unpredictable and, in most cases, rather arbitrary.

A valid alternative may be the recourse to the UNIDROIT Principles.\(^{32}\) They are available in all of the major international languages and provide a balanced set of rules covering virtually all of the most important topics of general contract law.\(^{33}\)

To quote an eminent Swiss scholar, ‘[t]he Principles represent a codification of high quality and homogeneity in contents, which in many respects even surpasses the quality of traditional national legal orders . . . they represent a clear and stable codification created by an approved international organization.’\(^{34}\) What still remains to be seen is whether, and, if so, to what extent under the relevant rules of private international law, parties or, in the absence of any choice of law by the parties, courts and arbitral tribunals are permitted to apply the UNIDROIT

\(^{32}\) Cf. paragraph 2 of the Preamble.

\(^{33}\) In addition to the five official language versions (English, French, German, Italian and Spanish), corresponding to the official languages of UNIDROIT, there exist also translations in many other languages, including Arabic, Chinese, Japanese, Persian, Portuguese, Russian (see with respect to the 2010 edition, http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010 versions (accessed 31 December 2017).

Principles as the rules of law governing the contract or applicable to the substance of the dispute in lieu of a particular domestic law.

In the context of international commercial arbitration, the answer at least with respect to the choice of the UNIDROIT Principles by the parties is nowadays generally in the affirmative. Article 28(1) of the 1985 UNCITRAL Model Law on International Commercial Arbitration expressly states that ‘[t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute’, and similar provisions may be found in the numerous domestic arbitration laws enacted worldwide on the basis of the UNCITRAL Model Law.35

By contrast, as far as court proceedings are concerned, the traditional and still prevailing view is that the parties’ freedom of choice, let alone their application ex officio by the courts, is limited to a particular domestic law, with the result that a reference to the UNIDROIT Principles will be considered as a mere agreement to incorporate them into the contract and, as such, would bind the parties only to the extent that they do not affect the mandatory provisions of the lex contractus.36

Admittedly, in more recent times, there have been some interesting developments that have given reason to believe that the traditional approach, based on a strictly positivistic and State-centred concept of law, would be gradually given up in favour of a more liberal and transnational approach.

To begin with, the 1994 Inter-American Convention on the Law Applicable to International Contracts refers in two places—precisely, in Articles 9(2) and 10—to legal sources of an a-national or supra-national character for the purpose of the determination of the lex contractus, thereby justifying the conclusion that under this Convention soft law instruments such as the UNIDROIT Principles may well be applied as the law governing the contract at least if expressly chosen by the parties.37 Yet, the Convention has so far been ratified only by two States—that is, Mexico and Venezuela.

Furthermore, a reference to the possibility for parties to agree on the applicability of the UNIDROIT Principles is contained in the Official Comments to the United States Uniform Commercial Code. More precisely, Comment 2 to paragraph 1–302, as revised in 2001, states that ‘parties may vary the effect of [the Uniform Commercial Code’s] provisions by stating that their relationship will be governed by recognised bodies of rules or principles applicable to commercial transactions . . . [such as, for example,] the UNIDROIT Principles of International Commercial Contracts’36. It is true that such reference is made in the context of paragraph 1–302, laying down the principle of freedom of contract and not in the

context of paragraph 1–301, which deals with the parties’ right to choose the applicable law, with the consequence that a party’s agreement to have its contract governed by the UNIDROIT Principles will be respected only to the extent that the Code grants parties the right to derogate from its provisions. Yet, the probability is rather remote that, if the parties agree on the application to their contract of the UNIDROIT Principles the individual provisions of the Principles will be struck out because of their incompatibility with the Code, all the more so since most of the mandatory provisions of the Code are restricted to consumer transactions.

Even more important, in a draft Regulation of 15 December 2005 intended to replace the 1980 Rome Convention on the Law Applicable to Contractual Obligations, the Commission of the European Communities proposed to insert in Article 3 on party autonomy a new paragraph 2 to read ‘[t]he parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally’. As pointed out in the explanatory notes, ‘[t]he...words used would authorise the choice of the UNIDROIT Principles...while excluding the lex mercatoria, which is not precise enough, or private codifications not adequately recognised by the international community’. Unfortunately, the innovative proposal put forward by the Commission met strong reservations on the part of the Member States of the European Union (EU), which were concerned about the risk of excessive legal uncertainty deriving from the choice of a-national principles and rules as the law governing the contract, compared to the alleged certainty and predictability of the choice of a particular domestic law. As a result, the proposed paragraph 2 was deleted from the final version of Article 3, with the mere mentioning in the Recitals that ‘[t]his Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention’.

Yet despite this serious setback, over the last couple of years the tendency towards a more flexible and liberal conflict-of-laws approach has received further and significant impetus. This applies above all to the Hague Principles on Choice

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38 One of the few examples of conflicting provisions is that of Article 1.2 of the UNIDROIT Principles, according to which neither the conclusion of a contract nor a subsequent modification thereof or its termination by agreement is subject to any requirement as to form, and UCC § 2-201 confirming the statute of frauds. For an article-by-article comparative analysis of the UNIDROIT Principles (and CISG), on the one hand, and the relevant provisions of the UCC, see H.D. Gabriel, Contracts for the Sale of Goods: A Comparison of Domestic and International Law, 2004.

39 On the other hand, it is true that there are still other provisions of the UNIDROIT Principles which may be disregarded by US courts not because they go against specific provisions of the UCC, but because they contrast with firmly established principles of general contract law: this is the case in particular of Articles 4.1 and 4.3 (contrasting with the ‘plain meaning rule’ and the ‘parol evidence rule’ in contract interpretation) and of Article 6.2.3 (contrasting with the reluctance of US courts to reform contracts).


