## ARTICLES

# The UNIDROIT Principles and Transnational Law

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### I. – INTRODUCTION

Summing up the results of an in-depth analysis of the so-called *lex mercatoria*, Felix DASSER observed that the real question is not "*lex mercatoria*: yes or no?" but "*lex mercatoria*: when and how?" [1] In other words, fascinating as it may be to discuss whether the modern *lex mercatoria* represents a veritable legal order different from and independent of the various domestic laws on the one side and public international law on the other, what ultimately matters is the extent to which States nowadays permit parties to an international commercial contract, by referring to the *lex mercatoria*, to escape the application of any domestic law.

What has been said of the *lex mercatoria* may well be applied to "transnational law" in general, *i.e.* to all kinds of principles and rules of non-national or a-national character used in international business practice as an alternative to domestic law. And indeed the International Law Association, on the occasion of an in-depth study of the role of transnational rules in international commercial arbitration carried out in the early 1990s, quite rightly devoted little if any attention to the theoretical question of the precise nature of such rules and whether they represent an independent legal order, and focused on the eminently practical issue of the validity and enforceability of awards based on transnational law in domestic courts.[2]

Whether the UNIDROIT Principles of International Commercial Contracts are part of transnational law depends of course on the meaning one intends to give to this latter notion. If one adopts a narrow definition whereby transnational law basically consists of generally recognised principles of law and trade usages, it may be difficult to consider the UNIDROIT Principles as a whole as falling in one category or the other.

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1 F. DASSER, *Internationale Schiedsgerichte und lex mercatoria* (Zürich, 1989), 296 *et seq.*

2 See E. Gaillard (ed.), "Transnational Rules in International Commercial Arbitration", I.C.C. Publication N° 480/4 (1993), 19-36.

On the contrary, on the basis of a broader definition whereby transnational law includes virtually all principles and rules other than those established by a particular domestic law, the UNIDROIT Principles, like other "private" instruments such as the INCOTERMS or the UCP, are definitely part of it. Yet regardless of the position taken on this point, it can hardly be disputed that, also with respect to the UNIDROIT Principles, what really matters is not so much their definition in theoretical terms but rather whether, and the extent to which, they may be applied in practice in lieu of or in addition to domestic law.

In this paper I shall therefore focus on the different ways in which the UNIDROIT Principles may be used in the context of international dispute resolution. I shall first address the case where the UNIDROIT Principles have been expressly chosen by the parties as the rules of law governing their contract (II), distinguishing between the case where the application of the UNIDROIT Principles as the *lex contractus* is invoked before a domestic court (II.1) or an arbitral tribunal (I.2). I shall then discuss the relevance of the UNIDROIT Principles in the absence of parties' reference (III), dealing in particular with the application of the UNIDROIT Principles as a source of "general principles of law", the "*lex mercatoria*" or the like (III.1), as a means of interpreting and supplementing international uniform law (III.2) and as a means of interpreting and supplementing domestic law (III.3).

Back in 1994, when the UNIDROIT Principles were first published, these questions might have appeared to be of purely theoretical interest. Today, thanks also to the world-wide inquiry carried out by the Center for Transnational Law (CENTRAL) on the use of transnational law in international contract practice and arbitration [3] – on which I would like sincerely to congratulate Professor Berger and his team – we know that the UNIDROIT Principles are widely used in practice in all the different contexts mentioned above.

## II. – THE PARTIES' EXPRESS CHOICE OF THE UNIDROIT PRINCIPLES AS THE LAW GOVERNING THEIR CONTRACT

Fifty-three replies to CENTRAL's inquiry indicated that they were aware of one or more cases in which the UNIDROIT Principles had been expressly chosen by the parties as the rules of law governing their contract.

Addressees had apparently not been asked to indicate the reason(s) for having made such a choice, nor do the aggregated data which have been published reveal further details such as the nationality of the parties, the type of transactions involved, the precise context in which the UNIDROIT Principles were referred to (*i.e.* instead of domestic law, in connection with domestic law or in connection with international uniform law) and whether the choice-of-law clause was combined with an arbitration clause. The latter aspect is of particular importance for the present purposes since the

[3] Center for Transnational Law (ed.), *The CENTRAL Study on the Use of Transnational Law in International Contract Law and Arbitration* (2000).

effect of the parties' choice of the UNIDROIT Principles as the governing law differs considerably depending upon whether their application is invoked before a domestic court or an arbitral tribunal.

### 1. *Application of the UNIDROIT Principles by domestic courts*

Domestic courts are bound to apply their own national law, which includes the relevant conflict of law rules. According to the traditional and still prevailing view, these conflict of law rules restrict the choice of the law(s) applicable to international contracts to the law(s) of (a) State(s), to the exclusion of any supra-national or a-national set of rules such as the UNIDROIT Principles.

This is confirmed by the 1980 Rome Convention on the Law Applicable to Contractual Obligations: by using expressions such as "law of a Contracting State" (Article 2), "foreign law" (Article 3(3)) or "law of the country with which [the contract] is most closely connected" (Article 4(1)), it clearly makes it understood that the law applicable in the respective cases must necessarily be the law of a particular State. [4]

A different conclusion can possibly be reached under the 1994 Inter-American Convention on the Law Applicable to International Contracts. Indeed this Convention, so far in force only between Mexico and Venezuela, refers on two occasions, *i.e.* in Articles 9(2) and 10, to legal sources of a supranational or a-national character, and according to some commentators this means that under the Convention the UNIDROIT Principles may be applied as the law governing the contract when expressly chosen by the parties or even in the absence of any reference to them. [5]

If a reference by the parties to the UNIDROIT Principles as the governing law amounts to a mere agreement to incorporate them into the contract, it follows that the proper law of the contract will still have to be determined separately on the basis of the rules of the private international law of the forum, and the UNIDROIT Principles will bind the parties only to the extent that they do not affect the mandatory provisions of the proper law from which the parties may not derogate by agreement.

It has recently been argued that in cases where the UNIDROIT Principles are unilaterally referred to by one of the parties and the other party merely accepts them with no further negotiations, the UNIDROIT Principles may even be considered as standard terms and consequently be subjected to the special limitations provided in the applicable domestic law for standard terms in general.[6] Yet this view is hard to

4 See, also for further references, M.J. BONELL, *An International Restatement of Contract Law*, 2nd ed. (1997), 188; K.-P. BERGER, *The Creeping Codification of the Lex Mercatoria* (The Hague/London/Boston, 1999), 178-180.

5 See, also for further references, F. JUENGER, "Contract Choice of Law in the Americas", in *The UNIDROIT Principles: A Common Law of Contract for the Americas?,* UNIDROIT (Rome, 1998), 77 *et seq.* at 85-87. For a similar conclusion also under the Rome Convention see the references in M.J. BONELL, *supra* note 4 at 189, n. 63.

