Towards a Legislative Codification of the UNIDROIT Principles ?

Michael Joachim Bonell *

I. – THE UNIDROIT PRINCIPLES – A SOFT LAW INSTRUMENT

The *UNIDROIT Principles of International Commercial Contracts* (hereinafter: the UNIDROIT Principles) are a non-legislative codification of the general part of the law of international commercial contracts.[1] They were prepared by a group of independent experts from all the major legal systems and geo-political areas of the world, set up by the International Institute for the Unification of Private Law (UNIDROIT).[2] As such they do not have the force of law and, apart from their wider scope, the only difference with respect to other internationally widely used soft law instruments, such as the INCOTERMS or the *Uniform Customs and Practices relating to Documentary Credits* (UCP) issued by the International Chamber of Commerce, is that they were produced under the supervision of and finally adopted by an intergovernmental organisation.[3]

It was both the merits and the shortcomings of the *United Nations*

* Professor of law, University of Rome I "La Sapienza"; Chairman of the Working Group for the preparation of the UNIDROIT *Principles of International Commercial Contracts*.

Paper presented at the UNCITRAL Congress "Modern Law for Global Commerce", held in Vienna (Austria) from 9-12 July 2007. The opinions expressed in this paper are those of the author only and do not necessarily reflect those of the other members of the Working Group.

1 The UNIDROIT Principles were first published in 1994 and a second enlarged edition appeared in 2004. At present work is underway on a third edition which will include additional topics.

2 The International Institute for the Unification of Private Law (UNIDROIT) was founded in 1926 as an auxiliary organ of the League of Nations and in 1940 became an intergovernmental organisation whose membership presently comprises 61 States from all five continents.

3 The final version of the UNIDROIT Principles was adopted by UNIDROIT's highest scientific organ, the Governing Council, composed of 26 members elected by the General Assembly of all member States.

Convention on Contracts for the International Sale of Goods (CISG) which prompted UNIDROIT in the early 1980s to embark upon the preparation of the UNIDROIT Principles. Indeed, the worldwide adoption of an international uniform sales law such as CISG paved the way for the even more ambitious project of formulating rules for international commercial contracts in general. At the same time, since the negotiations leading up to CISG clearly demonstrated that this Convention was the maximum that could be achieved at the legislative level, UNIDROIT decided to abandon the idea of a binding instrument and instead merely to "restate" (or where appropriate to "pre-state") international contract law and practice.

To the extent that the UNIDROIT Principles address the same issues as CISG, their provisions are in general taken either literally or at least in substance from the corresponding provisions of CISG.[4] However, since the UNIDROIT Principles were not intended to become a binding instrument, they could and actually did in addition deal with a number of topics not covered by CISG.[5] More importantly, while as a rule preference was given to solutions generally accepted at international level ("common core" approach), exceptionally solutions best suited to the special needs of international trade were preferred even though they represented a minority view at domestic law level ("better rule" approach).[6]

II. – THE UNIDROIT PRINCIPLES AND THEIR FAVOURABLE RECEPTION IN PRACTICE

As stated in the Introduction to the first edition of the UNIDROIT Principles,

> "[i]n offering the UNIDROIT Principles to the international legal and business communities, the Governing Council [of UNIDROIT] is fully conscious of the fact that the UNIDROIT Principles [...] are not a binding instrument and that in consequence their acceptance will depend upon their persuasive authority." [7]

In practice, the reception of the UNIDROIT Principles has been extremely

4 For further details see M.J. BONELL, *An International Restatement of Contract Law*, 3rd ed. (2005), 305 *et seq*. (wherein also references to the few but significant departures).

5 Mention may be made of contracting on the basis of standard terms, mistake, fraud and threat, gross disparity, exemption clauses, public permission requirements, authority of agents, third party rights and set-off.

6 Suffice it to mention the provisions on pre-contractual liability, merger clauses, battle of forms, duty to achieve a specific result and duty of best efforts, hardship, cure by non-performing party, right to performance and agreed payment for non-performance.

7 *Cf.* UNIDROIT *Principles of International Commercial Contracts* (1994), ix.

favourable.[8]

Hailed as "a significant step towards the globalisation of legal thinking [...]," [9] the UNIDROIT Principles have been taken by a number of national legislatures as a source of inspiration for the reform of their domestic contract laws.

