Symposium Paper: The *UNIDROIT Principles of International Commercial Contracts*: Achievements in Practice and Prospects for the Future

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ABSTRACT

After a brief account of what the *UNIDROIT Principles* have so far achieved in practice, this article sets out some proposals as to how to promote them from their present status as a mere soft law instrument. A first step in that direction would be a formal recommendation by the United Nations Commission on International Trade Law ('UNCITRAL') to use the *UNIDROIT Principles* as a means of interpreting and supplementing the United Nations Convention of Contracts for the International Sale of Goods ('CISG'). Another even more significant promotion of their legal status would be a formal recognition of the parties' right to choose the *Principles* as the law governing their contract. A last—and under the circumstances—the most ambitious way of fostering the legal status of the *UNIDROIT Principles* would be to adopt them in the form of a model law or alternatively to refer to them as the general contract law in the context of a 'Global Commercial Code'.

Introduction

This article first provides a general overview of the *UNIDROIT Principles of International Commercial Contracts*—what they are and what they have achieved so far in practice. This article then offers some suggestions and ideas as to how to promote the *UNIDROIT Principles* from their present status as a mere 'soft law' instrument.

1. The *UNIDROIT Principles* – An Overview

The *UNIDROIT Principles of International Commercial Contracts*—first published in 1994 and now available in their second enlarged edition of 2004, with a third edition about to

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appear[1]—are a non-legislative codification or 'restatement' of the law of international commercial contracts in general. They are the product of a group of independent experts from all the major legal systems and geo-political areas of the world—the Australians included Patrick Brazil and Justice Finn.[2] Apart from their wider scope—they cover virtually all the areas of general contract law: from contract formation, interpretation, validity, content, performance, non-performance and remedies to third party rights, agency, assignment, conditions and limitation periods. The only difference with respect to other internationally widely used soft law instruments, such as the International Commerce Terms ('INCOTERMS') or the Uniform Customs and Practice for Documentary Credits ('UCP') issued by the International Chamber of Commerce ('ICC'), is that they have been prepared under the aegis of an intergovernmental organisation, *UNIDROIT*.

This author thinks that in practice the reception of the *UNIDROIT Principles*—emphatically welcomed by an eminent American scholar as 'a significant step towards the globalisation of legal thinking'[3]—has gone far beyond the most optimistic expectations. They have been taken by a number of national legislatures as a source of inspiration for the reform of their domestic contract laws.[4] Moreover, also in view of the fact that the *UNIDROIT Principles* are available in their integral version, i.e. black letter rules and comments, in virtually all the principal languages of the world, they are more and more frequently used by parties in negotiating and drafting cross-border contracts.[5]

Finally, and most importantly, not only arbitrators but also domestic courts increasingly refer in their decisions to the *UNIDROIT Principles*. In a number of decisions—all arbitral awards—they have been applied as the rules of law governing the substance of the dispute. This is either expressly requested by the parties 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.[6] 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

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[1] The 2010 edition of the UNIDROIT Principles will contain additional provisions on restitution, illegality, plurality of obligors and of obligees, and conditions.

[2] The Working Group for the preparation of the third edition of the UNIDROIT Principles was composed of 18 members and of numerous observers from interested organisations and arbitration centres such as UNCITRAL, the Hague Conference on Private International Law, the American Law Institute, the Study Group for a European Code, the *Groupe de Travail Contrats Internationaux*, the ICC International Court of Arbitration, the Swiss Arbitration Association, the German Arbitration Institute, the New York City Bar, etc.

[3] J.M. Perillo, 'UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and A Review' (1994) 43 *Fordham Law Review* 281, 315.

[4] For more detailed information see Ralf Michaels, in Stefan Vogenauer and Jan Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (Oxford University Press, 2009) 68-77.

[5] Further references in Michael J. Bonell, *An International Restatement of Contract Law* (Transnational Publishers, 3rd ed, 2005) 271-77; Michaels, above n 4, 78-9.