6 *Cf.* C.W. CANARIS, "Die Stellung der 'UNIDROIT Principles' und der Principles of European Contract Law' im System der Rechtsquellen", in J. Basedow (ed.), *Europäische Vertragsrechtsvereinheitlichung und deutsches Recht* (Tübingen, 2000), 5 *et seq.* at 21-26. This author refers in particular to the

accept. To consider the UNIDROIT Principles on a par with standard terms fails to take account, above all, of the fact that they have been drawn up not for specific types of transactions but for contracts in general: as a result, they do not address single professional groups (*e.g.* sellers, lessors, carriers, banks, etc.) but the two abstract categories of "obligors" and "obligees".[7] Moreover the UNIDROIT Principles, far from laying down one-sided rules, themselves provide means for "policing" the individual contract terms against unfairness, including those specifically aiming at protecting the adhering party, in case of standard terms, against possible abuses.[8]

### 2. *Application of the UNIDROIT Principles by arbitral tribunals*

The effect of a reference by the parties to the UNIDROIT Principles as the rules of law governing their contract is quite different where the parties at the same time agree to submit their disputes to arbitration. This is also why Comment 4 to the Preamble recommends parties wishing to adopt the UNIDROIT Principles as rules applicable to their contract to combine such a choice-of-law clause with an arbitration agreement.[9]

Arbitrators are not necessarily bound to base their decision on a particular domestic law.

This is self-evident when the arbitrators are expressly authorised by the parties to decide *ex aequo et bono* or as *amiables compositeurs*.[10]

Yet also in the absence of such authorisation arbitrators are, at least in the context of international arbitration, increasingly permitted to base their decisions on rules of law that do not belong to any particular domestic law, if there is an express request to this effect by the parties.

German Standard Contract Terms Act (*AGB Gesetz*) and concludes that under § 9 of this Act individual provisions of the UNIDROIT Principles such as Art. 7.4.2(2) (providing for compensation also of non-pecuniary harm) and Art. 7.4.13 (admitting penalty clauses) may be considered void.

7 *Cf.* M. FONTAINE, "Les Principes UNIDROIT comme guide dans la rédaction des contrats internationaux", in Institute of International Business Law and Practice (ed.), "UNIDROIT Principles for International Commercial Contracts: A New *Lex Mercatoria*?", ICC Publication No. 490/1 (1995), 73 *et seq.* at 77: "L'élaboration des Principes s'est déroulée à l'abri de toute intervention politique de l'un ou l'autre groupe de pression. C'était l'un des avantages d'un travail portant sur le contrat en général, par rapport aux négociations relatives à des opérations spécifiques (vente, transport, etc..), dont la sérénité est souvent troublée par les interventions des milieux économiques concernés. Les experts préparant les Principes ne connaissaient que deux êtres abstraits, le 'créancier' et le 'débiteur'; très objectivement, ils se sont souciés de rechercher le meilleur équilibre entre ces deux parties, tant en cours de formation ou d'exécution qu'en cas d'inexécution du contrat."

8 See in particular Arts. 2.19-2.22 and 4.6. For a comparative analysis of these and other provisions of the UNIDROIT Principles aiming at the "policing" of the contract or its individual terms see M.J. BONELL, *supra* note 4 at 150-168.

9 Almost all the replies to CENTRAL's inquiry which indicated that they were aware of cases where the parties expressly referred to transnational law as the law governing their contract also indicated that the contract contained an arbitration clause. It may therefore be inferred that the same applies where the parties have specifically chosen the UNIDROIT Principles.

10 Such a possibility is nowadays admitted in most domestic laws; for further references see M.J. BONELL, *supra* note 4 at 194-196.

This is clearly not the place to mention all the arbitration laws that have recently been adopted at both international and domestic level and which, following the approach taken by the 1985 UNCITRAL Model Law on International Commercial Arbitration,[11] when sanctioning the parties' right to choose the law applicable to the substance of the dispute, employ the term "rules of law" instead of "law", in order to make it clear that the parties' freedom of choice is not restricted to national laws, but also includes rules of law of an a-national or supranational character.[12]

In the light of these developments, the "Resolution on Transnational Rules" as adopted by the International Law Association at Cairo in 1992 rightly states that "[t]he fact that an international arbitrator has based an award on transnational rules (general principles of law, principles common to several jurisdictions, international law, usages of trade, etc.) rather than on the law of a particular State should not in itself affect the validity or enforceability of the award [...] where the parties have agreed that the arbitrator may apply transnational rules [...]."[13]

Yet even more important, several cases are reported where the arbitral tribunal has been requested by the parties to base its decision on the UNIDROIT Principles alone or in conjunction with a particular domestic law. The formulae used vary. Sometimes reference was made to "the UNIDROIT Principles" with no further qualification,[14] while at other times the arbitrators were requested to decide in accordance with "the agreement between the parties and, to the extent necessary and appropriate, the UNIDROIT Principles,"[15] or "in conformity with the UNIDROIT Principles tempered by recourse to equity"[16] or according to "Russian law supplemented, if necessary, by the UNIDROIT Principles."[17]

The individual provisions of the UNIDROIT Principles applied range from Articles 1.3 *(Binding character of contract)*, 2.13 *(Conclusion of contract dependent on agreement on specific matters or in a specific form)*, 3.12 *(Confirmation)*, 4.1 *(Intention of the*

11 According to Art. 28(1) of the UNCITRAL Model Law "[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 [...]" (emphasis added).

12 See *e.g.* Art. 1496 of the French Code of Civil Procedure, Art. 1054(2) of the Dutch Code of Civil Procedure, Art. 182 of the 1987 Swiss Law on Private International Law, Art. 28(1) of the 1993 Russian Law on International Commercial Arbitration, Art. 834(1), first part, of the Italian Code of Civil Procedure, § 1051(1) of the German Code of Procedure, and sec. 46(1) of the 1996 English Arbitration Act.

13 *Cf.* Resolution on Transnational Rules as adopted at the 65th ILA Conference, Cairo (Egypt), 26 April 1992, and reproduced in E. Gaillard (ed.), *Transnational Rules ...*, *supra* note 3 at 36. For a discussion of this resolution see *ibid.*, 37-62 (with interventions, among others, by E. GAILLARD, Ph. FOUCHARD, P. MAYER, P. LALIVE, H. VAN HOUTTE, Y. DERAINS, B. HANOTIAU, S. BOND, E. SCHWARTZ).

14 *Cf.* ICC Award No. 8331 of 1996, in *Journal de droit international* (1998), 1041, with a note by Y. Derains at 1044; *ICC International Court of Arbitration Bulletin*, vol. 10, No. 2 (1999), 65-68.

15 *Cf. Ad hoc* Arbitration Award rendered in Paris on 21 April 1997, in M.J. BONELL, *supra* note 4 at 253.

16 *Cf.* Award No. 1795 of 1 December 1996 by the National and International Court of Arbitration of Milan, in *Uniform Law Review* (1997), 602.

17 *Cf.* Award No. 116 of 20 January 1997 by the International Arbitration Court of the Chamber of Commerce and Industry of the Russian Federation, in M.J. BONELL, *supra* note 4 at 252-253.

*parties)*, 4.2 *(Interpretation of statements and other conduct)*, 4.3 *(Relevant Circumstances)*, 4.5 *(All terms to be given effect)*, 5.1-5.2 on express and implied obligations, 5.4 *(Duty to achieve a specific result. Duty of best efforts)* to Articles 7.3.1 *(Right to terminate the contract)*, 7.3.5 *(Effects of termination in general)* 7.3.6 *(Restitution)*, 7.4.1 *(Right to damages)*, 7.4.2 *(Full compensation)*, 7.4.3 *(Certainty of harm)*, 7.4.4 *(Foreseeability of harm)*, 7.4.5 *(Proof of harm in case of replacement transaction)*, 7.4.6 *(Proof of harm by current price)*, 7.4.9 *(Interest for failure to pay money)*, 7.4.13 *(Agreed payment for non-performance)*.