Moreover, also in view of the fact that they are available in virtually all the principal languages of the world, the UNIDROIT Principles are more and more frequently used by parties in negotiating and drafting cross-border contracts.

Finally, and most importantly, not only arbitrators but also domestic courts increasingly refer in their decisions to the UNIDROIT Principles.[10] In a number of decisions – all arbitral awards – the UNIDROIT Principles have been applied as the rules of law governing the substance of the dispute. This either because the parties expressly requested it or because the contract referred to "general principles of law", "*lex mercatoria*" or the like, and the arbitrators applied the UNIDROIT Principles on the assumption that they represented a particularly authoritative expression of similar supra-national or transnational principles and rules of law.[11] In other decisions – by both domestic courts and arbitral tribunals – the UNIDROIT Principles have been used to interpret international uniform law instruments. In still other decisions – which by the way represent almost half of the reported cases and again comprise court decisions as well as arbitral awards – the UNIDROIT Principles have been invoked in support of a particular solution adopted under the applicable domestic law or in order to fill gaps in the latter.

8 See for more detailed information BONELL, *supra* note 4, 248 *et seq*.

9 J.M. PERILLO, "UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and A Review", in 43 *Fordham Law Review* (1994), 281 *et seq*. (at 315).

10 As of June 2007, the total number of arbitral awards and court decisions referring in one way or another to the UNIDROIT Principles reported in the UNILEX database (<http://www.unilex.info>) was 146: in fact, however, the number of arbitral awards referring to the UNIDROIT Principles is likely to be much greater since most awards on account of their confidential nature remain undisclosed.

11 Recently, arbitral tribunals have gone even further and applied the UNIDROIT Principles in the absence of any choice-of-law clause in the contract. In so doing, the arbitrators relied on the relevant statutory provisions or arbitration rules according to which they may – to quote the language used e.g. in Art. 17 of the ICC Rules of Arbitration – "apply the rules of law which [they] determine to be appropriate."

III. – TOWARDS A LEGISLATIVE CODIFICATION OF THE UNIDROIT PRINCIPLES ?

1. Pros and cons of the non-binding nature of the UNIDROIT Principles

The fact that the UNIDROIT Principles are the product of a group of independent experts acting under the aegis of an intergovernmental organisation without direct involvement of governments undoubtedly has its advantages. Not only did it permit wider discretion in their preparation but it also rendered them more flexible and capable of rapid adaptation to changing conditions in international trade practice. As pointed out by one of the participants in the project,[12]

> "[...] at the thought of drafting principles for the entire world [...] [w]e do not tremble for at least four reasons. One [...] whatever rules we write are only likely to be applied if they find favor with someone concerned with a particular transaction or dispute [...] Two, most of our principles are unlikely to miscarry because they are framed with evident generality (*e.g.*, 'good faith and fair dealing') or they have built-in safety valves (*e.g.*, 'unless the circumstances indicate otherwise'), giving them enough flexibility to permit a judge or arbitrator to use common sense in applying them so as to avoid an arbitrary or unfair result. Three, in some instances we have declined to deal with tough questions, as in the area [...] of invalidity on a variety of grounds under the applicable domestic law. And four, [...] UNIDROIT is free to amend the Principles [...] from time to time to take care of problems that later surface."

Or, in the words of two American arbitrators,[13]

> "The UNIDROIT Principles are work in progress and unlike an international treaty are readily amenable to amendment to reflect contemporaneous commercial concerns [...] Principles that may fail the test of the marketplace will be cast off, and those that are needed but nowhere found will be [...] devised".

Nor is there necessarily a contradiction between the purposes of the UNIDROIT Principles as indicated in the Preamble – above all that of serving as a model for legislatures and that of being applied as the rules governing the contract – and their non-binding nature. As pointed out by one of the most eminent experts of transnational commercial law,[14]

12 E.A. FARNSWORTH, "Closing Remarks", in 40 *The American Journal of Comparative Law* (1992), 699 *et seq.* (at 699-700).