[6] For a survey of decisions of this kind, see Bonell, above n 5, 281-86; for more recent decisions see *UNIDROIT Principles of International Commercial Contracts* (2004) Unilex <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13621&x=1>, as listed under issues no. 2.1.1, 2.1.2 and 2.1.3.

provisions or arbitration rules according to which they may—to quote the language used in article 17 of the ICC Rules of Arbitration—'apply the rules of law which [they] determine to be appropriate'.[7]

In other decisions—by both domestic courts and arbitral tribunals—the *UNIDROIT Principles* have been used to interpret international uniform law instruments such as the United Nations Convention on Contracts for the International Sale of Goods ('CISG').[8] In still other decisions—which represent more than half of the reported cases and again comprise court decisions as well as arbitral awards—they have been invoked in support of a more internationally oriented approach to be taken under the applicable domestic law or in order to fill gaps in the latter.[9] Suffice to mention that with express reference to the *UNIDROIT Principles*, among other instruments, Australian courts have on several occasions acknowledged the principle of good faith, both in contract negotiations and in contract performance,[10] and the significant role that courts in New Zealand and England have recently attributed to the *UNIDROIT Principles* (together with CISG) in support of a liberal interpretation of contracts and of the admissibility of evidence of pre-contractual negotiations to interpret written agreements.[11]

All is well then? Not necessarily. First and foremost, there can be no doubt that much remains to be done to make the *UNIDROIT Principles* even better known to potential users worldwide. A significant contribution to this effect is certainly being provided by UNILEX, the database on international case law and bibliography concerning the *UNIDROIT Principles*, freely accessible at <http://www.unilex.info>. As of July 2010, it contained 240 decisions, from all over the world, referring in one way or another to the *UNIDROIT Principles*. The total number of decisions of this kind is in fact much higher, but unfortunately most arbitral awards—for not always compelling reasons—remain confidential.

Yet obviously the *UNIDROIT Principles* have to be promoted also in other ways. Seminars such as that organised in 2008 by Professor Luke Nottage of the University of Sydney Law School and co-sponsored by the Federal Court of Australia, bringing together both academics and practitioners of this important region of the world, are certainly of utmost importance. Equally beneficial are other initiatives, such as the empirical evaluation of the utility of the *UNIDROIT Principles* as compared to other models of contract law rules recently undertaken by Professors Ellinghaus and Wright with the involvement of 1600 Australian

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[7] Cf Bonell, above n 5, 286-90; *UNIDROIT Principles of International Commercial Contracts*, above n 6, issue no. 2.1.5.

[8] Cf Bonell, above n 5, 293-94, 325-32; *UNIDROIT Principles of International Commercial Contracts*, above n 6, issue no. 2.4.

[9] Cf Bonell, above n 5, 294-300; *UNIDROIT Principles of International Commercial Contracts*, above n 6, issue no. 2.3.

[10] See, e.g. *Hughes Aircraft Systems International v Airservices Australia* (1998) 146 ALR 1 (Finn J); *GEC Marconi Systems Pty Ltd. v BHP Information Technology Pty Ltd and Others* (2003) 128 FCR 1 (Finn J); *United Group Rail Services v Rail Corporation of New South Wales* [2009] NSWCA 177; *Australian Medic-Care Company Ltd. v Hamilton Pharmaceutical Pty Limited* [2009] FCA 1220 (Finn J).

[11] Cf *Hideo Yoshimoto v Canterbury Golf International Limited* [2001] 1 NZLR 253 (Thomas J); *Proforce Recruit Limited v The Rugby Group Limited* [2006] EWCA Civ 69 (Arden LJ); *The Square Mile Partnership Ltd v Fitzmaurice McCall Ltd* (Arden LJ) [2006] EWCA Civ 1690. However, for a reaffirmation of the traditional approach the recent decisions of the High Court of Australia, see the House of Lords and the Supreme Court of New Zealand cited by P. Finn in his contribution to this Issue, above n 10.

university students,[12] or the Annual Intercollegiate Negotiation Competition, sponsored among others by the Japan Commercial Arbitration Association and White and Case Law Office, in which students from Japanese and Australian Universities are invited to solve a hypothetical dispute on the basis of the *UNIDROIT Principles*.[13]

Finally, a particularly significant recognition of the importance of the *UNIDROIT Principles* is their formal endorsement by UNCITRAL at its fortieth session in 2007.[14] UNCITRAL has already endorsed other soft law instruments that have proved particularly successful in practice, such as INCOTERMS or the UCP. The fact that UNCITRAL now formally commends to the international legal and economic community also the use of the *UNIDROIT Principles* will definitely enhance their prestige and popularity worldwide.

However, to increase in actual practice awareness of the *UNIDROIT Principles* around the globe, important as it is, is not enough. Maybe it is time to think of ways to promote the *UNIDROIT Principles* from their present status as a mere soft law instrument.