There have been no reports of any of these awards having been set aside by courts on the ground that by applying the UNIDROIT Principles they contravened mandatory rules of domestic law.

### III. – APPLICATION OF THE UNIDROIT PRINCIPLES IN THE ABSENCE OF AN EXPRESS REFERENCE BY THE PARTIES

#### 1. *The* UNIDROIT *Principles as a source of "general principles of law",* "lex mercatoria" *or the like*

CENTRAL's enquiry shows that in most cases where the parties expressly choose transnational law as the law governing their contract, they do so by referring to "general principles of law", "transnational principles of law", "*lex mercatoria*", "principles of international law", etc. Yet even if the contract is silent as to the applicable law, arbitrators themselves sometimes decide, particularly in the context of so-called State contracts, to base their decision on "general principles of law", the "*lex mercatoria*" or the like rather than on a particular domestic law. In both cases the question arises as to whether the UNIDROIT Principles may be used to determine the content of such rather vague concepts.[18]

Scholarly opinion is divided on this point.

Those in favour of this option recall that, given the uncertain nature and content of concepts such as "general principles of law", "*lex mercatoria*" or the like, it has hitherto been extremely difficult, if not impossible, to predict what arbitrators would decide when called upon to base their awards on them. Recourse to the UNIDROIT Principles would considerably reduce these uncertainties. Indeed, arbitrators would no longer be forced to work out solutions on an *ad hoc* basis, but have at their disposal a well-defined set of rules such as the UNIDROIT Principles, considered to be "a codification of general principles of law, *lex mercatoria* and the like" [19] or *"une*

18 *Cf.* Paragraph 3 of the Preamble to the UNIDROIT Principles, according to which "they *may be applied* when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like" (emphasis added).

19 J. LOOKOFSKY, "Denmark", in M.J. Bonell (ed.), *A New Approach to International Commercial Contracts* (Kluwer, 1999), 71 *et seq.* at 77. This author even proposes adding another "purpose" to the Preamble of the Principles stating that "[t]hey may be applied, even absent the parties' agreement, as a source of general principles of contract law and/or as a source of the usages and customs of international trade (*lex mercatoria*)."

*expression particulièrement autorisée et valable de la* lex mercatoria.*"* [20]

Those who espouse the opposite view point out that, as is openly admitted in the Introduction,[21] the UNIDROIT Principles, far from containing only principles and rules found in many, if not all, legal systems, also lay down what are perceived to be the best solutions, even if still not yet generally adopted. It follows that a reference by the parties to "general principles of law" can hardly be construed as an implicit choice of the UNIDROIT Principles. As to the "*lex mercatoria*", this is generally perceived as a very flexible and informal body of rules, so that a reference to it is even less likely to express the parties' intention to have the UNIDROIT Principles apply.[22]

Between these two extremes, the view has been expressed that precisely because the UNIDROIT Principles do not at all claim to enunciate only rules which are already generally accepted at international level, what is at stake is not their direct and exclusive applicability as "general principles of law" or as the "*lex mercatoria*", but merely the possibility to resort to them as one of the various sources available to determine the content of these (or similar) rather vague formulations used by the parties. Only the future can tell whether the UNIDROIT Principles will grow into something more and something different, in the sense of establishing themselves, in their entirety, as the most genuine expression of the "general principles of law" or the *lex mercatoria* in the field of contract law.[23]

20 So expressly P. LALIVE, "L'arbitrage international et les Principes UNIDROIT", in: M.J. Bonell / F. Bonelli (eds.), *Contratti commerciali internazionali e Principi UNIDROIT* (Milano 1997), 71 *et seq.* at 80.

21 UNIDROIT – International Institute for the Unification of Private Law, *Principles of International Commercial Contracts* (Rome, 1994), Introduction, viii.

22 Thus for example H. VAN HOUTTE, "UNIDROIT Principles of International Commercial Contracts and International Commercial Arbitration: Their Reciprocal Relevance", in Institute of International Business Law and Practice (ed.), *UNIDROIT Principles …*, *supra* note 7 at 181 *et seq.* (at 184: "[...] it is not up to the Principles to advance themselves as general principles of law or as *lex mercatoria* [...] The UNIDROIT standards will only be part of the *lex mercatoria* if they are recognised as such by the business community and its arbitrators. Since the UNIDROIT Principles are just launched, it is too early to assess this possibility"). Similarly H. RAESCHKE-KESSLER, "Should an Arbitrator in an International Arbitration Procedure Apply the UNIDROIT Principles?", *ibid.*, 167 *et seq.* at 174 ss.; B. FAUVARQUE-COSSON, "France", in M.J. Bonell (ed.), *A New Approach …*, *supra* note 19 at 95 *et seq.* (116).

23 M.J. BONELL, "General Report", in M.J. Bonell (ed.), *A New Approach …*, *supra* note 19, 1 *et seq.* at 4-5. For further references on this point see M.J. BONELL, *supra* note 4 at 202 *et seq.*; in the same sense, see among others, U. DROBNIG, "The Use of the UNIDROIT Principles by National and Supranational Courts", in Institute of International Business Law and Practice (ed.), *UNIDROIT Principles …*, *supra* note 7, 212 *et seq.* at 228; Ph. FOUCHARD / E. GAILLARD / B. GOLDMANN, *Traité de l'arbitrage commercial international* (Litec, 1996), 822; Ch. WICHARD, "Die Anwendung der UNIDROIT-Prinzipien für internationale Handelsverträge durch Schiedsgerichte und staatliche Gerichte", 60 *RabelsZeitung* (1996), 269 *et seq.* at 281; K.-P. BERGER, "The *Lex Mercatoria* Doctrine and the UNIDROIT Principles of International Commercial Contracts", in 28 *Law & Policy in International Business* (1997), 943 *et seq.* at 977-978; R. MICHAELS, "Privatautonomie und Privatkodifikation. Zur Anwendbarkeit und Geltung allgemeiner Vertragsrechtsprinzipien", in 62 *RabelsZeitschrift* (1998), 580 *et seq.* at 602-603; C.-W. CANARIS, *supra* note 6 at 13 *et seq.* (this writer distinguishes between "Rechtsgeltungsquellen" and "Rechtserkenntnisquellen" and, while denying the UNIDROIT Principles the former quality, he does not exclude at all that they possess the latter quality and could therefore be used, on a case-by-case basis, better to define the content of generally recognised principles of law).

Turning to actual arbitration practice, the UNIDROIT Principles have already on several occasions been referred to as a source of "general principles of law" or the "*lex mercatoria*".

The most explicit statement to this effect can be found in the ICC Partial Awards in Case No. 7110.[24] The dispute concerned contracts for the supply of equipment concluded between an English company and a Middle Eastern governmental agency. While most of the contracts were silent as to the applicable law, some did refer to settlement according to "rules of natural justice". In a first partial award dealing with the applicable law, the Arbitral Tribunal, by majority, held that the parties had intended to exclude the application of any specific domestic law and to have their contracts governed by general principles and rules which, though not enshrined in any specific national legal system, are specially adapted to the needs of international transactions and enjoy wide international consensus. According to the Arbitral Tribunal,

> such "*general rules and principles enjoying wide international consensus [...] are primarily reflected by the UNIDROIT Principles.*" (emphasis added)

As a consequence, it concluded that

> "without prejudice to taking into account the provisions of the Contracts and relevant trade usages [...] the Contracts are governed by, and should be interpreted in accordance to, the UNIDROIT Principles with respect to all matters falling within the scope of such Principles [...]."