41 For a convincing critique of these arguments, see e.g. B. Schinkels, Die (Un-)Zulässigkeit einer kollisionsrechtlichen Wahl der UNIDROIT Principles nach Rom I, in Zeitschrift für Gemeinschaftsprivatrecht 2007, p. 106 ss., p. 108 ss.


43 Cf. Recital no. 13.
of Law in International Commercial Contracts (Hague Principles), which were adopted in 2015 by the Hague Conference on Private International Law,44 and the Paraguayan law “Sobre el derecho aplicable a los contratos internacionales” (Paraguayan Law), which entered into force in that same year.45 Both instruments expressly provide that parties to an international contract may choose as the law governing their contract not only a particular domestic law but also, to quote Article 3 of the Hague Principles, the ‘rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules’,46 and the Official Commentary expressly mentions the UNIDROIT Principles as an example of such rules of law capable of being chosen as the governing law.47 It is true that, according to the Hague Principles, parties may choose such non-State ‘rules of law’ as the law governing their contract only if the law of the forum does not provide otherwise. This proviso may be considered superfluous in view of the fact that the Hague Principles are a soft law instrument, but it was politically necessary to overcome the strong opposition that the liberal rule laid down in Article 3 met at the Hague Conference among numerous delegations, including the EU, which was not surprisingly given the conservative approach adopted in the Rome I Regulation.48

In any case, if the Paraguayan Law is the first and, so far, only example of legislative recognition of a party’s right to select non-State rules of law as the proper law of its contract also in court proceedings,49 in other countries, there have been some significant court decisions in recent times admitting that soft law instruments, such as international conventions not yet entered into force or the UNIDROIT Principles,

44 See the full text at https://www.hcch.net/de/instruments/conventions/full-text/?cid=135 (accessed 31 December 2017).
46 The more concise formulation of Art. 5 of the Paraguayan Law reads ‘rules of law of a non-State origin that are generally accepted as a neutral and balanced set of rules’
47 Cf. Comment 3.6 (‘[R]ules of law’ that would satisfy this … criterion may [be] non-binding instruments formulated by established international bodies. One example is UNIDROIT, an inter-governmental organisation responsible solely to its Member States, which operates on the basis of consensus. The UNIDROIT Principles are an example of ‘rules of law’ that are ‘generally accepted on an international level’. Moreover, the UNIDROIT Principles expressly provide that parties may designate them to govern their contract and suggest choice of law clauses to that end (see the footnote to the UNIDROIT Principles’ Preamble and the Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts’).
48 Significantly enough, however, even the most vehement critics of the provision concede that their opposition would have been much weaker if at stake was only the possibility to choose as the lex contractus the UNIDROIT Principles: so expressly, e.g., P. Mankowski, Art. 3 Hague Principles: The Final Breakdown for the Choice of Non-State Law?, in Uniform Law Review 2017, p. 369 et seq. p. 371: ‘If it was only for the UNIDROIT Principles the battle for a choice of non-state law would hardly be so heated.
may be applied as *lex contractus*. To begin with, in 2004, the Handelsgericht St. Gallen,50 in a dispute concerning the validity of a choice-of-law clause in favour of the Rules of the Fédération Internationale de Football Association (FIFA Rules), decided in the affirmative, pointing out that according to the prevailing view among legal scholars in Switzerland parties were entitled to choose non-State rules of law as the *lex contracts* even before domestic courts, provided that the rules in question were transnational in character and sufficiently coherent and balanced with respect to content, as was the case of the UNIDROIT Principles and in the Court’s opinion also of the FIFA Rules. One year later, the Swiss Supreme Court, while overruling the decision of the lower court with respect to the FIFA Rules, confirmed that a different solution might be adopted with respect to the UNIDROIT Principles, which, in its words, represent ‘a set of general principles and rules prepared by independent academics and comparable to domestic legal systems as to intrinsic equilibrium, comprehensiveness and general recognition’.51

Yet, there are court decisions that have applied soft law instruments such as the UNIDROIT Principles as the rules of law governing the substance of the dispute even in the absence of an express choice by the parties. Apart from a decision of the Belgian Cour de Cassation of 2009 and two French decisions (Court d’Appel of Reims of 2012 and Cour de Cassation of 2015) concerning international sales contracts governed by the CISG, all of which applied side by side with the CISG also the UNIDROIT Principles, defining them as ‘a code of international contracts containing general principles governing the law of international commerce’52, even more explicit about the possible role of the UNIDROIT Principles as the rules of law applicable to the substance of the disputes are two Brazilian decisions rendered in 2017 by the Court of Appeal of Rio Grande do Sul.

The first case concerned a contract between a Danish multinational company and a Brazilian company for the delivery of goods in Hong Kong. The contract, concluded in Denmark, was silent as to the applicable law. In its decision, the Court noted that according to Article 9(2) of the current Brazilian private international law, the applicable law would be Danish law as the law of the place of the conclusion of the contract. However, the Court held that whenever the contract was ‘pluri-connected’, as was the case at hand, the traditional *lex loci celebrationis* rule should be disregarded in favour of a more flexible approach, and it decided to apply the CISG, which, at the time of conclusion of the contract, was not yet in force in Brazil, and the UNIDROIT Principles as an expression of the ‘new *lex mercatoria*’.53

The second case concerned a sales contract between a Venezuelan company and a Brazilian company with the price expressed in US dollars. Since the Venezuelan exchange regulations only permitted the payment in US dollars after the goods had been delivered at the place of destination in Venezuela, the buyer anticipated

52 For further details see infra p. 20.
the price to the seller through a US bank in order to make the sale possible and then paid a second time after the arrival of the goods. When the seller refused restitution of the first payment, alleging its illegality because it was made in violation of the Venezuelan exchange regulations, the buyer filed a legal action, and the Court, in determining the law governing the substance of the dispute, again decided to disregard as a connecting factor the place of conclusion of the contract and, in application of the ‘proximity principles’ and ‘the most significant relationship rule’, based its decision on the CISG and, with respect to matters outside the scope of the Convention—as was clearly the case of the alleged illegality of the first payment and the claim for restitution—on the UNIDROIT Principles. ⁵⁴