To be sure, the fact that the *UNIDROIT Principles* are the product of a group of independent experts without direct involvement of governments undoubtedly has its advantages. Not only does it permit wider discretion in their preparation but also renders them more flexible and capable of rapid adaptation to the changing conditions in international trade practice. Not surprisingly 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 Klaus Peter Berger:

> [...] the informal approach taken by the *UNIDROIT* Working Group has had a decisive influence on the success of the Principles [...] Informal, not formalised codification of transnational commercial law is the order of the day.[15]

Or, to quote Roy Goode:

> [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.[16]

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[12] Cf Manfred Ellinghaus and Edmund Wright with Maria Karras, *Models of Contract Law. An Empirical Evaluation of Their Utility* (Themis Press, 2005).

[13] See <http://www.osipp.osaka-u.ac.jp/inc/eng/comp8th/index.html> for the link to the 8th Intercollegiate Negotiation Competition held in December 2009.

[14] See *Report of the United Nations Commission on International Trade Law*, 40th session, A/62/17 Part I (2007) paras 209-13.

[15] K. P. Berger, *The Creeping Codification of the Lex Mercatoria* (Kluwer Law International, 1999) 154.

[16] Roy Goode, 'Rule, Practice and Pragmatism in Transnational Commercial Law' (2005) 54 *The International and Comparative Law Quarterly* 539, 553-56.

However, the present status of the *UNIDROIT Principles* clearly has its shortcomings. Like any other soft law instrument in the field of contract law, they 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. Hence repeated calls for the transformation of the *UNIDROIT Principles* into a binding instrument.

2. Ways to Further Expand the *UNIDROIT Principles*' Reach

The legislative codification of the *UNIDROIT Principles* would certainly be the most radical way of promoting them from their present status as a mere soft law instrument. But is it also the best way? That is rather doubtful. After all, it is—to say the least—rather unlikely that governments will ever be willing to embark upon such a costly project as the transformation of the *UNIDROIT Principles* into an international convention.

In my opinion, there are other less radical but maybe even more appropriate options. This author presented some of them in Vienna in 2007 at the UNCITRAL Congress on 'Modern Law for Global Commerce',[17] and since on that occasion reactions were quite encouraging, they are repeated here to stimulate further discussion.

A first significant step to promote the legal status of the *UNIDROIT Principles* would be a formal Recommendation by UNCITRAL to use them as a means of interpreting and supplementing CISG. Article 7 of CISG provides that the Convention should be interpreted and supplemented autonomously, i.e. according to internationally uniform principles and rules, whereas recourse to domestic law is admitted only as a last resort. 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, others deny the possibility of using the *UNIDROIT Principles* to interpret or supplement the CISG on the basis of the rather formalistic argument that the former were adopted after the latter.

In practice, not only arbitral tribunals but also domestic courts seem to have few—if any—scruples in referring to the *Principles* to interpret and supplement the 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 the CISG. More often than not, the application of individual provisions of the *Principles* to interpret or supplement CISG has not been explained at all or it was simply argued that the *Principles* as a whole coincide with 'the general principles underlying the CISG' referred to in art 7(2) of CISG or represent 'trade usages widely known in international trade' applicable in

[17] See Michael J. Bonell, 'Towards a Legislative Codification of the UNIDROIT Principles?' (2007) *Uniform Law Review*, 233-46.

accordance with art 9(2) of CISG.[18] Justice Thomas in the Court of Appeal of New Zealand went even so far as to describe the *UNIDROIT Principles* as 'a restatement of the commercial contract law of the world which refines and expands the principles contained in the CISG'.[19]

Yet the most striking example of such 'liberal' interpretation of the CISG on the basis of the *UNIDROIT Principles* is a recent decision of the Belgian Supreme Court.[20] In a contract for the delivery of steel tubes governed by the CISG, after an unexpected increase of the market price of steel by 70 per cent, the seller requested re-negotiation of the contract price. The Court, after recalling that the CISG does not specifically address the issue of supervening change of circumstances or hardship, and pointing out that according to art 7(2) of CISG, gaps are to be filled in a uniform manner taking into account 'the general principles governing the law of international commerce', concluded that according to such principles as laid down, among others, in the *UNIDROIT Principles*, in case of a change in circumstances fundamentally disrupting the contractual equilibrium the aggrieved party actually had the right to request re-negotiation of the price.

So why not have UNCITRAL adopt a formal Recommendation to use the *UNIDROIT Principles* to interpret and supplement the CISG, provided that the issues at stake fall within the scope of CISG and that the individual provisions referred to can be considered an expression of a general principle underlying both the *UNIDROIT Principles* and the CISG? Such a Recommendation—a precedent of which may be seen in the Recommendation of 2006 regarding the interpretation of art II(2) and art VII(1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards—would have the merit of promoting uniformity in the application of the CISG world-wide, while at the same time ensuring that in practice recourse to the *UNIDROIT Principles* is made only within the limits and on the conditions provided by art 7 of CISG.