Indeed, in the other partial awards dealing with substantive issues, the Arbitral Tribunal referred to Articles 1.7 *(Good faith and fair dealing)*, 2.4 *(Revocation of offer)*, 2.14 *(Contracts with terms deliberately left open)*, 2.18 *(Written modification clause)*, 7.1.3 *(Withholding performance)* and 7.4.8 *(Mitigation of harm)* of the UNIDROIT Principles, considering them all to be an expression of generally accepted principles of law.

A more cautious approach was taken in ICC Award No. 7375.[25] The case concerned a contract for the supply of goods between a United States seller and a Middle Eastern governmental agency. The contract contained no choice-of-law clause. In investigating the parties' intentions, the Arbitral Tribunal assumed that neither party was prepared to accept the other's domestic law. Given such an implied negative choice, the Arbitral Tribunal by majority decided to apply

> "those general principles and rules of law applicable to international contractual obligations which qualify as rules of law and which have earned a wide acceptance and international consensus in the international business community, including notions which are said to form part of a *lex mercatoria*, also taking into account any relevant trade usages as well as the UNIDROIT Principles, *as far as they can be considered to reflect generally accepted principles and rules.*" (emphasis added)

[24] For abstracts of the three partial awards rendered in 1995, 1998 and 1999 respectively, see *ICC International Court of Arbitration Bulletin*, vol. 10, No. 2 (1999), 39-57.

[25] ICC Award No. 7375 of 5 June 1996: *cf.* 11 *Measley's International Arbitration Report* (1996), A-1 *et seq.*; *Uniform Law Review* (1997), 598.

Indeed, according to the Arbitral Tribunal, the UNIDROIT Principles have not as yet stood the test of detailed scrutiny in all their aspects, so that some of their individual provisions might not reflect international consensus.

Another example of an award referring to the UNIDROIT Principles as a source of general principles of law or the *lex mercatoria* is ICC Award No. 8261.[26] The case concerned a contract between an Italian company and a Middle Eastern governmental agency. The contract did not contain any choice-of-law clause, since both parties had insisted on the application of their own national law. In a partial award on the question of the applicable law, the Arbitral Tribunal had declared that it would base its decision on the "terms of the contract, supplemented by general principles of trade as embodied in the *lex mercatoria*." Subsequently, when dealing with the merits of the dispute, it applied, with no further explanation, individual provisions of the UNIDROIT Principles, thereby implicitly considering the latter a source of the *lex mercatoria*. In particular, it referred to Articles 4.6 (Contra proferentem *rule)*, 4.8 *(Supplying omitted terms)*, 7.4.1 *(Right to damages*), 7.4.7 *(Harm due in part to aggrieved party*) and 7.4.13 *(Agreed payment for non-performance*) in support of its reasoning.

A further example is ICC Award No. 8502 [27] concerning a contract for the supply of rice entered into between a Vietnamese exporter and French and Dutch buyers. The contract did not contain any choice-of-law clause. The Arbitral Tribunal decided to base its award on

> "trade usages and generally accepted principles of international trade"

and to refer

> "in particular to the 1980 Vienna Convention on Contracts for the International Sale of Goods (Vienna Sales Convention) or to the Principles of International Commercial Contracts enacted by UNIDROIT, *as evidencing admitted practices under international trade law.*" (emphasis added)

The individual provisions it then referred to were Articles 76 CISG and 7.4.6 *(Proof of harm by current price)* of the UNIDROIT Principles.

Yet another example is the award rendered by an *ad hoc* Arbitral Tribunal in Buenos Aires in 1997.[28] The case concerned a contract for the sale of shares between shareholders of an Argentine and a Chilean company. The contract did not contain a choice-of-law clause and the parties authorised the Arbitral Tribunal to act as *amiables compositeurs*. Notwithstanding the fact that both parties had based their claims on specific provisions of Argentinean law, the Tribunal decided to apply the UNIDROIT Principles. The Tribunal held that the UNIDROIT Principles constituted

> "*usages of international trade reflecting the solutions of different legal systems and of international contract practice*" (emphasis added)

26 ICC Award No. 8261 of 27 September 1996, in *Uniform Law Review* (1999), 171.

27 ICC Award No. 8502 of 1996, in *ICC International Court of Arbitration Bulletin*, cit., 72-74.

28 Award of 10 December 1997: *cf. Uniform Law Review* (1998), 178.

and that as such, according to Article 28(4) of the UNCITRAL Model Law on International Commercial Arbitration, they should prevail over any domestic law.[29] The individual provisions of the UNIDROIT Principles applied to the merits of the case were Articles 3.12 *(Confirmation)*, 3.14 *(Notice of avoidance)* and 4.6 *(*Contra proferentem *rule)*.

Finally, mention may be made of ICC Award No. 7365.[30] The case concerned contracts for the delivery of sophisticated military equipment, entered into in 1977 between a U.S. corporation and the Iranian Air Force. The contracts contained a choice-of-law clause in favour of the law of the Government of Iran in effect at the date of the contracts, but when the dispute arose the parties eventually agreed to the supplementary application of "general principles of international law and trade usages". In addressing the issue of the law applicable to the substance of the dispute, the Arbitral Tribunal held that

> "[s]ince both Parties eventually agreed to the complementary and supplementary application of *general principles of international law and trade usages*, and based on Article 13(5) of the ICC Rules, the Tribunal shall, to the extent necessary, take into account such principles and usages as well. *As to the contents of such rules, the Tribunal shall be guided by the Principles of International Commercial Contracts* [...]." (emphasis added)

Consequently, when deciding the merits of the case, the Arbitral Tribunal on a number of occasions based its solutions, exclusively or in conjunction with similar rules to be found in Iranian law, on individual provisions of the UNIDROIT Principles such as Articles 5.1-5.2 on express and implied obligations, 6.2.3(4) *(Effects of hardship)*, 7.3.6 *(Restitution)* and 7.4.9 *(Interest for failure to pay money)*.

It is worth noting that the award was challenged by the U.S. corporation before the District Court, S.D. California precisely on the ground, among others, that the Arbitral Tribunal, by resorting to the UNIDROIT Principles – whereas the parties had only referred to "general principles of international law" as the rules applicable to the substance of the dispute – had exceeded the scope of the submission to arbitration, thereby violating Article V(1)(c) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. However, the Court expressly rejected this argument, thereby confirming the Arbitral Tribunal's implicit assumption that the UNIDROIT Principles represent a source of "general principles of international law and usages" to which arbitrators may resort even in the absence of an express authorisation by the parties.[31]

Only a few awards are known which have expressly excluded the possibility of referring to (individual provisions of) the UNIDROIT Principles as an expression of "general principles of law" or the "*lex mercatoria*".

[29] Art. 28(4) provides that "[i]n all cases the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

[30] ICC Award No. 7365 of 5 May 1997. For a summary of the award see *Uniform Law Review* (1999), 796 *et seq*.

[31] *The Ministry of Defence and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 29 *F.Supp.2d* 1168: for a comment see M.J. BONELL, "UNIDROIT Principles: a significant recognition by a United States District Court", *Uniform Law Review* (1999), 651.