13 *Cf.* CH.N. BROWER / J.K. SHARPE, "The Creeping Codification of Transnational Commercial Law: An Arbitrator's Perspective", in 45 *Virginia Journal of International Law* (2004), 199 *et seq.* (at 220-221).

14 R. GOODE, *Commercial Law in the Next Millennium* (1998), 234.

> "[...] the impact of the [P]rinciples may prove to be even greater than that of an international convention, for a convention has no force at the time it is concluded and represents at most a provisional indication of support by participating States which may or may not crystallise, whereas the Principles represent the unconditional commitment and consensus of scholars of international repute from all over the world."

It may therefore not come as a surprise that there are those who openly state that the non-binding nature of the UNIDROIT Principles, far from being problematic, makes them even more attractive. As pointed out by another expert of transnational commercial law,[15]

> "[...] the informal approach taken by the UNIDROIT Working Group has had a decisive influence on the success of the Principles [...] Informal, not formalized codification of transnational commercial law is the order of the day."

Or, to quote Roy GOODE again,[16]

> "[t]he Principles demonstrate [...] that the formulation of international rules of general law, whether relating to international trade or otherwise, is best left to scholars [who possess both the technical expertise and freedom from political constraints], leaving governments [...] to focus on more specific areas – for example competition law and consumer protection – where the rules are essentially mandatory rules or rules of public policy rather than dispositive provisions."

However, the present status of the UNIDROIT Principles clearly also has its shortcomings. Like any other soft law instrument in the field of contract law, the UNIDROIT Principles are binding only within the limits of party autonomy, whereas in the absence of voluntary acceptance by the parties, courts and arbitral tribunals will apply them, if at all, only if persuaded by their intrinsic merits. Accordingly, the Preamble to the UNIDROIT Principles states that they *shall* be applied (emphasis added) only when the parties have agreed that their contract be governed by them, whereas in all other cases – namely where the parties have agreed that their contract be governed by the "general principles of law", the "*lex mercatoria*" or the like, or where the parties have not chosen any law to govern their contract, or for the purpose of interpreting or supplementing international uniform law instruments or domestic law – the UNIDROIT Principles simply *may* become relevant (emphasis added), *i.e.* their application is left to the discretion of the adjudicating body.

15 K.P. BERGER, *The Creeping Codification of the Lex Mercatoria* (1999), 154.

16 R. GOODE, "Rule, Practice and Pragmatism in Transnational Commercial Law", in 54 *The International and Comparative Law Quarterly* (2005), 539 *et seq.* (at 553 and 556).

In fact, already shortly after their publication voices were raised in support of the transformation of the UNIDROIT Principles into a binding instrument. Thus, to quote a Dutch judge and member of the Governing Council of UNIDROIT,[17]

> "The UNIDROIT Study Group has all but finished its work [...] after some period for study and reflection has passed, it would be worthwhile to consider resuming and continuing the work in UNCITRAL with a view to preparing an international convention on the general part of the law of contracts".

Or, as suggested by a French judge,[18]

> "Once the Principles have become accessible to all [...] they could, if their success justifies it, be incorporated in a treaty and thereby acquire the greatest force of law" [translation from the French original].

Likewise, as an American lawyer pointed out,[19]

> "Adoption of the *Principles* would expand the narrow focus of the CISG into a far more comprehensive legal structure to govern [international commercial contracts] [...]."

Recently the idea of promoting the UNIDROIT Principles from their present status as a soft law instrument to a binding legislative text has been re-launched in the context of the proposal to prepare a "Global Commercial Code". As pointed out by the most eminent supporter of such a proposal,[20]

> "The need for a Global Commercial Code [...] will grow with the globalisation of communications and commerce [...] When the world becomes one market, that market will require one law, and that law must include general principles of contract law [...] [The UNIDROIT Principles] will have to be raised from their present status to that of rules of law binding on the courts [...] they should be incorporated in the Code, thus making their many mandatory and non-mandatory

17 A.S. HARTKAMP, "Principles of Contract Law", in A.S. HARTKAMP *et al*. (Eds.), *Towards a European Civil Code* (1994), 50. Yet for a more cautious approach recently taken by the same author, see *infra* text and footnote n. 40.