Yet, apart from these significant, but still isolated, cases of explicit recognition at the legislative level or by the judicature of the possible role of the UNIDROIT Principles as lex contractus, what ultimately matters, of course, is how often the Principles are actually chosen or applied as such in practice. In this respect, it is worth mentioning, first of all, that an increasing number of model contracts prepared, among others, by the ICC and the ITC. In the field of commercial agency, distributorship, joint ventures, and so on contain a reference to the UNIDROIT Principles in conjunction with other sources of law (for example, a particular domestic law; the CISG; general principles of law prevailing in a given trade sector; and usages). ⁵⁵ Admittedly, in most cases, the UNIDROIT Principles are referred to in a subordinate role—that is, to be applied only to the extent that the other legal sources indicated do not provide a solution to the question(s) at stake ⁵⁶—yet there are also examples of reference to the UNIDROIT Principles and the other sources on an equal footing. ⁵⁷ Recently, the Standard Material Transfer Agreement for Plant Genetic Resources of Food and Agriculture adopted by the Food and Agriculture Organization also refers as the applicable law to the ‘General Principles of Law, including the UNIDROIT Principles of International Commercial Contracts.’

⁵⁶ See e.g. Art. 24.1 A of the 2002 ICC Model Commercial Agency Contract; Art. 24.1 of the 2002 ICC Model Distributorship Contract–Sole Importer–Distributor; Art. 23.1 A of the 2004 ICC Model Selective Distributorship Contract; Art. 18.1 B of the 2004 ICC Model Mergers & Acquisitions Contract, all of which provide ‘Any questions relating to this contract which are not expressly or implicitly settled by the provisions contained in this contract shall be governed, in the following order: (a) by the principles of law generally recognized in international trade as applicable to international [agency] [distributorship] [selective distributorship] [merger and acquisition] contracts; (b) by the relevant trade usages; (c) by the UNIDROIT Principles of International Commercial Contracts, with the exclusion of national laws.’
⁵⁷ See e.g., Art. 13.1 of the 1999 ICC Model Occasional Intermediary Contract and Art. 32A of the 2000 ICC Model International Franchising Contract providing, respectively, “[u]nless otherwise agreed in writing…any questions relating to this […] Agreement shall be governed by the rules and principles of law generally recognised in international trade as applicable to international contracts with occasional intermediaries together with the UNIDROIT Principles of International Commercial Contracts’. Similarly ITC Model Contract for the International Distribution of Goods and ITC Model Contract for the International Long-Term Supply of Goods.
UNIDROIT itself in 2013 published a set of Model Clauses for the Use of the UNIDROIT Principles, which include three model clauses for the choice by the parties of the UNIDROIT Principles as the rules of law governing their contract or applicable to the substance of the dispute, respectively: (i) without any reference to other legal sources; (ii) supplemented by a particular domestic law; or (iii) supplemented by ‘generally accepted principles of international commercial law’.

On a different note, in an Official Explanatory Note of 2008, the High Commercial Court of Ukraine stated that the UNIDROIT Principles, like other documents such as the UCP and the Incoterms, ‘enshrine the trade customs applied in Ukraine’ and are therefore applicable if they do not conflict with the terms of the contract or the mandatory provisions of Ukrainian law.

Concerning the actual use of the UNIDROIT Principles in international contract and dispute resolution practice, there are obviously no precise data available and the only sufficiently representative, though still incomplete, source of information are court decisions and arbitral awards rendered worldwide referring in one way or the other to the UNIDROIT Principles.

Thus, of the 434 decisions of this kind collected in the UNILEX database, 112 decisions—precisely 16 court decisions, eight of which uphold arbitral awards applying the UNIDROIT Principles, and 96 arbitral awards, including nine ICSID awards relating to investment disputes between States and foreign private investors—applied the UNIDROIT Principles as the rules of law governing the substance of the dispute. Moreover, three court decisions admitted as an obiter dictum the parties’ right to choose the UNIDROIT Principles as the rules of law governing their contract.

Only in a few of the reported cases were the UNIDROIT Principles expressly chosen by the parties in their contract either as the sole lex contractus or in


59 See Model Clauses no. 1.1, no. 1.2 and no. 1.3, respectively, each of which with two variants, i.e. one for inclusion in the contract (‘pre-dispute use’) and one for use after a dispute has arisen (‘post-dispute use’). For an analytical analysis of the entire instrument see M.J. Bonell, Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts, in Uniform Law Review 2013, p. 473 et seq.; K.P. Berger, The Role of the UNIDROIT Principles of International Commercial Contracts in International Contract Practice, in Uniform Law Review 2014. 519 et seq.

60 The various surveys on the actual use of the UNIDROIT Principles conducted over the years in different parts of the world are only of limited informational value since in general they consider only those cases where the Principles were expressly chosen by the parties as the law governing their contract, thereby neglecting other possible uses of the Principles, such as their choice as the rules applicable to the substance of the dispute after the beginning of a court or arbitration proceedings, or their application by the adjudicating body in the absence of any reference to them by the parties: for a list of the most significant surveys of this kind conducted in recent years see S. Vogenauer, Commentary, cit., pp. 23–24. Even less informative are the data concerning choice-of-law clauses in favour of the UNIDROIT Principles reported on an annual basis in the ICC Dispute Resolution Bulletin: they relate only to contracts that had given rise to a dispute submitted to the ICC Court of Arbitration and therefore do not include disputes decided worldwide by other arbitration centres or by ad hoc arbitration.

conjunction with other sources of law, such as the CISG or a particular domestic law. More often, the parties agreed on the application of the UNIDROIT Principles after the commencement of the arbitral proceedings, admittedly sometimes at the suggestion of the arbitral tribunal itself.62 Nor should this come as a surprise. Indeed, once a dispute has arisen, the parties know what the issues at stake are and are therefore in a better position to appreciate the advantages of choosing the Principles as the rules of law applicable to the substance of the dispute in lieu of a particular domestic law.