The awards in question are ICC Awards Nos. 8873,[32] 9029 [33] and 9419.[34] In each of these cases the contract giving rise to the dispute was governed by a particular domestic law, and the application of the UNIDROIT Principles was invoked by one of the parties on the ground that they represented veritable trade usages which the Arbitral Tribunal had at any rate to take into account under Article VII of the 1961 Geneva Convention on International Arbitration and Article 13(5) [now 17(2)] of the ICC Rules of Arbitration and Conciliation. While the first award rejected this argument only with respect to certain individual provisions of the UNIDROIT Principles, *i.e.* Articles 6.2.1-6.2.3 on hardship, the other two did so with respect to the UNIDROIT Principles as a whole. Indeed, according to them,

> "[...] although the UNIDROIT Principles constitute a set of rules theoretically appropriate to pre-figure the future *lex mercatoria*should they be brought into line with international commercial practice, *at present there is no necessary connection between the individual Principles and the rules of the* lex mercatoria, so that recourse to the Principles is not purely and simply the same as recourse to an actually existing international commercial usage" [35] and "[...] the UNIDROIT Principles could certainly be used for reference by the parties involved for the voluntary regulation of their contractual relationship, in addition to helping the arbitrator in confirming the existence of particular trade usages but *they cannot constitute a normative body in themselves that can be considered as an applicable supranational law to replace a national law, at least as long as the arbitrator is required to identify the applicable law by choosing the rule of conflict that he considers most appropriate*, in accordance with the provisions laid down by the international conventions and as provided for in the rules of arbitration within the scope of which he operates." (emphasis added) [36]

In the light of the above, it is of course especially interesting to note that recently, even a State legislator – in Panama – considered it appropriate expressly to mention the UNIDROIT Principles as one of the sources on which arbitrators should base their decisions even in the absence of any reference by the parties. Indeed, according to Article 27 of the Arbitration Act of 8 July 1999,

> "the arbitral tribunal shall rely on the terms of the contract in applying the law governing contractual relations and shall take account of trade usages and practices and of the UNIDROIT Principles of International Commercial Contracts."

Equally significant – although only at the contractual level – is the reference to the UNIDROIT Principles to be found in Article 13.1 of the recently adopted *ICC Model Occasional Intermediary Contract (Non-Circumvention & Non-Disclosure Agreement)* according to which:

> "Unless otherwise agreed in writing [...], any questions relating to this NCND Agreement shall be governed by the rules and principles of law generally recognised in international

[32] ICC Award No. 8873 of 1997: in *Journal de droit international* (1998), 1017 with a note by D. Hascher at 1024.

[33] ICC Award No. 9029 of 1998, in *ICC International Court of Arbitration Bulletin*, cit., 88-96.

[34] ICC Award No. 9419 of 1998, *ibid.*, 104-106.

[35] *Cf.* ICC Award No. 9029, *ibid.*, 90.

[36] *Cf.* ICC Award No. 9419, *ibid.*, 105-106.

> trade as applicable to international contracts with occasional intermediaries together with the UNIDROIT Principles of International Commercial Contracts." [37]

### 2. *The UNIDROIT Principles as a means of interpreting and supplementing international uniform law*

According to the Preamble of the UNIDROIT Principles, "[t]hey may be used to interpret or supplement international uniform law instruments." [38] Obviously, no difficulties arise where the parties include in their contract – as in practice they more and more frequently do – an express reference to the UNIDROIT Principles to this effect. Such reference may now be found, for example, in the *Model Contract for the International Commercial Sale of Perishable Goods* issued by the International Trade Centre UNCTAD/WTO in 1999 which in Article 14 *(Applicable Law)* expressly provides that:

> "[i]n so far as any matters are not covered by the foregoing provisions, this Contract is governed by the following, in descending order of precedence: The United Nations Convention on Contracts for the International Sale of Goods; the UNIDROIT Principles of International Commercial Contracts, and for matters not dealt with in the above-mentioned texts, the law applicable at [....] or, in the absence of a choice of law, the law applicable at the Seller's place of business through which this Contract is to be performed."

Yet what is the situation in the absence of such a reference?

The question – in itself pertinent to all existing international instruments – is in practice particularly relevant in the context of the 1980 UN Convention on Contracts for the International Sale of Goods (CISG), Article 7 of which expressly states 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 [...]"

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 [...]."

Opinion among legal scholars is divided. On the one hand, there are those who categorically deny that the UNIDROIT Principles can be used to interpret or supplement CISG, invoking the rather formalistic and not necessarily convincing argument that the UNIDROIT Principles were adopted later in time than CISG and therefore cannot be of any relevance to the latter. [39] On the other hand, there are those who, perhaps too enthusiastically, justify the use of the UNIDROIT Principles for this purpose on the mere ground that they are "general principles of international commercial contracts". [40] The correct solution would appear to lie between these two extreme positions. In other words, there can be little doubt that in general the UNIDROIT Principles may well be

37 ICC Publications N° 619 (2000).

38 *Cf.* Paragraph 5 of the Preamble.

39 See F. SABOURIN, "Quebec", in M.J. Bonell (ed.), *A New Approach ...*, *supra* note 19 at 245.

40 See J. BASEDOW, "Germany", *ibid.* at 149-150. For a similar view see K.-P. BERGER, *supra* note 4 at 182.

used to interpret or supplement even pre-existing international instruments such as CISG; on the other hand in order for individual provisions to be used to fill gaps in CISG, they must be the expression of general principles underlying also CISG.[41]

In practice, domestic courts and arbitral tribunals have so far generally taken an extremely favourable attitude to the UNIDROIT Principles as a means of interpreting and supplementing CISG or other international uniform law instruments.

Significantly, only in a few cases has recourse to the UNIDROIT Principles been justified on the ground that the individual provisions invoked as gap-fillers could be considered an expression of general principles underlying also CISG. Thus, in two awards of the International Court of Arbitration of the Federal Chamber of Commerce of Vienna,[42] the sole arbitrator applied Article 7.4.9(2) of the UNIDROIT Principles, according to which the applicable rate of interest is the average bank short-term lending rate to prime borrowers prevailing at the place for payment for the currency of payment, in order to fill the gap in Article 78 CISG on the ground that it could be considered an expression of the general principle of full compensation underlying both the UNIDROIT Principles and CISG. Likewise the Court of Appeal of Grenoble,[43] in referring to Article 6.1.6 of the UNIDROIT Principles to determine, under CISG, the place of performance of the seller's obligation to return the price unduly paid by the buyer, stated that this provision expressed in general terms the principle underlying also Article 57(1) CISG, *i.e.* that monetary obligations have to be performed at the obligee's place of business.

In all other cases, the relevant provisions of the UNIDROIT Principles were applied with no further justification at all,[44] or because they were considered *"one of the general principles according to Art. 7(2) CISG."*[45] On two occasions, the Arbitral

[41] See also for further references M.J. BONELL, *supra* note 4 at 75-82. More recently, F. FERRARI in P. Schlechtriem (ed.), *Kommentar zum Einheitlichen UN-Kaufrecht – CISG* (3rd ed. 2000), 138 (No. 64); C.W. CANARIS, *supra* note 6 at 28.