18 J.P. BERAUDO, "Les Principes d'UNIDROIT relatifs au droit du commerce international", in *La Semaine Juridique* (1995), I, 194.

19 B.S. SELDEN, "*Lex Mercatoria* in European and U.S. Trade Practice: Time to Take a Closer Look", in 2 *Golden Gate University School of Law Annual Survey of International & Comparative Law* (1995), 111 *et seq.* (at 128).

20 O. LANDO, "Principles of European Contract Law and UNIDROIT Principles: Moving from Harmonisation to Unification?", in *Unif. L. Rev. / Rev. dr. unif.* (2003), 123 *et seq.* (at 132); IDEM, "CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law", in 53 *The American Journal of Comparative Law* (2005), 379 *et seq.* (at 384).

provisions part of that Code [...]."

2. Different ways of promoting the UNIDROIT Principles from their present status as a non-binding instrument

The transformation of the UNIDROIT Principles into binding legislation is certainly the most radical, but by no means the only nor necessarily the best way of promoting them from their present status as a mere soft law instrument. And since it is rather unlikely that governments will, at least in the near future, be willing to embark upon a far-reaching project such as the adoption of the UNIDROIT Principles by an international convention, it may be worthwhile further to explore less radical and maybe even more appropriate options.

(i) Formal endorsement of the UNIDROIT Principles by UNCITRAL

A first step in that direction would be the formal endorsement of the UNIDROIT Principles by UNCITRAL – and this is what in fact happened at the 40th UNCITRAL Plenary Session in June 2007.[21] UNCITRAL has already endorsed other soft law instruments that have proved particularly successful in practice, such as INCOTERMS or the *Uniform Customs and Practice for Documentary Credits* prepared by the International Chamber of Commerce, and it goes without saying that the fact that UNCITRAL has now also endorsed the UNIDROIT Principles will certainly enhance their prestige and popularity worldwide.

(ii) Recommendation by UNCITRAL to use the UNIDROIT Principles as a means to interpret and supplement CISG

Article 7 CISG 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 or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

The purpose of the provision is to make it clear that the Convention should be interpreted and supplemented autonomously, *i.e.* according to

[21] See Report of the United Nations Commission on International Trade Law on the work of its fortieth session, Vienna, 25 June – 12 July 2007 (A/62/17 Part I), *paras.* 209-213.

internationally uniform principles and rules, whereas recourse to domestic law is admitted only as a last resort.[22] In the past such autonomous principles and rules had to be found by judges and arbitrators themselves on an *ad hoc* basis. Now that the UNIDROIT Principles exist, the question arises whether they may be used for this purpose.

Among scholars opinions are divided. While according to the prevailing view the answer is in the affirmative,[23] others deny the possibility of using the UNIDROIT Principles to interpret or supplement CISG on the basis of the rather formalistic argument that the former were adopted after the latter.[24]

In practice, not only arbitral tribunals but also domestic courts seem to have few if any scruples in referring to the UNIDROIT Principles to interpret and supplement CISG. Only in a few cases has this been justified on the ground that the individual provisions invoked can be considered an expression of a general principle underlying both the UNIDROIT Principles and CISG. Other decisions simply equate, without any further explanation, the UNIDROIT Principles in their entirety to the general principles underlying CISG and so justify the application of individual provisions of the UNIDROIT Principles to interpret or supplement CISG. Still other awards go even further and apply the UNIDROIT Principles as "trade usages [...] in international trade widely known" according to Article 9(2) CISG, or because they represent "a world-wide consensus in most of the basic matters of contract law" or "a restatement of the commercial contract law of the world [which] refines and expands the principles contained in the United Nations Convention." [25]

Under the circumstances, it would be desirable to have UNCITRAL adopt a formal Recommendation [26] to use the UNIDROIT Principles to interpret and

22 *Cf.* M.J. BONELL, in C.M. BIANCA / M.J. BONELL (Eds.), *Commentary on the International Sales Law* (1987), 72 *et seq.*; J.O. HONNOLD, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed. (1999), 88 *et seq.*

23 To be sure, there are those who are in favour of virtually unlimited recourse to the UNIDROIT Principles on the ground that they represent "general principles of international commercial contracts" and as such meet the requirements of Art. 31(3) of the *Vienna Convention on the Law of Treaties* or more specifically of Art. 7(1) and (2), while others admit recourse only to those individual provisions of the UNIDROIT Principles that can be considered an expression of a general principle underlying both the UNIDROIT Principles and CISG: see, also for further references, BONELL, *supra* note 4, 233 *et seq.*, 317 *et seq.*

24 In this sense, see recently J.J. FAWCETT / J.M. HARRIS / M. BRIDGE, *International Sale of Goods in the Conflict of Laws* (2005), 934.