In other cases, the parties agreed that their contract would be governed by, and/or the arbitral tribunal should decide the merits of the dispute in accordance with, no further specified principles and rules of supra-national or transnational character, such as the the lex mercatoria, ‘general principles of international contract law’, ‘general principles of equity’, ‘laws and rules of natural justice’, and the arbitral tribunal applied the UNIDROIT Principles on the ground that they constitute a particularly authoritative and reliable expression of the principles and rules in question.63

Yet, in quite a number of other cases, the UNIDROIT Principles were applied either as the sole lex causae or in conjunction with other sources of law, such as the CISG or a particular domestic law, even in the absence of any indication by the parties. In so doing, the arbitral tribunals gave no reason whatsoever or relied either on paragraph 4 of the preamble or, more often, on the relevant statutory provisions or arbitration rules, according to which—to quote the language used in Article 21(2) of the 2017 ICC Rules of Arbitration—‘[it] shall apply the rules of law which [it] determines to be appropriate’, while, as already indicated above, the domestic courts applied the UNIDROIT Principles as an expression of ‘general principles governing the law of international commerce’ or ‘the new lex mercatoria’.64 Moreover, in 11 international investment arbitration awards—nine rendered under the ICSID Arbitration Rules and two in an ad hoc arbitration—the UNIDROIT Principles were referred to, together with other sources of law such as the domestic law of the hosting State, as an expression of international law.65 Finally, in four cases, the UNIDROIT Principles were applied by the arbitral tribunal in an arbitration ex aequo et bono.66

62 See the relevant decisions at http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13621&x=1 (accessed 31 December 2017) (under issues no. 2.1.1.1 and 2.1.1.2).
63 See the relevant decisions at http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13621&x=1 (accessed 31 December 2017) (under issues nos. 2.1.2, 2.1.3 and 2.1.4).
64 See the relevant decisions at http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13621&x=1 (accessed 31 December 2017) (under issues nos. 2.1.5, 2.1.5.1, 2.1.5.2 and 2.1.5.3).
65 See the relevant decisions at http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13621&x=1 (accessed 31 December 2017) (under issue no. 2.1.5.4).
66 See the relevant decisions at http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13621&x=1 (accessed 31 December 2017) (under issue 2.1.6). One of these awards was rendered in 2001 by the Arbitral Tribunal of the City of Panama, which applied the UNIDROIT Principles in accordance with Articles 3 and 27 of the 1999 Decree no. 5 on Arbitration.
2. The UNIDROIT Principles as a means of interpreting and supplementing international uniform law instruments

It is nowadays widely recognized that international uniform law instruments, even after their incorporation into national legal systems, remain an autonomous body of law that should be interpreted and supplemented according to autonomous and internationally uniform principles and rules and that recourse to domestic law should only be a last resort. As rightly observed, in this respect, there is a clear trend away from positive law (‘ Depositivierung‘) in the sense that the strict legal rules of domestic law are increasingly being supplanted by non-binding principles and rules of supranational origin. In the past, such autonomous principles and rules had to be found each time by the judges and arbitrators themselves. The UNIDROIT Principles could considerably facilitate their task in this respect.

The use of the UNIDROIT Principles as a means of interpreting and supplementing international uniform law instruments is particularly relevant with respect to the CISG. Notwithstanding the different scope of application of the two instruments—international commercial contracts in general in the case of the former and international sales contracts in the case of the latter—they deal with many of the same issues concerning contract formation, interpretation, performance, non-performance, and remedies, and since the provisions contained in the UNIDROIT Principles are, in general, more detailed and comprehensive, they may in many cases provide a solution for ambiguities or gaps in the CISG.

Admittedly, opinions among legal scholars are divided as to whether and, if so, to what extent the UNIDROIT Principles may be used to interpret and supplement the CISG. On the one hand, there are those who categorically deny such a

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67 So Article 7 of the CISG stating that ‘[i]n the interpretation of this Convention regard is to be had to its international character and to the need to promote uniformity in its application’ (paragraph 1) and that ‘[q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absense of such principles, in conformity with the law applicable by virtue of private international law’ (paragraph 2). Yet similar formulae are to be found also in many other recent international Conventions.


70 Cf. paragraph 5 of the Preamble.


72 For numerous examples of provisions of the UNIDROIT Principles that may be used to interpret or supplement the CISG, see M. J. Bonell, An International Restatement of Contract Law, cit., pp. 318–25.
possibility not only on account of the private and non-binding nature of the UNIDROIT Principles but also, at least with respect to instruments adopted prior to the publication of the UNIDROIT Principles such as the CISG, on the basis of the rather formalistic argument that, coming later, the latter could never be of relevance to the former. On the other hand, there are those who definitely assert the possibility of using the UNIDROIT Principles as a means of interpreting and supplementing the CISG on the ground that they represent ‘general principles of international commercial contracts’ and, as such, without further qualification meet the requirements of Article 7 of the Convention.

The correct solution appears to lie between these two extreme positions. In other words, there can be little doubt that the UNIDROIT Principles may well be used to interpret or supplement the CISG as well as other international uniform law instruments even if they were adopted prior to the UNIDROIT Principles. The only conditions that need to be satisfied are that the issue at stake falls within the scope of the respective international uniform law instrument and that the relevant provisions of the UNIDROIT Principles can be considered an expression of—to use the language of Article 7(2) of the CISG—the ‘general principles on which [the Convention] is based’.