[42] *Cf.* Schiedssprüche SCH 4318 and SCH 4366 of 15 June 1994: the original German version in *Recht der internationalen Wirtschaft* (1995), 590 *et seq.*, with note by P. Schlechtriem (592 *et seq.*); for an English translation see M.J. Bonell (ed.) *UNILEX. International Case Law & Bibliography on the UN Convention on Contracts for the International Sale of Goods*, Transnational Publishers, Inc., Ardsely, NY, December 1998 release, E.1994-13 and E.1994-14.

[43] *Cf.* Cour d'Appel de Grenoble, 23 October 1996, in *Uniform Law Review* (1997), 182.

[44] See, with respect to Art. 7.4.9(2) of the UNIDROIT Principles, ICC Award No. 8769 of December 1996 in *ICC International Court of Arbitration Bulletin*, cit., 75.

For a similar approach see also ICC Award No. 8908 of 1998, *ICC International Court of Arbitration Bulletin*, cit., 83-87 at 87: after having pointed out that "Art. 78 [CISG] [...] does not lay down the criteria for calculating the interest" and that "[i]nternational case law presents a wide range of possibilities in this respect", the Arbitral Tribunal, though without expressly mentioning Art. 7.4.9(2) of the UNIDROIT Principles, concluded that "amongst the criteria adopted in various judgments, the more appropriate appears to be that of the rates generally applied in international trade for the contractual currency ... in concrete terms, since the contractual currency is the dollar and the parties are European, the applicable rate is the 3-month LIBOR on the dollar, increased by one percentage point, with effect from the due date not respected up until full payment has been made."

[45] See, with respect to Art. 7.4.9(2) of the UNIDROIT Principles, ICC Award No. 8128 of 1995, in *Journal de droit international* (1996), 1024, with note by D. HASCHER, *ibid.*, 1028; *Uniform Law Review* (1997), 810.

Tribunal went even further by stating in general terms that it would apply "the provisions of [CISG] *and its general principles, now contained in the UNIDROIT Principles* [...]" [46] or that in applying CISG it was "informative to refer to [the UNIDROIT Principles] *because they are said to reflect a world-wide consensus in most of the basic matters of contract law.*" [47]

*3. The UNIDROIT Principles as a means of interpreting and supplementing domestic law*

There are still other situations in which the UNIDROIT Principles may be applied both by domestic courts and arbitral tribunals even in the absence of any reference to them by the parties.

A first such case is expressly mentioned in the Preamble, according to which "[the UNIDROIT Principles] may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law." Notwithstanding the language used, recourse to the UNIDROIT Principles as a substitute for the domestic law otherwise applicable may be justified not only in case of an absolute impossibility to establish the relevant rule of the applicable law, but also whenever – as is likely to occur where the law governing the contract is that of a remote country whose legal sources are of a rudimentary character and/or extremely difficult to access – the research would involve disproportionate efforts and/or costs.

Among legal writers there are those who insist on the traditional view according to which in situations of this kind courts should apply the *lex fori* and consequently expressly deny the possibility of using the UNIDROIT Principles as a substitute for the domestic law otherwise applicable. [48] However, others openly favour, also in this context, recourse to the UNIDROIT Principles, pointing out that:

> "[...] courts are called upon to give up their homeward trend in favour of a solution which provides both an internationally accepted standard and a remarkable degree of legal certainty." [49]

Yet even more important is the role that the UNIDROIT Principles may play as a means of interpreting and supplementing the otherwise applicable domestic law. To be sure, for this purpose it does not matter whether the domestic law in question is that of the forum or a foreign law and, in the latter case, whether it is known or easily

[46] See ICC Award No. 8817 of December 1997, in *ICC International Court of Arbitration Bulletin*, cit., 75-78 (the individual provisions of the UNIDROIT Principles applied were Arts. 1.8 on usages and 7.4.8 on mitigation of harm).

[47] See ICC Award No. 9117 of March 1998 in *ICC International Court of Arbitration Bulletin*, cit., 96-101 (the individual provisions of the UNIDROIT Principles applied were Arts. 2.17 on merger clauses, 2.18 on written modification clauses and 4.3 on the relevant circumstances in contract interpretation).

[48] More recently see B. FAUVARQUE-COSSON, *supra* note 22 at 117-118; F. SABOURIN, *supra* note 39 at 247.

[49] So, expressly, J. BASEDOW, *supra* note 50 at 147-148. For a similar view see also M.J. BONELL, *supra* note 4 at 222-224; K.-P. BERGER, *supra* note 4 at 180; J. LOOKOFSKY, *supra* note 19 at 76; Ch. HULTMARK, "Sweden", *ibid.*, 303; F. WERRO / E.M. BELSER, "Switzerland", *ibid.*, 376.

accessible. Whenever the law governing the contract is unclear or presents a veritable lacuna, domestic courts as well as arbitral tribunals – at least in the context of cross-border transactions – may turn to the UNIDROIT Principles as a source of inspiration and apply the solutions they offer.

This role, although not expressly stated in the Preamble, is widely acknowledged in legal writings.[50] In the words of Antonio BOGGIANO,

> "[...] the UNIDROIT Principles may be of assistance in interpreting, supplementing and applying the national law chosen by the parties or applicable by virtue of the conflict-of-law rules: the applicable national rules may prove to be too rigid or ill suited to international contracts [...]." [51]

Or as Klaus-Peter BERGER has pointed out,

> "[a]n internationally useful method of construction inspired by the UNIDROIT Principles would help to avoid frictions between transnational and domestic law by breaching the gap between domestic legal systems and the *lex mercatoria*." [52]

Even those who, like Bénédicte FAUVARQUE-COSSON, moving from a more consevative position, state that:

> "[*c*]*e chef d'application des Principes est impossible devant le juge français: n'ayant pas été intégrés dans l'ordre juridique français, ils ne constituent pas une source autonome de droit*",

admit that:

> *"[t]out au plus le juge, tenu de statuer sous peine de commettre un déni de justice (art. 4 C.civ.), pourrait-il adapter la règle interne en s'inspirant d'une disposition précise. Mais la source de la règle de droit serait alors la décision du juge et le texte de droit interne visé, non l'article des Principes dont il s'est inspiré*".[53]

The importance of the UNIDROIT Principles as a yardstick to ensure interpretation of domestic law consistent with internationally accepted standards and/or the special needs of cross-border trade relationships is even further highlighted by the fact that more than half of all reported decisions have used the UNIDROIT Principles for this purpose.

50 See, also for further references, M.J. BONELL, *supra* note 4 at 224-228; K.-P. BERGER, *supra* note 4 at 183 *et seq.*; P. WIEDEMANN, "Note to the decision of the German Supreme Court of 26 September 1997", in *Juristenzeitung* (1998), 1173; C.-W. CANARIS, *supra* note 6 at 29-31.

51 A. BOGGIANO, "La Convention interaméricaine sur la loi applicable aux contrats internationaux et les Principes d'UNIDROIT", in *Uniform Law Review* (1996), 219 *et seq.* (at 226).

52 K.-P. BERGER, *supra* note 4 at 184. For similar statements see also F. WERRO / E.M. BELSER, *supra* note 49 at 376 ("Such an approach should [...] expose contract law that is not subject to the *Principles* to a breath of fresh air [...] Thus, beyond their scope the *Principles* may provide international impetus to the formation of national contract law [...]); Ch. HULTMARK, *supra* note 19 at 304 ("The UNIDROIT Principles may come to serve as a soft source of Swedish law to the extent that judges and arbitrators can use them as a tool to reach knowledge about the general principles that fill in the wide gaps not covered by Swedish legislation or case-law"); J. LOOKOWSKY, *supra* note 19 at 75 ("Once applied by our courts, the UNIDROIT solution becomes an integral part of the 'Danish' solution, part of our own judge-made law [...] In this way that which previously might have represented a domestic, perhaps even 'parochial' solution, becomes 'internationalized' and thus better suited to the modern needs of trade").