25 For a more detailed and critical analysis, see BONELL, *supra* note 4, 325 *et seq.*

26 For a precedent, see UNCITRAL's *Recommendation of 7 July 2006 regarding the interpretation of Article II, paragraph 2, and article VII, paragraph 1, of the Convention on the*

supplement CISG, provided that the issues at stake fall within the scope of CISG and that the individual provisions of the UNIDROIT Principles referred to can be considered an expression of a general principle underlying both the UNIDROIT Principles and CISG. Such a Recommendation would have the merit of promoting uniformity in the application of CISG worldwide while at the same time ensuring that in practice recourse to the UNIDROIT Principles is had only within the limits and on the conditions provided by Article 7 CISG.

(iii) Formal recognition of the parties' right to choose the UNIDROIT Principles as the law governing their contract

One may think of a variety of situations in which parties to an international commercial contract – be they powerful "global players" or small or medium businesses – may wish to, and actually do, avoid the application of any domestic law and instead prefer to subject it to a genuinely neutral legal regime such as the UNIDROIT Principles.[27]

Likewise, an increasing number of Model Contracts prepared by international agencies such as the ICC or the ITC UNCTAD/WTO contain a reference to the UNIDROIT Principles either as the exclusive *lex contractus* or in conjunction with other sources of law (*e.g.* a particular domestic law; general principles of law prevailing in a given trade sector; usages).[28]

However, according to the relevant conflict-of-laws rules the effects of the parties' agreement on the application of the UNIDROIT Principles vary considerably depending on whether such agreement is invoked before a domestic court or an arbitral tribunal. Only in the context of international commercial arbitration are parties nowadays permitted to choose a soft law instrument such as the UNIDROIT Principles as the law governing their contract in lieu of a particular domestic law. By contrast, as far as court proceedings are concerned, the traditional and still prevailing view is that the parties' freedom of choice 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 can bind the parties only to the extent that they do not affect the mandatory provisions of the *lex*

Recognition and Enforcement of Foreign Arbitral Awards.

27 For the most frequent situations, see BONELL, *supra* note 4, 174 *et seq.*; E. BRÖDERMANN, "The Growing Importance of the UNIDROIT Principles in Europe – A Review in Light of Market Needs, the Role of Law and the 2005 Rome I Proposal", in *Unif. L. Rev.* / *Rev. dr. unif.* (2006), 749 *et seq.* (at 751 *et seq.*).

28 Further details in BONELL, *supra* note 4, 275-277.

contractus.[29]

To be sure, recently there have been some significant developments suggesting that things may change in the near future.

Thus, the 1994 *Inter-American Convention on the Law Applicable to International Contracts* refers on two occasions to legal sources of an a-national or supranational character for the purpose of determining the *lex contractus*,[30] thereby justifying the conclusion that under this Convention the UNIDROIT Principles may well be applied as the law governing the contract, at least if expressly chosen by the parties.[31]

Furthermore, a reference to the possibility for parties to agree on the applicability of the UNIDROIT Principles can now be found even in the United States *Uniform Commercial Code*. More precisely, Comment 2 to § 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, e.g.,] the UNIDROIT Principles of International Commercial Contracts) [...]." [32]

Finally, and most importantly, in a draft Regulation of December 2005 intended to replace the 1980 *Rome Convention on the Law Applicable to Contractual Obligations*, the Commission of the European Communities proposes to insert in Article 3 of the Rome Convention 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 [...];" [33]

as pointed out in the explanatory notes,

29 See, also for further references, BONELL, *supra* note 4, 192 *et seq*. and 180 *et seq*., respectively.

30 Specifically, in Arts. 9(2) and 10.

31 For further references see BONELL, *supra* note 4, 183-186.

32 It is true that such reference is made in the context of § 1-302 laying down the principle of freedom of contract and not in the context of § 1-301 dealing with the parties' right to choose the applicable law. Yet the probability that, if parties actually choose the UNIDROIT Principles as the rules of law governing their contract, individual provisions of the Principles will be struck out because of their incompatibility with the Code is rather remote, all the more so since most of the mandatory provisions of the Code are restricted to consumer transactions.