Turning to actual practice, the total number of decisions referring to the UNIDROIT Principles to interpret or supplement international uniform law instruments collected in UNILEX is 50, most of which—both arbitral awards and court decisions—relate to the CISG, while the remaining decisions concern, among others, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the 1975 Inter-American Convention on Commercial Arbitration, and the 2001 European Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

Significantly enough, despite scholarly doubts and reservations as to the possibility of using the UNIDROIT Principles to interpret or supplement the CISG, both judges and arbitrators do not seem too troubled by theoretical justifications when resorting to the UNIDROIT Principles for this purpose. Only in a few cases has recourse to the UNIDROIT Principles been justified on the ground that the issue at stake falls within the scope of the CISG and that the relevant provisions of the Principles invoked as gap-fillers could be considered an expression of the general principles on which the Convention itself is based. Other decisions equate the

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73 In this sense, e.g., R. Herber, ‘Lex mercatoria’ und ‘Principles’: Gefährliche Irrlichter im internationalen Kaufrecht, in Internationales Handelsrecht 2003, p. 1 et seq. (pp. 7 and 9).
75 See M.J. Bonell, An International Restatement, cit., p. 233.
76 See the relevant decisions at http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13621&x=1 (accessed 31 December 2017) (under issues nos. 2.4.1 and 2.4.2).
UNIDROIT Principles in their entirety with the general principles underlying the CISG, with no further explanation.

Yet, there are decisions that go even further and consider the UNIDROIT Principles to be ‘trade usages’ applicable according to Article 9(2) of the CISG or, more emphatically, an expression of the ‘new lex mercatoria’. On the basis of such premises, the Principles are no longer merely used as a means to interpret and supplement the CISG in accordance with, and within the limits of, Article 7 of the Convention; rather, they are applied side by side with the CISG as rules of law to regulate, in lieu of the otherwise applicable domestic law, even questions outside the scope of the Convention such as merger clauses, the right to request renegotiation of the contract in case of hardship, illegality and restitution, penalty clauses, limitation periods, and so on. Admittedly, most of the decisions of this latter kind are arbitral awards, but, recently, some domestic courts, including courts of last instance, have also taken a similar far-reaching approach.

This is the case, in particular, of a decision rendered by the Belgian Cour de Cassation in 2009 and of two French decisions, one rendered by the Court d’Appel of Reims in 2012 and one rendered by the Cour de Cassation in 2015. All of these cases concerned international sales contracts in which the seller requested the renegotiation of the agreed contract price due to a substantial increase of the price of the raw materials. The contracts were governed by the CISG, but since the Convention does not expressly address hardship, all three courts, on the assumption that the topic was covered by the CISG, held that the gap was to be filled by recourse to the UNIDROIT Principles on the ground that it represented ‘a code of international contracts proposed by an international organization’, all the more so if the home countries of the two parties were both members of that international organization (that is, of UNIDROIT).

Notwithstanding this ample use of the UNIDROIT Principles by adjudicating bodies worldwide, parties to an international sales contract governed by the

78 Cour de Cassation of Belgium, 19 September 2009 (English abstract and full text at http://www.unilex.info/case.cfm?id=1456 (accessed 31 December 2017). For an accurate analysis of this decision see A. Veneziano, UNIDROIT Principles and CISG: change of circumstances and duty to renegotiate according to the Belgian Supreme Court, in Uniform Law Review 2010, 137-149.
81 So expressly Court d’Appeal of Reims, cit. (‘[T]he UNIDROIT Principles form a code of international contracts proposed by an international organization of which France and Poland are members, circumstance that gives the UNIDROIT Principles a greater authority than the Principles of European Contract Law to which the Seller referred in its conclusions but which only represented a doctrinal work of comparative law’), but implicitly confirmed also by the subsequent decision of the Cour de Cassation. For a critical comment of the three decisions see F. Ferrari, C.P. Gillette, M. Tarello, S.D. Walt, The Inappropriate Use of the PICC to Interpret Hardship Claims under the CISG, in Internationales Handelsrecht 2017, p. 97 et seq.
CISG may still wish expressly to stipulate—and, in actual practice, increasingly do so—that the CISG should be interpreted and supplemented by the UNIDROIT Principles so as to ensure that judges or arbitrators, when faced with ambiguities or veritable gaps in the Convention, will primarily resort to the UNIDROIT Principles to settle the issues and turn to domestic law only as a last resort.82 However, whenever the CISG—as will normally be the case—applies vigore proprio as part of the domestic law governing the contract, such a reference by the parties to the UNIDROIT Principles as a means of interpreting and supplementing the Convention will only have the effect impliedly to derogate from Article 7(2) of the CISG. As a consequence, in such cases, only with respect to issues within the scope of the CISG, but not expressly settled by it (so-called internal gaps), the UNIDROIT Principles would act as gap-filler, rather than the possibly conflicting general principles underlying the CISG, whereas issues outside the scope of the CISG would still be governed by the applicable domestic law. In order to avoid the application of a particular domestic law to issues outside the scope of the CISG (so-called external gaps) and subject them as well to the UNIDROIT Principles, the parties would expressly stipulate that their contract be governed by the CISG and by the UNIDROIT Principles, but such a choice-of-law clause might be effective, as far as the UNIDROIT Principles are concerned, only before an arbitral tribunal but not before a domestic court.83

3. The UNIDROIT Principles as a ‘global background law’ to interpret or supplement domestic law

In view of their intrinsic qualities, the UNIDROIT Principles may furthermore be used to interpret or supplement the domestic law governing the contract chosen by the parties or applicable by virtue of the relevant conflict-of-laws rules of the forum.84 This is the case, in particular, when the domestic law in question is that of a country in transition from a planned economy to a market economy or if the country lacks expertise in regulating modern business transactions. Yet, highly developed legal systems also do not always provide a clear-cut solution to specific issues arising out of commercial contracts, especially if international in nature, either because opinions are sharply divided or because the issue at stake has so far not been addressed at all. In both cases, the UNIDROIT Principles may be used as a yardstick to ensure an interpretation and supplementation of the respective domestic law consistent with internationally accepted standards and/or the special needs of cross-border trade relationships.