Another even more significant promotion of the legal status of the *UNIDROIT Principles* would be a formal recognition of the parties' right to choose the *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-sized businesses—may wish to, and actually do, avoid the application of any domestic law and instead prefer to subject the contract to a genuinely neutral legal regime such as the *UNIDROIT Principles*.

Also, an increasing number of Model Contracts prepared by international agencies, such as the ICC or the International Trade Centre ('ITC') United Nations Conference on Trade and Development ('UNCTAD') / World Trade Organisation ('WTO'), contain a reference to the *Principles* either as the exclusive *lex contractus* or in conjunction with other sources of law

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[18] References in Bonell, above n 5, 326-29.

[19] In *Hideo Yoshimoto v Canterbury Golf International Limited* [2001] 1 NZLR 253 (Thomas J).

[20] See *Scafom International BV v. Lorraine Tubes S.A.S*, C.07.0289.N, Court de Cassation of Belgium, 19 June 2009. An abstract in English is available at: <http://www.unilex.info/case.cfm?pid=2&do=case&id=1456&step=Abstract> and the full text in French is available at: <http://www.unilex.info/case.cfm?pid=2&do=case&andid=1456&step=FullText>.

(e.g. a particular domestic law, general principles of law prevailing in a given trade sector, usages).

However, the effects of the parties' agreement on the application of the *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 often 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 *Principles* will be considered as a mere agreement to incorporate them into the contract. As such, they can bind the parties only to the extent that they do not affect the mandatory provisions of the *lex contractus*.

To be sure, recently there have been some significant developments suggesting that things may change in the near future. Suffice to mention the 1994 Inter-American Convention on the Law Applicable to International Contracts, or the Official Comments to § 1-302 of the United States Uniform Commercial Code, as revised in 2001. The latter states that parties may vary the effect of the Code's provisions by stating that their relationship will be governed by 'recognised bodies of rules or principles applicable to commercial transactions such as the *UNIDROIT Principles*'.

On the other hand, it is fair to say that there have been also regrettable drawbacks. The proposal by the European Commission to amend art 3 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations to the effect that parties may choose as the applicable law not only the law of a particular State, but also 'principles and rules of the substantive law of contract recognised internationally' (with express reference to the *UNIDROIT Principles*) was at the very last moment vetoed by the Governments of the EU Member States. They were concerned about the risk of excessive legal uncertainty deriving from the choice of a-national principles and rules as the law governing the contract, as compared to the alleged certainty and predictability of the choice of a particular domestic law.[21]

Despite that–or maybe just because of that—this author thinks it would be a good idea formally to recognise, at a 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*. The Hague Conference on Private International Law would obviously be the most appropriate body to launch such a project, and it 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. By coincidence, the Hague Conference is currently exploring the possibility of preparing a parallel instrument to the 2005 Convention on Choice

[21] As a consequence in this respect art 3 remained unchanged: see *Regulation (EC) No 593/2008 of 17 June 2008 of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I)* [2008] OJ L 177/6.

of Court Agreements and concerning choice of law in international contracts.[22] What is proposed here could perfectly fit in that project.

This article will conclude with, under the circumstances, the most ambitious way of fostering the legal status of the *UNIDROIT Principles*. While this author has already pointed out that transforming the *Principles* into an international convention is not a realistic and perhaps not even a desirable objective, it may still be worth considering adopting them in the form of a Model Law. The direct involvement of governments would certainly enhance the authority of the *Principles*. At the same time, the risk that they might lose much of their innovative character and be 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.[23] Such a Code—to be prepared in the form of a Model Law 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, etc., as well as soft law instruments such as INCOTERMS, the UCP, etc.). The *UNIDROIT Principles* could play the role of the 'general contract law' of the Code. More precisely, the Code could contain a provision declaring the *Principles* applicable to the specific contracts covered by the Code unless parties have excluded them by choosing another law or otherwise.

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[22] For more detailed information about this project see M. Pertegàs, 'Choice of Law in International Commercial Contracts: Hague Principles?' (2010) *Uniform Law Review* (forthcoming).

[23] The idea of a Global Commercial Code was first launched by Gerold 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). For a further elaboration see Michael J. Bonell, 'Do We Need a Global Commercial Code?' (2001) 106 *Dickinson Law Review* 87; Ole Lando, 'CISG and Its Followers: A Proposal to Adopt Some International Principles of Contract Law', (2005) 53 *The American Journal of Comparative Law*, 379-84.