33 *Cf. Draft Regulation of the Parliament and the Council on the Law Applicable to Contractual Obligations* (Rome I), Brussels, 15 December 2005 (COM(2005) 650 final).

> "[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 [...]."

While discussion on this proposal is still going on within the European Union,[34] it is suggested formally to recognise at universal level the right of parties to an international commercial contract to choose as the governing law a soft law instrument such as the UNIDROIT Principles. Such explicit recognition would have the merit of rendering the principle of party autonomy consonant with the needs of businesses engaged in international trade, while at the same time eliminating the totally unjustified differentiation in the parties' freedom to choose the applicable law depending on whether they decide to have their disputes settled by arbitration or in court.

The Hague Conference on Private International Law would obviously be the most appropriate body to launch such an initiative which could eventually lead to the adoption of a binding treaty or – alternatively – of a model law or simply a recommendation.[35] As to how best to formulate the proposed recognition of the right of the parties to choose the UNIDROIT Principles as the law governing their contract, one possibility would be to use the formula of Article 28(1) of the UNCITRAL *Model Law on International Commercial Arbitration* and generically state that parties to an international commercial contract may choose the "*rules of law*" (emphasis added) applicable to their contract.[36] If such language was considered to be too vague, one could restrict the parties' freedom of choice to "principles of commercial contracts

34 So far, the proposal seems to be meeting considerable reservations on the part of member States apparently concerned about the risk of excessive legal uncertainty deriving from the choice of a-national principles and rules as the law governing the contract as compared to the alleged certainty and predictability of the choice of a particular domestic law. Yet – as pointed out by an eminent Swiss scholar (F. VISCHER, "The Relevance of the UNIDROIT Principles for Judges and Arbitrators in Disputes Arising out of International Contracts", in 1 *The European Journal of Law Reform* (1998/1999), 203 *et seq.* (at 211)) – the UNIDROIT Principles, far from being just a loose set of a few poorly drafted principles, in fact represent "a codification of high quality and homogeneity in content which in many respects even surpasses the quality of traditional national legal orders."

35 By coincidence, the Hague Conference is currently exploring the possibility of preparing a parallel instrument to the 2005 *Convention on Choice of Court Agreements* and concerning choice of law in international contracts: what is proposed here could perfectly fit in that project.

36 Such broad language would cover practically all choice-of-law clauses in favour of non-State principles and rules most frequently used in international trade, including a reference to the "*lex mercatoria*" or to no further specified "general principles of law" and "usages and customs of international trade".

recognised by international organisations" [37] or even specifically refer to the UNIDROIT Principles alone.[38]

(iv) Adoption of the UNIDROIT Principles as a Model Law

If the conversion of the UNIDROIT Principles into a binding instrument in the form of an international convention is not a realistic and perhaps not even a desirable objective,[39] it may still be worth considering adopting them as a model law. The direct involvement of governments would certainly enhance the authority of the UNIDROIT Principles; at the same time the risk of their losing much of their innovative character and being reduced to the lowest common denominator among existing domestic laws is certainly less acute given the non-binding nature of the chosen instrument.

What still remains to be seen is whether the UNIDROIT Principles should be the subject of a model law on its own or be part of an even farther reaching project such as a Global Commercial Code. Such a Code – to be adopted in the form of a model law [40] prepared by UNCITRAL in co-operation with other interested international organisations – should be a sort of consolidation of existing international uniform law instruments (e.g. CISG, the various transport law conventions, the UNIDROIT Conventions on leasing and factoring, etc., as well as soft law instruments such as INCOTERMS, the UCP, etc.).[41] The UNIDROIT Principles – it is suggested – could play the role of the Code's "general contract law": more precisely, the Code could contain a provision declaring that the UNIDROIT Principles apply with respect to the specific contracts covered by the Code to matters not expressly settled unless the

37 To make it clear that parties may choose as the law governing their contract, instead of the law of a particular country, not any set of privately drafted contract rules but only "codifications" or "restatements" prepared under the aegis of an international organisation.