What still remains to be seen is, first, whether the use of the UNIDROIT Principles as a means to interpret and supplement a particular domestic law is restricted to

82 See the Model Clauses no. 3 referring to the UNIDROIT Principles as a Means of Interpreting and Supplementing the United Nations Convention on Contracts for the International Sale of Goods (CISG) when the Latter is Chosen by the Parties (with two variants, i.e. one for inclusion in the contract and one for use after a dispute has arisen, in UNIDROIT (ed.), Model Clauses cit.
83 See Model Clauses no. 3, cit., General Remarks, Comment 4.
84 Cf. paragraph 6 of the Preamble.
international disputes or should be admitted also in a purely domestic context and, second, whether the UNIDROIT Principles may even be invoked to justify a solution that, though conforming to current international standards, contradicts an express statutory provision (or the prevailing case law) of the domestic law in question. While the answer to the first question is definitely in the affirmative, at least as far as transactions between businesses are concerned, the second question is more difficult. On the one hand, there can be no doubt that, in general, if the applicable domestic law provides a clear-cut solution to the issue at stake, it should not be permitted to depart from it in favour of a different solution provided by the UNIDROIT Principles, unless there is an explicit request to this effect by the parties. On the other hand, a different approach may be justified exceptionally in those cases where the strict application of a particular provision of the relevant domestic law would, to quote the language used in Article 6:2(2) of the Dutch Civil Code, ‘be unacceptable according to criteria of reasonableness and equity’. Reference may be made, for instance, to a domestic law whose statutory rate of interest for payments in arrears is considerably higher than that of other countries. The rate in question may or may not be justified with respect to payments in the local currency, but it is likely to appear exorbitant where payments are to be made in a foreign currency that is negotiated on the international financial markets at a much lower rate. In such a case, it may be appropriate to interpret the law fixing the rate in question narrowly, so as to restrict its application to payments in the local currency and to replace it by Article 7.4.9(2) of the UNIDROIT Principles whenever payment is to be made in a foreign currency.

Turning to actual practice, in more than half of the decisions reported in UNILEX—most of which are court decisions—the UNIDROIT Principles were used as a means of interpreting and supplementing the applicable domestic law. Most of the cases in question concerned international disputes, but there are also decisions referring to the UNIDROIT Principles that relate to disputes of a purely domestic character, including cases concerning consumer transactions. More important, the domestic laws governing the individual contracts in the cases in question are far from being only those of less developed countries or so-called emerging countries. Indeed, they include, inter alia, the laws of Argentina, Australia, Brazil, England, Finland, France, Germany, Greece, Italy, the Netherlands, Norway, New Zealand, Paraguay, Quebec, Spain, Sweden, Switzerland, and the state of New York, thus confirming that even highly sophisticated legal systems do not always provide clear and/or satisfactory solutions to the special needs of current international commercial transactions, while the UNIDROIT Principles may actually offer such a solution.

Admittedly, quite often, the reference to the UNIDROIT Principles have had no direct impact on the decision of the merits of the dispute at hand, and individual provisions of the Principles were cited, either alone or together, with other legal

85 See the list of the relevant decisions at http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13621&x=1 (accessed 31 December 2017).
sources such as the CISG or foreign domestic laws, essentially to demonstrate that the solution provided by the applicable domestic law was in conformity with current internationally accepted standards and rules. Yet even such ‘purely ornamental remarks’\textsuperscript{86} may assume considerable importance in an international context where normally at least one of the parties involved is confronted with a foreign law that is virtually unknown to it. For that party, the assurance that the solution adopted under the foreign law basically corresponds to the solution provided by a balanced and internationally accepted set of rules such as the UNIDROIT Principles may well have a beneficial psychological effect and increase its confidence in a fair judgement.

However, in a number of cases, the courts and arbitral tribunals have resorted to the UNIDROIT Principles in support of the adoption of one of several possible solutions under the applicable domestic law or in order to fill a veritable gap in the latter.\textsuperscript{87}

Even more important, there are decisions, including decisions of courts of second and last instance, referring to the UNIDROIT Principles as a source of inspiration for openly revisiting the current law of their country. Thus, for instance, courts in Australia and, although to a less extent, courts in England and New Zealand have, on a number of occasions, referred to the Principles as a source of inspiration in their attempt to affirm also at the domestic level the relevance of good faith in contract formation and performance or to admit recourse to extrinsic evidence for the interpretation of written contracts.\textsuperscript{88} More recently, the Court of Appeal of Quebec, which is the highest judicial court of the Canadian province of Quebec, in a case of alleged hardship due to a considerable price increase on the oil market, after recalling that the doctrine of hardship or imprevision was traditionally not accepted in Canada, quoted Articles 6.2.1, 6.2.2, and 6.2.3 of the UNIDROIT Principles, pointing out that they ‘represent a synthesis of comparative law on the subject that might enlighten the Court on the suitable orientation of the case law in a civil law system like that of Quebec’.\textsuperscript{89}

\textsuperscript{86} So expressly O. Meyer, The UNIDROIT Principles as a Means to Interpret or Supplement Domestic Law, in Uniform Law Review 2016, p. 599 et seq. p. 611: ‘The impact of the PICC in an individual case may be limited to purely ornamental remarks or learned obiter dicta, whereas in other cases they may contribute to the internationalisation of the applicable law for cross-border transactions, or even occasionally also to the development and modernisation of a legal system.’

\textsuperscript{87} See the list of the relevant court decisions and arbitral awards at http://www.unilex.info/dynasite.cfm?dssid= 2377&dsmid= 13621&x=1 (accessed 31 December 2017) (under issue 2.3.2). For an overview of the most significant decisions falling in this category with a brief indication of the legal issues respectively addressed, see M.J. Bonell, An International Restatement, cit. p. 297 et seq.; E. Finazzi-Agrò, The Impact of the UNIDROIT Principles in International Dispute Resolution: An Empirical Analysis, in Uniform Commercial Code Law Journal, 2011, p. 79 et seq; The Impact of the UNIDROIT Principles in International Dispute Resolution: The Figures—An Update, in Uniform Law Review 2018 (to be published).