53 B. FAUVARQUE-COSSON, *supra* note 22 at 117.

The domestic laws governing the individual contracts in the cases in question were far from being only those of less developed countries or countries in transition to a market economy. Indeed, they include the laws of Australia, France, the former German Democratic Republic, Italy, the Netherlands, New Zealand, the State of New York and Switzerland, 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.

Of the individual provisions of the UNIDROIT Principles invoked either to confirm a particular interpretation of the relevant domestic rules or to fill in a veritable gap thereof, mention may be made of Articles 1.1 *(Freedom of contract)*, 1.3 *(Binding character of contract)*, 1.7 *(Good faith and fair dealing)* and 2.15 *(Negotiations in bad faith)*;[54] Articles 1.2 *(No form required)*, 2.1 *(Manner of formation)*, 2.6 *(Mode of acceptance)* and 2.12 *(Writings in confirmation)*;[55] Article 1.7 *(Good faith and fair dealing)*;[56] Articles 1.7 *(Good faith and fair dealing)*, 2.11 and 4.1-4.8 on interpretation;[57] Article 2.19 *(Contracting under standard terms)*;[58] Articles 2.21 *(Conflict between standard terms and non-standard terms)* and 4.6 *(*Contra proferentem *rule)*;[59] Articles 3.4 *(Definition of mistake)*, 3.5 *(Relevant mistake)* and 3.8 *(Fraud)*;[60] Article 3.5 *(Relevant mistake)*;[61] Articles 4.1 *(Intention of parties)* and 4.2 *(Interpretation of*

54 ICC Award No. 8540: *cf. White & Case International Dispute Resolution*, vol. 10, March 1997, 3; *Uniform Law Review* (1997), 600 (in support of the solution, reached under New York law, that an agreement to negotiate in good faith is enforceable).

55 Award rendered by an *ad hoc* Arbitral Tribunal in Rome on 4 December 1996: *cf.* M.J. BONELL, *supra* note 4 at 244 (in support of the solution, reached under Italian law, that a contract may be validly concluded even without an ascertainable sequence of offer and acceptance).

56 *Cf. Hughes Aircraft Systems International v. Airservices Australia* <http://www.lawnet.com.au/private/fct/1997/J970558.html>; *Uniform Law Review* (1997), 812 (in support of the solution, reached under Australian law notwithstanding legal opinion is "sharply divided on this matter", that a duty of good faith is implied by law in pre-award contract contexts).

57 ICC Award No. 8908 of 1998 *supra* note 44 (to demonstrate that the solutions reached in applying Arts. 1337, 1362-1371 and 1326(6) of the Italian Civil Code correspond in substance to the UNIDROIT Principles defined as "normative texts that can be considered helpful in the interpretation of all contracts of an international nature").

58 ICC Award No. 8223 of 1998, *ICC International Court of Arbitration Bulletin*, cit. 58-60 (in support of the solution, reached under French law, that a non-assignment clause contained in standard terms may be tacitly modified by subsequent conduct by the party).

59 Court of Appeal of Grenoble of 24 January 1996, in *Revue de l'arbitrage* (1997), 87; *Uniform Law Review* (1997), 180 (in support of the existence of similar rules in French law).

60 Award rendered by an *ad hoc* Arbitral Tribunal in Rome on 4 December 1996, *supra* note 55 (to demonstrate that under Italian law the extent to which a party may avoid the contract for mistake or fraud is the same).

61 Preliminary Award of the Zürich Chamber of Commerce of 25 November 1994, in *Yearbook Commercial Arbitration*, Vol.22-1997, 211-221 (in support of the solution, reached in application of Art. 24(1) of the Swiss Code of Obligations, that only a material mistake, *i.e.* one relating to facts which the mistaken party in accordance with the rules of goods faith in the course of business considered to be a necessary basis of the contract, entitles the mistaken party to invalidate the contract).

*statements and other conduct)*;[62] Article 4.3 *(Relevant circumstances)*;[63] Article 5.3 *(Co-operation between the parties)*;[64] Article 6.1.7*(2)* on payment by cheque or other order to pay or promise to pay stating the presumption that payment will be honoured;[65] Article 6.1.9*(3)* on the rate of exchange for the conversion of foreign currency of account in local currency of payment;[66] Article 6.2.1 *(Contract to be observed)*;[67] Articles 6.2.2 *(Definition of hardship)* and 6.2.3 *(Effects of hardship)*;[68] Article 7.1.6 *(Exemption clauses)*; Article 1.7 *(Good faith and fair dealing)* and Articles 7.4.1-7.4.12 on the right to damages;[69] Article 7.4.3*(2)* on the compensability of loss of a chance;[70] Article 7.4.3*(3)* on the equitable quantification of the harm by the court, Article 7.4.7 *(Harm due in part to aggrieved party)* and Article 7.4.9*(3)* on the possibility to recover additional damages if interest does not compensate the entire harm sustained;[71] Article 7.4.9 *(Interest for*

62 Preliminary Award of the Zürich Chamber of Commerce of 25 November 1994, *ibid.* (in support of the solution, reached in application of Art. 18(1) of the Swiss Code of Obligations and Art. 2 of the Swiss Civil Code, that parties to a contract are bound by the meaning of the contractual provision as it must be understood by the average honest and diligent business person).

63 Award rendered in 1995 by an *ad hoc* Arbitral Tribunal in Auckland (New Zealand), in 2 *New Zealand Business Law Quarterly* (1996), 7 *et seq.* (at 17-21) (in support of the solution, reached under New Zealand law defined "in a somewhat unsettled state" on this point, that post-contractual conduct by the parties is admissible as a means of interpreting ambiguous contract language).

64 ICC Award No. 9593 of 1998, *ICC International Court of Arbitration Bulletin*, cit., 107-109 (in support of a similar principle of co-operation between the parties in the course of performance of the contract inferred from Arts. 1134(3) and 1135 of the Civil Code of the Ivory Coast).

65 Award of the Court of Arbitration of the Economic Chamber of the Czech Republic in Prague of 17 December 1996, in *Uniform Law Review* (1997), 604 (in support of the solution, reached in application of Art. 921(5) of the Polish Civil Code, that in case of delegation of payment the original obligor is discharged only when the new obligor actually pays the obligee).

66 ICC Award No. 8240, *ICC International Court of Arbitration Bulletin*, cit., 60 (to confirm a similar rule of Swiss law).

67 ICC Award No. 8486: *Journal du droit international* (1998), 1047 (note by Y. Derains) (in support of the solution, reached in application of Art. 6.258 of the new Dutch Civil Code, that a mere increase in the cost of performance does not amount to hardship).

68 *Cf.* Schiedsgericht Berlin, SG 126/90: see D. MASKOW, "Hardship and Force Majeure", in 40 *American Journal of Comparative Law* (1992), 657 *et seq.* (at 665) (in support of the solution, reached under the law of the former German Democratic Republic, that a fundamental alteration of the original contractual equilibrium amounts to hardship leading to the termination of the contract).