38 The reference to the UNIDROIT Principles could be further qualified by the statement that questions not expressly covered by them should be settled as far as possible in accordance with their underlying principles or in the absence of such principles in accordance with the otherwise applicable domestic law.

39 See on this point the pertinent remarks of K.P. BERGER, "European Private Law, *Lex Mercatoria* and Globalisation", in A. HARTKAMP *et al.*, *Towards a European Civil Code*, 3rd ed. (2004), 43 *et seq.* (at 53-54).

40 For the different view that the proposed Code should be adopted in the form of a binding convention see *supra* text and footnote n. 20.

41 The idea of a Global Commercial Code was first launched by G. HERRMANN, "Law, International Commerce and the Formulating Agencies – The Future of Harmonisation and Formulating Agencies: The Role of UNCITRAL" (paper presented at the Schmitthoff Symposium 2000 "Law and Trade in the 21st Century", Centre of Commercial Law Studies, London 1-3 June 2000).

parties have excluded the UNIDROIT Principles by choosing another law or otherwise.[42]

IV. – CONCLUSIONS

The UNIDROIT Principles, prepared as a soft law instrument, have been very favourably received in practice.

To transform them into binding legislation in the form of an international convention is neither feasible nor recommendable.

There are less radical but maybe even more appropriate ways to promote the UNIDROIT Principles from their present status as a non-binding instrument.

Apart from endorsing them, UNCITRAL may formally recommend the use of the UNIDROIT Principles to interpret and supplement CISG within the limits and on the conditions laid down in Article 7 CISG.

On its part the Hague Conference on Private International Law may take the initiative of formally recognising the right of parties to an international commercial contract to choose the UNIDROIT Principles as the law governing their contract.

Last but not least, UNCITRAL may prepare, in co-operation with other interested international organisations, a "Global Commercial Code" to be adopted in the form of a model law which refers to the UNIDROIT Principles as its "general contract law" applicable to the specific contracts covered by the Code unless otherwise agreed by the parties.

VERS UNE CODIFICATION LEGISLATIVE DES PRINCIPES D'UNIDROIT ? *(Résumé)*

Michael Joachim BONELL (Professeur de droit, Université de Rome I "La Sapienza"; Président du Groupe de travail pour la préparation des Principes d'UNIDROIT relatifs au contrats du commerce international)

On fait de plus en plus recours, dans la pratique contractuelle et de l'arbitrage, aux Principes d'UNIDROIT relatifs aux contrats du commerce international, même s'il s'agit d'un instrument non contraignant. D'où l'idée dans certains milieux de les

42 In this sense see M.J. BONELL, "Do We Need a Global Commercial Code?", in 106 *Dickinson Law Review* (2001), 87 *et seq.*; A.S. HARTKAMP, "Modernisation and Harmonisation of Contract Law", in *Unif. L. Rev.* / *Rev. dr. unif.* (2003), 81 *et seq.* (at 89); HUANG Danhan, "The UNIDROIT Principles and Their Influence in the Modernisation of Contract law in the People's Republic of China", in *Unif. L. Rev.* / *Rev. dr. unif.* (2003), 107 *et seq.*, 117.

*convertir en quelque chose de plus contraignant que leur statut actuel de "*soft law*". Bien que rejetant l'idée de transformer les Principes d'*UNIDROIT *en législation contraignante, l'auteur du présent article énonce un certain nombre de solutions alternatives. La première solution consiste à obtenir le soutien formel de la CNUDCI aux Principes d'*UNIDROIT*; la deuxième implique une recommandation de la part de la CNUDCI en vue d'utiliser les Principes d'*UNIDROIT *pour interpréter et compléter la CVIM; la troisième concerne la reconnaissance formelle du droit des parties à choisir les Principes d'*UNIDROIT *comme loi régissant leur contrat; la quatrième, enfin, de plus vaste portée, serait l'adoption des Principes d'*UNIDROIT *comme loi type.*