\textsuperscript{89} Cour d’Appel, Province de Québec, District of Montreal of 8 August 2016 (Churchill Falls (Labrador) Corporation Ltd c. Hydro-Québec) (for an abstract in English and an excerpt of the full text see at http://www.unilex.info/case.cfm?id=1968 (accessed 31 December 2017). Note that
In view of these figures—all the more impressive considering that the use of the UNIDROIT Principles as a means of interpreting and supplementing domestic laws was not even mentioned in the preamble of the first edition of 1994—it has been argued that the so-called ‘restatement function’ of the UNIDROIT Principles is more important than their role as rules of law governing international commercial contracts. Indeed, just like the US Restatements of the law, the UNIDROIT Principles are by their very nature particularly suited to serve as background law in applying domestic laws in an international context and, as such, may eventually become a sort of *ius commune* or the general part of transnational contract law.\(^9\) Needless to say, such gradual development of the UNIDROIT Principles into such a ‘global background law’ or modern *ius commune* would receive considerable impulse if the parties themselves, in order to ensure a fair and internationally oriented interpretation of their contract, more and more often expressly agree that the domestic law they have chosen as the law governing their contract and/or applicable to the substance of disputes that might arise, be interpreted and/or supplemented by the UNIDROIT Principles, rather than by the national *lex contractus* or the *lex fori*.\(^1\)

What still remains to be seen is whether the parties’ reference to the UNIDROIT Principles will have the same effect regardless whether they are invoked before a domestic court or an arbitral tribunal. Some doubts may arise in view of the fact that courts consider the interpretation and gap-filling of the applicable domestic law in principle to be their prerogative. Yet, on closer examination, it would seem that the answer should be in the affirmative. Indeed, at least with respect to issues covered by party autonomy, not only arbitral tribunals but also domestic courts will normally follow the indications made by both parties as to how they wish to have ambiguities in the applicable law resolved or gaps filled, and, to this effect, it is irrelevant whether such indications are made by the parties in their pleadings with respect to specific issues under dispute or by a reference to the UNIDROIT Principles with respect to all issues that may become relevant.\(^2\)

\*V. Some concluding remarks*

As shown in the foregoing remarks, the fact that, despite the ever-growing internationalization of trade, cross-border transactions continue, to a large extent, to be subject to national laws presents a number of shortcomings, and soft law instruments such as the UNIDROIT Principles could represent a valid alternative in its decision the Court rejected the request for contract adaptation merely because in the case at hand the two basic requirements, i.e. the fundamental alteration of the equilibrium of the contract and the unpredictability of the event causing hardship, were not met.


\(^1\) See the Model Clauses no. 4 referring to the UNIDROIT Principles as a Means of Interpreting and Supplementing the Applicable Domestic Law (with two variants, i.e. one for inclusion in the contract and one for use after a dispute has arisen, in UNIDROIT (ed.), Model Clauses cit.

\(^2\) So expressly Model Clauses no. 4, cit., Comment 3 to Variant (b).
to a strictly positivist or State law-centred conflict-of-laws approach. Yet, why is it that despite the widely acknowledged intrinsic qualities of the UNIDROIT Principles, their relevance in the international contract and dispute resolution practice is—at least at first sight—still rather limited?

Of the various reasons commonly given, none is really convincing. Certainly not the argument that the Principles as a merely private codification lack the ‘democratic legitimacy’ necessary to be a veritable binding or ‘positive’ set of legal rules.93 Apart from the fact that the UNIDROIT Principles have not been prepared by individual companies or national trade associations but, rather, by independent experts from all over the world working under the supervision and with the final approval of an intergovernmental organization like UNIDROIT, domestic courts, when asked to apply a foreign State law, do not care at all about how that law has been produced in its country of origin but only make sure that its content does not violate the international ordre public of the forum, and there are no provisions in the UNIDROIT Principles that would not meet that test.94

Nor should it matter that the Principles cover only issues of general contract law but do not contain rules for specific contracts.95 Apart from the fact that such rules are normally agreed upon by the parties on a case-by-case basis or by a reference to their standard terms, nothing prevents parties, when choosing the Principles as the rules of law governing their contract, to indicate in addition a particular domestic law to which to resort to fill possible gaps in the Principles.96

Finally, the argument that the UNIDROIT Principles without a sufficiently developed case law concerning their application in practice do not provide the necessary certainty and predictability of solutions proves too much and too little at the same time. Too much because even highly sophisticated national laws, let alone less developed ones, do not always offer such clear and predictable solutions for the ever-changing scenario of cross-border business transactions; too little because more and more decisions—not only arbitral awards but also court decisions that apply in one way or the other the UNIDROIT Principles—are reported and annotated so that it may not take too much time until the Principles will also be corroborated by a sufficient body of case law.

So what is the true reason for the so far at least not too exciting performance of the UNIDROIT Principles in practice? The answer is at bottom very simple and quite sobering. The principal reason is the inherent conservatism, coupled with a good

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96 Model Clauses no. 2.1 Choosing the UNIDROIT Principles Supplemented by a Particular Domestic Law (in the two variants, i.e. one for ‘pre-dispute use’ and one for use ‘post-dispute use’). Yet even if parties do not want to refer to a particular domestic law, Article 1.6 of the UNIDROIT Principles provides a—though not always conclusive—device for filling in gaps within the system of the Principles themselves.
deal of provincialism, of the legal profession. The legal education of the vast majority of lawyers is even today, let alone in the past, focused on one legal system—that is, that of their own country—with little, if any, consideration for foreign laws or international uniform law conventions, let alone for soft law instruments such as the UNIDROIT Principles. No wonder that, when assisting their clients in cross-border transactions, most lawyers will advise them to insist, if their bargaining power permits them to do so, on the application of their own national law or otherwise to opt for the domestic law of a third country. In fact, as shown by a number of empirical studies undertaken in different parts of the world, most international commercial contracts contain a choice-of-law clause in favour of the national law of either of the parties or, if neither party is in a position to impose its own law, in favour of so-called neutral laws—mostly English law or Swiss law—with little if any regard to their intrinsic merits as compared to other possible choices.