69 Award rendered by an *ad hoc* Arbitral Tribunal in Rome on 4 December 1996, *supra* note 55 (to demonstrate that also under Italian law the duty of the parties to act in good faith exists throughout the life of the contract and that the basic principles concerning the right to damages are the same).

70 ICC Award No. 8264 of 1997, *ICC International Court of Arbitration Bulletin*, cit., 62-65 (in support of the compensability of loss of a chance, not expressly stated in the Algerian Civil Code but in the UNIDROIT Principles "qui consacrent, comme on le sait, des règles très largement admises à travers le monde dans les systèmes juridiques et la pratique des contrats internationaux").

71 ICC Award No. 5835 of 1996, *ICC International Court of Arbitration Bulletin*, cit., 35-39 (to demonstrate that similar rules laid down either expressly or impliedly in Arts. 304, 300(1) and (2) of the Kuwaiti Civil Law No. 67 of 1980 correspond to "generally accepted principles of international commerce").

*failure to pay money)*;[72] Article 7.4.13*(2)* on the reduction of excessively high amounts agreed for non-performance.[73]

**IV. – CONCLUSIONS**

The idea of avoiding a strict "localisation" of international commercial contracts within the framework of a single national legal system, and subjecting them instead to principles and rules of a supranational or a-national character – here generically referred to as "transnational law" – has so far met with more criticism than approval. One of the objections most frequently raised was that in the absence of a more precise definition of the nature and content of such principles and rules, recourse to them would inevitably lead to unpredictability, if not arbitrariness, in the solution of each individual case.[74]

With the publication of the UNIDROIT Principles of International Commercial Contracts, this argument could lose much of its force. Intended

> "[...] to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied,"[75]

they may indeed considerably reduce, if not even eliminate, the difficulties so far encountered in attempts to "de-nationalise" the legal regime of cross-border transactions.

The originality of the UNIDROIT Principles and their advantages over traditional uniform law instruments both in terms of content and practical application are generally acknowledged. As Michael FURMSTON recently put it:

> "[...] the UNIDROIT Principles may assume the role of David. Their lack of governmental authority is at the same time a weakness and a strength. They do not require the approval of governments to prosper. If they really succeed in satisfying an international need, then they

72 ICC Award No. 9333 of 1998, *ICC International Court of Arbitration Bulletin*, cit., 102-104 (right to interest as stated in Art. 104 of the Swiss Code of Obligations corresponds to "les usages du commerce international dont se font l'écho, entre autres, la Convention des Nations Unies sur les contrats de vente internationale de marchandises (Convention de Vienne), ou encore les Principes UNIDROIT pour les contrats commerciaux internationaux").

73 Award rendered by an *ad hoc* Arbitral Tribunal in Helsinki on 28 January 1998: *cf. Uniform Law Review* (1998), 180 (in support of the possibility to reduce the agreed amount of a penalty, inferred from Art. 36 of the Nordic Contract Law, according to which any contract term which is unreasonable or the application of which leads to unreasonableness may be mitigated or set aside).

74 See, among others, W.W. PARK, "Control Mechanisms in the Development of a Modern *Lex Mercatoria*", in Th. E. Carbonneau (ed.), Lex Mercatoria *and Arbitration* (1990), 109, who points out that "the uncertain content of the *lex mercatoria* makes it a highly problematic tool in the hands of even an intelligent and intellectually honest arbitrator", while some arbitrators may even be tempted to use it as a "fig leaf to hide an unauthorized substitution of their private normative preferences in place of the parties' shared expectations under the properly applicable law".

75 *Cf.* UNIDROIT, *Principles of International Commercial Contracts*, *supra* note 2, Introduction, at viii.

may enjoy the rewards which economic theory tells us are enjoyed by the design of a better mouse trap; the world may beat a path to their door." [76]

One of the goals of CENTRAL's research project is "[...] to clarify whether [...] transnational law is accepted by international legal practice [...] [and] whether [...] principles of transnational commercial law such as *'pacta sunt servanda'*, 'good faith' or specific rules relating to the conclusion, performance and non-performance of international commercial contracts are being used in international commercial practice." [77] It is hoped that by providing a first answer to these questions with particular regard to the UNIDROIT Principles, the present paper may contribute to the success of this remarkable project.

***LES PRINCIPES D'UNIDROIT ET LE DROIT TRANSNATIONAL* (Résumé)**

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*Le Séminaire sur "L'utilisation du droit transnational dans la pratique contractuelle et l'arbitrage international" organisé par le Centre de droit transnational (CENTRAL) de Münster (Allemagne) en mai 2000 a donné lieu à la présentation du rapport ici reproduit, qui est centré sur l'application effective que reçoivent dans la jurisprudence les Principes d'UNIDROIT. Bien qu'il soit possible aux juridictions étatiques de donner application aux Principes d'UNIDROIT, c'est dans le contexte de l'arbitrage qu'ils trouvent le terrain d'application le plus évident, et dont provient la totalité de la jurisprudence illustrée ici.*

*Les parties peuvent s'être expressément référées (selon différentes formulations) dans leur contrat aux Principes d'UNIDROIT. Elles peuvent aussi avoir visé – ce qui est fréquemment le cas pour délocaliser le contrat – les "principes généraux du droit", la* "lex mercatoria" *ou autres concepts semblables; dans un nombre assez important de cas, les Principes d'UNIDROIT ont été appliqués comme aptes à donner un contenu à ces notions plutôt vagues et incertaines. Cependant il est des cas (3 sont cités) où un tel cas d'application a été refusé aux Principes – ou à des dispositions spécifiques de ceux-ci.*

*De nombreux exemples sont cités où les Principes ont été appliqués pour interpréter ou compléter le droit international uniforme – dans la majorité des cas la Convention de Vienne de 1980 sur la vente; mais – et cela n'est guère surprenant – les Principes sont de plus en plus invoqués comme instrument pour interpréter ou compléter le droit national applicable (dans les différentes espèces: d'Australie, France, Italie, Etat de New York, Nouvelle-Zélande, Pays-Bas, ancienne RDA, Suisse), ou trouver confirmation d'une interprétation du droit national appropriée dans le contexte international.*

*Outre l'application des Principes dans la pratique arbitrale, il faut citer la référence expresse qui leur est faite dans le cadre de la clause de loi applicable par deux contrats*

[76] *Cf.* M. FURMSTON, "United Kingdom", in M.J. Bonell (ed.), *A New Approach*, *supra* note 19 at 380.

[77] Center for Transnational Law (ed.), *The CENTRAL Study on the Use of Transnational Law in International Contract Law and Arbitration* (2000), 2.

*modèles récemment adoptés: le Contrat modèle de vente commerciale internationale de denrées périssables (Centre du commerce international CNUCED/OMC (CCI) – 1999) et le Contrat modèle d'intermédiation occasionnelle (accord de réservation et de confidentialité) (Chambre de commerce internationale – 2000), et de façon encore particulièrement significative, le premier cas connu de référence par le législateur étatique – Panama – dans la nouvelle loi sur l'arbitrage (1999) comme l'une des sources sur lesquelles l'arbitre fondera sa décision.*

*Un argument allant à l'encontre de l'idée d'un droit transnational est le flou et l'incertitude qui le caractérisent. Même si de façon nuancée, les Principes d'UNIDROIT s'affirment comme offrant une réponse valable à une telle objection.*