And yet, notwithstanding the continuing dominance of national laws, there exist ‘market niches’ that the UNIDROIT Principles actually fill with considerable success. Indeed, in addition to the already highlighted role of the Principles as ‘global background law’, the Principles may also fulfil useful functions as lex contractus.

To begin with, parties of equal bargaining power, especially if they operate in so-called emerging countries and/or in countries with totally different cultural and legal traditions, more and more often prefer to choose the UNIDROIT Principles as the law governing their contract or applicable to the substance of

97 Similarly, but with special reference to the hostility of national and supranational legislators against accepting that non-national rules can be the lex contractus of transnational contracts. L. Radicati di Brozolo, Non-National Rules and Conflicts of Laws, cit., p. 858: ‘The most plausible explanation is the inherent conservatism, and perhaps narrow-mindedness, of legislators and an inability to overcome traditional conceptual categories.’

98 For an overview of eleven empirical studies of this kind conducted over the last 15 years or so, see S. Vogenauer, Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence, in European Review of Private Law 2013, p. 13 et seq. (pp. 35–52).

99 So in his conclusions S. Vogenauer, Regulatory Competition through Choice of Contract Law, cit. p. 53: “[C]hoices of law and forum are primarily driven by factors other than the substantive merits of the respective regimes’ legal rules. By far the most important factor is the parties familiarity with the chosen regime. Businesses prefer to choose their home law.”

100 See supra p. 21 et seq.


102 See e.g. The Membership Agreement of Covisint, an electronic marketplace set up among DaimlerChrysler, Ford, General Motors, Nissan, Peugeot and Renault for their suppliers, which under the heading ‘Governing Law; Arbitration’ provides that '[t]he Product Agreement shall be construed in accordance with the UNIDROIT Principles of International Commercial Contracts'; likewise, The Global Fund, an international organization financing the fight against aids, tuberculosis and malaria in ca. 140 jurisdictions, includes in all its contracts a choice-of-law clause in favour of the UNIDROIT Principles in combination with an arbitration clause.
their disputes, instead of one the two or three ‘neutral’ national laws mostly en vogue in other parts of the world. 103

Even more important, the **UNIDROIT Principles** prove particularly useful in cases of a so-called implied negative choice—that is, where neither party is prepared to accept the other’s domestic law or any other domestic law, and, as a result, the contract is silent as to the applicable law or contains a reference to a not further defined general formula such as ‘general principles of law’, ‘lex mercatoria’, or the like, and—as already pointed out above104—the adjudicating body eventually decides the dispute on the basis of the **UNIDROIT Principles**, defined as a particularly authoritative expression of a genuinely a-national or transnational set of rules. 105

All in all, the role that the **UNIDROIT Principles** already fulfil, side by side with the still dominant domestic laws, is far from insignificant, and one may expect that the recently adopted **UNIDROIT Model Clauses** for the Use of the **UNIDROIT Principles** in international contract and resolution practice will promote their relevance even more.

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103 Thus, e.g. in an arbitration proceedings concerning highly sophisticated equipment and involving half a dozen jurisdictions, the parties, after lengthy discussions were unable to find out which of the competing domestic laws should prevail (i.e. English law or Swiss law both respectively invoked by the parties) and eventually agreed to choose the **UNIDROIT Principles** as the rules of law applicable to the substance of the dispute, all the more so as at last they came to acknowledge that the solution provided with respect to the issues at stake by the Principles was not only basically consistent with that provided by the two conflicting domestic laws but also anyway much easier to understand by all the parties and their lawyers involved: cf. E. Brödermann, The Impact of the **UNIDROIT Principles** and Arbitration Practice: The Experience of a German Lawyer, in Uniform Law Review 2011, p. 589 et seq., at 590–92.

104 See **supra** at p. 17 and n. 63.

105 For a particularly significant example, see ICC Award no. 9797 of 28 July 2000 (abstract and excerpt of full text at http://www.unilex.info/case.cfm?id=668 (accessed 31 December 2017): the Member Firm Interfirm Agreements concluded in the late 1970s between the 140 Arthur Andersen member firms operating in 75 different countries contained an arbitration clause stating ‘the [sole] arbitrator shall decide in accordance with the terms of this Agreement . . . and in interpreting [it] the arbitrator shall not be bound to apply the substantive law of any jurisdiction but shall [take] into account general principles of equity’. When some years later a dispute arose the Arbitral Tribunal, noting that the voluminous Agreements, though drafted by legions of lawyers, did not provide a clear cut answer to the numerous intriguing legal questions that had to be decided, declared that it would apply ‘general principles of law . . . commonly accepted by the legal systems of most countries’, and that to this effect it would have resort to the **UNIDROIT Principles** defined as ‘a reliable source of international commercial law in international arbitration for they contain in essence a restatement of those ‘principes directeurs’ that have enjoyed universal acceptance and, moreover, are at the heart of those most fundamental notions which have consistently been applied in arbitral practice’. And so it did, basing its decision in a dispute worth billions of US dollars not on this or that other domestic law but on numerous provisions of the **UNIDROIT Principles**. For a comment on this award see M.J. Bonell, A ‘Global’ Arbitration Decided on the Basis of the **UNIDROIT Principles**, in Arbitration International 17 (2001), pp. 249–61.